



The European Union's Tacis programme
for Ukraine

CAPACITY BUILDING IN DONETSK OBLAST FOR WASTE MANAGEMENT - UKRAINE

Legal study

*Secret of information concerning
environment protection projects*



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Warning

This programme is implemented by the Consortium Sogreah – GWK Consult - ADEME. The views expressed in this report do not necessarily reflect the views of the European Commission.

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1. Request

1.1. General principles

Tacis Project: names the cooperation programme "Capacity Building in Donetsk Oblast for Waste Management – Ukraine" agreed by the European Union and Ukraine, within the frame of the treaties and agreements between both, and funded by the European Union.

Consultant: names the experts and employees of the consortium (Sogreah – GWK Consult – ADEME) which has contracted with the European Union for the implementation of the Tacis Project. The contract between the consortium and the European Union implies the fulfilment of all the obligations of the general conditions of contracting of the European Union. The experts and employees are of several citizenships: Ukrainian, or countries of the European Union, or countries of the Commonwealth of Independent States; so they may be considered in the Ukrainian Law as citizens or foreigners.

Beneficiary: names the public bodies of the Republic of Ukraine which asked assistance from the European Union and which will receive all the results of the Tacis Project. During the execution of the Tacis Project, the Beneficiary is the partner of cooperation of the Consultant.

ToR: Terms of Reference: they describe the problem the Beneficiary asks to solve. The ToR are agreed between the European Delegation, the Tacis Coordinating Unit of the Ministry of Economy, the Beneficiary. The ToR are the base of the involvement of the Consultant who made his proposal on this base and so are the key point of his contractual obligations.

Inception Report: this report updates the work programme and (lightly) the ToR. It reflects the evolution between the time of the writing of the ToR and the beginning of the execution of the Tacis Project. The Beneficiary endorses it.

1.2. Object of the request

According to the ToR and the Inception Report, the Beneficiary asks the Consultant to provide a Plan of creation of Regional Sanitary Landfills and to help to launch this programme. This tasks includes the main steps:

- calculation of the needs;
- location of the landfills;
- estimation of the cost of investment;
- estimation of the operation costs;
- selection of the existing landfills for the management of the transition;
- needs and location of transfer stations;
- preparation of a dossier for the negotiation of the funding with International Financing Institutions.

The two first steps are done and the Consultant concludes with the location of 11 sites for sanitary landfills.

The next sub-tasks are now to make the "design studies" of the 11 sites. The objectives are:

- to check acutely the geological and hydrogeological conditions of the sites: it means to pass from an information "There's clay" to species of clay, permeability, thickness, slope, and intercalary materials;
- to design the implementation of the rows of the landfill that will respect the minimal thicknesses and the slopes for a gravitarian flow of all the liquids and allowing to implement all the required facilities;
- to calculate the cost of investment of these works of construction of the landfill.

The expected issues are either to reject the site as non-favourable, either to know the capacity, the investment costs and the operation costs of the future landfill.

The studies require to dispose of data which are the topography of the sites and the geological and hydrogeological knowledge of the sites. The precision required is average. Normally, the engineering studies of the construction of the landfills will require detailed data that can only be obtained by measures on the field: topographic survey, geological boreholes, laboratory measures and analyses. These works are particularly expensive. The engineering studies will adapt the design to the met conditions. So usually, the design studies are based on topographic maps and geological existing databases.

The topographic maps with the required precision exist all over the territory of Ukraine.

The geological and hydrogeological databases belong to the State body Donbass Geology, which has also a commercial activity, and is attached to the Ministry of Ecology and Natural Resources.

The Consultant asks to use these data for the 11 pre-selected sites in aim to fulfil its task of "design studies" of new sanitary landfills.

The Beneficiary wonders if these data may be delivered according to the Ukrainian legislation about secret.

1.3. Point of view of the Consultant

The Consultant made a legal study as following. The problem can be shared in several questions.

1.3.1. Is the information relevant of the secret of Ukraine?

This information concerns projects for the protection of the environment. So we can examine what's about the purpose of the data, protection of the environment, and the nature of the data, natural resources.

1.3.1.1. Information

According to Article 1 of the Law on Information, the information stands for documentary data or data stated in public as regards actions and events taking place in the society, state and environment.

The Law on Information establishes general legal framework for the acquisition, use, distribution and storage of the information. Beside that, this law also regulates the access to the information, ensuring its protection. This law guarantees the right for getting information, its openness, accessibility and the freedom of exchange.

According to Article 1 of the Law of Ukraine "On Topographic, Geodesic and Cartographic Activities", the topographic, geodesic and cartographic activities are the activities of legal and physical entities focused, among other things, on creation of topographic and cadastre maps (plans).

According to Article 1 of the Code of Ukraine "On Earth Depths" the earth depths are the part of the earth which is located above the land surface and bottom of water reservoirs and is stretched to the depths accessible for geological studies and exploration.

The Regulations on the procedure of disposal of cartographic information defines the procedure of disposal (submission for use or sale of open cartographic information which belongs to the State). The Procedure of disposal of cartographic information with a limited access is defined by the other law – the Law on State Secret.

Cartographic information presents fixed values of astronomic, geodesic, high-altitude and gravimetric measurements, topographic and cartographic data, aerospace shots.

Cartographic information which is the state property and which has been submitted to the State Cartographic and Geodesic Fund of Ukraine is provided for use on a contract basis. As far as executive authorities and local self-government bodies are concerned, they receive it free-of-charge.

According to item 4 of the Regulations, the legal and physical entities willing to receive and use the cartographic information should send to the State Committee on Natural Resources a request indicating why this information should be received, territory (region) which it should cover, list of requested data and the extent to which they should be detailed (scale of a map), type of an information carrier and the form of the information delivery. The State Committee on Natural Resources should study the request about the provision of cartographic information into use within 10 days and to inform the applicant about the result. In case the information is available the request should be satisfied within one month.

The State Department of Ecology and Natural Resources is entitled to ask to the State Committee on Natural Resources the geological data and the topographical maps.

1.3.1.2. Protection of the environment

Article 50 of the Constitution guarantees to each citizen the right for a free access to the information about **the state** of the environment as well as the right for its distribution. In addition to that, the Constitution states in the imperative form that the ecological information cannot be classified by anybody as secret.

According to Article 13 of the Law on Information, the ecological direction is one of the main directions of the informational activities guaranteed by the State. This Law stipulates that the main types of ecological information include reference and encyclopaedia information which, following Article 24 of the Law of Information, represents systematized and documentary data, or data stated in public and referring to the environment. Among the main sources of information about the environment there are also guidebooks and cartographic materials.

According to Article 9 of the Law of Environment Protection, ecological rights of Ukrainian citizens also include a free access to the information about the state of environment, free acquisition, use, distribution and storage of such an information, except for restrictions established by the law as regards the State Secret.

According to Article 25 of the Law on Environmental Protection, by the information about the state of environment (ecological information) the legislator means any information presented in a written, audiovisual, electronic or any other material form about the state of environment and its facilities – land, water, mineral resources, atmospheric air, vegetative and animal world and the level of their contamination. Beside that, the ecological information can contain data about the threat of/reasons of emergency ecological situations, results of their liquidation, recommendations concerning the activities aiming at their liquidation.

On 06.07.99 Ukraine ratified Aarhus convention as of 25.06.98 on the access to information, participation of the general public in the process of decision-making and access to justice as regards the questions referring to the environment. Aarhus convention aims at considerable extension of the general public participation in decision-making on the issues of environment protection, presupposes a guaranteed access to ecological information at the stages of design of projects that can influence the environment and human health.

The asked geological data and the topographical maps constitute an information about the protection of the environment as far as it's relevant of the design of projects aiming at the protection of the environment, and therefore, should be accessed by any inhabitant.

1.3.1.3. Natural resources

According to Article 13 of the Constitution, it is declared that the earth, its mineral resources as well as other natural resources located at the territory of Ukraine, are the objects of the ownership right of the Ukrainian people. On behalf of the Ukrainian people the rights of the owner are exercised by public authorities and local self-government bodies. In accordance with Article 14 of the Constitution of Ukraine the land is considered the main national treasury which is under special protection of the state.

According to Article 1 of the Law of Ukraine “On Land Utilisation”, topographic, geodesic, cartographic and other types of works are previewed among the existing types of works referring to collection of information about land resources aimed at preparing of documentation on land utilization.

The mineral resources, which can be also defined as geological and hydrogeological resources, are documented, i.e. the information is managed by the State.

1.3.1.4. Secret

According to Article 1 of the Law on State Secret, the state secret (or secret information) is a type of information which covers the data referring to defence, economy, science and engineering, external relationships, state security and protection of law order, the disclosure of which can do a harm to the national security of Ukraine and which are recognised by the law procedure as the state secret and are to be protected by the State.

The assignment of the information to the State Secret is a procedure during which the state expert in the field of secrets takes a decision of whether to qualify the category of information or separate data as the

State Secret by including this information into the Code of Information belonging to the State Secret and publication of this Code.

The Law on Information distinguishes between the open information and information with a limited access. This law prohibits to restrict the right for acquisition of an open information to which ecological information refers. As far as information with a limited access is concerned, this kind of information is divided into confidential and secret.

The part 11 of Article 30 of the Law on Information distinguishes an exception concerning the information the access to which is limited (including the information containing the data belonging to the State Secret): *"the information the access to which is limited can be distributed without the authorisation of its owner, in case this information is of public significance, i.e. it is the subject of public interest, and if the right of the general public to know it prevails over the right of its owner for its protection"*.

When European experts requested information in the form of topographic and geological maps of the Donetsk Oblast (scale 1:50 000) it was an open, ecological information and not the information with a limited access, i.e. secret information.

The Article 8 of the Law on State Secret provides an exhaustive list of information which can be considered as the State Secret. According to Article 10 of the Law on State Secret, the information is considered to be a State Secret since it is published in the Code of Information. Such a "Code of Information which is a State Secret" is prepared and published in official editions by the State Security Service of Ukraine and only based on the decisions of state experts on secret issues.

The State Department of Ecology have ascribed the information, which have been requested (topographic and geological maps of the Donetsk oblast) to the field of defence which means that this information concerned cartographic and hydro-meteorological data. At the same time such data can be considered a State Secret only in case they are included in the published Code of Information belonging to the State Secret or in case their disclosure will do a harm to the National Security of Ukraine.

The above-mentioned Code of information has lost its validity and it was replaced by a new Code of information which belongs to the State Secret, ratified by the State Security Service of Ukraine #440 as of 12.08.05. In the old Code of Information belonging to the State Secret the wording of item 1.59 was the following:

topographic maps and plans of scale 1:50000 and larger, specialized maps prepared on the basis of aero- and cosmic shootings created in accordance with the state system of co-ordinates (not depending on the form and type of information) of the territory of Ukraine, which belong to the State Secret.

In the new Code of Information this item looks differently:

the information about topographic, special or digital maps or city plans of scale 1:25000 and larger, created for the territory of Ukraine in the system of coordinates of 1942 or in the other system of coordinates, however in accordance with the Baltic system of heights, which contains, taking into account all indicators, full information for the detailed study and assessment of the area, orientation on it and indication of goals, implementation of measurements, different household and defence activities.

These maps of scale 1:25000 and larger, on which there are no geographic (rectangular) coordinate grids in the system of coordinates of 1942, corners of frames in the state ruling, planned or height network points, qualitative or quantitative characteristics of the area facilities (the list of which is to be defined by the Headquarters of the Armed Forces of Ukraine), relief of which is indicated with the help of horizontal lines with the height of cutover more than 10 m do not belong to the State Secret.

But Part 3 of Article 8 of the Law on State Secret prohibits to treat as the State Secret any data in case such actions will narrow the content and scope of the Constitutional rights and freedoms of a person and citizen. This article reproduces once again the declarative norm of Article 50 of the Constitution saying that the information about the state of the environment, dangerous natural phenomena and other emergency situations which might happen and threaten the security of citizens does not belong to the State Secret.

The topographic maps requested by the Consultant are 1/25 000° maps with 10 m spaced level curves, limited to the areas defined in the study of location of landfills sites, without geographic coordinate grids in the system of coordinates of 1942, corners of frames in the state ruling, planned or height network points, qualitative or quantitative characteristics of the defence area facilities, are not relevant of the Secret.

1.3.2. Is the Consultant entitled to know this information?

As far as foreigners or persons without any citizenship are concerned, the access to the State Secret is given in exclusive cases based on the international agreements of Ukraine, the obligatory implementation of which has been approved by the Supreme Council of Ukraine or by the resolution of the President of Ukraine based on the proposal of the Council of National Security and Defence of Ukraine.

According to Article 6 of the Law on Information, the basis of the state policy is the assurance of citizens' access to the information, promotion of international co-operation in the field of information as well as satisfaction of information requests of Ukrainians living abroad.

According to Article 7 of the Law on Information, alongside with the citizens of Ukraine, legal entities and the State, the subjects of informational relationships can be also represented by other states, their citizens, legal entities, international organizations and persons without citizenship.

A common rule of cooperation is to provide the necessary information. So, in the article 15 of the Memorandum signed by Ukraine and EU on 28/12/94

The Government will provide all administrative support necessary to facilitate the implementation of agreed projects and of the terms of these general rules.

The "Partnership and co-operation agreement between the European Communities and their member states, and Ukraine" specifies:

ARTICLE 94

Nothing in the Agreement shall prevent a Party from taking any measures:

(a) which it considers necessary to prevent the disclosure of information contrary to its essential security interests;

(b) which relate to the production of, or trade in arms, munitions or war materials or to research, development or production indispensable for defence purposes, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes;

and in ANNEX V

Ukrainian reservations in accordance with Article 30(2)(a)

The application of the reservations in this Annex shall in no case result in treatment less favourable than that accorded to companies of any third country.

2. Other areas

Brokerage of immovable property including land

Ownership and use of natural resources

Use of subsoil and natural resources including mining

Acquisition and sale of natural resources

Article 63 of the Agreement on Partnership and Co-operation between Ukraine and the European Community¹, including their member-states, as of 14.06.94, ratified by the Law of Ukraine N° 237 as of 10.11.94, foresees the conditions of development and strengthening of co-operation between the European Community and Ukraine in the field of environment protection. One of such conditions is the improvement of the information system about the state of environment, and the co-operation as such should be implemented through exchange of information and experts.

As far the information is not relevant of the essential security interests of Ukraine, the experts of the EU are entitled to jointly work with the Ukrainian experts on these data within the frame of a cooperation in the field of environment protection.

¹ Any government body could arise in front the Co-operation Council existing between EU and Ukraine any question concerning the application or the interpretation of the Agreement (Article 85 of the Partnership Agreement).

2. Introduction

2.1. Task

Analysis of laws and legal acts of Ukraine regulating the provision of information about natural resources, checking the conformity of these documents with international agreements signed and ratified by Ukraine with EC and WTO

To collect and analyse the legal Ukrainian texts about provision of information on natural resources (topographic and geological data).

To analyse the relevant pieces of information in the WTO and the EU agreements dealing with provision of information about natural resources by Ukraine and rules of protection of geographic and geological data.

To report the contradictions, the missing, the existing limits of the present legal texts and conclusions on the present possibilities for foreign experts to solve tasks linked with landfill design.

2.2. Data

In order to analyse the legislation of Ukraine regulating the provision of information about natural resources the following laws and legal acts have been studied:

- Constitution of Ukraine as of 28.06.96 (hereinafter referred to as the Constitution);
- Law of Ukraine «On Information» as of 02.10.92 N° 2657(hereinafter referred to as the Law on Information);
- Law of Ukraine «On State Secret» as 21.01.94N° 3855 (hereinafter referred to as the Law on State Secret);
- Law of Ukraine «On Environment Protection» as of 25.06.91 N° 1264 (hereinafter referred to as the Law on Environmental Protection);
- Land Code of Ukraine as of 25.10.01 N° 2768 (hereinafter referred to as the Land Code);
- Law of Ukraine «On Land Utilisation» as of 22.05.03 N° 858 (hereinafter referred to as the Law on Land Utilisation);
- Law of Ukraine «On Topographic, Geodesic and Cartographic Activities» as of 23.12.98 N° 353 (hereinafter referred to as the Law on Topographic, Geodesic and Cartographic Activities);
- Code of Ukraine «On Earth Depths» as of 27.07.94 N° 132/ 94 (hereinafter referred to as the Code on Mineral Resources);
- Code of Information belonging to the State Secret, ratified by the Order of the State Security as of 12.08.05 N° 440 (hereinafter referred to as the Code of Information);
- Regulations concerning the provision of ecological information ratified by the Order of the Ministry of Environment Protection of Ukraine as of 19.12.03 (hereinafter referred to as the Regulations concerning the provision of ecological information);
- Regulations about the procedure of use of cartographic information, ratified by the resolution of the Cabinet of Ministers of Ukraine as of 25.03.97 #269 (hereinafter referred to as the Regulations about the procedure of use of cartographic information).

3. Basic provisions of the Ukrainian legislation regulating information

3.1.

As a result of the analysis of the above-mentioned documents it has been established that:

In accordance with Article 1 of the Law on Information, the information stands for documentary data or data stated in public as regards actions and events taking place in the society, state and environment.

The Law on Information establishes general legal framework for the acquisition, use, distribution and storage of the information. Beside that, this law also regulates the access to the information, ensuring its protection. This law guarantees the right for getting information, its openness, accessibility and the freedom of exchange.

3.2.

In accordance with Article 6 of the Law on Information the basis of the state policy is the assurance of citizens' access to the information, promotion of international co-operation in the field of information as well as satisfaction of information requests of Ukrainians living abroad.

3.3.

In accordance with Article 34 of the Constitution the state guarantees for the citizens the right to collect, store, use and distribute information in a verbal, written or any other form, depending on the choice of citizens.

In order to specify the subjects to whom the State guarantees the right to possess and use information it is necessary to refer to Article 7 of the Law on Information in which the subjects of informational relationships are defined. Alongside with the citizens of Ukraine, legal entities and the State, the subjects of informational relationships can be also represented by other states, their citizens, legal entities, international organizations and persons without citizenship.

3.4.

In accordance with Article 13 of the Law on Information the ecological direction is one of the main directions of the informational activities guaranteed by the State.

This Law stipulates that the main types of ecological information include reference and encyclopaedia information which, following Article 24 of the Law of Information, represents systematized and documentary data, or data stated in public and referring to the environment. Among the main sources of information about the environment there are also guidebooks and cartographic materials.

3.5.

While working with the environmental legislation the attention was paid to the fact that the ecological information is first of all represented by the information about **the state and level of contamination** of some of the environmental resources in general. To my mind, these are the key words allowing to distinguish the environmental information from any other information.

To confirm all mentioned above I suggest you refer to Article 25 of the Law on Environmental Protection where by the information about the state of environment (ecological information) the legislator means any information presented in a written, audiovisual, electronic or any other material form about **the state** of environment and its facilities – land, water, mineral resources, atmospheric air, vegetative and animal world and **level** of their contamination.

Beside that, the ecological information can contain data about the threat of/reasons of emergency ecological situations, results of their liquidation, recommendations concerning the activities aiming at their liquidation.

3.6.

The above-mentioned criteria of ecological information are not exhaustive. However, they should be born in mind to understand why the access to some of the information similar to ecological information can be

limited, which at the first glance enters into contradiction with Article 50 of the Constitution which in its turn guarantees to each citizen the right for a free access to the information about **the state** of the environment as well as the right for its distribution. In addition to that, the Constitution states in the imperative form that the ecological information cannot be classified by anybody as secret.

In case the criteria of the ecological information, both open information, or, if to be more precise, information open to general use, are underlined correctly, then during the further reading of this report there shouldn't be created an opinion about violation of ecological rights of Ukrainian citizens, which, following Article 9 of the Law of Environment Protection, also include a free access to the information about the state of environment, free acquisition, use, distribution and storage of such an information, except for restrictions established by the law as regards the State Secret.

4. Ecological information

4.1.

In Article 13 of the Constitution it is declared that the earth, its mineral resources as well as other natural resources located at the territory of Ukraine, are the objects of the ownership right of the Ukrainian people. On behalf of the Ukrainian people the rights of the owner are exercised by public authorities and local self-government bodies. In accordance with Article 14 of the Constitution of Ukraine the land is considered the main national treasury which is under special protection of the state.

In accordance with item (d) of Article 25² of the Law on Environment Protection the ecological information provision is exercised by state authorities and local self-government bodies within the range of their competence by securing a free access to ecological information which does not belong to the State Secret and is contained in lists, registries, archives and other sources.

4.2.

In order to secure an information support for a proper preservation and use of land resources public authorities and local self-government bodies carry out a monitoring of lands.

In accordance with Article 191 of the Land Code land monitoring stands for the system of observation over **the state** of the land aimed at timely identification of changes, their assessment, allocation and liquidation of consequences of negative processes. Within the system of land monitoring there is implemented a collection, processing, transfer, storage and analysis of information about the state of lands, forecasting of changes.

Land monitoring is a constituent part of the state system of environment monitoring, that's why the provision of information about the state of land by public authorities or local self-government bodies is open.

4.3.

The data collection about **the state** of such natural resources as land and mineral resources is regulated by the Law on Land Utilisation, Law on Topographic, Geodesic and Cartographic Activities, Code on Mineral Resources and other legal acts.

4.3.1.

In accordance with Article 1 of the Law of Ukraine "On Land Utilisation" among the existing types of works referring to collection of information about land resources aimed at preparing of documentation on land utilization there are previewed topographic, geodesic, cartographic and other types of works.

4.3.2.

For a proper understanding of topographic, geodesic and cartographic works it is necessary to refer to the Law on Topographic, Geodesic and Cartographic Activities. In accordance with Article 1 of the Law of Ukraine "On Topographic, Geodesic and Cartographic Activities", the topographic, geodesic and cartographic activities are the activities of legal and physical entities focused, among other things, on creation of topographic and cadastre maps (plans). In its turn, for creation of such maps or plans the Article 184 of the Land Code presupposes the implementation of topographic, geodesic, cartographic, ground and other studies and land exploration.

Following Article 57 of the Law on Land Utilisation special thematic maps and atlases are created in aim to reflect on them **the state of land** and its use, data of zoning, definition of activities for organization of rational use and protection of lands.

4.3.3.

For a more qualitative answer on the questions set, alongside the land resources as such, I believe it necessary to touch the question of earth depths, the information about which is also subject to collection and studies through implementation of topographic, geodesic, cartographic and other types of activities.

² The state cartographic and geodesic fund of Ukraine presents the total set of topographic, geodesic and cartographic materials, not depending on their type, place of creation and ownership rights, which are stored at the territory of Ukraine.

For this purpose it is necessary to define what is meant by earth depths. In accordance with Article 1 of the Code of Ukraine “On Earth Depths” the earth depths are the part of the earth which is located above the land surface and bottom of water reservoirs and is stretched to the depths accessible for geological studies and exploration.

Resume: Thus, it is necessary to make a conclusion that the inclusion into topographic and cadastre maps and atlases of the information about the state of land, earth depths as well as the level of contamination is an open ecological information, the access to which cannot be reduced by executive authorities or local self-government bodies.

5. Protection of information belonging to the State Secret

5.1.

In accordance with Article 17 of the Constitution the most important functions of the State are the provision of information security of Ukraine.

5.2.

Following Article 1 of the Law on State Secret, the state secret (or secret information) is a type of the secret information which covers the data referring to defence, economy, science and engineering, external relationships, state security and protection of law order, the disclosure of which can do a harm to the national security of Ukraine and which are recognised by the law procedure as the state secret and are to be protected by the State.

The assignment of the information to the State Secret is a procedure during which the state expert in the field of secrets takes a decision of whether to qualify the category of information or separate data as the State Secret by including this information into the Code of Information belonging to the State Secret and publication of this Code.

Beside that Constitution, Law on State Secret, Law on Information, the relations in the field of State Secret Protection are regulated by international agreements, the approval on a compulsory implementation of which has been given by the Supreme Council of Ukraine.

5.3.

The Law on Information distinguishes between the open information and information with a limited access. This law prohibits to restrict the right for acquisition of an open information to which ecological information refers.

As far as information with a limited access is concerned, this kind of information is divided into confidential and secret.

5.3.1.

In accordance with Article 30 of the Law on Information the confidential information which is the property of the State and which is at disposal of public authorities or local self-government bodies, enterprises, institutions and organizations of all types of ownership cannot include the data about the state of environment as well as other information, the access to which is open in accordance with the laws of Ukraine and international agreements, the approval of the compulsory implementation of which has been given by the Supreme Council of Ukraine.

5.3.2.

The secret information is the information which contains data belonging to the State Secret, the disclosure of which will do a harm to a person, society and the State. The attribution of the information to the category of secret data belonging to the State Secret and the access of citizens toward this information are carried out in accordance with the Law on State Secret.

5.3.3.

At the same time I would like to pay your attention to the fact that in part 11 of Article 30 of the Law on Information there is an exception concerning the information the access to which is limited (including the information, containing the data belonging to the State Secret – note of the Author), which only confirms the rule. The article says that **“the information the access to which is limited can be distributed without the authorisation of its owner, in case this information is of public significance, i.e. it is the subject of public interest, and if the right of the general public to know it prevails over the right of its owner for its protection”.**

Otherwise, the information containing the state secret or confidential information is not to be obligatorily submitted in response to information requests.

5.4.

Secret information as any other information is an object of civil legal relations and that's why its owner has a right to possess, use and dispose of this information, however, with consideration of restrictions imposed by the national security of Ukraine. In case such limitations on secret information do a harm to its owner the State is to compensate such a harm by making an agreement between the owner of secret information and the state body and paying compensation.

In accordance with Article 6 of the Law of State Secret the contract between the owner of the secret information and the state body is obligatory, otherwise by decision of the court such an information can be transferred to the property of the State, provided that the owner of the information is preliminary and fully reimbursed for its costs.

5.5.

The Article 8 of the Law on State Secret provides an exhaustive list of information which can be considered as the State Secret.

After the analysis of this article of the Law as well as of the answer of the State Department of Ecology and Natural Resources in the Donetsk Oblast as of 22.09.05 N° P1-6320 to your request, I conclude that **the specialists of the State Department of Ecology have ascribed the information, which have been requested (topographic and geological maps of the Donetsk oblast) to the field of defence which means that this information concerned cartographic and hydro-meteorological data.**

At the same time such data can be considered a State Secret only in case they are included in the published Code of Information belonging to the State Secret or in case their disclosure will do a harm to the National Security of Ukraine.

5.6.

Part 3 of Article 8 of the Law on State Secret prohibits to treat as the State Secret any data in case such actions will narrow the content and scope of the Constitutional rights and freedoms of a person and citizen. This article reproduces once again the declarative norm of Article 50 of the Constitution saying that the information about the state of the environment, dangerous natural phenomena and other emergency situations which might happen and threaten the security of citizens does not belong to the State Secret.

The information which is submitted within the framework of laws and international agreements the obligatory implementation of which have been approved by the Supreme Council of Ukraine cannot be considered as State Secret as well.

5.7.

The attribution of information to the State Secret is exercised exclusively based on the decision of a state expert on secret issues within the framework of the powers given to him. Beside that, in accordance with Article 10 of the Law on State Secret, the information is considered to be a State Secret since it is published in the Code of Information.

Such a Code of Information which is a State Secret is prepared and published in official editions by the State Security Service of Ukraine **and only based on the decisions of state experts on secret issues.**

In Article 12 of the Law on State Secret there is described a mechanism of ascribing the information to the information with a limited access. It presupposes that on the basis and within the Code of Information belonging to the State Secret, in aim to precise and systematize the data about secret information public authorities should create branch and institutional detailed lists of data belonging to the state secret. In order for these lists to have a power of a normative document they should be obligatorily agreed with the State Security Service of Ukraine, ratified by state experts on secret issues and registered in the State Security Service of Ukraine.

The Law demands that these detailed Lists of Secret Data do not contradict the Code of Information belonging to the State Secret.

In case the Code of Information or Detailed Lists include the information which cannot be secret, the interested citizens and legal entities have a right to appeal against this decision in the court. Besides, in the court the citizens can also appeal against imposing secrecy on a material carrier of such an information.

5.8.

Article 14 of the Law on State Secrecy presupposes the procedure of cancellation of the decision in accordance with which the information has been ascribed to the State Secret. Two variants are foreseen: it can be either on the basis of the conclusion made by the state expert on secret issues, or on the basis of a court decision in case of appealing against a decision about imposing secrecy on the information. This should be followed by the actions of the State Security Service of Ukraine that should introduce the relevant changes in the Code of Information.

The information stops to be considered a state secret since the publication of the relevant changes in the Code of Information.

5.9.

During the detailed study of the law on State Secret I got convinced that the access to information, containing the State Secret, is foreseen only for the citizens of Ukraine. At the same time a citizen of Ukraine can also get a refusal to be provided with the necessary information in case he is permanently living abroad or is getting ready to move abroad and get a permanent residence there.

As far as foreigners or persons without any citizenship are concerned, the access to the State Secret is given in exclusive cases based on the international agreements of Ukraine, the obligatory implementation of which has been approved by the Supreme Council of Ukraine or by the resolution of the President of Ukraine based on the proposal of the Council of National Security and Defence of Ukraine.

Thus, it is possible to make a preliminary conclusion that the existing legislation of Ukraine almost fully restricts the possibility of foreign citizens and persons without any citizenship to get an access to the information which belongs to the State Secret of Ukraine.

The only exception is international agreements, the obligatory implementation of which has been approved by the Supreme Council of Ukraine or by the Resolution of the President of Ukraine.

6. Procedure and specifics of ecological information delivery

6.1.

As far as ecological information is concerned, it cannot be considered a State Secret, in case it is not directly indicated in the Code of Information. In fact, in such a case we cannot speak about information being ecological as the ecological information cannot be considered a State Secret – that would be a non-sense. For instance, in case the enterprise engaged in production of military equipment refuses to provide environmental control bodies with the information about the composition and volume of waste generated at the enterprise referring to the fact that based on these indicators it is possible to define real volumes of production, types of the armament produced, this cannot be considered as a serious argument for the refusal to provide the information requested, as to my mind it will be considered as ecological information, which finally informs about the level of land contamination. Let's underline that we speak about the level of land contamination and not of the state of waste as in the Ukrainian legislation in the same way as it is in the European legislation the waste are not the object of environment and it is not possible to provide the information about the state of waste apart from land which they contaminate and on the state of which they influence.

6.2.

In order to define how it is necessary to build further co-operation of the European Union experts with the State Department of Ecology and Natural Resources I believe it is necessary to get acquainted with the main provisions of the Regulations on Procedure of ecological information delivery.

The Procedure of ecological information delivery presupposes that the organization of the ecological information provision is exercised by the Ministry of Environment Protection of Ukraine, its state departments in oblasts, enterprises, institutions and organizations. In section 2 of these Provisions there is a list of information which the ecological information should include. With the help of this list it is possible to outline the range of issues covered by the notion of the ecological information and the access to which cannot be prohibited or limited.

6.3.

So the ecological information includes:

- National and regional reports and the reports about the state of environment with the dynamics of changes in it;
- List, texts and drafts of legal acts covering the field of environment protection and reports about the observance of the environment legislation;
- Documents on the policy in the field of environment protection, plans, projects, programmes for its protection;
- International agreements in the field of environment protection and the state of their execution;
- Other information about the state of separate environmental objects in case it has turned out useful for the general public which is confirmed by sociological surveys.

6.4.

In accordance with section 3 of the Procedure of ecological information delivery the tasks to provide the ecological information have been delegated both to the Ministry of Environment Protection of Ukraine and the State Department of Ecology and Natural Resources in Donetsk Oblast and exercised with the aim to implement the rights of citizens, their associations and legal entities to get information by means of:

- acquisition, storage, use and distribution of ecological information in a verbal, written or any other way;
- its systematic publication in mass media, reports on the state of environment, distribution by information services of state bodies and organizations, public speeches;

- its direct provision to those who are requesting it, also from automated information and analytical ecological systems, library and archive funds, lists, registries, cadastres.

In item 3.6 of the Regulations on the procedure of delivery of ecological information it is foreseen that the request concerning the provision of the ecological information can be declined in case the information requested belongs to the State Secret. **Here there is a contradiction which, to my mind, has allowed the State Department of Ecology and Natural Resources to give a negative answer not even explaining whether the information requested can be qualified as the ecological information or presents the information belonging to the State Secret.**

6.5.

In Ukraine there is a supremacy of the law and the Constitution of Ukraine has the strongest legal power, thus, none of the law or legal act can contradict it, and on the contrary, they should be in line with it. At least, it is written like that in Article 8 of the Constitution.

Item 3.6 of the Regulations obviously contradicts Article 50 where it is stated that “each citizen has a right for a free access to the information about the state of environment. Nobody can impose a secrecy on such an information”. In order to exclude different interpretation of terms I would like to come back to Article 8 of the Law on State Secret stating that “it is prohibited to impose secrecy on any data that will narrow the content and scope of Constitutional rights and freedoms of a person and citizen”. The information about the state of environment does not belong to the state secret. In accordance with Article 25 of the Law on Environment Protection the ecological information stands for the information about the state of environment!

Thus, we come to a conclusion that item 3.6 of the Regulations contradicts:

First of all, to Article 25 of the Law on Environment Protection

Secondly, to Article 8 of the Law on State Secret

Thirdly, and this is the most important, directly to Article 8 of the Constitution of Ukraine!

6.6.

Having analysed the Constitution and laws of Ukraine as well as legal acts which directly prohibit to assign ecological information to the State Secret I can conclude that the refusal of the State Department of Ecology and Natural Resources to provide topographic and geological maps of the Donetsk Oblast can be justified only in case the information requested by you is classified not as ecological but as information referring to the field of defence of the country, i.e. it is the State Secret.

6.6.1.

In case the information requested is open or ecological then the actions of the State Department of Ecology and Natural Resources are illegitimate and can be appealed against either in the Ministry of Environment Protection of Ukraine or in the court as Article 39 of the Law on State Secret foresees a disciplinary, administrative and criminal responsibility of officials and citizens for violation of the legislation about State Secret, including both its unauthorized disclosure or imposing a groundless secrecy.

6.6.2.

I believe that at the moment when European experts requested information in the form of topographic and geological maps of the Donetsk Oblast (scale 1:50 000) it was an open, ecological information and not the information with a limited access, i.e. secret information. That's why I offer to consider different items of the Regulations on the procedure of disposal of cartographic information.

6.6.3.

The Regulations on the procedure of disposal of cartographic information defines the procedure of disposal (submission for use or sale of open cartographic information which belongs to the State). **The Procedure of disposal of cartographic information with a limited access is defined by the other law – the Law on State Secret.**

Cartographic information presents fixed values of astronomic, geodesic, high-altitude and gravimetric measurements, topographic and cartographic data, aerospace shots.

Cartographic information which is the state property and which has been submitted to the State Cartographic and Geodesic Fund of Ukraine¹ is provided for use on a contract basis. As far as executive authorities and local self-government bodies are concerned, they receive it free-of-charge.

In accordance with item 4 of the Regulations the legal and physical entities willing to receive and use the cartographic information should send to the State Committee on Natural Resources³ a request indicating why this information should be received, territory (region) which it should cover, list of requested data and the extent to which they should be detailed (scale of a map), type of an information carrier and the form of the information delivery. The State Committee on Natural Resources should study the request about the provision of cartographic information into use within 10 days and to inform the applicant about the result. In case the information is available the request should be satisfied within one month.

6.6.4.

In case a physical or legal entity is willing to acquire the ownership rights for the cartographic information given to the State Committee on Natural Resources for storage, then it is necessary to write a relevant request addressed to the Head of the Central Directorate of Geodesy, Cartography and Cadastre at the Cabinet of Ministers of Ukraine (the content of the request is foreseen in item 6 of the Regulations).

The procedure of the request consideration as well as the terms are the same as for the request to receive and use cartographic information. The only difference is that such information can be sold only if there are no restrictions established by the law on acquisition of such data.

³ In accordance with the Decree of the President of Ukraine N° 31/2004 as of 06.03.04 the Ministry of Ecology and Natural Resources of Ukraine has been transformed into the Ministry of Environment Protection and the State Committee of Natural Resources of Ukraine. Part 2 of the President's Decree states that the State Committee on Natural Resources of Ukraine is a central executive body specially authorised for implementation of geological studies and assurance of rational use of mineral resources as well as of topographic, geodesic and cartographic activities.

7. Comparison of the Ukrainian legislation with the European Union legislation regulation provision of ecological information

7.1.

In order that Ukraine meets the third Copenhagen and Madrid EC membership criteria there was issued on 18.03.04 the law of Ukraine N° 1629 which ratified the “National Programme of Adaptation of the Ukrainian Legislation to the Legislation of the European Union” (hereinafter referred to as the Programme) previewing the adaptation of the legislation. The process of adaptation of the legislation of Ukraine presupposes the harmonization of the laws of Ukraine and other legal acts with acquis communautaire (EC legal system).

The agreement on partnership and co-operation between Ukraine and the European Community, including member-states as of 14.06.94 defines the priority fields of legislation adaptation (hereinafter referred to as UPF).

Adaptation of the legislation of Ukraine is a regular process which includes several consecutive steps. The first step of the Programme implementation covers the years 2004-2007. One of the priority fields is environment protection.

Adaptation of the Ukrainian legislation presupposes reforms in the legal system and its gradual harmonisation with the European standards, including environment protection. The legal basis of co-operation in the field of environment protection is UPF, international agreements and bargains referring to the safety of environment, the parties of which are Ukraine and EC.

7.2.

Article 63 of the Agreement on Partnership and Co-operation between Ukraine and the European Community, including their member-states, as of 14.06.94, ratified by the Law of Ukraine N° 237 as of 10.11.94, foresees the conditions of development and strengthening of co-operation between the European Community and Ukraine in the field of environment protection. One of such conditions is the improvement of the information system about the state of environment, and the co-operation as such should be implemented through exchange of information and experts.

At the same time Article 94 of the Agreement on Co-operation allows Ukraine to carry out any activities which it finds necessary in order to prevent from disclosure of information of vital importance or the information referring to its defence.

7.3.

On 06.07.99 Ukraine ratified Aarhus convention as of 25.06.98 on the access to information, participation of the general public in the process of decision-making and access to justice as regards the questions referring to the environment. Aarhus convention aims at considerable extension of the general public participation in decision-making on the issues of environment protection, presupposes a guaranteed access to ecological information at the stages of design of projects that can influence the environment and human health.

In accordance with the definition given in the Convention the ecological information stands for any information provided in a written, audiovisual, electronic or any other form, about the state of environment components such as soils, land, landscape and natural facilities as well as plans and programmes which influence or can influence soils, land, landscape.

If to compare the content of the term “ecological information” given in the Convention and Article 25 of the Law on Environment we can conclude that from the legal point of view the Convention does not contradict the legislation of Ukraine and its ratification has not brought considerable changes in the legislation. Almost all principal provisions of the Convention are regulated by the legislation and reflected in the Constitution, laws of Ukraine on information, on citizens’ appeals, on environment protection, etc.

7.4.

In section “Access to Ecological Information” of the Aarhus convention Ukraine guarantees that in the answer to a request for submission of ecological information the state bodies will provide the general public with this kind of an information within the framework of the national legislation in the form that will correspond to the request as well as copies of factual documents which contain or cover such information.

Quite an unclear wording of item 5.2. of the Aarhus convention “within the framework of the national legislation” results in different interpretations of sub-items 3,4 of Article 4 of section “Access to Ecological Information” which give the right to the state bodies to refuse to provide ecological information on the basis of the following arguments:

- a) the state body, to which the request has been addressed, does not have the relevant ecological information at its disposal;
- b) the request is not well-grounded and is presented only in a general way.

The request to provide ecological information can be also denied if the distribution of such information will have a negative impact on:

- National defence or state security;
- Confidential character of commercial and industrial information in case such a confidentiality is protected by law. This can be done in aim to protect legal economic interests, for instance, it maybe the information about soils, land, mineral resources, landscape. The only exception is an ecological information referring to atmospheric emissions – such an information is subject to distribution;
- Intellectual property rights.

At the same time in accordance with Article 5 of the Convention none of the provisions of the Aarhus convention can influence the right of Ukraine to refuse from publication of definite ecological information in accordance with the above-mentioned items of Article 4 of the Convention.

7.5.

Thus, the Aarhus convention is even more flexible then the legislation of Ukraine as far as provision of ecological information is concerned and allows state bodies of Ukraine to refuse from provision of such information in case its distribution can have a negative impact on the national defence or state security of the country.

8. Brief Conclusions

8.1.

While writing this paper I tried to answer your questions considering my own attitude toward the problem. To my mind, the problem which the experts have run across, has not appeared today and I think it would appear sooner or later anyway.

8.2.

Unfortunately, except for unclear legislation of Ukraine as regards the provision of ecological information, which is the initial and true reason of the problem, I think, that the next reason for the failure to submit the requested information is the lack of due legal knowledge from the side of the management of the State Department of Ecology and Natural Resources in the Donetsk Oblast as in the answer as of 22.09.05 #p1-6320, the Head of the State Department has made a reference to a legal act which lost its validity already one month ago, namely on the 12th of August 2005. By the legal act we mean a Code of Information which belongs to the State Secret, ratified by the Order of the State Security Service of Ukraine #52 as of 01.03.01.

8.3.

As you can understand, it is not just an ordinary legal act. It is the most important state document which concerns the questions of the State Secret as all of the information included into it belongs to the State Secret and is to be protected by the State. Thanks to that the State Department of Ecology could refer to item 1.59 of the Code of information and refuse to provide the requested information referring to the State Secret.

However, already at the moment the State Department of Ecology and Natural Resources was writing the answer as of 22.09.05 #P1-6320 the above-mentioned Code of information has lost its validity and it was replaced by a new Code of information which belongs to the State Secret, ratified by the State Security Service of Ukraine #440 as of 12.08.05.

In the old Code of Information belonging to the State Secret the wording of item 1.59 was the following: "topographic maps and plans of scale 1:50000 and larger, specialized maps prepared on the basis of aero- and cosmic shootings created in accordance with the state system of co-ordinates (not depending on the form and type of information) of the territory of Ukraine, which belong to the State Secret".

In the new Code of Information this item looks differently: "the information about topographic, special or digital maps or city plans of scale 1:25000 and larger, created for the territory of Ukraine in the system of coordinates of 1942 or in the other system of coordinates, however in accordance with the Baltic system of heights, which contains, taking into account all indicators, full information for the detailed study and assessment of the area, orientation on it and indication of goals, implementation of measurements, different household and defence activities".

These maps of scale 1:25000 and larger, on which there are no geographic (rectangular) coordinate grids in the system of coordinates of 1942, corners of frames in the state ruling, planned or height network points, qualitative or quantitative characteristics of the area facilities (the list of which is to be defined by the Headquarters of the Armed Forces of Ukraine), relief of which is indicated with the help of horizontal lines with the height of cutover more than 10 m do not belong to the State Secret.

8.4.

Thus, not even knowing the details of restrictions, it is necessary to say that if before the scale of secret maps was 1:50000 and larger, now it is 1:25000 and larger. That's why not knowing exactly what kind of a request you've filed to the State Department of Ecology, we can state that at the moment of request topographic maps of the scale 1:50 000 were no longer the state secret. Beside that, everything which was not included into a new Code of Information has nothing to do with the State Secret.

8.5.

In conclusion I would like to summarise the results of the study as regards provision of the ecological information and to dwell on the following:

1. indication on topographic and cadastre maps and atlases of information about the state of the earth, its depth as well as the level of contamination is an open ecological information, the access to which cannot be reduced by any executive bodies or local self-government bodies;
2. limitation of the right to receive the information open to everybody, to which the ecological information refers, is prohibited by the Constitution of Ukraine and the Law on State Secret;
3. qualification of information as the State Secret is a procedure during which the state expert in the field of secrets takes a decision of whether to qualify the category of information or separate data as the State Secret by including this information into the Code of Information belonging to the State Secret and publication of this Code;
4. the information with a limited access can be distributed without an approval of its owner in case this information is of a public significance, i.e. in case it is a subject of public interest and in case the right of the general public to know this information prevails over the right of the owner on its protection;
5. the information which in accordance with international agreements and laws approved by the Supreme Council of Ukraine should be considered open cannot be considered a State Secret;
6. In case the Code of Information or the Detailed Lists include the data which cannot be considered secret, the interested persons and legal entities have a right to appeal in the court against the relevant decisions. Beside that, in the court it is possible to appeal against a decision imposing a secrecy on information carriers;
7. The information cannot be longer considered a State Secret as soon as it is excluded from the Code of Information, belonging to the State Secret;
8. The current legislation of Ukraine almost fully limits the access of foreign citizens and persons without a citizenship to information which belongs to the State Secret of Ukraine.