

The First Intelligence Legislation for Finland

Rauno Korhonen

1	Introduction	134
2	New Constitutional Limitation will allow Intelligence Gathering for the Purposes of Protecting National Security	135
3	Civilian Intelligence Legislation will give the Finnish Security Intelligence Service New Ways to Safeguard National Safety and Security	137
4	Military Intelligence Legislation will improve the Defence Forces' Intelligence Gathering on International Threats	138
5	Intelligence Ombudsman and Parliamentary Committee to Oversee Intelligence Gathering	139
6	Conclusion	141

1 Introduction

The word ‘intelligence’ can be defined as information, which has been identified as relevant and which is collected, verified and interpreted within the context of specific objectives. This entails that the information has been analyzed, classified and distributed to policy makers who utilize it towards the betterment of the country or the community. In addition, differences can also be found between the concepts investigation and intelligence:

Investigation: Reactive; occurs after the event or incident
 Reports are generally open
 Sources are generally known and open
 Arrests are made based on evidence and facts

Intelligence: Proactive; information gathered before the event
 Reports are almost always closed
 Sources are confidential and closed
 Arrests are rarely made ¹

Intelligence as a concept can further be divided into Human Intelligence (HUMINT) and Technical Intelligence (TECHINT), which in turn have their various subfields.²

Up until recently, Finland has been one of the few European countries without almost any kind of intelligence legislation. For many years this has been identified as a problem³ and now the Finnish Parliament (Eduskunta), after a long drafting process during the Spring of 2018, is working with the relevant acts in order to rectify this problem.

The Finnish Government has proposed the adoption of intelligence legislation in Finland, with the aim of improving the country’s protection capabilities against serious threats to national security. Such threats include terrorism, espionage by foreign states or the disruption of critical infrastructure. The focus of intelligence gathering by *the Finnish Security Intelligence Service* (Supo) will be on identifying threats and responding to them at as early a stage as possible.

1 For more, see Täytor, R., Caeti, T., Loper, D., Fritsch, E. and Liederbach, J., *Digital Crime and Digital Terrorism*. Pearson Prentice Hall. New Jersey 2006, p. 236.

2 See Thomas, D., Loader, B. (edit.), *Cybercrime. Law enforcement, security and surveillance in the information age*. Routledge. London and New York 2000., p. 251-268.

3 One of the first committees for reform was nominated in December 2013. See *Guidelines for Developing Finnish Intelligence Legislation*. Working Group Report 14.1.2015. Ministry of Defence. There in Description is written that ”When the authorities responsible for national security collect information in the cyber domain to identify serious threats, their work is by its very nature intelligence work. However, existing Finnish legislation does not provide for intelligence work. The working group there proposes that the Government should initiate necessary measures to create a legal basis for intelligence work”

Consequently, the Government submitted a proposal for *civilian intelligence* legislation to Parliament on 25 January.⁴

At the same time, the Government also submitted proposals to Parliament regarding *military intelligence*⁵, *oversight of intelligence gathering*⁶ and *amendment to the Constitution*.⁷ All these proposals have been prepared at the Ministry of Interior, the Ministry of Defence and the Ministry of Justice, and they form a comprehensive intelligence legislation package comprising almost 1000 pages in printed form.⁸

2 New Constitutional Limitation will allow Intelligence Gathering for the Purposes of Protecting National Security

The Finnish Government has proposed that the Constitution be amended so that provisions on limitations of the secrecy of confidential communications that are essential for protecting national security could be laid down in ordinary law if the necessary preconditions are met. In practice, the amendment would allow the enactment of legislation on intelligence gathering powers.⁹

Under the proposal, in order to identify and prevent potential threats directed at Finland, it will be necessary to obtain intelligence on military operations and other such activities that pose a serious threat to national security. The threats that will in the future be subject to intelligence gathering operations would not necessarily be punishable under the Finnish law nor will it be necessary that it has reached a stage where a concrete and individualized suspicion of a crime could be identified. The development of intelligence capabilities are required in the security environment in order to combat activities that seriously threaten the democratic system of government and basic functions of society. These threats

4 *HE 202/2017 vp. Hallituksen esitys eduskunnalle siviilitiedustelua koskevaksi lainsäädännöksi.* Available in Swedish too: RP 202/2017 rd. Regeringens proposition till riksdagen med förslag till lagstiftning om civil underrättelseinhämtning.

5 *HE 203/2017 vp. Hallituksen esitys eduskunnalle laiksi sotilastiedustelusta sekä eräiksi siihen liittyviksi laeiksi.* Available in Swedish too: RP 203/2017 rd. Regeringens proposition till riksdagen med förslag till lag om militär underrättelseverksamhet och till vissa lagar som har samband med den.

6 *HE 199/2017 vp. Hallituksen esitys eduskunnalle laiksi tiedustelutoiminnan valvonnasta ja laiksi valtion virkamieslain muuttamisesta.* Available in Swedish too: RP 199/2017 rd. Regeringens proposition till riksdagen med förslag till lag om övervakning av underrättelseverksamheten och lag om ändring av 7 § i statstjänstemannalagen.

7 *HE 198/2017 vp. Hallituksen esitys eduskunnalle laiksi Suomen perustuslain 10 §:n muuttamisesta.* Available in Swedish too: RP 198/2017 rd. Regeringens proposition till riksdagen med förslag till lag om ändring av 10 § i Finlands grundlag.

8 See also: *Legislative Package on Intelligence Submitted to Parliament.* Government Communications Department, Ministry of Defence, Ministry of Justice and Ministry of the Interior. NEWS ITEM 5/2018. 25.1.2018.

9 See: *Proposal to Parliament for amending the constitutional provision on the secrecy of confidential communications.* Ministry of Justice. Press Release 25.1.2018 and *HE 198/2017 vp.*

include *terrorism-related activities, violent radicalization or the activities of foreign intelligence services*. Under the proposal, intelligence on military operations and other such activities that seriously threaten national security must also be obtained through such means that may also interfere with the secrecy of confidential communications.¹⁰

Under the Constitution of Finland, *the secrecy of correspondence, telephony and other confidential communications is inviolable (10 §)*. The existing wording of the Constitutional is such that, provisions limiting the secrecy of confidential communications, which are necessary in the investigation of crimes that endanger the security of the individual or society or the sanctity of the home, at trials and security checks, as well as during the deprivation of liberty, may be laid down by an act. In accordance with the wording of the Constitution and its current interpretation, provisions that limit the secrecy of communications for other purposes, such as the protection of national security or the protection from threats to national security, may not be laid down by law. In order to allow provisions that limit the secrecy of communications in relation to national security, it is proposed that provisions on new permissible grounds for the limitations of secrecy of confidential communications should be added to the Constitution.¹¹

Under the proposal, the secrecy of communications could be limited if this is necessary for ‘obtaining information about military operations or other such activities that seriously threaten national security’. For the purposes of the provision, ‘military operations’ would mean both governmental and non-governmental operations involving organized military units or military forces. Intelligence gathering on military operations would include the surveying of external military threats directed towards Finland. For the purposes of the provision, ‘activities that seriously threaten national security’ means activities that threaten the democratic system of government, basic functions of society, the lives or health of a large number of people or international peace and security. However, it would be required that the activities are connected with Finland and specifically threaten the national security of Finland.¹²

Under the amendment, provisions on intelligence gathering powers interfering with the secrecy of communications could be laid down in ordinary law. Under the provision, introducing these powers would be subject to significant restrictions. The threat to national security should be of a serious nature. Also, the power to interfere with the secrecy of communications should be necessary for obtaining the intelligence. The phrase ‘*investigation of crime*’ in the current provision on the secrecy of confidential communications would be

10 See: *Proposal to Parliament for amending the constitutional provision on the secrecy of confidential communications*. Ministry of Justice. Press Release 25.1.2018 and HE 198/2017 vp., p. 29-31.

11 See more detailed about the Finnish Constitution: Saraviita, I., *Constitutional Law in Finland*. Wolters Kluwer. Law § Business 2012.

12 See: *Proposal to Parliament for amending the constitutional provision on the secrecy of confidential communications*. Ministry of Justice. Press Release 25.1.2018 and HE 198/2017 vp., p. 29-31.

replaced with ‘*combating of crime*’, which would cover the prevention, uncovering and investigation of crime. The new wording would be in accordance with the generally accepted interpretation of the expression but would not change its content.¹³

Under the necessity requirement contained in the Finnish Constitution, the measures interfering with the secrecy of the confidential communications must be as specific as possible. It is emphasized in the proposal that the general preconditions for limiting fundamental rights applied under the current interpretation practice would also be applied in the future. This means that under the new provisions, no legislation on general and all-encompassing telecommunications surveillance could be introduced.¹⁴ Under the ordinary legislation, the intelligence gathering powers must be specified and the preconditions for limiting fundamental rights (the human rights obligations) and EU law must be complied with. Adequate legal protection and oversight arrangements must also be ensured.

The Government proposes that Parliament should consider the amendment to the Constitution as a matter of urgency. In the Government’s view, the weakening of Finland’s security situation and the need to prepare for activities threatening the national security of Finland have created an exceptional situation in which there is an immediate need to amend the Constitution.

If the normal procedure for constitutional enactment is applied, the provisions on the new powers of the intelligence authorities may only enter into force in early 2020. If the proposal is declared urgent (5/6 majority required), the new provisions may enter into force already at the end of 2018. Under the Government proposal, should the consideration of the proposals in Parliament continue until the end of the current electoral term (until spring 2019), there would be less need to declare them urgent.¹⁵

3 Civilian Intelligence Legislation will give the Finnish Security Intelligence Service New Ways to Safeguard National Safety and Security

According to the legislative proposal, a new chapter on civilian intelligence would be added to *the Police Act* and a new act on network traffic intelligence as part of civilian intelligence would be enacted. It is also proposed that *the*

13 See: *Proposal to Parliament for amending the constitutional provision on the secrecy of confidential communications*. Ministry of Justice. Press Release 25.1.2018 and *HE 198/2017 vp.*, p. 29-31.

14 There has in any event been a lot of discussion during the legislative process about the possible *mass surveillance* nature of the new powers authorised by the reform.

15 There has been a hard political debate about the details concerning reform between Government Parties and Opposition Parties. The Government has a weak majority in the Parliament and there have been discussions about possible new elections.

Finnish Security Intelligence Service be given intelligence powers both in Finland and abroad.¹⁶

Intelligence gathering methods would be based partly on the intelligence gathering methods already laid down in the Police Act. Completely new powers would be *intelligence gathering on specific locations, copying of a message, interruption of the delivery of a message for copying and network traffic intelligence*. The purpose of these intelligence methods would be to provide state leaders with essential information on operations that pose a serious threat to national security for the purpose of supporting their decision making processes and safeguarding national security. The security environment in Finland is changing rapidly, and new threats demand a new kind of preparedness and contingency planning.¹⁷

Network traffic intelligence would enable technical intelligence gathering of cross-border traffic in the communications network and the processing of this information. A specific objective of network traffic intelligence would be to improve Finland's capability to protect itself against the most serious cyber threats.

According to the proposal, courts would decide on network traffic intelligence. They would also decide on intelligence gathering on specific locations when intelligence gathering is targeted at domestic premises or premises to which there is no public access. The director of *The Finnish Security Intelligence Service* (Supo) would decide on foreign intelligence, the use of intelligence methods in foreign intelligence and participation in international cooperation. Also, the use of new intelligence powers would be tightly controlled. Information obtained through intelligence methods could, under certain conditions, be closed to criminal investigation authorities or other competent authorities. The criteria for disclosure would be strict.¹⁸

4 Military Intelligence Legislation will improve the Defence Forces' Intelligence Gathering on International Threats

The purpose of military intelligence is to monitor developments in the security environment and produce information on the current situation to support the decision-making of the top political and military leaders. Military intelligence provides advance warning of military threats against Finland and supports other authorities. At this point in time, the Defence Force's powers to gather intelligence are inadequate compared to other countries and considering the security environment has changed.¹⁹

¹⁶ See proposal *HE 202/2017 vp*,

¹⁷ *Civilian intelligence legislation would improve Finland's national security*. Ministry of the Interior. Press Release 9/2018. 25.1.2018 and *HE 202/2017 vp.*, p. 108-134.

¹⁸ *Civilian intelligence legislation would improve Finland's national security*. Ministry of the Interior. Press Release 9/2018. 25.1.2018 and *HE 202/2017 vp.*, p. 108-134.

¹⁹ *Government proposes new legislation on military intelligence*. Ministry of Defence. Press Releases. 30.1.2018.

Technology has made strong progress and military communications have moved from an analogue environment to a digital one. As a result, without powers specified in legislation, it is very difficult to gain access to critical intelligence. The proposal would improve intelligence gathering by the Defence Forces related to serious international threats in such a way that the Defence Forces would be given powers for *human intelligence, information system intelligence, radio signal intelligence* and *network traffic intelligence*. Military intelligence helps prepare for military threats against Finland and provides support for other authorities. The purpose of military intelligence would be to gather information in Finland and abroad. Intelligence operations will target military activities, such as activities by a foreign country's armed forces and troops comparable to them, intelligence operations targeting Finland's national defence and the development and distribution of military supplies and action that may endanger Finland's national defence or functions vital for society.²⁰

The new legislation would include provisions on the principles of intelligence activities and the directing and oversight of intelligence operations in the defence administration. Military intelligence authorities would include the *Defence Command Finland* and the *Finnish Defence Forces Intelligence Agency*.

5 Intelligence Ombudsman and Parliamentary Committee to Oversee Intelligence Gathering

An intelligence oversight system would consist of both parliamentary oversight and a new authority, an *Intelligence Ombudsman*, responsible for the oversight of the legality of operations. Under the proposal²¹ submitted to Parliament, trust in the appropriateness of intelligence gathering and in the realization of legal protection of individuals would be ensured by efficiently organizing the oversight of legality and by providing a strong mandate and powers to the oversight bodies. According to the proposal, the intelligence oversight system would consist of both parliamentary oversight and an Intelligence Ombudsman responsible for the oversight of legality. The aim is to organize the oversight of intelligence gathering so that it meets the requirement of effective and independent oversight.²²

Covert intelligence gathering methods interfere with the basic rights of individuals, in particular *the protection of private life* and *the secrecy of confidential communications*.

A new parliamentary special committee, *Intelligence Oversight Committee*, would exercise parliamentary oversight of intelligence gathering. Establishing the committee requires amendments to *the Parliament's Rules of Procedure*, and the Speaker's Council has drawn up a separate proposal on the matter. The new

20 HE 203/2017 vp. and *Government proposes new legislation on military intelligence*. Ministry of Defence. Press Releases. 30.1.2018.

21 HE 199/2017 vp.

22 *Government proposal on oversight of intelligence gathering to Parliament*. Ministry of Justice. Press Release. 25.1.2018 and HE 199/2017 vp, p. 32-35.

act would lay down provisions on the right of *the Intelligence Oversight Committee* to access information and receive reports. The committee would have an extensive right of access to information and the right to receive reports on intelligence gathering from the Intelligence Ombudsman, other authorities and other parties performing public tasks.²³

The *Intelligence Ombudsman* would function in connection with *the Office of the Data Protection Ombudsman* and would be an independent and autonomous authority. The ombudsman would be responsible for overseeing the legality of the use of intelligence gathering methods and the realization of fundamental and human rights in intelligence gathering activities. The intelligence ombudsman will have a strong mandate and effective powers to conduct an oversight of legality. The Intelligence Ombudsman would be appointed by the Government for a maximum of five years at a time.²⁴ The duties and powers of the new ombudsman would not restrict the oversight powers of the supreme overseers of legality: *the Chancellor of Justice* and *the Parliamentary Ombudsman*, or the other special ombudsmen.²⁵

The Intelligence Ombudsman would have an extensive right of access to information and the right to receive reports on intelligence gathering from authorities and other parties performing public administrative functions. The ombudsman could also conduct inspections on the premises of authorities and other parties performing public administrative tasks. The Intelligence Ombudsman will have the authority to order the use of a certain intelligence gathering methods to be suspended or terminated if the Ombudsman considers that the authority has acted unlawfully in the course of intelligence gathering. To suspend or terminate the use of intelligence gathering methods that require court authorization, the intelligence ombudsman could issue an interim order, which would, without delay, be refer to the court that issued the authorization for consideration. The court will also be required to decide on the matter urgently. The Intelligence Ombudsman could also order that any unlawfully gathered intelligence data must be destroyed without delay. If the intelligence ombudsman deems that a party subject to oversight has acted unlawfully, the ombudsman could report the case to the competent criminal investigation authority.²⁶

The Intelligence Ombudsman would also monitor and assess the functioning of the legislation in its field and propose improvements as deemed necessary. The ombudsman will report annually to Parliament, the Parliamentary Ombudsman and the Government on its activities. The Intelligence Ombudsman will also issue separate reports on issues deemed important. The ombudsman will also be able to use its own initiative to report any significant oversight

23 *HE 199/2017 vp*, p. 36.

24 Same period as Data Protection Ombudsman has. Reijo Aarnio has been Data Protection Ombudsman in Finland since 1997.

25 *Government proposal on oversight of intelligence gathering to Parliament*. Ministry of Justice. Press Release. 25.1.2018 and *HE 199/2017 vp*, p. 32-35.

26 *Government proposal on oversight of intelligence gathering to Parliament*. Ministry of Justice. Press Release. 25.1.2018 and *HE 199/2017 vp*, p. 32-35.

findings to *the Parliamentary Intelligence Oversight Committee* for consideration.²⁷

According to the proposal, complaints concerning the legality of intelligence gathering could be filed with the Intelligence Ombudsman. A person who has been a target for intelligence gathering or a person who suspects that intelligence gathering has been targeted against him or her could also request the ombudsman to investigate the legality of the measure targeted at him or her. Submitting such a request could be possible, for example, in situations where a person is informed by an authority that he or she was the target for intelligence gathering, even after the use of the intelligence gathering method has ended. Such subsequent notifications could be made in connection with the use of certain intelligence gathering methods, such as telecommunication interception, data traffic monitoring and network traffic intelligence.²⁸

6 Conclusions

In January 2018 the Finnish Parliament started the consideration of controversial intelligence law reforms that would give wide-ranging expanded powers to the security services. Prime minister Sipilä's government says that an increased threat of terrorism necessitates a reform of the intelligence laws, especially after the terrorist attack in Turku City (Åbo) in 2017.²⁹

Currently the law does not allow *the Finnish Security Intelligence Service* (Supo) to gather intelligence to uncover plots that may threaten national security where the use of such measures are tied to the suspicion of a crime. If the proposed reform is passed, Supo and military intelligence officers would be allowed to intercept confidential communications, hack messaging services and break encryption in order to read the contents of messages between persons deemed to be a potential threat to national security.³⁰

Seppo Tiitinen, the former *director of the Finnish Security Intelligence Service* has criticized some elements of the proposal. He is very worried about the role and the powers of the new *Intelligence Ombudsman*. Somebody or something should also oversee *Intelligence Ombudsman* in a proper manner. The number of members of the *Parliamentary Intelligence Oversight Committee* should also be kept to a minimum, for example, in order to avoid possible data-leaks and in order to have facilitate the future access to intelligence information

27 *Government proposal on oversight of intelligence gathering to Parliament*. Ministry of Justice. Press Release. 25.1.2018.

28 *Government proposal on oversight of intelligence gathering to Parliament*. Ministry of Justice. Press Release. 25.1.2018 and HE 199/2017 vp., p. 32-35.

29 In this incident, a very young man with an Arabian background attacked people in the Turku market place in the city center and stabbed several persons with knife. Two people died and 8 were injured. This was probably the first real terrorist attack in Finland.

30 *Finnish Parliament starts to debate on expanded intelligence law*. Yle Uutiset. News 25.1.2018. "yle.fi/uutiset".

from different sources. On the other hand, Mr Tiitinen says that this reform is absolutely necessary for Finland as an independent country.³¹

Big concerns have been raised that the new legislation could threaten individual privacy as intelligence gathering could be undertaken through the *mass surveillance*³² of email and other private communications. This discussion will go on during the legislative process in Parliament and most certainly also long after that and until the reform has finally come into force.

31 See Tiitinen: *Tietoa ei voi jakaa kuin apulantaa*. Lapin Kansa 4.1.2018, p. A 12 – A 13. Seppo Tiitinen worked as a Director of Supo 1978-1990 and then as a Secretary General of Parliament 1992-2015.

32 More and deeper about surveillance from different viewpoints for example: Wiese Schartum, D (edit.), *Overvåking i en rettsstat*. Nordisk årbok i rettsinformatikk. Fagbokforlaget. Bergen 2010. See also: Lyon, D., *Theorizing Surveillance. The panopticon and beyond*. Willan Publishing.2006.