Actors' Theories of Legitimate Secrecy – The Case of Public-Private Partnerships in the German Bundestag

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Abstract

Theories of democratic secrecy have explored the limits and challenges of democratically legitimising secrecy, whether through a democratic purpose or a democratic decision-making process regarding secrecy. The paper argues that this warrants an analysis of political actors' practical theories of legitimate secrecy. Empirically, it draws on a case study of debates about public-private partnerships in the German Bundestag. As the literature has shown, PPPs are characterised by specific forms of secrecy, which makes them an interesting case for investigating actors' theories of when and how secrecy can be reconciled with democratic demands for openness and transparency.

Keywords: executive secrecy, public-private partnerships, actors' theories, Germany, oversight

1. Introduction

Political secrecy has received increasing scholarly attention in recent years (Knobloch 2019; Mokrosinska 2020). There is work on secrecy as a normative and theoretical challenge (Mokrosinska 2022), on secrecy regimes in specific policy fields (see the contributions in Rittberger and Goetz 2019), and on the formalised (Abazi 2019) and informal manifestations of secrecy (Braat 2020). What is largely missing, however, is an investigation into political actors' perspectives on and justifications for secrecy. In a democratic system, this is particularly pertinent when it comes to understanding interactions between branches of government, especially parliaments and executives. The most prominent examples of political secrecy are instances of *executive* secrecy.[2] In turn, parliaments as legislators and overseers of the executive have

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2 Other branches keep secrets, too: in both parliaments and courts we find in-camera procedures designed for protecting their internal deliberations.

stakes in limiting executive secrecy, even though this is moderated in parliamentary systems where parliamentary majorities are linked to the government.

Executive secrecy exists in different policy fields. Foreign and security policy, for example, are especially prone to executive secrecy (Colby 2008; Rosén 2011). I argue that less prominent fields are also worth investigating. Therefore, this paper takes public-private partnerships (PPPs) as an example. The term encompasses a wide range of long-term contractual cooperations between public and private partners (see Sack 2019). PPPs are a relevant case given the public-private nature of the information concerned: while information on *classic* executive activities is subject to parliamentary control, the constellation is more difficult with PPPs. Private actors may claim protection for their trade and business secrets since they are not just contractors providing public services but also market participants and competitors in other contexts. Previous research has pointed out the principal-agent problems arising from these types of cooperation (Krumm 2013; Krumm and Mause 2009) and analysed secrecy and transparency surrounding PPP projects (Grimsey and Lewis 2002; Hood et al. 2006; Reig et al. 2021; Reynaers and Grimmelikhuijsen 2015), their effects on the public sector's bargaining power vis-à-vis private companies (Siemiatycki 2007) and on the quality of PPP projects (Rosell and Saz-Carranza 2020). However, while the academic literature has been interested in the effects of PPP projects on executive secrecy and transparency, we know less about how political actors make sense of executive secrecy surrounding PPP projects. How do political actors justify executive secrecy? How can their actors' theories be systematised?

The paper focuses on political actors' conceptions of legitimate secrecy. First, it theoretically develops the idea that we should investigate actors' theories and introduces Costas and Grey's distinction of an informational and a social approach to secrecy for making sense of actors' practical theories of secrecy (part 2). Part 3 describes how the empirical analysis was conducted. Turning to the case of parliamentary debates about public-private partnerships in Germany, the paper proceeds to reconstruct how secrecy became an issue in PPP-related debates over time (part 4). Then, it delves into political actors' theories of legitimate secrecy (part 5). In the conclusion (part 6), the paper summarises the findings.

2. From Academic Theories to Actors' Theories: Perspectives on Legitimate Secrecy

Secrecy has long received scholarly attention. In the early 20th century, the emerging discipline of sociology addressed secrecy as a social and organisational phenomenon. Georg Simmel defined secrecy as a "sociological technique" (Simmel 1906: 464) and took it to be "one of the greatest accomplishments of humanity" (Simmel 1906: 462). He pointed out that secrecy is a social phenomenon rather than just

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a means for protecting valuable information. Secrecy shapes relationships and confers value upon its content and the initiated. Max Weber, in turn, focused more on formal organisations and famously stated a tendency of bureaucracy towards secrecy (Weber 1978) beyond areas where there is an *objective* reason for it. Both share the assumption that secrecy is an inescapable social and societal fact.

In the form of individual privacy and the secret ballot, a specific, citizen-centred form of secrecy is entrenched in liberal democratic systems. But beyond individual secrecy meant to protect the individual from the state (see Wegener 2006 on the history of ideas and law), and despite the sociological observation of its ubiquity, secrecy is by no means a seamless component of democratic decision-making. Often, it is problematized as a violation of democratic standards of publicity and transparency (Stiglitz 2002: 34). Consequently, theoretical and normative considerations of democratic secrecy grapple with the issue of whether secrecy can be legitimised (e.g. Mokrosinska 2024). On the one hand, secrecy may serve democratic purposes: "The conflict involves this basic dilemma of accountability: democracy requires publicity, but some democratic policies require secrecy" (Thompson 1999: 182). But in the light of the normative significance of publicity for democracy (Luhmann and Fuchs 1992; Wegener 2006; Westerbarkey 1991), secrecy requires justification.

In the literature, there are two lines of argument on what this justification can be based on. Accordingly, it can either be substantial or procedural: substantial justifications focus on notions of necessity. Such a functional perspective on secrecy (Shils 1956) is based on the idea that secrecy might be a "necessary evil" (Kitrosser 2005; Shils 1956) for achieving overriding goals such as security. It derives secrecy's justification from its content. Where information could jeopardise a goal given its sensitivity, it needs to be kept secret. Legal scholars, for example, identify typical reasons for secrecy, such as privacy, state security, and separation of powers (Wischmeyer 2018). Furthermore, open and rational deliberations, it is argued, can only take place shielded from publicity, though sometimes proponents do not call this secrecy but confidentiality (Depenheuer 2002; Sarcinelli 2009). Procedural justifications, in turn, stress the role of the decision-making process *on* secrecy. Scholars have suggested that the democratic legitimacy of secrecy can arise from process (cf. Luhmann 1978), from democratically deciding upon it (Sagar 2007: 408). "Secrecy is justifiable only if it is actually justified in a process that itself is not secret. First-order secrecy (in a process or about a policy) requires second-order publicity (about the decision to make the process or policy secret)" (Thompson 1999: 185). The idea of second-order publicity is also reflected in typologies of secrecy. Where second-order publicity is

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lacking, secrets turn from simple into reflexive ones (Sievers 1974), or from shallow to deep ones (Pozen 2010).[3]

Both arguments, based on substantive and procedural legitimation, however, are contestable. Substantive legitimation requires an assessment of the information's value and sensitivity. At first glance, identifying and balancing costs and benefits (Epps 2008) seems to be a simple way to decide whether secrecy in a concrete situation and context is adequate or not. But, if we look more closely, the question remains: *what* end justifies *what* means? Answering this question is contentious on two levels: first, the balancing of conflicting and potentially incommensurable interests is inherently political (Sagar 2013: 120). Second, deciding on secrecy's necessity also involves assessing disclosure risks, a task that comes with inherent uncertainty (Fenster 2012; Gowder 2008). For example, we can as easily argue that deliberation benefits from confidentiality, allowing people to openly and reasonably debate alternatives without public pressure (Depenheuer 2002: 25) as we can assume that only a public debate ensures that every argument and alternative will be heard (Samuel 1972; Tefft 1979). A similar point can be made about national security: it can be argued that vulnerabilities are best kept secret (Schoenfeld 2010) or that the public should be aware of them in order to protect themselves accordingly (Shapiro and Siegel 2010). These examples show that there can be significantly different evaluations of secrecy's necessity. There is discretion (Bok 1989: 176; Rösch 1999) on whether secrecy is justified in a specific case. Substantive arguments on the necessity of secrecy thus fail to provide an evident legitimation.

Procedural arguments about the legitimacy of secrecy manage to avoid a normative predetermination of what kinds of secrecy are democratically legitimate, focusing on whether secrecy is authorised through democratic (and open) decision-making processes. Nevertheless, they, too, are contested for two main reasons. First, there is a theoretical debate on whether an informed and independent decision on allowing secrecy is actually possible. Secrecy, it is argued, deprives citizens of their autonomy and knowledge to decide about secrecy rules, "because secrecy defeats the principles of rationality which must underlie any such legitimate process" (Gowder 2008: 683). Thus, secrecy cannot be authorised without losing autonomy. Even if this rather abstract objection is dismissed, a second one remains. The latter questions whether secrecy really can be managed and limited through rules or law (e.g., Horn 2011: 113). It is in secrecy's nature that it eludes legal circumscription:

3 While Sievers approaches the topic sociologically, Pozen discusses normative-theoretical perspectives, arguing that neither utilitarian nor liberal democratic or constitutional theory allows for deep secrecy. He, like Thompson, argues that general decisions about what is supposed to be secret and why must be taken in public.

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deviation from rules cannot be easily traced, especially given second-order secrecy or circumvention strategies (such as "hidden law", Roberts 2006: 20). Once authorised, what would keep executives from using secrecy for their advantage (Sagar 2013)? Conceptualising secrecy as legitimate when decided upon in a democratic and public process requires compliance on the part of those keeping the secrets. Drawing on Simmel (1906) and Weber (1978), who prominently identified secrecy's crucial role for social relations and bureaucratic tendencies towards secrecy, we should be cautious to assume that secrecy is only used as a means to attain democratically set goals. Secrecy as "the exception of the political in the modern age" is not "a temporary suspension of the entire legal order, but [...] a permanent possibility inherent in the state itself" (Horn 2011: 114). Oversight mechanisms, as an attempt to procedurally contain secrecy *ex post* (Riese 2023), can limit these problems but often come with their own shortcomings and vulnerabilities. Not all overseers may be equipped (on prerequisite knowledge, see Pozen 2010:324) or willing to conduct meaningful oversight (due to deference, see Fenster 2006; Fuchs 2006; or ulterior motives, see Sagar 2013).

Summing up, the legitimacy of executive secrecy in democratic systems is inherently contested. Whether secrecy is justified or not is subject to negotiation and justification. This makes a strong case for investigating political actors' own conceptions of legitimate secrecy. How, then, can actors' theories of legitimate secrecy be systematised? This paper argues that we can draw on Jana Costas's and Christopher Grey's work for this purpose (Costas and Grey 2014, 2016). They have developed a distinction of approaches to secrecy, building on Simmel's focus on social relations. They identify an *informational* and a *social* approach. The informational approach is based on the idea that secrecy's "significance lies primarily in the protection of valuable information" (Costas and Grey 2014: 1424). The above-discussed substantive justifications of secrecy focusing on necessity fall into that category of conceptualising secrecy as a function of the value of concealed information. The social approach turns away from this functionalist logic of necessity and highlights secrecy's social dimension, drawing on Georg Simmel. Secrecy shapes social relations, establishes hierarchies, and creates identity. Therefore, information is not inherently valuable. "Indeed it may even be that what is kept secret only acquires its value by virtue of being kept secret" (Costas and Grey 2014: 1437). Originally, Costas and Grey developed these types to distinguish scholarly perspectives on secrecy. However, I argue that they can also be fruitful for analysing political actors' theories of secrecy. How political actors make sense of secrecy and what their conceptions of its (il)legitimacy build on can be adequately interpreted according to the typology of an informational and a social approach to secrecy.

Both approaches see secrecy as inevitable, though for different reasons: the social approach conceptualises secrecy as a "universal sociological form" (Simmel

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1906: 463), while the informational approach considers secrecy to be essential for specific goals or policies. What distinguishes the two approaches is that an informational view of secrecy does not account for its impact on relationships. It focuses on the necessity of a secret for a policy's effectiveness without discussing the effects on social relations, while the social approach to secrecy holds that secrecy and disclosure have inherent consequences for social relations, irrespective of content and its sensitivity.[4]

3. Empirical Approach

The paper focuses on how parliamentary actors develop their own practical theories of legitimate executive secrecy. To do so, it draws on a case study of parliamentary debates on public-private partnerships in the 15th to 19th legislative periods (2002-2021) in the German Bundestag on public-private partnership secrecy and transparency. This time period starts with the first parliamentary proceedings concerning PPPs and their facilitation, including the so-called "PPP Acceleration Act" as well as the later debates after the first experiences with PPPs.

Two types of documents were included in the analysis: parliamentary documents and expert interviews. While the parliamentary debates are suitable for comprehending the condensed ideas of (il-)legitimate secrecy addressed to the public, the interviews add background information, expert knowledge and interpretations.

For the plenary debates, one legislative act and several motions were included. Whether or not the motions were passed was not relevant to the interest in the political actors' theories of legitimate executive secrecy – and, in fact, we see the typical pattern of parliamentary democracies, where it is regularly the initiatives by the governing majority that are successful. Table 1 gives an overview of the parliamentary proceedings under review. For each proceeding, plenary protocols and – where available – committee minutes were included. Further legislative debates on PPPs were excluded when they did not (or only marginally) address issues of transparency or secrecy, for example, the amendment to the German Basic Law precluding PPPs for the entire German highway grid or the (unsuccessful) attempts by the oppositional left and left parties to stop the construction of a specific highway that was planned in the form of a PPP project.

4 Of course, the two are conceptually distinct but need not be mutually exclusive in political practice: informational approaches might be used by political actors to legitimise secrecy while at the same time considering social motives such as avoiding blame (Kitrosser 2008) and keeping power (Wise 1973).

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Table 1 Overview of empirical material for document analysis

Date	Parliamentary printed matter	Party	Title
04.07.2003	Drs. 15/1400	SPD & Bündnis 90/ Die Grünen (gov)	Motion 'Public-Private Partnerships'
03.03.2004	Drs. 15/2601	FDP (opp)	Motion 'Privatization and Public-Private Partnerships'
30.11.2004	Drs. 15/4391	CDU/CSU (opp)	Motion 'Producing transparency of the processes concerning the preparation of the toll – disclosing the Court of Auditors' report'
14.06.2005	Drs. 15/5668	SPD & Bündnis 90/ Die Grünen (gov)	'Act to accelerate the implementation of public-private partnerships and to improve the legal framework for public-private partnerships'
18.03.2009	Drs. 16/12283	CDU /CSU & SPD (gov)	Motion 'Creating fair conditions of competition for public-private partnerships'
23.03.2011	Drs. 17/5258	Bündnis 90/ Die Grünen (opp)	Motion 'Transparency in Public Private Partnerships in the Transport Sector'
10.05.2011	Drs. 17/5776	Die LINKE (opp)	Motion 'Speeding up remunicipalisation – stopping public-private partnerships'
22.05.2012	Drs. 17/9726	SPD (opp)	Motion 'For a New Infrastructure Consensus: Differentiated Evaluation of Public-Private Partnerships, Developing Further with More Transparency and Strengthening the Focus on Efficiency'
12.03.2013	Drs. 17/12696	CDU/CSU & FDP (gov)	Motion 'Public-Private Partnerships: Using Potentials Right, Design SME-friendly'
12.03.2013	Drs. 17/12700	CDU/CSU & FDP (gov)	Motion 'Stability, growth, development – further preparing strong German medium-sized companies for the future'
11.05.2016	Drs. 18/8402	Bündnis 90/ Die Grünen (opp)	Motion 'Not at any cost – realizing major projects on time and on budget'

Date	Parliamentary printed matter	Party	Title
29.11.2016	Drs. 18/10499	DIE LINKE (opp)	'Draft of a Fourth Act amending the Federal Highway Toll Act'
15.02.2017	Drs. 18/11188	Bündnis 90/ Die Grünen (opp)	Motion 'Preserving public assets, keeping an honest balance sheet, investing the right way'
19.05.2021	Drs. 19/29788	Bündnis 90/ Die Grünen (opp)	'Draft Act to restrict the privatization of public infrastructure in the field of federal highways'

All translations by the author.

The second empirical source was nine semi-structured expert interviews conducted in 2017 with eleven interviewees, including (at the time) current and former Members of Parliament, parliamentary and executive staff. Both text types (documents and interviews) were first inductively coded. In a second step, all those codes that dealt with the justification (or limits) of secrecy were systematised deductively according to the typology of informational and social perspectives on secrecy derived from Costas's and Grey's work. Thus, patterns of political actors' accounts of secrecy and its justification could be identified.

4. The Development of the Parliamentary Debate on PPPs – How Secrecy Became an Issue

Initially, parliamentary discussions about public-private partnerships did not focus on transparency or secrecy. Instead, the main emphasis lay on the efficiency and benefits of PPPs as a governance tool and on implementing rules to facilitate PPPs. One exception was the Liberal Democrats' motion in 2004 that stressed the need for parliamentary oversight mechanisms and transparency, at least vis-à-vis parliament (Drs. 15/2601). Only later did secrecy feature prominently on the agenda. Legally regulating public-private partnerships in Germany is a relatively young policy-making subject, starting with the PPP Acceleration Act in the 15th legislative period,[5] and the focus at first was on what could be gained by facilitating PPPs.

5 The name of the law roughly translates to "Act to accelerate the implementation of public-private partnerships and to improve the legal framework for public-private partnerships" ("Gesetz zur Beschleunigung der Umsetzung von Öffentlich Privaten Partnerschaften und zur Verbesserung gesetzlicher Rahmenbedingungen für Öffentlich Private Partnerschaften")

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The first debates about secrecy followed with some delay and were generally motivated by initial experiences with the instrument or specific cases such as the introduction of a truck toll for federal highways. They did not take the form of legislation but motions that suggested goals for PPPs and cornerstones for the government's approach to PPPs. These motions in the 17th legislative period focused on transparency, nearly all containing a demand for more transparency in their title (see Table 1). Only the LINKE's motion differed in that regard. Since they had rejected PPPs as an instrument from the start and repeatedly demanded remunicipalisation, they did not discuss *how* to organise PPPs but *whether* to use them at all (Drs. 17/5776).

These debates on transparency focused on all the stages of the decision-making process on PPP projects, starting with economic feasibility studies and ending with evaluations and Court of Auditors reports. First, there are the economic feasibility studies and the fact that they are secret. In the critics' view, this poses a fundamental problem for deciding whether to do a project as a PPP or not. One Green Party MP pointed out why he sees this as a problem: "We cannot even decide whether the projects are more efficient" (Anton Hofreiter, Bündnis 90/ Die Grünen, PlPr 17/181: 21583[6]). The debate about these studies did not only concern the level of balancing secrecy with MPs' rights and their need to know, but also whether secrecy is legitimate at all. One interviewee thus questioned if business secrets can be the source of state secrecy in this case at all, since at the moment of the feasibility studies, no private partner was involved yet.

Secrecy was not only discussed as a problem when it comes to economic feasibility studies but also concerning the contracts with private partners (e.g., Michael Groß, Social Democrats, PlPr 17/181: 21578). One issue was complexity, which is, strictly speaking, not an instance of secrecy, but rather one of intransparency.[7] But the contracts themselves are often secret, too. Costs and benefits and the risk allocation (e.g., Ulla Lötzer, Die LINKE, PlPr 16/211: 22925) between public and private actors thus remain opaque.

Finally, the secrecy of evaluations of PPP projects was an issue. One of the analysed plenary debates centred on a motion of the then-oppositional Christian Democrats concerning a report by the German Court of Auditors concerning the truck toll introduction. The motion demanded the disclosure of this report on the specific PPP project (Drs 15/4391). Other MPs addressed the issue of secret Court of Auditors' reports, too (e.g., Beatrix Philipps, Liberal Democrats, PlPr 15/149: 13950).

6 All quotes from interviewees and MPs in plenary debates were translated by the author.

7 Secrecy requires the intent (Bok 1989; Sievers 1974) to keep information from a third party. Even if we assume intent here (complexity as an instrument for hiding relevant facts), I would not consider this secrecy but rather a different form of non- or disinformation.

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In conclusion, the debates in the 17th legislative period were concerned with secrecy in all stages of the decision-making and implementation process of PPP projects, from deciding whether to do public procurement in a specific case in the form of a PPP to its ex-post evaluation. Much criticism of secrecy was motivated by a concern for parliamentary and public oversight. Opposition party MPs problematised secrecy as an impediment to oversight. Government MPs, in turn, justified their demand for transparency differently. PPP transparency, they argued, could "steal critics' thunder" (Karl Holmeier CDUCSU PlPr 17/181: 21584) or function as a "tailwind" for PPPs (Reinhold Sendker CDUCSU PlPr 17/181: 21580)[8].

Subsequently, in the 18th and 19th legislative periods, it can be seen that the issue was only actively addressed by some of the parliamentary party groups in the German Bundestag. Transparency and secrecy in PPPs have increasingly become an opposition topic. The Left and the Green parties repeatedly put the issue on the Bundestag agenda. They demanded the disclosure of economic feasibility studies and contracts (Drs. 18-10499 by the LINKE). Bündnis 90/Die Grünen, too, insisted on regulating PPP transparency in a broader motion demanding a general transparency law (Drs. 19-14596). While they had been part of the government that introduced the PPP Acceleration Act, they increasingly argued not only in favour of establishing transparency rules and limiting PPP secrecy, for example by establishing new rules for accounting for the costs of PPPs in federal budgets (Drs. 18-11188), but in general in favour of precluding the use of PPPs as an inefficient and inherently intransparent instrument (for highways, see Drs. 19-29788). In a similar vein, the LINKE demanded remunicipalisation, arguing that public service provision should remain in the state's hands (e.g., Drs. 19/10755). However, the parliamentary debates that addressed these motions and drafts – they were often debated together with other drafts and motions – usually focused on substantive questions of how to design PPP projects and whether they are cost-effective, and not on issues of transparency and secrecy. There is a continued debate on whether to use PPPs as an instrument at all. While the main concern is about projects' (in)efficiency, secrecy remains a cornerstone of opponents' arguments against PPPs. In their view, secrecy (of feasibility studies, contracts, and evaluations) cloaks inefficiency and hinders democratic oversight (see Drs. 19/29788 by the Green Party).

8 MPs disagreed on whether secrecy is inherent in PPPs: Some MPs argued that PPPs can also lead to more transparency since they force public administrations to identify the real costs of projects (Michael Bürsch, Social Democrats, PlPr 16/211: 22924) and to clearly define the goals of a project (Wolfgang Tiefensee, Social Democrat 17/112: 12852), but also to plan costs ahead (Florian Toncar, Liberal Democrats, 17/112: 12854). Still, this argumentation was only marginal compared to criticism of PPP secrecy, and it was found amongst government party MPs, while the main criticism of PPP secrecy originated with the opposition.

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5. Actors' Theories of Legitimate Secrecy

For a time, secrecy was a central issue in the debates about public-private partnerships. Analysing the parliamentary debates and interviews helps reconstruct how political actors make sense of executive secrecy. The most dominant arguments fall into the category of what Costas and Grey called *informational*. Political actors focused on rationalising secrecy as necessary for achieving overriding goals. Three of those could be identified throughout the empirical material: the main argument concerned private partners' rights and the protection of their trade and business secrets. A second argument related to the state's fiscal interests. And a third argument was based on the separation of powers and the executive's independent sphere for decision-making (*Kernbereich exekutiver Eigenverantwortung*). In each of the three, the underlying assumption was that there is information that is sensitive to the respective goal and needs to be protected.

The most prominent argument concerned third-party rights. Here, the need for executive secrecy was derived from the private companies' right to their trade and business secrets, which the state has to protect when cooperating with them. It is an informational argument since it rests on the expectation that disclosing this kind of secret would weaken private companies' competitiveness. However, actors disagreed on the scope of legitimate trade and business secrecy. One perspective was that these private rights set a limit to transparency: "Transparency is possible to a certain point. But not all can be disclosed" (Werner Simmling, Liberal Democrats, PlPr 17/181: 21581). For the Liberals, for example, this was rooted in a strong programmatic emphasis on private autonomy (Florian Toncar, Liberal Democrats, PlPr 17/112: 12853). This claim on behalf of private interest was even evaluated to be an inevitable *truth*: "However, transparency ends – this is a piece of truth – where the interests of the project partners worthy of protection and the economic interests of the state are at stake" (Reinhold Sendker, Christian Democrats, PlPr 17/237: 29675). Other actors did not question the informational value of trade and business secrets as such, but whether they can and should justify executive secrecy. In their view, private companies should submit to the state's transparency requirements when (voluntarily) entering into a PPP contract with the state, as one interviewee stressed: "if a private contractor gets involved with the state, then they know that this is a democratic state and democratic scrutiny belongs to the democratic state, and nobody is forced to answer for the democratic state, that's why there's also another restriction on the trade secret." This interviewee accepted the informational value of trade and business secrets but questioned whether they should bind democratic executives.

A second, less prominent informational argument for secrecy concerned the state's fiscal interests. Its proponents pointed out that the state, too, might have an interest in secrecy to secure its negotiation position and preclude anticompetitive

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agreements by the companies (Karl Holmeier, Christian Democrats, PlPr 17/181: 21584). Several executive interviewees argued that the state's bargaining position would be impaired if the state waived secrecy, allowing private companies to take advantage of their knowledge about, say, the state's internal calculations and expectations laid down in economic feasibility studies. Information on the state's bargaining position was thought of as inherently valuable since it could be exploited by private companies. Confidentiality was necessary to "prevent bidder collusion, protect innovation, and bring the award procedure to a successful conclusion with the most efficient outcome", a governing majority motion argued (Drs. 17-12696: 5 by Christian and Liberal Democrats).

Finally, a third informational argument for secrecy derived from the separation of powers: for the executive to be independent, the argument went, it needs a sphere of sovereign decision-making (the so-called *Kernbereich exekutiver Eigenverantwortung* as coined by the German constitutional court). The process of decision-making on PPPs should also be protected given the separation of powers – unfinished executive decisions are beyond parliament's scope of control. However, defining what qualifies as unfinished decision-making – how long are PPP projects *in the making* and thus exempt from parliamentary scrutiny – proves tricky, as several interviewees pointed out. Like the fiscal interests argument, the separation of powers argument was primarily brought up by executive interviewees whose institutional role arguably shapes their perspective on secrecy.[9]

While these were the main arguments in favour of secrecy, they were not at all consensual. Most disagreement concerned the argument about third-party rights. To what extent private companies' trade and business secrets could commit the state to secrecy was highly contested. Critics argued that the state could and should set the rules for cooperation. One interviewee, for example, pointed out that private partners are or should be fully aware of the consequences of entering into a contract with the state and that, therefore, transparency should be the default setting. Others took a middle ground and argued that economic secrecy and publicity should be balanced, thus rejecting the idea that trade secrets override disclosure requests by definition (e.g., Karl Holmeier, Christian Democrats, PlPr 17/181: 21584). Instead of considering trade secrets an absolute boundary for disclosure, it was then argued that where private companies provide public services (and public money is spent), disclosure needs to – and can – be the default setting. Thus, the approaches differed. Which principle, transparency or (business) secrecy, should the default setting

9 This argument cannot so easily be qualified as informational as the other two, since it has some social aspects to it. In addition to the informational value, it is also intended to uphold specific roles in decision-making processes, which has a social side to it.

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limiting the other's reach vary? Either business secrecy finds its limits in the transparency requirements of the public sector, or transparency can only be expected as long as it does not harm private secrecy interests. How the different informational motives were weighted differed in part according to party affiliation. The Christian and Liberal Democrats were more willing to accept the protection of trade and business secrets as a rationale for executive secrecy concerning PPP projects, while the Left and Green parties were more critical of the argument that the sensitivity of this kind of third-party information justifies secrecy. Arguments on the state's fiscal interests, however, were less clearly driven by party ideology.

While informational concerns – even if contested in substance – were the dominant lens political actors used for discussing secrecy, we also find instances of what Costas and Grey called the *social approach*. Debates about the need for oversight or minority rights in oversight committees bear witness to this. Claims that government actors might use secrecy to cover up wrongdoing – be it mistakes in negotiating contracts or organising a specific PPP project (as in the truck toll example) or be it the circumvention of the so-called *debt brake*[10] – were strong examples of how secrecy creates power relations and produces room for manoeuvre for the executive. A recurring theme was that someone with a clear conscience would not need to keep secrets (for example, Christian Democrat motion Drs. 15-4391), and that secrecy was used to cover up incompetence (Dietrich Austermann, Christian Democrats, PlPr 15-149: 13976). Calls for oversight mechanisms, therefore, relied on a social understanding of secrecy.

Another instance of a social understanding of executive secrecy was actors' problematisation of the social hierarchies created by different gradations of access to secret information. Often, MPs themselves could access respective documents in a specific classified document reading room (*Geheimschutzstelle*). However, they were uncomfortable with the position it puts them in when they can access secrets (as MPs or members of specific committees) but the general public cannot.

Consequently, they criticised the fact that the documents were secret from the public since this meant that even though they could read them, they could not use them in plenary or public debates. This even led to some MPs not using the reading room: "One thing we will not do as Members of Parliament, namely, look at the report of the Court of Auditors in the *Geheimschutzstelle*. Because then we would have signed that we cannot use further what we have read" (Horst Friedrich, Liberal Democrats, PlPr 15/149: 13972). One interviewee also confirmed that they never

10 One criticism of PPPs is that they are not chosen for their efficiency but simply as an instrument of circumventing the German constitutionalised "debt brake" by cloaking deficits and creating "shadow households" (Anton Hofreiter, Bündnis 90/ Die Grünen, PlPr 17/181: 21582).

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used the *Geheimschutzstelle* and instead tried to get the information elsewhere and then be able to use it publicly.

This can be illustrated by the debate about the secret reports on the truck toll introduction. A motion by the Christian Democrats suggested blacking out the passages of the report containing business secrets and declassifying the redacted document. They preferred limited information that they *could* use over full information that they could *not* use for public debate. A similar case is described by one interviewee, who pointed out that they could gain more (usable) information through an FOI (*Informationsfreiheitsgesetz*, IFG) request as a private citizen than they could as an MP. Even though the document accessed via an FOI request was heavily redacted, it was at least usable. In these cases, the practice of blacking out, which at first sight simply seems to be an instrument of secrecy, can also be perceived as a way to provide (limited) transparency.

These examples show how secrecy (and being an insider) also produces problems for the secret bearer: it confers some responsibility on those who know (even if they are not formally responsible) while not enabling them to challenge decisions. On the other hand, secrecy produces a hierarchy between those who have the power to (de-)classify and those who are simple receivers of information and its classification level.

Whether a social perspective on secrecy and its power implications was taken was partly due to status as a government or opposition party MP, and respective perspectives shifted with the role of a party within the parliament: as an opposition party, the Christian Democrats focused much on transparency to fulfil their role as an overseer, arguing that those who have nothing to hide have no reason to reject transparency (Drs 15/4391) and that anybody with a "clear conscience" (Klaus Lippold, CDUCSU PlPr 15/149: 13968) would not keep said court of auditors' report on the highway toll contract secret. Thus, they assumed that secrecy was used not to protect legitimate private or state interests but to cover up their mistakes and protect them from criticism. Later, as a governing party, they focused more on arguments about protecting business secrets and state interests.

6. Conclusion

I have argued that democratic systems face a conundrum: on the one hand, they depend on publicity; on the other hand, there might be democratically established goals only attainable in secret. In addition, as we can learn from Simmel, secrecy is inherent to social relations. It might thus be the case that secrecy is a social fact independent of the necessity for a specific goal, a fact that democratic systems have to deal with. How political actors deal with it, however, has been less researched.

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The paper started out with a discussion of theoretical conceptions of secrecy's role in a democratic polity. It argued that there is no way to theoretically establish a democratic scope of secrecy, but that there is an inherent need to balance and continuously justify secrecy in a democratic polity. Therefore, the paper argued that it would be worthwhile to empirically investigate actor theories of democratic secrecy. In order to do so, the paper adapted Costas's and Grey's distinction of informational and social conceptions of secrecy for systematising actors' theories of secrecy.

Based on these theoretical and conceptual considerations, the paper drew on a case study of German parliamentary debates on public-private partnership secrecy in order to trace political actors' own theories of democratic secrecy. It showed how, over time, there was significant debate within the Bundestag and between parliament and the responsible parts of the executive about what had to be kept secret in what way. The weighing of competing claims for secrecy (especially business secrets) and disclosure was – and remains – contested. Several stages of PPP projects (from deciding whether to do a PPP to evaluating PPPs afterwards) constitute spheres of secrecy that are criticised, mainly by opposition MPs. Still, governing party MPs, too, saw a need for more transparency, especially for legitimising PPPs in public.

Public-private partnerships, however, come with specific setups of secrecy and transparency – each stage of a project has its own issues of secrecy and transparency, from feasibility studies through contracts to ex post evaluations. How far, then, do the findings travel? The focus on a less prominent instance of secrecy – as compared to classic fields of executive secrecy such as foreign and security policy – provides an example of more *day-to-day* debates on secrecy. At the same time, PPPs concern the use of public funds as well as the provision of public goods and, therefore, are a relevant subject, as public interest in concrete projects and connected issues of secrecy and transparency shows. Nevertheless, PPP secrecy is merely an example; whether the patterns observed can also be found in other fields remains a research desideratum.

Finally, differentiating between social and informational approaches to secrecy turned out to be a fruitful strategy for systematising actors' theories of secrecy in the example of PPPs. While secrecy as a social phenomenon is seen as a problem and warrants control mechanisms, conceptualising secrecy as an informational necessity allows political actors to integrate secrecy into a democratic framework and regulate it in a way that, in their view, provides second-order legitimacy and potentially reconciles secrecy and democracy.[11] Thus, while the informational approach might be unsatisfying from a theoretical point of view (Costas/Grey 2016) because of its

11 Albeit with very different limits: The LINKE and Bündnis 90/Die Grünen arguably draw the narrowest boundaries for legitimate secrecy.

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functionalist assumption of secrecy's instrumental value, it might be decisive in practice for how actors discursively produce legitimacy for secrecy.

Acknowledgements

This work was supported by European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme [ERC-2014-STG GA 639021]. The author further thanks the anonymous reviewers for their valuable feedback and suggestions.

Literature

Abazi, Vigjilenca. 2019. *Official Secrets and Oversight in the EU: Law and Practices of Classified Information*. Oxford: Oxford University Press.

Bok, Sissela. 1989. *Secrets: On the Ethics of Concealment and Revelation*. New York: Vintage.

Braat, Eleni. 2020. "Self-Reinforcing Secrecy: Cultures of Secrecy Within Intelligence Agencies." Pp. 118–34 in *Routledge research in comparative politics, Transparency and secrecy in European democracies: Contested Trade-Offs,* edited by D. Mokrosinska. Abingdon, Oxon, New York, NY: Routledge.

Colby, William E. 2008. "Intelligence Secrecy and Security in a Free Society." Pp. 477–86, In *Government Secrecy: Classic and Contemporary Readings,* edited by S. Maret and J. Goldman. Westport, Conn.: Libraries Unlimited.

Costas, Jana, and Christopher Grey. 2014. "Bringing Secrecy into the Open: Towards a Theorization of the Social Processes of Organizational Secrecy." *Organization Studies* 35(10):1423–47.

Costas, Jana, and Christopher Grey. 2016. *Secrecy at work: The hidden architecture of organizational life*. Stanford, California: Stanford Business Books, an imprint of Stanford University Press.

Depenheuer, Otto. 2002. *Selbstdarstellung der Politik: Studien zum Öffentlichkeitsanspruch der Demokratie*. Vol. 103. Paderborn, München: Schöningh.

Epps, Daniel. 2008. "Mechanisms of Secrecy." *Harvard Law Review* 121(6):1556–77.

Fenster, Mark. 2006. "The Opacity of Transparency." *Iowa Law Review* 91:885–949.

Fenster, Mark. 2012. "Disclosure's Effects: WikiLeaks and Transparency." *Iowa Law Review* 97:753–807.

Fuchs, Meredith. 2006. "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy." *Administrative Law Review* 58(1):131–76.

Gowder, Paul. 2008. "Secrecy as Mystification of Power: Meaning and Ethics in the Security State." Pp. 674–94, in *Government Secrecy: Classic and Contemporary Readings,* edited by S. Maret and J. Goldman. Westport, Conn.: Libraries Unlimited.

Grimsey, Darrin, and Mervyn K. Lewis. 2002. "Accounting for Public Private Partnerships." *Accounting Forum* 26(3&4):245–70.

Hood, Christopher, Ian Fraser, and Neil McGarvey. 2006. "Transparency of Risk and Reward in U.K. Public-Private Partnerships." *Public Budgeting & Finance* 26(4):40–58.

Horn, Eva. 2011. "Logics of Political Secrecy." *Theory, Culture & Society* 28(7-8):103–22.

Kitrosser, Heidi. 2005. "Secrecy and Separated Powers: Executive Privilege Revisited." *University of Minnesota Law School Legal Studies Research Paper Series* (06-01).

Kitrosser, Heidi. 2008. "Classified Information Leaks and Free Speech." *University of Illinois Law Review*: 881–932.

Knobloch, Jörn, editor. 2019. *Staatsverständnisse*, vol. 125, *Staat und Geheimnis: Der Kampf um die (Un-) Sichtbarkeit der Macht*. 1st ed. Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG.

Krumm, Thomas, and Karsten Mause. 2009. "Public-Private Partnerships als Gegenstand der (Politik-) Wissenschaft." *Politische Vierteljahresschrift* 50(1):105–29.
Krumm, Thomas. 2013. "Parlamentarische Kontrolle von öffentlich-privaten Partnerschaften." *dms – der moderne staat* 6(2):393–410.
Luhmann, Niklas. 1978. *Legitimation durch Verfahren*. Frankfurt am Main: Suhrkamp.
Luhmann, Niklas, and Peter Fuchs. 1992. *Reden und Schweigen*. Frankfurt am Main: Suhrkamp.
Mokrosinska, Dorota, editor. 2020. *Routledge research in comparative politics, Transparency and secrecy in European democracies: Contested Trade-Offs*. Abingdon, Oxon, New York, NY: Routledge.
Mokrosinska, Dorota. 2022. "Necessary but Illegitimate: On Democracy's Secrets." *The Review of Politics*: 1–25.
Mokrosinska, Dorota. 2024. *State Secrecy and Democracy: A Philosophical Inquiry*. 1st ed. Milton Park, Abingdon: Taylor & Francis Group.
Pozen, David E. 2010. "Deep Secrecy." *Stanford Law Review* 62(2):257–339.
Reig, Monica, Mila Gasco-Hernandez, and Marc Esteve. 2021. "Internal and External Transparency in Public-Private Partnerships – The Case of Barcelona's Water Provision." *Sustainability* 13(4):1777. doi:10.3390/su13041777.
Reynaers, Anne-Marie, and Stephan Grimmelikhuijsen. 2015. "Transparency in Public-Private Partnerships: Not so Bad After All?" *Public Administration* 93(3):609–26.
Riese, Dorothee. 2023. *Executive Secrecy and Democratic Politics: Arguments and Practices in the German Bundestag*. 1st ed. Cham: Palgrave Macmillan.
Rittberger, Berthold, and Klaus H. Goetz, editors. 2019. *Secrecy in European Politics*. 1st ed. London: Routledge.
Roberts, Alasdair. 2006. *Blacked Out: Government Secrecy in the Information Age*. Cambridge, New York: Cambridge University Press.
Rösch, Ulrich. 1999. *Geheimhaltung in der rechtsstaatlichen Demokratie: Demokratietheoretische Überlegungen zum Informationsverhältnis zwischen Staat und Bürger sowie zwischen den Staatsgewalten*. Vol. 309. 1st ed. Baden-Baden: Nomos.
Rosell, Jordi, and Angel Saz-Carranza. 2020. "Determinants of public–private partnership policies." *Public Management Review* 22(8):1171–90.
Rosén, Guri. 2011. "Can You Keep a Secret?: How the European Parliament got access to sensitive documents in the area of security and defence." *ARENA Working Paper* (13):1–28 (https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2011/wp13-11.pdf).
Sack, Detlef. 2019. "Public Private Partnership/Öffentlich-Private Partnerschaften," in: Sylvia Veit (Hrsg.), *Handbuch zur Verwaltungsreform*. Wiesbaden: Springer Fachmedien Wiesbaden, 275-284.
Sagar, Rahul. 2007. "On Combating the Abuse of State Secrecy." *Journal of Political Philosophy* 15(4):404–27.
Sagar, Rahul. 2013. *Secrets and Leaks. The Dilemma of State Secrecy*. Princeton: Princeton University Press.
Samuel, Peter. 1972. "Government Secrecy." *The Australian Quarterly* 44(2):5.
Sarcinelli, Ulrich. 2009. *Politische Kommunikation in Deutschland: Zur Politikvermittlung im demokratischen System*. Wiesbaden: VS Verlag für Sozialwissenschaften.
Schoenfeld, Gabriel. 2010. *Necessary Secrets: National Security, the Media, and the Rule of Law*. 1st ed. New York, London: W.W. Norton & Company.
Shapiro, Jacob N., and David A. Siegel. 2010. "Is this Paper Dangerous? Balancing Secrecy and Openness in Counterterrorism." *Security Studies* 19(1):66–98.
Shils, Edward. 1956. *The Torment of Secrecy: The Background and Consequences of American Security Policies*. London: William Heinemann Ltd.
Siemiatycki, Matti. 2007. "What's the Secret?" *Journal of the American Planning Association* 73(4):388–403.
Sievers, Burkhard. 1974. *Geheimnis und Geheimhaltung in sozialen Systemen*. Studien zur Sozialwissenschaft Vol. 23. Wiesbaden: Springer Fachmedien.

Simmel, Georg. 1906. "The Sociology of Secrecy and of Secret Societies." *American Journal of Sociology* 11(4):441–98.
Stiglitz, Joseph E. 2002. "Transparency in Government." Pp. 27–44 in *WBI Development Studies, The right to tell: The Role of Mass Media in Economic Development,* edited by The World Bank. Washington, DC: The World Bank.
Tefft, Stanton K. 1979. "The politics of secrecy." *Society* 16(4):60–67.
Thompson, Dennis F. 1999. "Democratic Secrecy." *Political Science Quarterly* 114(2):181–93.
Weber, Max. 1978. *Economy and Society.* Berkeley: University of California Press.
Wegener, Bernhard W. 2006. *Der geheime Staat. Arkantradition und Informationsfreiheitsrecht*. Göttingen: Morango.
Westerbarkey, Joachim. 1991. *Das Geheimnis: Zur funktionalen Ambivalenz von Kommunikationsstrukturen*. Opladen: Westdeutscher Verlag.
Wischmeyer, Thomas. 2018. "Formen und Funktionen des exekutiven Geheimnisschutzes." *Die Verwaltung* 51(3):393–426.
Wise, David. 1973. *The Politics of Lying: Government Deception, Secrecy, and Power.* New York: Random House.