

THE MONGOLIAN LEGISLATION ON STATE SECRETS

Review of shortcomings, recommendations for reform

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General observations

The Mongolian government has repeatedly pledged itself to transparency and openness. During a recent International Conference on New and Restored Democracies, the Mongolian government signed the Ulaanbaatar Declaration, promising support for “an open and transparent society [which] encourages the free creation, pursuit and flow of information.” The Action Plan of the Mongolian government (2004-2008) contains a commitment to “provide the citizens with rights to access any information”.

At the same time, free access to information is impeded in Mongolia by the existing legislation on state secrets (the April 1995 Law on State Secrets and the January 2004 List of State Secrets), which in sum set up such far reaching restrictions on access to government records in Mongolia as to make it possible for virtually anything to be classified as “secret” and hidden from the public view for an indefinite period.

Existing restrictions contradict the spirit of the Mongolian government’s commitment to openness. Unnecessary secrecy breeds irresponsibility on the part of government officials. The lack of transparency leads to corruption. Failure to open up past government records speaks to the unwillingness of the Mongolian government to face up to the former policies.

The following list represents an effort to summarize some of the shortcomings of the Mongolian legislation on state secrets. It is by no means a full analysis of the deficiencies of this legislation. Please direct all inquiries to Sergey Radchenko, +976-9977-8284, S.S.Radchenko@lse.ac.uk.

Main problem areas

1. Scope of the Law on State Secrets and the List of State Secrets. All-embracing nature of the List of State Secrets. The List’s provisions are too broad in scope (just about anything can be classified as “state secret”).
2. Classification period. The classification periods are unacceptably long (in many cases, “indefinite”).
3. Weak declassification provisions. The Law on State Secrets makes it highly unlikely that any information, considered state secret, will ever be declassified and opened to the public.
4. What must not be considered state secret. Unlike similar laws in other countries, the Mongolian Law on State Secrets does not specify what *must not* be classified as a state secret (i.e. natural catastrophes, abuse of human rights, repressions, etc.)

5. Reaffirming commitment to openness. The Law on State Secrets regrettably does not affirm the commitment of the Mongolian government to the freedom of information (for example, in the preamble).
6. The Law on State Secrets unjustifiably overlaps with the List of State Secrets, complicating the legislative framework in this area.

Methodology

This paper considers deficiencies of the Mongolian Law on State Secrets and the List of State Secrets in light of similar legislation in other countries. The following countries were included in the survey: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan and Ukraine.

Findings

Scope of the Law on State Secrets and the List of State Secrets

Further study must be undertaken in order to arrive at a definitive conclusion as to the justifiability of the scope of Article 5 of the Law on State Secrets and the List of State Secrets.

Preliminary study indicates that provision 32 of the List of State Secrets regarding secrecy of maps of scale more detailed than 1:100000 should be repealed. On the practical level, detailed maps of Mongolian provinces, based on the US satellite surveillance, can be obtained from the Internet. Russian maps of Mongolia are also now available. In many Western countries detailed maps of cities and areas are freely accessible to the public.

In terms of comparable legislation in other countries, only laws of Kazakhstan, Tajikistan and Ukraine include provisions regarding secrecy of maps, but only in such cases when maps detail sensitive military (Kazakhstan, Tajikistan and Ukraine) or economic (Kazakhstan and Tajikistan) information. Other countries do not have provisions regarding secrecy of maps. Indeed, the Georgian Law on State Secrets expressly *forbids* classification of maps (Article 8.3) except for “special maps of military application”.

Article 4 of the List of State Secrets (provisions 39, 40 and 43 in particular), pertaining to the secrecy of intelligence and counterintelligence operations should be accompanied by a clause to the effect that these provisions must not be used to classify facts of state repressions against its own citizens and of abuse of human rights.

Classification Period

The key weakness of the Mongolian State Secrets legislation is the unacceptably long classification period for state secrets. In accordance with the current List of State Secrets, items falling under 12 categories (of which some are very broad categories, like “national security” and “foreign policy”) are deemed secret *indefinitely*. Items in 15 categories are to be kept secret for 60 years, in 2 categories for 50 years and in 11 categories – for 40 years.

These classification periods apply for 40 (out of 58) categories of state secrets. Items in remaining 18 categories can be kept secret for 5, 10, 15, 20, 25 and 30 years.

Thus, items related to the Mongolian foreign policy may be kept secret *indefinitely*, obstructing legitimate public interest in the country's foreign affairs. Under provision 1 of the List of State Secrets, information related to Mongolia's independence and territorial integrity is to be secret forever. If the letter of this provision were to be followed, even Chinggis Khan's Secret History could be considered state secret; of course, in practice, these restrictions impede historical research on Mongolia's foreign policy in the 1940s-1970s.

Provision 3 of the List mandates permanent secrecy for documents outlining in one form or another Mongolia's foreign policy with regard to other countries. Under this provision, mundane documents decades-old would still be considered state secret.

Provision 6 details secrecy provisions for multilateral or bilateral agreements as 60 years (unless the parties agreed otherwise). Perhaps only North Korea could demand 60 year secrecy for a government-level agreement with Mongolia. Importantly, bilateral agreements rarely include a secrecy provision (much less multilateral agreements). The current 60 year rule restricts the public's right to know about Mongolia's commitments and engagements with other countries.

Provision 13 mandates permanent secrecy for codes and cryptography used by the Mongolian government. One should note that codes have the tendency of becoming obsolete rather quickly and therefore must be changed often. The provision would keep secret Mongolian keys and codes dating back decades and centuries and thereby create absolutely unnecessary restrictions on information access in this country.

Article 2 of the List of State Secrets classifies for lengthy periods of time (mainly, 40 years) materials pertaining to the defence doctrine of Mongolia, strategy and tactics of military operations. While such materials may be justifiable classified, it seems unnecessary to extend the classification period to 40 years.

Provision 32, classifying maps for an indefinite period, has already been discussed above. Not only is it unnecessary to classify maps for such lengthy periods, but it is often unnecessary and counterproductive to classify them at all.

Provisions regarding intelligence and counterintelligence operations (according to the List, classified for periods ranging from indefinite to 60 years) should be amended so as to bring the operations of affected agencies under the public control. In the Western countries, intelligence information is usually declassified after the passage of 30 years; this period is sometimes extended up to 70 years to protect intelligence personnel. It is important not to allow these indefinite provisions to prevent the public from accessing information related to the repression of the State against its own citizens.

It must also be noted that the classification period provisions of the List of State Secrets are in blatant contradiction with Articles 25.7 and 25.8 of the 1998 Mongolian Law on Archives, which mandates the opening of government records to the public after 30 years, in exceptional cases, after 50 years, and, when a person's private life is involved, after 70 years.

It should be noted that comparing Mongolian legislation in this sphere to that of other countries is complicated by the fact that in most countries it is the Law on State Secrets, not the List of State Secrets, which determines classification periods. The Mongolian Law on State Secrets, however, does not in itself contain a provision regarding the classification periods of state secrets. This is perhaps not surprising, since the Mongolian List of State Secrets provides for 10 classification periods of different length (in contrast, most countries under consideration here only provide for 2 such periods).

Inasmuch as the Mongolian Law on State Secrets *does not have* a classification period provision, it is similar to the respective laws of Kyrgyzstan and Turkmenistan.

Now, let us compare this with the legislation in other countries.

According to the Armenian Law on State Secrets, classification periods are set to be 30 years for special dossier and top secret documents and 10 years for secret documents (Article 15).

In Belarus, the respective periods are 30 years (secret and top secret) and 10 years (confidential) (Article 10).

In Kazakhstan, the normal upper limit is 30 years (Article 20.3).

The same is true of Azerbaijan, 30 years (Article 12).

In Georgia, the classification period is as follows: 20 years for special dossier documents, 10 years for top secret documents and a mere 5 years for secret documents (Article 14.1).

In Lithuania, the classification period is 30 years for top secret documents, 10 years for secret documents and 75 years for documents pertaining to the participants of the secret operative activities (Article 13.1 and 13.2).

Moldova follows the pattern with 25 years for special dossier and top secret materials as 10 years for secret materials (Article 11.1).

Russia follows the 30 year rule, as many other countries. Indeed, it is possible now to openly access documents pertaining to Mongolia in Russia, still considered state secret in Mongolia (Article 13).

The Tajikistan's system is very complicated; it provides for 7 different classification periods (still less than Mongolia's 10). It is the only other country under consideration, besides Mongolia, to explicitly allow classification of documents *indefinitely* (Article 10.1), though one should mention that Azerbaijan's law mentions such possibility when doing so is in the "interest of the State and the people" (Article 12).

Finally, in Ukraine, classification periods range from 30 years (special dossier) to 10 years (top secret) and 5 years (secret) (Article 13).

While in most countries (for example, Azerbaijan, Kazakhstan, Ukraine), the benefit of a firmly set classification period is eroded by escape clauses, permitting indefinite classification in “exceptional cases” or in the “interest of the State and the people”, laws of other countries indicate a firm commitment to declassify government-held records after the expiry of the classification period. For example, the Lithuanian Law on State Secret does not permit indefinite extension of classification periods.

Recommendations:

In the Mongolian Law on State Secrets, introduce a clause on the period of classification as follows:

State secrets shall be classified as follows:

Materials classified as secret (“*нууц*”) – for a period not exceeding 10 years.

Materials of special importance and top secret materials (“*онц чухал*”, “*маш нууц*”) – for a period not exceeding 30 years.

Materials related to participation of individuals in operative, intelligence or counterintelligence activities – for a period not exceeding 75 years.

Classification for *indefinite* periods *must not* be permitted.

Classification period provisions in the List of State Secrets should be removed.

Weak declassification provisions

The Mongolian Law on State Secrets has a very obscure provision for the declassification of records. The grounds are: “emergence of new circumstances, which make further secrecy unnecessary”, “expiration of the classification period” and “other grounds”.

The normal procedure for declassification is for the government to submit a proposal to the Great Khural on the recommendation of the National Security Council. It is evident that the government and National Security Council, as well as the Great Khural, have other urgent matters to attend to besides the routine declassification of government records. The existing arrangement makes it highly unlikely that any records will be declassified even after the expiry of the classification period (for instance, after the passage of eternity).

Experience demonstrates that when declassification is left in the hands of the government authorities (particularly, the State Security apparatus), nothing will ever be declassified. The very nature of the State Security bureaucracy speaks in favor of secrecy, not openness.

Therefore, Mongolia should adopt provisions similar to those in use in Western countries, where the process of declassification is semi-automatic. After the passage of the expiration period government-held records must be automatically declassified unless there is a strong imperative not to do so. In the latter case, the matter must be submitted for consideration to the National Security Council and decided upon by the Great Khural. Such procedure would

complicate the government's efforts to keep information secret after the classification period had expired.

A strong declassification clause is a necessary component of the Law on State Secrets so as to reaffirm that the public, and not the state owns the government-held records; that the government is only a temporary guardian of records, but that they must necessarily be made a part of the public domain once the period of their secrecy, by generally acceptable international standards, expires.

What must not be secret

The Mongolian Law on State Secrets does not contain a provision specifying what *must not* be classified as state secret. In this respect it differs from similar laws in most of the countries reviewed in the context of this study.

For example, the Lithuanian Law on State Secrets (Article 8) mandates that the following items must not be considered state secret:

- statistical data concerning the state of economy and finances [...] as well as the state of health care, education, ecology, social and demographic situation, results of social studies;
- information about natural calamities or catastrophes, as well as about their consequences;
- information about criminogenic situation, corruption, illegal actions of officers, violations of human rights;
- information about labour market, as well as information about wages, privileges and guarantees provided for officers and employees of public institutions;
- information about implementation of the state budget of the Republic of Lithuania
- information, concealment whereof would violate human rights

The Russian Law on State Secrets adds two important provisions to this list (Article 7): (1) gold and currency reserves and (2) the state of health of the highest government officials *are not to be considered state secret*.

In addition, the Russian law provides for *administrative, disciplinary or penal action* against officials who unduly classify such information as state secret.

Here follows a brief analysis of the laws of other countries under consideration:

Belarus (Article 7). Most of the above, plus a curious provision: information, the loss of which will result in lesser *expenses* for the state than its continuing protection as secret, *must not* be considered state secret. Clearly important in the Mongolian context, where a vast amount of historical materials are kept as state secrets (and officials in charge of secrecy receive special salary compensations), at the time when the release of this documental will cause no detriment whatsoever to Mongolia.

Kazakhstan (Article 17). Most of the above, plus a provision that materials pertaining to *repressions*, including *archival materials*, must not be considered state secret. Another point to note: in Mongolia, most of such materials are in fact considered state secret.

Georgia (Article 8). The above provisions plus a statement to the effect that “maps” and “legal acts” cannot be classified as state secret. Detailed maps are state secret *indefinitely* in Mongolia, whereas ministries and government agencies often have internal instructions governing the use of and access to information, which are also considered state secret.

Kyrgyzstan (Article 4). Most of the above provisions plus the state of the agricultural economy.

Moldova (Article 12). Some of the above provisions and, additionally, any information, which could obstruct the implementation of the socio-economic and cultural development programs.

Armenia (Article 10). As above.

Ukraine (Article 8). As above.

Azerbaijan (Article 6). Broadly, the above provisions, except that the information regarding gold and currency reserves *may be* classified as a state secret.

Turkmenistan (Article 10). Very brief provision, forbidding classification of materials, if this may cause harm to the health and security of citizens, as well as their legal rights.

Tajikistan – the only country, other than Mongolia, which does not have provisions as to what must not be considered state secret.

Recommendations:

Include a provision into the Mongolian Law on State Secrets, specifying what must not be considered state secret. This list what include:

- Violations or abuse of human rights, repressions;
- The state of economy and finances;
- Calamities and catastrophes, natural or man-made, which have happened or are known to happen;
- The state of the ecological situation;
- Information regarding corruption and the criminal situation in the country;
- Wages and privileges of the public officials;
- The state of health of the highest public officials;

Include provision of penalties (administrative, disciplinary) for officials who classify such information contrary to the law.

Reaffirming commitment to openness

The Mongolian Law on State Secrets should begin with a preamble reaffirming Mongolia's commitment to openness and confirming the public right to access government-held records.

Overlapping between the Law on State Secrets and the List of State Secrets

In Mongolia, there are in fact two laws on State Secrets: the 1995 Law on State Secrets and the List on State Secrets, last updated in January 2004. The List on State Secrets repeats and expands upon Article 5 of the Law on State Secrets. This duplication complicates the legislative framework. When amendments are introduced to the List of State Secrets, Article 5 of the Law on State Secrets may also have to be (and has been) amended to reflect the changes introduced to the List.

Recommendations: The issue can be tackled in two ways: either the List should be cancelled altogether and its provisions incorporated into the Law on State Secrets (this is the case in most other countries under consideration here) or defining the scope of state secrets should be left to the List of State Secrets, and provisions to this effect should be included in Article 5 of the Law on State Secrets (the Lithuanian Law on State Secrets takes this approach). One way or another, unnecessary duplication should be avoided.