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CHAPTER 2

DEMOCRATIC CONSTRAINTS ON SECRECY

INTRODUCTION

While democracy requires openness, some legitimate democratic policies require secrecy for their realisation. For example, keeping detailed military plans or intelligence sources secret is generally accepted to be necessary for security purposes. Yet, as a result, this information is then unavailable to oversight actors and citizens, making accountability processes and public deliberation difficult or even impossible to attain. Moreover, beyond legitimate security driven reasons, secrecy could be applied to information that is embarrassing or incriminating if disclosed, leading to unjustified hidden information.

The basic dilemma between secrecy and democracy is first, how to ensure oversight processes and public deliberation while safeguarding secrecy when necessary, and second, how to decipher necessary secrets, which may be diluted in the depths of unnecessary bureaucratic secrets. This chapter provides democratic constraints that aim to address this dilemma after discussing in more detail the concept of secrecy and its impact on institutional relations as well as elaborating on democracy and its reliance on openness. The democratic constraints established in this chapter strive to frame a strictly conditioned use of justified and necessary secrecy.

Firstly, the chapter examines the concept of secrecy in order to understand and differentiate it from other notions concerning the unavailability of information. It also discusses the functions and types of secrecy that affect institutional relations and allot power to executive actors. Secondly, the chapter turns to foundational observations regarding democratic processes and their necessity for openness. Lastly, the chapter identifies and develops the democratic constraints of secrecy.

2.1 INTRODUCING SECRECY

2.1.1 *The Concept of Secrecy*

Secrecy is intentional concealment. To keep a secret from someone is to block information or its evidence from reaching that person and to do so intentionally.¹ The word secrecy, derives from the Latin *secernere* and originally meant to set apart, to separate.² Secrecy is a result of a deliberate act by actor A (who holds information) to keep actor B (who does not) from knowing something (the secret) at a given time.³ Secrecy therefore is applied *to* and not embodied *in* information. By applying secrecy to information, the secret-keeper gains the exclusivity to decide whether the information may be accessible and hence creates a situation of ownership or property of the concealed information,⁴ leading to the unavailability of information about institution A, which prevents institution B from monitoring its workings and performance.⁵ The core and unique trait of secrecy as intentional concealment enables us

- 1 Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Pantheon Books 1982). For an overview of secrecy and its definition, see Lisa Blank, 'Introduction' in Susan Maret and Jan Goldman (eds), *Government Secrecy: Classic and Contemporary Readings* (Libraries Unlimited 2009), who argues that this is the predominate view of secrecy but that there is not one overarching definition of secrecy accepted in all the disciplines in which it is studied (varying between law, political science, psychology, sociology). See Clare Birchall, 'Introduction to "Secrecy and Transparency": The Politics of Opacity and Openness' (2011) 28 *Theory, Culture and Society* 7, who opposes the clear and 'simplistic' delineation between secrecy and openness as being defined completely in opposition to each other. Similarly, Eva Horn, 'The Logics of Political Secrecy' (2011) 28 *Theory, Culture and Society* 103.
- 2 Bok (n 1) 6.
- 3 Itzhak Galnoor, *Government Secrecy in Democracies* (New York University Press 1972).
- 4 Kim Lane Scheppele, *Legal Secrets* (University of Chicago Press 1988). Itzhak Galnoor, 'Government Secrecy: Exchanges, Intermediaries, and Middlemen' (1975) 35 *Public Administration Review* 32. Studies prior to his own with regard to information treated as a commodity, but not strictly related to secrecy, include Warren F. Ilchman and Norman T. Uphoff, *The Political Economy of Change* (University of California Press 1971) 67. Secrecy as a property of information has been most thoroughly developed by Kim Scheppele (n 4), although other renowned scholars and practitioners have joined the debate, the most notable example being Daniel P. Moynihan who referred to secrecy an 'organisational asset' or Stephen J. Schulhofer who labelled it a 'currency'. Additionally, Ritchie Lowry, in his 'Toward a Sociology of Secrecy and Security Systems', defines secrecy as a possession of special, hidden and unacknowledged information and as such a permanent characteristic of human organizations. Senator Daniel P. Moynihan in Commission on Protecting and Reducing Government Secrecy, Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. 105-2, (1997); Stephen J. Schulhofer, 'Secrecy and Democracy: Who Controls Information in the National Security State?' (2010) Public Law and Legal Theory Research Paper Series, Working Paper No. 10-53, 15 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661964> accessed 13 May 2015. Ritchie P. Lowry, 'Toward a Sociology of Secrecy and Security Systems', in Stanton K. Tefft (ed), *Secrecy: A Cross-Cultural Perspective* (Human Sciences Press 1980) 298.
- 5 See by contrast the definition of transparency in Albert Meijer, 'Understanding the Complex Dynamics of Transparency' (2013) 73 *Public Administration Review* 429, 430.

to delineate secrecy from other closely related yet different notions such as privacy or unknown information.⁶ The inclusion of elements of intention and actor to the conceptualization of secrecy merit further elaboration, especially when the concept of secrecy is applied within an institutional setting as opposed to keeping secrets between private individuals.

Secrecy is intrinsically social and functions within a certain political setting.⁷ It presupposes a relation between at least two parties. Who is intentionally hiding something from whom? In an institutionalised context, it is not unitary actors that maintain secrets but a multiplicity of actors 'linked to each other through a multiplicity of channels, pursuing a multiplicity of ends, serving a multiplicity of masters.'⁸ Secret-keepers refer to institutions that create secrets, but unlike private law relations of contract for example, it is less clear and direct to decipher the specific individuals and individual interests.⁹ This does not imply that within an institution each official has the same position regarding the authority to establish secrets, since depending on the hierarchy, high officials would indeed have more discretion than their subordinates. Similarly, the uninformed actor B is not a sole individual but a broad range of groups such as citizens, oversight actors and third states.¹⁰ Furthermore, secrecy creates separation between institutions that keep the secrets, as insiders who have the knowledge and access to secrets, and oversight bodies or citizens, as outsiders that do

6 Privacy, at its core, is the right of individuals to control information about themselves, it is seen as a condition of being protected from unwanted access by others. Personal control of personal information is viewed as critically important in preserving the autonomy of the individual from other actors. See particularly Joseph Berman and Robert Lilienfeld, *Between Public and Private: Lost Boundaries of the Self* (Free Press, 1979); Alan Westin, *Privacy and Freedom* (Atheneum 1967); Charles Fried, 'Privacy' (1966) 77 *Yale Law Journal* 475. However, note that there are authors who do not accept this distinction like Richard Posner. See Richard A. Posner, 'The Right to Privacy' (1978) Sibley Lectures, Paper 22. See also Carol Warren and Barbara Laslett, 'Privacy and Secrecy: A Conceptual Comparison', in Tefft (n 4) 26-27, arguing that there are three distinctions to be drawn, primarily between public life secrecy and private life secrecy, while within private life, there is also private life privacy. The difference between the latter categories is that secrecy is concealment of something negatively valued by the excluded audience, while privacy has a consensual basis in society.

7 See Horn (n 1) 9, who argues that secrecy by nature is relational and functions through inclusion and exclusion. See Carl J. Friedrich, *The Pathology of Politics: Violence, Betrayal, Corruption, Secrecy and Propaganda* (Harper and Row Publishers 1972) 175-209.

8 David E. Pozen, 'Deep Secrecy' (2010) 62 *Stanford Law Review* 257, 266.

9 See the definition and explanation on secrecy given by Scheppele (n 4) in a legal context, but in private law where the actors do take on a more individual form.

10 There is debate whether and to what extent it matters for secrecy who the intended outsider is. In this regard, there is a split between scholars for whom maintaining secrets is irrespective of whether the citizens or a third country is the primary intended actor B. See Friedrich (n 7). By contrast, for David Gibbs knowing who is the target of secrecy illustrates the different rationales the secret-keeper might have for engaging in secrecy. In order to assess if secrecy is practiced in order to maintain security or for other unjustified reasons, it is important to know who the intended outsider is. David Gibbs, 'Secrecy and International Relations' (1995) 32 *Journal of Peace Research* 213.

not know the secrets. An internal division within institutions that keep secrets also arises as secrecy may lead to clusters of inside-insiders, those officials that are directly in charge of secrets and have access to them, and inside-outsiders, those officials within the administrative circle yet without access to secrets.

The significance of pointing to the different aspects regarding actors is related to the second and key element of the definition of secrecy – intention. What becomes a secret is an explicit choice of the secret-keeper. A “*secret*” is a *political category, not a natural one*. Facts in isolation do not cry out for secrecy; facts within a specific political context do.¹¹ The choice to conceal involves a level of discretion and is driven by the motives of the actor in question.¹²

The legal discussion on secrecy is often limited to the consequences arising from the limitation of information without exploring the dynamics in the relation between the secret-keeper and uninformed parties. Lawyers seem more interested in the manner in which secrecy affects human rights, such as the right of defence or administrative obligations to public access requests. However, social sciences have empirically shown that secrecy is more than a mere limitation of information and that it can be a significant factor in the changes and adaptability of relations and actors.¹³ The next section examines the impact of secrecy on institutional relations.

2.1.2 Secrecy and Institutional Relations

The way in which secrecy structures relations and distributes political power is relevant to the understanding of secrecy within an institutional context.¹⁴ Institutional settings are the key to addressing the imbalance that secrecy creates between insiders and outsiders and they matter in order to minimize the possibilities of secrecy abuse.¹⁵

Secrecy may be strategic and manipulative.¹⁶ It involves a dynamic interplay between the insider and the outsider as both try to pursue their respective goals.¹⁷ Secrecy constructs the interactions between actors within a certain institutional field

11 See Josh Chafetz, ‘Whose Secrets?’ (2013) 127 *Harvard Law Review Forum* 86, emphasis in original.

12 Steven Aftergood, ‘If in Doubt, Classify’ (2008) 37 *Index on Censorship* 101.

13 Georg Simmel, ‘The Sociology of Secrecy and of Secret Societies’ (1906) 11 *American Journal of Sociology* 441; see also Tefft (n 4).

14 Marieke de Goede and Mara Wesseling (2013) ‘Clashing Cultures of Secrecy: Tracking Terrorism Financing and the Paradox of Publicity’. Paper presented to the Annual Meeting of the Council of European Studies, University of Amsterdam, 25–27 June, 3.

15 Pozen, ‘Deep Secrecy’ (n 8).

16 See Friedrich (n 7) on manipulation; and Scheppele (n 4) on secrecy being strategic.

17 Tefft (n 4).

and at the same time these interactions change the nature of the field.¹⁸ It creates various dynamics in a relationship and influences the positions of the parties due to the way in which different types of secrets are created, maintained and shared as well as the complex functions of secrecy, which are mostly favourable to the secret-keeper. In the following discussion, the institutional relations resulting from secrecy types and functions are examined.

A. Secrecy Types and Institutional Interplays

The secret-keeper may create a deep or shallow secret. While it would be a 'conceptual mistake to see them as wholly discontinuous categories',¹⁹ the distinction points to deep secrecy being situations where the uninformed institution is not aware at all that something is being kept secret as distinct from situations of shallow secrecy where the institution knows that a secret is being kept by executive actors although it has no knowledge of its content. Deep secrecy is an especially vulnerable situation for the uninformed institution, depriving it of information needed to make decisions or initiate any action of oversight and pursue openness.

The manner in which secrets are created is also relevant to how relations will be structured for both insiders and outsiders. The secret-keeper (institution A) may have a direct relation to the uninformed (institution B) about a secret or a collective relation to another secret-keeper (institution C) regarding the uninformed (institution B). Direct secrecy is the simplest type of secrecy. Institutionally, the importance of this categorisation is that when institution A has a direct secret, the choice whether the secret will be disclosed is solely dependent on itself. This is different for collective secrets. Collective or shared secrets exist when institution A and institution C jointly create or maintain a secret and institution B wants to find out the secret from either of the secret-keepers. Such situation is common in multi-layered and interconnected institutional contexts, for example in complex international organizations such as the European Union, because secrets are most often collective among more than one institution. Moreover, these collective secrets are maintained by certain rules in order not to allow the institutions to share (or give access to) the secret without permission. Through applying secrecy to information, as mentioned above, the secret-keeper creates a situation of ownership of secrets and the exclusivity to decide whether these can be disclosed. Hence, it is much more difficult for institution B to gain access to collective secrets.

¹⁸ Meijer (n 5).

¹⁹ Pozen, 'Deep Secrecy' (n 8) 266.

Lastly, the secret-keeper may use selective disclosure, which implies the information is either not fully disclosed or not disclosed in a timely manner. Only secrets that are deliberately disclosed by the secret-keeper fall under this categorization. Yet, it is possible that a disclosure seemingly unauthorised from the outsider's perspective, more commonly known as 'leaked' information, could be strategically disclosed internally by the institution in possession of the secrets to advance a particular interest.²⁰

Table 2.1 The Position of the Outside Institution (OI) due to Types of Secrets

Type of Secrecy	The position of the outsider institution (OI)
Deep	OI is oblivious to the existence of secrets and unable to take any action
Shallow	OI knows that information is being concealed and is able to take further action for disclosure
Direct	OI only needs consent for access from one (main) secret-keeper
Collective	OI needs consent for access from all multiple secret-keepers
Selective disclosure	OI cannot react timely or obtain all relevant information

The dependency of the outside institution on the secret-keeper for access to information is the common aspect of all the types of secrecy outlined.²¹ Such dependency causes an adaptation of behaviour from the outside actor to the secret-keeper. This adaptation is further clarified when the functions of secrecy are examined and how the secret-keeper institution may utilise secrecy in its favour.

²⁰ See David E. Pozen, 'The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information' (2013) 127 *Harvard Law Review* 512. This is not to ignore that leaks also occur outside the will of the secret-keeper, but such instances are not within the scope of the current discussion. Disclosure may also occur without the (hidden) will of the secret-keeper. This example of leaks by a third party means that the leaked information as such might not be intended to maintain the interests of the secret-keeper but of the uninformed. These two different types of leaks have different consequences to the relation between the secret-keeper and the uninformed party. Accidental disclosure could lead to consequences that the secret-keeper aimed to avoid, such as embarrassment to institutional actors. It could also be disclosure about the abuse of power.

²¹ Rahul Sagar, 'Who Holds the Balance?: A Missing Detail in the Debate over Balancing Security and Liberty' (2009) 41 *Polity* 166.

B. Power, Protection and Confidentiality

One of the key aspects of secrecy is that it gives power to the secret-keepers derived from the hidden information.²² Power is portrayed as the ability of actor A to make actor B do something that the latter otherwise would not do.²³ It is more broadly understood as a 'question of who gets their way, how often they get their way and over what issues they get their way'.²⁴

Information is treated as a power and hence managing access to it and control over it leads to different power dynamics.²⁵ Information is a precondition of choice; institutions need a certain amount of information in order to be able to choose from different alternatives, to understand enough of their implications to be able to distinguish among them. Secrecy obstructs this function of information since the institution that does not hold the relevant information is not given the choice.²⁶ The information being kept secret must be knowledge that the outsider institution would take into account if it were known, otherwise the secret would have no effect.²⁷ Information is kept secret to prevent certain parties from gaining access to information that is deemed significant for enhancing ones position and gaining advantage in a competitive setting.²⁸ Hence, by clustering information, the secret-keepers also cluster power.

Secrecy could also lead to the concentration of power because it is able to block or delay institutional checks and balances. Research shows many examples when secrecy is invoked because the secret-keeper suspects or is concerned it will receive disapproval from others,²⁹ or wants to prevent oversight bodies from asking the 'right

22 For bureaucracy, see Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich eds, Bedminster Press 1968) 956-1005, as the first discussion on this direct link; see Simmel (n 13) for societal relations, and Scheppele (n 4) more concretely for the power of secrets in case law.

23 See the notion of power in Robert A. Dahl, 'The Concept of Power' (1957) 2 *Behavioral Science* 201.

24 Andrew Heywood, *Political Theory: An Introduction* (Palgrave Macmillan 2004) 124.

25 Catherine Kelly, 'Managing the Relationship Between Knowledge and Power in Organisations' (2007) 59 *New Information Perspectives* 125. Information as power in Thomas M. Franck and Edward Weisband (eds), *Secrecy and Foreign Policy* (OUP 1974) 8. See also Thomas M. Franck and Edward Weisband, 'Secrecy in the Foreign Relations of Three Democracies: A Comparative Analysis' (1973) 50 *Chicago-Kent Law Review* 1.

26 Posner, 'The Right to Privacy' (n 6); Anthony T. Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' (1978) 7 *The Journal of Legal Studies* 1.

27 Scheppele (n 4).

28 Donald Hislop, *Knowledge Management in Organizations: A Critical Introduction* (OUP 2005) 96; and Friedrich (n 7) 176.

29 Bok (n 1), Simmel (n 13), Moynihan (n 4), Katz (n 42), Arthur M. Cox, *The Myths of National Security: The Peril of Secret Government* (Beacon Press 1975) for USA; Deirdre Curtin, 'Judging EU Secrecy' [2012] *Cahiers de Droit Européen* 459, for the EU; Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (Cambridge University Press 2006) for Eastern Europe.

questions'.³⁰ Power and secrecy enhance each other in decision-making and policy execution.³¹ In this context, it is argued that secrecy can also be seen as a determinant of the nature of the power system.³²

More specifically, in an institutional context, secrecy also enables specialized experts to gain a much more informed and powerful position vis-à-vis the non-expert outsider. In order to maintain and increase this power position, as Max Weber argued, bureaucracies seek 'to increase the superiority of the professionally informed by keeping their knowledge and intentions secret'.³³ However, secrecy can also decrease effectiveness and reduce learning because it compartmentalizes information. Most empirical findings conclude that secrecy within an administration facilitates competition between different administrative bodies among each other or among different officials within one body as a means to gain advantages, which could possibly lead to selectivity of officials connected to power.³⁴ Some scholars argue further that the very structure of administration generates internal secrecy both vertically and horizontally.³⁵

The power of secrecy is also manifested through selective disclosure. The power of a secret lies in the potential that it may be disclosed, either as a favour to the outsider institution or as a betrayal or lapse on the part of those hiding it.³⁶ In addition, selective disclosure enables the secret-keepers to self-promote and enhances their position by revealing only information that is favourable to their image, while preventing external 'interference'. The secret-keeper is able to give an appearance of effective and successful realization of a policy or programme, and the value of secrecy at this point is in protecting the authority of its keeper.³⁷ Such understanding does not mean that the policy in question is not effective *per se*, but that the policy cannot be reviewed publicly.³⁸

30 Deirdre Curtin, 'Top Secret Europe', Inaugural lecture delivered at the University of Amsterdam, 20 October 2011.

31 See Bok (n 1), who makes a direct relation of how more secrecy breeds more power and vice versa.

32 Maxwell Cohen, *Secrecy and Foreign Policy* (OUP 1974) 20. For the national context, see Gabriel Schoenfeld, *Necessary Secrets* (W. W. Norton & Company 2010).

33 Weber (n 22) 233.

34 There are very few exceptions: In this regard, Bruce Berkowitz and Allan Goodman more recently explored secrecy by examining the ways in which intra-agency norms promulgate and institutionalize poor decision-making processes. Bruce D. Berkowitz and Allan E. Goodman, *Best Truth: Intelligence in the Information Age* (Yale University Press 2002).

35 See Tefft (n 4).

36 Thomas O. Beidelman, 'Secrecy and Society: The Paradox of Knowing and the Knowing of Paradox' (1993) Program of African Studies, Northwestern University, No. 5, at 6-7.

37 De Goede and Wesseling (n 14) 12.

38 For authors who link openness and justification (reason giving) this part of secrecy negatively impacts that process. See Daniel Naurin, 'Transparency, Publicity, Accountability – The Missing Links' (2006) 12 *Swiss Political Science Review* 90.

In addition to power, echoing Max Weber, secrecy is a functional tool that enables the creation of protected space for its keeper in the sense that it offers a veil under which information is kept safe if the secret-keeper deems it either unfavourable or does not want to disclose it for other motives.³⁹ Secrecy ‘shields error and inefficiency’, protects agency turf and prevents scrutiny.⁴⁰ For example, embarrassment is the key issue that individuals want to protect themselves from when invoking secrecy.⁴¹ Some scholars note that public organizations invoke secrecy on similar grounds as well.⁴² In Weber’s analysis secrecy is an attitude of management of bureaucrats, which enables them to self-protect: Bureaucrats do not want to disclose information that involves embarrassing information or information about negligence or abuse of power that would incriminate the official concerned, rather they aim to ‘protect their knowledge and action from criticism.’⁴³ Such ‘protection’ can be twofold: protecting the secret-keeper during her actions, which is protection from *ex durante* interference, or protection of a finalised course of action, understood as protection from *ex post* oversight. The latter, in an institutional sense, takes form in various accountability mechanisms, for example parliamentary or judicial oversight,⁴⁴ as well as administrative supervision. Supervision can be understood in a narrow sense of focusing directly on the procedures for establishing secrecy and in a broader manner as supervision concerned with the policy or process upon which secrecy has an effect. These different institutional oversight mechanisms aim to address the ‘interference free’ space that secrecy offers and enables the secret-keeper to avoid unwanted consequences by establishing various obligations of information sharing.⁴⁵

The discussion on the protective function so far has an implicit bias that individuals and organizations only care to protect ‘the dangerous, the shameful, the source

39 Simmel (n 13), similarly Weber (n 22).

40 Stephen Schulhofer, ‘Oversight of National Security Secrecy in the United States’ in David Cole, Federico Fabbrini, Arianna Vidaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar 2013) 40.

41 Anita Kelly, *The Psychology of Secrets* (Springer 2002).

42 Steven L. Katz, *Government Secrecy: Decisions Without Democracy* (People for the American Way 1987).

43 Weber (n 22) 233.

44 See Chapters 6 and 7.

45 Peter M. Shane, ‘Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information’ (1992) 44 *Administrative Law Review* 197, 200. Information sharing between outsider institution and secret-keeper may be limited to what Kitrosser has termed an ‘information funnel’, which implies that information is only given to discrete groups of people which results in some inter-branch knowledge sharing without requiring full public or even full legislative access. See Heidi Kitrosser, ‘Congressional Oversight of National Security Activities: Improving Information Funnel’ (2008) 29 *Cardozo Law Review* 1049.

of power'.⁴⁶ It must be clearly emphasized that such is not always the case and indeed secrecy is protective of sensitive information for which there is a public and legitimate reason, such as security related measures.

Secrecy leads to confidentiality and trust between secret-keepers. The creation of confidants as a function of secrecy is illustrated in many accepted professional norms of confidentiality, such as the relation between a lawyer and client or a doctor and patient. Relationships are characterized by the amount and kind of secrecy within them or around them.⁴⁷ The secret-keeper shares secrets under the condition that the entrusted institution maintains the same level of protection and that the secrets will remain undisclosed. Secrecy strengthens the organization by emphasizing its boundaries as is necessary for collective identity.⁴⁸ Moreover, sharing secrets on certain occasions builds a community among secret-keepers: when enough secret-keepers share their secrets, everyone eventually becomes a holder, a giver and a recipient of secrets.⁴⁹ The members jointly conceal the information from those who are excluded emphasizing their mutual allegiance.⁵⁰ Hence, practices of secrecy create loyalty and community among those that join together and, at the same time, create a radical sense of separation from those excluded.⁵¹ Sharing secrets is not always a full revelation between actors. In what is called splitting secrets, the secret-keeper maintains some secrecy despite disclosing information because the entrusted party only receives *some* information.⁵² Unless all entrusted parties assemble the parts of the secret that have been shared with them, secrecy as such is not revealed. For example, one intelligence agency can share different parts of its secrets with many other agencies with which it cooperates and receive their feedback, valuable for its work, but would still be able to maintain overall secrecy. Such splitting of secrecy enables the secret-keepers to share information with more parties and yet have a higher assurance that the complete secret would not be revealed. In both situations, sharing secrets in their entirety or splitting secrecy, it is the secret-keeper who

46 Bok (n 1).

47 Simmel (n 13) 331.

48 Robert Bales, *Personality and Interpersonal Behaviour* (Holt, Rinehart, and Winston 1970); see also Roderick M. Kramer, *Organizational Trust* (OUP 2006) 410.

49 For example, see Chapter 5 on the secrets shared between EU executive institutions and member states.

50 Gary A. Fine and Lori Holyfield, 'Secrecy, Trust, and Dangerous Leisure: Generating Group Cohesion in Voluntary Organizations' (1996) 59 *Social Psychology Quarterly* 22.

51 Hugh Guterson, *Nuclear Rites A Weapons Laboratory at the End of the Cold War* (University of California Press 1998) 80.

52 Adi Shamir, 'How to Share a Secret' (1979) 22 *Communications of the Association for Computing Machinery* 612.

determines and conditions the position of the receiving party,⁵³ and the latter adjusts to the requests. Although some level of trust is required in order for them to function, once secrets are shared the institutions invoke different rules to ensure secrets are not revealed. Such relationship between trust and suspicion is particularly evident from an institutional perspective where different procedures apply to ensure the confidentiality of the relation between actors that share secrets.

Table 2.2 Secrecy Functions and Institutional Relations

Function	How the secret-keeper implements different functions of secrecy
Power	Alter actions of the other
	Not share relevant information
	Selective disclosure
Protection	Create separation
	Prevent ‘criticism’ ex post and ‘interference’ ex durante
Confidentiality	Create internal alliances
	Emphasize external boundaries

The foregoing discussion regarding the types and functions of secrecy shows the complex nature of secrecy and its impact on institutional relations. Secrecy empowers the secret-keeper by granting exclusivity to decide whether the secrets will be disclosed and prevents the outsider institution from monitoring the actions of the secret-keeper. Deep secrecy and the protective function of secrecy are particularly noteworthy for this impact on the uninformed institution. Moreover, an imbalance in the relation between the secret-keepers and the uninformed institutions arises because the secret-keepers may use the dynamics of concealment and disclosure to their advantage and create a more favourable institutional image by not revealing embarrassing or incriminating information. In this aspect too, the uninformed institutions’ reliance on access to secrets is detrimental to it being able to form an independent opinion and judgement. Lastly, secrecy through its function of confidentiality enables trust between secret-keepers who share their secrets. However, this potential for trust is not shared with the outsiders but rather the opposite effect is possible: the uninformed institution may be suspicious and/or mistrustful towards the secret-keeper precisely because of the lack of information

⁵³ Guterson (n 51) 80, arguing that secrecy is powerful in that it can create or break the bonds between the actors.

on what is intentionally concealed. Secrecy in this respect leads to separation and disconnection between the secret-keepers and the uninformed institutions. As a result, the preferences between secret-keepers and outsider institutions in decision-making could be diametrically opposed since only the insiders know all the information upon which they base their actions and choices that affect the outsiders.⁵⁴

Understanding the specifics of how secrecy influences institutional relations provides the necessary background to examine the democratic constraints aiming to counter-balance the power of the secret-keepers. In order to establish such democratic constraints, the following section turns to discuss democracy and openness. In doing so, the chapter adopts a view of democracy that is broader than a procedural focus on accountability and emphasizes the importance of public deliberation for the assessment of secrecy.

2.2 DEMOCRACY AND OPENNESS

Democracy is understood as a form of governing that purports to ensure citizens' will. This aspect of democracy is well established and elaborated in democratic theory.⁵⁵ Opinion is another essential element of democracy equivalent to citizens' will, although it is less emphasized.⁵⁶ The realisation of will *and* opinion relies on both democratic processes of accountability *and* public deliberation. These processes in turn require openness in their realization. The relevance of openness for democracy is noted as early as 1839, when Jeremy Bentham acknowledged the instrumental value of openness to attain accountability in his essay '*Of Publicity*'.⁵⁷ From a Utilitarian perspective, openness is a mechanism 'to make the self-interest of officials coincide with the general

54 For directions as elaborated for transparency, see David Heald, 'Varieties of Transparency' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (OUP 2006).

55 Maria Paula Saffon and Nadia Urbinati, 'Procedural Democracy, the Bulwark of Equal Liberty' (2013) 41 *Political Theory* 441; Norberto Bobbio, *The Future of Democracy* (Richard Dellamy ed, Roger Griffin tr, Polity 1991); Robert A. Dahl, 'Procedural Democracy' in Robert E. Goodin and Philip Pettit (eds), *Contemporary Political Philosophy: An Anthology* (Blackwell 1997); Hans Kelsen, *The Essence and Value of Democracy* (Nadia Urbinati and Carlo Invernizzi Accetti eds, Brian Graf tr, Rowman & Littlefield 2013); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012); Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Arthur Goldhammer tr, Cambridge University Press 2008).

56 Although opinion has been a point of discussion (and disagreement) regarding its proper position in democracy since Plato and Aristotle, in contemporary theory opinion has been treated (mostly) as a facilitator of will. A wide consensus is lacking on whether opinion may be seen as a basis of democracy or as a component to the realisation of the free will of the sovereign citizens. Yet, it is not disputed that opinion is essential to democracy and hence justifies democratic mechanisms and processes that are particularly focused its realisation. See further Section 2.2.2 and the references therein.

57 Jeremy Bentham, 'Of Publicity', in John Bowring (ed), *Essays on Political Tactics in the Works of Jeremy Bentham* (William Tate 1839).

interest.⁵⁸ A different take on openness, beyond utility, is a Kantian view on openness as a value for the justifiability of public action.⁵⁹ According to this understanding, a policy is unjust if making it public would defeat its purpose.⁶⁰ These views illustrate that the significance of openness in decision-making and in justifying policies has long been recognized. Contemporary discussions also relate information with the exercise of public power and argue in favour of openness.⁶¹ Yet, besides accountability, this chapter points to the relevance of openness for public deliberation and the crucial role of the latter for an understanding of democracy that aims to ensure both citizens' will and opinion. Against this background, the aim is to question how openness specifically matters for institutional structures aimed at creating space to ensure both accountability and public deliberation.

2.2.2 Democratic Foundations and Processes

Will and opinion are acknowledged as the foundations of democracy, indeed as the 'two powers of the sovereign citizens', in what is called the 'diarchic system' of democracy.⁶² Yet, in the realisation of democracy emphasis is more often placed on accountability processes. This is to some extent linked to the liberal conceptions of democracy that focus on majoritarian models of ensuring citizens' will and place significance on account giving but do not see public deliberation as an equally relevant process. Instead of this democratic conception that is too focused on attaining accountability, this research holds that the relation between citizens and public institutions is not one strictly of account giving, it is also one that should engage with the citizen and hence facilitate public deliberation. Indeed, ensuring public deliberation is also necessary considering that democracy, as noted above, is also based

58 Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press 1998) 98.

59 Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1975). For the statement of the publicity test, see Appendix II: Of the Harmony Which the Transcendental Concept of Public Right Establishes Between Morality and Politics, available at <<http://www.constitution.org/kant/append2.htm>> accessed 24 August 2015.

60 See Gutmann and Thompson (n 58) 99.

61 See, Adam Samaha, 'Government Secrets, Constitutional Law, and Platforms for Judicial Intervention' (2005) 53 *UCLA Law Review* 909. For a similar argument, information matters no matter the theoretic understanding of democracy, see James G. March and Johan P. Olsen, *Democratic Governance* (Free Press 1995) 81-83. Scilla Elworthy, 'Balancing the Need for Secrecy with the Need for Accountability' (1998) 143 *The RUSI Journal* 5.

62 Nadia Urbinati, *Democracy Disfigured: Opinion, Truth and the People* (Harvard University Press 2014) 2. The discussion on opinion and democracy draws on Urbinati as the most prominent author to develop the position of 'opinion' as a democratic building block. In this sense, it differs from the mere view of opinion as public discussion. Opinion is not seen as merely a facilitator of voting processes and preference creation, but as an equally important and separate building block of democracy that creates its own conditionality on how public institutions should function.

on citizens' opinion. More importantly, public deliberation, as an equally important democratic process, creates its own conditionality on how public institutions should function because it aims to ensure the active role of citizens in democracy.⁶³

In practice a complete separation between opinion and will as foundations of democracy cannot be established. Citizens do not act as a dual actor, one driven by will, the other by opinion. Despite the fact that clear splits between will and opinion cannot be established in practice, it is valuable to point them out conceptually because they show the relevance of *both* accountability and public deliberation for their realisation. This in turn is valuable as it provides more clarity on the question of when and how openness matters to ensure accountability and public deliberation.

Both accountability and public deliberation rely on openness as they ensure citizens' contribution to the exercise of public power. Yet, the emphasis on the implementation of openness in practice is slightly varied since these democratic processes have different objectives: whereas the former aims to make sure that public power is exercised in accordance with citizens' will, the latter aims to enable them to create independent and informed opinions based on accurate public information,⁶⁴ and broaden the range of citizens who have access to such opportunities.⁶⁵ Through openness, citizens are informed and can express their preferences about a policy or a course of action,⁶⁶ as well as their preference for political decision-makers through the mechanism of democratic elections. The notion of accountability is used in a broader sense as a 'mutual exchange of responsibilities and potential sanctions between citizens and rulers,'⁶⁷ and is seen as a feature that sets democracy apart from other (non-democratic)

63 Urbinati, *ibid*, 6.

64 Similarly, Francis Bourke, *Secrecy and Publicity: Dilemmas of Democracy* (John Hopkins Press 1961) 90.

65 See Diana Mutz, *Hearing the Other Side: Deliberative versus Participatory Democracy* (Cambridge University Press 2006), arguing that deliberation has strong effects on political behaviour.

66 Gutmann and Thompson (n 58).

67 Philippe C. Schmitter, 'Political Accountability in "Real-Existing" Democracies: Meaning and Mechanisms', European University Institute, 2007, at 4. The notion of accountability has been widely used in the literature and beyond, although the legal discourse has only recently witnessed a rise of its importance since the term typically relates to the financial contexts of accountancy and auditing. Steve Peers and Marios Costa, 'The Accountability of Delegated and Implementing Acts after the Treaty of Lisbon' (2012) 18 *European Law Journal* 427; Elizabeth Fisher, 'The European Union in the Age of Accountability' (2004) 24 *Oxford Journal of Legal Studies* 495; Richard Mulgan, 'Accountability': An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555; Deirdre Curtin and Andre Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) 36 *Netherlands Yearbook of International Law* 3; Gijs Brandsma, 'Accountability Deficits in European "Comitology" Decision-Making' (2007) 11 *European Integration Online Papers*; Carol Harlow, 'European Governance and Accountability' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003); Mark Bovens, 'Analysing and Assessing Accountability: A conceptual Framework' (2007) 13 *European Law Journal* 4; Joy M. Moncrieffe, 'Accountability: Ideals, Ideas, Constraints' (2001) 8 *Democratization* 26; Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29.

political forms.⁶⁸ Openness enables citizens to check and correct the exercise of the delegated power,⁶⁹ and as was already noted above, to ensure that actions of public authority are representative of their interests.⁷⁰ In this sense, the obligations to explain and justify public conduct are crucial elements.

Hence, both accountability and public deliberation rely on openness.⁷¹ Openness enables the formation and expression of citizens' support, whether in agreement or disagreement, about a course of action, and the possibility for citizens' to express their alternative preference or action. Moreover, openness is seen as a condition (state of being) without which giving account and public support or opinion cannot be established. Openness turns democracy into a 'house of glass' exposed to external scrutiny and provides space for citizens to exchange views and participate in decision-making.⁷² The aim of the following subsection is to take the discussion on openness and its significance for accountability and public deliberation a step further by asking more specifically how openness should be applied in practice to indeed enable the realisation of these equally valuable processes for democracy.

2.2.3 Applying Openness: Actors, Scope and Time

Beyond understanding the democratic presumption in favour of openness, the objective in this section is to identify more specifically how openness should be applied,

68 Schmitter, *ibid.*

69 Implying also different types of accountability – political in the sense of elections; legal in terms of specific checks. Also, elections and voting are seen primarily as an expression of the will of the people and as such the only valid tangible mechanisms for the expression of citizens' will. Voting is also seen as a selection process of approval or disapproval, which gives democracy the merit of being a political system that 'allows citizens to change decisions and leaders without calling into question their political order' Urbinati (n 62) 10. The idea of checks and approval, as a formulated by Mill, has a strong hold in the debate of how the delegation of power is actually maintained. For another perspective, see Vigjilence Abazi and Eljalil Tauschinsky, 'Reasons of Control and Trust: Grounding the Public Need for Transparency in the European Union' (2015) 11 *Utrecht Law Review* 78.

70 Ken G. Roberston, *Public Secrets: A Study in the Development of Government Secrecy* (St. Martin's Press 1982) 12. See Gutmann and Thompson (n 58) 98, arguing that through accountability we could 'make the self-interest of officials coincide with the general interest'.

71 This discussion on democracy is broader and as such it is not dependent on a specific legal context and questions to what extent particular legal and democratic settings can adhere to the democratic aspects as developed here. Regarding the European Union, scepticism could arise to what extent some other conditions exist in order for public deliberation to be attained. It is worthwhile mentioning here that the practical realization of public deliberation is related to questions very familiar to EU scholarship regarding EU public sphere (or the lack thereof), to what extent citizens want to engage with the EU and questions of national identity. However, I take openness to be a pre-condition for all these issues, a state of being without which the formation of the issues is hardly attainable. Hence, rather than seeing openness as a result, I take it as an a priori condition.

72 Remo Bodei, 'From Secrecy to Transparency: Reason of State and Democracy' (2011) 37 *Philosophy and Social Criticism* 889.

taking both processes of accountability and public deliberation into account. The first relevant aspect is to whom should openness specifically apply. For processes of accountability, the actors that must have availability to information are the control bodies. This does not mean that citizens should not have direct control and hence direct access to information for purposes of holding power to account, however from the viewpoint of the oversight bodies, accountability is warranted if the oversight bodies have access to the specific information whereas the citizens are informed that a level of nondisclosure is justified on the basis of legitimate aims and more importantly to have access to the information that results from the outcomes of oversight. Hence, citizens rely on the control bodies to access information and conduct oversight.

From the perspective of public deliberation, however, openness is first and foremost important to citizens because they require this knowledge in order to participate or deliberate. The level of openness should not, however, be confused with the extent of information. That is a separate aspect of openness. To clarify, there is a difference between who should know in order for openness to be instrumental for attaining accountability and public deliberation, on the one hand, and what type of information and how specific that information should be, on the other hand.

Therefore, the second question is what should public and oversight actors know? From the perspective of accountability, information must be fully and timely accessible as well as containing detail about the processes and the actors. Oversight actors must also be in a position to attain this information without full discretion belonging to the controlled actors.⁷³ From the perspective of public deliberation, citizens' participation and deliberation does not depend strictly on detailed information, but relevant information must be available which enables agreement or disagreement about the broader but basic questions that relate to a certain government policy or act, such as: What are the interests at stake? What means do citizens find acceptable to protect or attain their interests? For example, for public deliberation, citizens must know what type of power the security and intelligence agencies have and the extent to which this power is used in the broader discussion of drawing a balance between privacy protection and surveillance measures that result from security policies. For accountability purposes, the aim is not directed at establishing a consensus in society regarding the balance between civil liberties and security, but the objective is very specific and directed towards whether there is an abuse of public powers by the intelligence agency. The oversight actors hence would demand specific information and

⁷³ See Sagar, 'Who Holds the Balance?' (n 21).

all relevant details in order to establish whether a particular intelligence agency exceeds its powers and how these powers are exercised. It must be stressed that from the perspectives of accountability and public deliberation, the scope of information does not only concern how wide or narrow the information is but the key aspect to both is whether it is the relevant information in order for these processes to take place. For example, oversight bodies could have access to files full of detailed documents but if the relevant details are missing the oversight process would not be effective. Another common aspect to both perspectives is determining what is relevant information for the process and which actor is in a position to make such an assessment. Clear dividing lines between the secret-keeper and the outsiders (oversight actors and/or citizens) cannot be drawn on this issue as the insider has all the information and is in a position to know its relevance, whereas it depends what information the oversight actor and citizens deem valuable for making their own assessment.

The timing of availability of information is essential. Especially for mechanisms of oversight, where the aim is to act preventively and not *ex post facto*, the challenge is when should the oversight actors and citizens know? And how should the necessity of openness be coordinated in instances when the element of surprise is needed for successfully attaining a security measure? Accountability and public deliberation differ regarding the timing of the importance of information. Whereas for public deliberation it is relevant for citizens to know before a decision is taken and be informed during decision-making (hence there is a higher threshold for openness), accountability requires that the outputs of the processes are known and function on the presumption that the representatives are well informed and have access to the relevant information in order to best defend the interests of their electorate.

The discussion thus far shows that the application of openness to accountability and public deliberation differs with respect to actors, scope and timing. This already implies that institutional arrangements set to ensure accountability and public deliberation should be established in a way that correspond to the requirements on openness from both accountability and public deliberation. In institutional settings, mechanisms of oversight are often established in a manner that only addresses accountability. However, oversight has a complimentary role and can also be institutionally established in a way that better facilitates public deliberation. If established in a way that follows the rationale of openness for public deliberation, the realisation of oversight – parliamentary, judicial and administrative – can create the space and the necessary possibilities for the attainment of public deliberation. For example, the parliament is a key deliberative

forum that brings public attention to and discusses executive action of significant societal relevance. Administrative and judicial actors ensure the concrete application of the right to public access to documents and hence make it possible that citizens are accurately informed and participate in decision-making. Whereas from an accountability perspective openness should provide detailed information about a course of action or decision and this information should be accessible to oversight bodies, from the public deliberation perspective it is paramount that citizens are informed even if the information is broad and without including the sensitive protected information. Oversight can be institutionally established in a way that addresses these differences. Indeed, the aim of the constraints of secrecy that the following section develops is based precisely on this conviction. The aim is to develop conditions for secrecy that follow the necessity of openness for accountability and public deliberation. This is also different from the dominant approach of having the rationales of secrecy determine when, how and to what extent openness will be limited. This approach is justified and necessary considering that secrecy and openness are not equally relevant instruments to be balanced against each other, but rather democratic processes of accountability and public deliberation, as it was shown above, have a clear presumption in favour of openness for their realization.

Table 2.3 Openness with Accountability and Deliberation

Openness	Accountability	Deliberation
Actor	In principle, citizens and oversight bodies, yet also sufficient if oversight actors are informed in detail, whereas citizens are informed of the legitimate aim for nondisclosure and of oversight outcomes.	Citizens and oversight bodies.
Type of Information	Who did what when how? What is behind the secrets? What are the secrets?	What interests are at stake? What are the means to attain those interests?
Time of Disclosure	Sufficient if it is <i>ex post facto</i> .	Prior to decisions and choices.

2.3 TOWARDS DEMOCRATIC CONSTRAINTS ON SECRECY

The interface between openness and secrecy is not static. On the contrary, it is a moving balance and although its overall evaluation should be based on a pattern of cases, practice shows that a single case of discretionary secrecy may be highly detrimental to the commitments and obligations of openness.⁷⁴ Taking this as a starting point in conjunction with the developed understanding of democratic processes of accountability and public deliberation discussed in the foregoing sections, this subsection elaborates on each democratic constraint. The applicability of these constraints is not limited to the type of secrecy or a specific context. They are rather guided by the premise that the exercise of public power must be justified whether in national or supranational setting, and as a result, the practice of secrecy must adhere to certain legitimising conditions.

First, it was noted that for processes of both accountability and public deliberation openness is essential for their effectuation. Hence, any claim that limits openness must be legitimate and necessary. Yet, establishing what constitutes a legitimate and necessary claim is one of the most difficult aspects in the efforts to democratically constrain secrecy. Second, openness cannot be limited to the extent that the realisation of accountability processes is halted. Accessibility to the relevant information is the first and key step for the inception of any accountability mechanism. Third, for the realisation of public deliberation, openness cannot be limited to the extent that the public does not know that there is a secret and does not know the outcomes of oversight. A public discussion relies on relevant and timely accessible information and this must be taken into account in establishing limits to the use of secrecy.

Parliamentary, judicial and administrative oversight processes should ensure these democratic constraints of secrecy. In addition, administrative measures of a 'self-binding'⁷⁵ nature are necessary to address secrecy at an internal administrative level. A complementarity between these different oversight processes is a precondition to constrain secrecy in line with the requirements of accountability and deliberation.

74 Christopher Kuner et al, 'PRISM and Privacy: Will this Change Everything?' (2013) 3 *International Data Privacy Law* 217.

75 Eric A. Posner and Adrian Vermeule, 'The Credible Executive' (2006) University of Chicago Law and Economics, Olin Working Paper No. 309 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931501##> accessed 17 May 2015.

Before discussing each democratic constraint of secrecy in-depth, it should be noted that within an institutional context different legal practices give secrecy a concrete expression, such as civil service oaths of allegiance, official secrets acts protecting classified information, espionage statutes, censorship laws and the executive privilege doctrine.⁷⁶ The predominant manner of controlling and limiting the flow of information is through classified information, leading some scholars to conclude that it is the embodiment of institutionalized secrecy⁷⁷ and a key ‘form of regulation.’⁷⁸ The system of classified information is a set of administrative and technical rules that assign a certain level of security over various types of sensitive information, the disclosure of which in the judgment of the classifier could be harmful.⁷⁹ Taking into account classified information as an institutional expression of secrecy, as each democratic constraint is discussed, reference is made to the implications of these constraints specifically on classified information.

2.3.1 *Determining Legitimate Claims to Secrecy*

The first condition applicable from both the perspective of accountability and public deliberation is whether the claim to secrecy is legitimate and necessary. Necessary refers to the reasons presented on whether without the use of secrecy the aim would indeed not be reached. This condition refers to specific claims of secrecy as well as establishing policies that authorise the use of secrecy in an institutional setting, such as laws on official secrets. The latter implies that rules on secrecy are publically debated and due consideration is given to the extent of limits posed by secrecy regulation on the applicability of openness.

The delineation between legitimate and illegitimate secrecy in a specific case is one of the basic and key challenges of oversight. Apart from cases of secrecy abuse, it is questionable what secrets may be deemed legitimate. In abstract, only broad categorizations may be offered, as strict definitions cannot be constructed without the specific context in which secrecy is invoked. In principle, it is considered legitimate

76 Itzhak Galnoor, ‘Government Secrecy: Exchanges, Intermediaries, and Middlemen’ (1975) 35 *Public Administration Review* 32.

77 Heidi Kitrosser, ‘What If Daniel Ellsberg Hadn’t Bothered?’ (2011) 45 *Indiana Law Review* 89.

78 Daniel Moynihan, *Secrecy: The American Experience* (Yale University Press 1999).

79 William G. Phillips, ‘Secret Government: The Classification System’, in Norman Dorsen et al. (eds), *None of Your Business* (Viking Press 1974) 62. Steven Aftergood, ‘Reducing Government Secrecy: Finding What Works’ (2009) 27 *Yale Law and Policy Review* 399.

to utilize secrecy when it is necessary.⁸⁰ Yet, in order to determine whether secrecy is necessary, the use of secrecy must be justified in light of the democratic presumption in favour of openness.

A. The Necessity of Secrecy

Secrecy may be protective of a substantive policy or a specific goal. A military plan, security protection of IT systems and location of arms are but a few examples of when secrecy is invoked because it is considered valuable and necessary in order to allow the state or organization to ensure a certain public interest, such as security, and carry out a policy. The critical distinctive feature for invoking secrecy is hence the nature or substance of the policy.⁸¹ Secrecy is considered legitimate in the sense that it is invoked to enhance or protect the interests of the citizens, for example their safety (security policies) or economic well-being (financial policies). Another key factor for the legitimacy of the secrecy is demonstration of reasonably foreseeable harm.⁸² The claim of protection of a policy directly depends on whether there are substantive issues to be protected and that their protection is considered necessary due to the demonstration of reasonably foreseeable harm.

Secrecy may also enhance internal deliberation between executive institutions as it provides confidentiality and hence facilitates candour.⁸³ This aspect gives rise to an opposition between, on the one hand, the internal institutional deliberation, for which secrecy is deemed necessary as it provides an entrusted space based on confidentiality, and on the other hand, public deliberation, for which openness of the institutions towards the citizens is necessary.⁸⁴ The case for necessity of secrecy in internal institutional deliberation is not straightforward. Scholars argue that secrecy prevents shallow public reasoning wanting to please the largest number of people possible or

80 Dennis Thompson, 'Democratic Secrecy' (1999) 114 *Political Science Quarterly* 181. See also Deirdre Curtin, 'Overseeing Secrets in the EU: A Democratic Perspective' (2014) 52 *Journal of Common Market Studies* 684, 687.

81 Curtin, 'Judging EU Secrecy' (n 29).

82 De Goede and Wesseling (n 14).

83 Scholars also refer to this type of rationale for secrecy as process rationale of secrecy because of its *process-based* nature, whereby the decision-making process as such is prioritized – a type of procedural or process rationale for secrecy (for example, the need to keep strategic information secret while negotiating). See Deirdre Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' (2013) 50 *Common Market Law Review* 423, 425.

84 Mutz (n 65). See especially Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984) xiv-xv. For the recent discussion on European Union and the importance of information for participation see, Deirdre Curtin, Herwig Hofmann and Joana Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19 *European Law Journal* 1.

wanting to appear firm and decisive in the public's eye.⁸⁵ This is considered relevant due to possible 'positionalism' that officials or politicians could develop in situations where, after having publicly committed to a certain position, they do not consider other possibly better solutions due to the need for consistency or a perceived sign of weakness.⁸⁶ In these cases, the assumption is that citizens would consent to the decisions made if they had the opportunity, but making them public would defeat their purpose. Yet, research also shows that secrecy may lead to irrationality, because errors and biases in decision-making are not corrected by public debate.⁸⁷

Lastly, secrecy serves to deploy the effect of surprise. As intentional disclosure at a selected time, secrecy is often used for surprising the outsider. Security policies or negotiations are instances whereby the element of surprise is necessary for a successful investigation or attaining a desired outcome.⁸⁸ The use of secrecy to attain the element of surprise is also more limited in terms of scope and the temporal effect. Scope-wise, the information that is considered necessary to be secret is merely the information that would otherwise reveal the time, identity or other relevant fact for the action envisaged. Such secrecy is intended to create a situation where the intended target is left unprepared to take counter-action. For example, a police investigation will keep secret the time, place and the names of the individuals it aims to arrest in order for the arrest to actually take place. This example also illustrates the more limited temporal effect considering that once the arrest takes place, the information is public.⁸⁹ Besides the necessity of secrecy, the institutional arrangements that aim to determine whether claims to secrecy are legitimate are an additional aspect to the first condition on the claim to secrecy. It is first relevant to discuss which institutional actor is in a position to determine whether claims are legitimate.

85 Simone Chambers, 'Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation' (2004) 12 *Journal of Political Philosophy* 389, 394.

86 Daniel Naurin, 'Taking Transparency Seriously' (2002) Sussex European Institute Working Paper No 59, 11 <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=sei-working-paper-no-59.pdf&site=266>> accessed 17 May 2015.

87 Bok (n 1) 106, 113.

88 Case C-27/09 P *France v People's Mojahedin Organization of Iran*, EU:C:2011:853, para 62 – information undisclosed to the party concerned in the case of asset freezing in the EU due to efficiency of the measure. See also Christina Eckes, 'Decision-making in the Dark? Autonomous EU Sanctions and National Classification' Amsterdam Centre for European Law and Governance Working Paper Series 2012-02, at 10: 'The EU Courts distinguish between the initial (first) listing of a person and subsequent (following) listings. The General Court justified this with considerations of effectiveness: the effect of the surprise is necessary when the assets are frozen for the first time.'

89 Note that there are cases where investigations take place over many years, which makes the temporal effect longer.

B. Who Decides?

Secrecy creates divisions between secret-keepers as insiders and oversight bodies or citizens as outsiders, as it was noted above.⁹⁰ Moreover, clusters of inside-insiders (officials directly in charge of secrets) and inside-outsiders (those within the administrative circle yet not secret-keepers) are also created by the use of secrecy. This division of actors is relevant to reiterate in light of the question of which institutional actor should decide whether secrecy claims are necessary. This chapter maintains that the delineation between legitimate and illegitimate secrecy should be determined internally within the administration that has the authority to keep secrets. Officials with discretion to decide whether secrecy should apply are in an informed position to decide whether secrecy is indeed justified.⁹¹ One could question whether it is reasonable to expect that the officials who are entrusted with keeping secrets should also be authorised to be the starting point for determining which secrets are necessary. Valid objections could be raised regarding the possible abuse of such authority.⁹² Although suspicion regarding the good faith of officials could be justified when secrecy is used,⁹³ absolute control is impossible. It is also unnecessary since the idea of internal delimitation of secrecy claims is to prevent misuse of classification authority while acknowledging the possibility that some level of abuse is inevitable. Hence, any mechanism of oversight (internal or external) is aimed to minimise but could not fully eliminate the possibility of abuse of secrecy. The internal actors are the only ones that could possibly address the issue because they have direct access to secrets.

The determination of the claim should start with the core insiders, the officials with classification authority, and then inside-outsiders, such as administrative bodies with authority of independent oversight. A variety of institutional arrangements for this delineation could apply. For example, for core insiders, prevention-focused measures could include legal obligations of assumption of openness and/or ex post mechanisms such as reviews of classified information, which aim to reduce and

90 See Section 2.1.1 above.

91 Aftergood, 'Reducing Government Secrecy' (n 79) 411-412, also arguing that the agency level is best for any reform on secrecy.

92 Posner and Vermeule (n 75); see also Gillian E. Metzger, 'The Independent Relationship Between Internal and External Separation of Power' (2009) Columbia Public Law Research Paper No. 09-213; Neal Kumar Katyal, 'Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within' (2006) 115 *Yale Law Journal* 2314. See more broadly on executive powers and constraints to executive power, Marc de Wilde, 'Locke and the State of Exception: Towards a Modern Understanding of Emergency Government' (2010) 6 *European Constitutional Law Review* 249.

93 Bentham (n 57).

declassify information. As for the inside-outsiders, the general mechanisms of review could also be focused with the aim of tackling issues of over-classification (such as the investigative prerogative of ombudsperson).

The delineation of necessary secrecy from extensive secrecy rests on the mechanism of balancing between discretion to conceal sensitive information as a measure aimed at protecting a public interest and the rights and obligations related to openness.⁹⁴ Balancing openness and secrecy is an administrative action that happens on daily basis.⁹⁵ Administrative balance arises in actions involved in the process of managing it. It deals specifically with officials' decision on balancing openness and secrecy at various stages. In this respect, discretion in its most narrow sense implies an application of judgment in accordance with set standards.⁹⁶ This type of balance can arise for instance when an official makes a decision that something will be secret or a decision to cease protection of information, hence make it public. Overall, the internal administrative stage of secrecy is a crucial one that should be institutionally structured to protect information and operationalize the presumption of openness in the different layers of decisions regarding secrecy.

However, difficulties persist in making the distinction between acceptable and illegitimate secrecy. Secrecy is a subjective decision. It is the secret-keeper who decides that some information must be protected due to the interests of a policy. In the institutional sense of classified information system, the first decision whether to classify a document therefore is a decision that, although guided by a set of norms, is made by an official. In this respect, disputes even between good faith and well-intentioned officials could arise about whether a document should be classified at all or at what specific level. As a result of this factor, the subjectivity of a decision, information may be classified at a higher level than it should or when it is not necessary to classify it at all. Hence, institutional arrangements should include appropriate safeguards in order to minimize the subjectivity of secrecy. Another factor that makes delineation more difficult is the practical impossibility of checking every single document that is classified individually. In this respect as well it is relevant to question the institutional

94 Wolf Sauter, 'Proportionality in EU law: A Balancing Act?' (2013) TILEC Discussion Paper, DP 2013-003. But see Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002).

95 Assuming that each time an official classifies or has to deal with documents she actually does take both openness and secrecy into consideration. This is not a shared view. See Schulhofer (n 40) who argues that there is no incentive for this to happen and there should be no such expectations from the administration.

96 Ronald M. Dworkin, 'The Model of Rules' (1967) *Faculty Scholarship Series*, Paper 3609 <http://digitalcommons.law.yale.edu/fss_papers/3609> accessed 17 May 2015.

setting in which claims and decisions regarding secrecy are raised in order to know more generally whether the claims are enhanced for self-serving interests and power.

2.3.2 Oversight and Public Deliberation

In 1861, John Stuart Mill posed the question of how can citizens either check or approve what they are not permitted to see.⁹⁷ Without some level of openness, processes of oversight are unattainable and they depend on fully and timely accessible information about decision-making and the actors involved. Similarly, whether citizens are able to form and express opinion in an independent manner on the basis of accurate information is very relevant for a functioning democracy. Public debate is a key process involved in achieving democratic accountability and part of defining good governance.⁹⁸ The second and third constraints to secrecy hence require that openness is only limited to the extent that these processes are still able to function.

Oversight is not only relevant in the case of a possible individual abuse of secrecy. Institutional arrangements for secrecy, the system of classified information, could be constructed in such a manner that, on the one hand, they are required for the functioning of the administration and coherence of security of information but, on the other hand, can result in extensive secrecy. Hence, arrangements of the system of classified information may lead to more secrecy than necessary even if the assessment of whether to impose secrecy may be necessary and legitimate. Furthermore, obstructing or preventing oversight is not strictly related to, for example, applying rules of classification and as such limiting public knowledge. It can also take place in what has been termed obstructed transparency, which refers to situations where the government uses the means available within the law to limit access to information as much as possible.⁹⁹ Secrecy provides the potential to completely obstruct oversight. The structural dependency of oversight actors on the secret-keeper and the different types of secrets are two key factors that contribute to this challenge. In an institutional sense, the structural dependency of the oversight actor implies that

97 John Stuart Mill, *Considerations on Representative Government* (Parker Son and Bourn 1861) 34.

98 Johan P. Olsen, 'The Institutional Basis of Democratic Accountability' (2013) 36 *West European Politics* 447, 448-449.

99 It has been noted that these are the most frequent cases of limiting transparency within the framework of law. See Martial Pasquier and Jean-Patrick Villeneuve, 'Organizational Barriers to Transparency: A Typology and Analysis of Organizational Behaviour Tending to Prevent or Restrict Access to Information' (2007) 73 *International Review of Administrative Sciences* 147.

discretion on whether to disclose secrets lies with the executive actor. Moreover, the structural dependency could be maintained through various administrative ‘technical’ rules that trump the right of the oversight actor to access information or impose conditions in such a manner that this impacts the (open) realization of the oversight process. Yet, the dependency feature of secrecy should not mean a *carte blanche* for the secret-keeper. Institutional arrangements for oversight should be structured to take into account the inherent dependency on the secret-keeper.¹⁰⁰

In light of the aforementioned, the single most relevant requirement for the institutional arrangements regarding oversight is that oversight actors have means to know or access *independently* from the discretion of the secret-keeper. There should be means in order to prevent a dependence relationship between oversight actors and secret-keepers. The external actors should not fully rely on the willingness of secret-keepers to disclose the secrets.¹⁰¹ The possibility of the oversight body to access secrets independently from the actor it controls, could be stipulated by norms, such as constitutional provisions, that arrange their relation. Regardless of the specific arrangement, the prerogative of the oversight body to access should ensure that full discretion does not belong to the executive actor being checked.

If institutional arrangements about secrecy were established in a manner that ensures first, the delineation of legitimate from illegitimate secrets, and second, that oversight bodies do not fully rely on the discretion of the secret-keeper for the disclosure of official secrets, these arrangements would be in line with the democratic requirements of the process of accountability. The fulfilment of these democratic conditions limit secrecy to the extent that accountability processes are not hindered, but as such would not be fully addressing the necessity for establishing conditions that ensure citizens’ public deliberation. In order for the latter to be attained, the third and final condition should be addressed.

Secrecy limits the option of public deliberation, which results in a disconnection between citizens and public institutions regarding policies and actions about which there might be agreement or disagreement. The necessity of openness for deliberation creates a higher threshold on the question to what extent secrecy may be

100 Franck and Weisband (n 25) 4. See also Franks Commission in the UK - Departmental Committee on Section 2 of the Official Secrets Act 1911, (Cmnd. 5104) (1972) at 9, noting that ‘There is an inevitable tension between the democratic requirement of openness, and the continuing need to keep some matters secret.’

101 Rahul Sagar, ‘On Combating the Abuse of State Secrecy’ (2007) 15 *Journal of Political Philosophy* 404. See also Schulhofer (n 40) on the idea that there are no proper checks on secrecy.

deemed acceptable because it always requires that some information is directly available to the citizens. However, it was also discussed that from the perspective of public deliberation, that information does not need to be specific and detailed. It is very relevant that citizens, in broad terms, know what the policy is about, what interests are at stake and what means are suggested to protect those interests. Hence, the perspective of public deliberation is more focused on the interests at stake and to what extent their protection relies on secrecy. The question then is how should broader openness towards citizens be established in institutional arrangements or what institutional arrangements could deliver broader openness. The overall premise of such arrangements is that citizens must be informed about the *existence of secrecy* and the *outcomes of oversight*. Citizens should be able to know that some level of secrecy is applied in a certain situation. For example, it should be publically known that a meeting among political actors takes place, even if the discussions are not fully public or the documents from that meeting immediately available. These points are nevertheless the bare minimum thresholds about establishing public deliberation.

The more relevant aim would be to establish *open oversight* as a general rule. Open oversight aims to inform citizens and create possibilities for discussion and disagreements. Oversight should also be open because, from this perspective, the question is not only about ‘policing’ the actors if there is a wrongdoing but it is a question of debates that are also oriented towards future prospects of how things should be done and enabling citizens to formulate and express their agreement. It should, as well, foster public knowledge about decisions and outcomes that most affect the citizens. Open oversight could increase public support.¹⁰² Public deliberation aims to grant citizens a participatory role in the exercise of secrecy by requiring that core choices regarding secrecy be made publically through debate, consultation or by other means. More clarity should be established between what is considered secret and what is open and available for citizens to discuss. Fulfilling deliberation ensures that citizens are already informed and have expressed their views. If indeed abuse of secrecy is established, citizens are better able to understand the distinction between the policy that secrecy was supposed to protect and the act of abuse.

¹⁰²Dennis Thompson, *Restoring Responsibility: Ethics in Government, Business, and Healthcare* (Cambridge University Press 2004).

CONCLUSIONS

This chapter sets out the theoretical framework of secrecy from a democratic perspective. It acknowledges the inherent conflict between the principle of openness and the necessities of secrecy. The principle of openness has intrinsic value besides being instrumental for democratic processes, yet it is not an absolute principle and institutionally it has to coexist along with the necessary use of secrecy. The latter is an obvious truism but it is noteworthy when considered in more detail what and how institutional arrangements facilitate these opposing policies.

The chapter initially considered secrecy in a broader perspective, establishing its definition and mapping the different types and functions of secrecy. The latter aspect enabled us to see the dynamics that secrecy creates between insiders and outsiders and significantly, to realise the advantages secrecy creates for the secret-keeper, including enhancing power and protection. The favourable and discretionary position as a result of secrecy in an institutionalised setting raises questions about the position and prerogatives of outsiders, such as citizens or oversight bodies.

The theoretical framework developed specific democratic limitations to secrecy based on the application of openness that enables realising both accountability and public deliberation. The latter are seen to be equally relevant democratic processes in addressing citizens' will and opinion as foundations of democracy. The aim of these conceptual differentiations and clarification is to be able to better point out how institutional arrangements should be established that address their requirement for openness and hence limit secrecy accordingly. Important in this regard is whether and to what extent institutional arrangements both internally within administrative practice and through external processes of oversight ensure the necessary secrecy and expose discretionary secrets.

The delineation of legitimate claims to secrecy as well as establishing processes of oversight and public deliberation are basic institutional arrangements in the efforts to align the exercise of secrecy with the democratic presumption in favour of openness. Especially regarding the system of classified information, this chapter points to the relevance of the initial decision to determine whether information should be classified as well as showing the importance of accessibility of oversight actors to classified information without fully relying on the discretion of the secret-keepers. Moreover, it is salient to examine to what extent the legal framework of classified information shows a presumption in favour of openness and how this presumption is

rendered in institutional arrangements, both internally within administrative practice and through external processes of oversight. When these institutional arrangements are examined in practice they can also reveal the extent of a culture of secrecy and whether indeed the practice promotes openness. The discussion on the democratic constraints of secrecy provides the basis to examine the dynamics of secrecy within the setting of the European Union in the ensuing chapters. Towards that goal, the following chapter provides the broader institutional framework and institutional workings of the EU.