



Institucioni i Avokatit të Popullit në Republikën e Kosovës
Institucija Ombudsmana Republike Kosovo
Ombudsperson Institution of Republic of Kosovo

GOOD ADMINISTRATION PRINCIPLES

SUMMARY

BY

OMBUDSPERSON

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The Ombudsperson's concept is of Sweden origin where the institutions was first established in 1809. The term "Ombud" in Swedish means representative, agent, mediator, delegate, etc. Since the establishment of the first Ombudsman Institution in Sweden, it served as a model for establishing this institution in other countries. Thus, during 20th century, this institution was established in many European countries and USA.¹

The Ombudsman Institutions operate in compliance with the *Paris Principles*.² The Paris principles are enshrined in a document approved by the General Assembly of the United Nations, which foresees standards on the functioning of National Institutions for the Promotion and Protection of Human Rights (NIPPHR).

The Ombudsperson has the constitutional³ and legal⁴ mandate defined as independent institution that supervises and protects human rights and freedoms.

¹ The book of the Ombudsman, The ombudsman in Eastern Europe and Balkans, p. 189, for more information, visit:

<http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/Otros/Anexos/Documentos/libroI.pdf>

² Paris Principles, see:

http://kosovo.ohchr.org/repository/docs/Parimet_qe_kane_te_bejne_me_statusin_e_instituci_oveve_kombetare_Parimet%20e%20Parisit.pdf

³ Constitution of the Republic of Kosovo, Chapter I XII

⁴ Law No.05/L-019 on Ombudsperson

The Ombudsperson has competencies to investigate complaints received from each natural and legal person with regards to claims for violation of human rights provided for in constitution, laws and other acts, as well as international instruments of human rights, in particular European Convention on Human Rights, including actions or omissions which constitute misuse of authority.⁵

The core purpose of the Ombudsperson Institution is the implementation of human rights and freedom standards by increasing public authorities' accountability, supervising the systematic violations and restoring the right by strengthening the accountability and good administration culture.

The Ombudsperson Institution, as a mechanism for controlling state administration, has an important role in strengthening the accountability of state administration; it may also contribute to the improvement of administration quality by detecting cases of “maladministration” and raising awareness of civil servants on the publics' expectations with regard to the good governance and good administration, thus impacting the administrative system to be more transparent and accessible for all citizens.

⁵ Law No.05/L-019 on Ombudsperson, Article 16, paragraph 1.

Good governance and good administration

There is no clear and concise definition on “good governance,” therefore leaving room for a broader interpretation. There is no definition that as such would require universal recognition. This was a conclusion of the United Nations High Commissioner for Human Rights. However, what can be said beyond any doubt is that “good governance” includes full respect of human rights, rule of law, political pluralism, effective participation, transparent and accountable processes, efficient and effective public sector, legitimacy, education, equality, as well as attitudes and values that foster responsibility, solidarity and tolerance.⁶ After all, considering all these, one cannot but conclude that good governance depends on political processes and results necessary to be established as the basis for development. The process enabling the use of existing resources in view of realizing citizen rights and avoiding corruption, cannot but serve as a basis for designing a unified definition on “good governance”.

⁶<http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>

The concept of good governance has been clarified in the Resolution 2000/64, whereby the good governance is based on the following attributes:⁷

- transparency
- accountability
- responsibility
- participation
- accountability (towards citizen's needs)

Good governance, good administration and human rights are intertwined in a manner so that they reinforce each other. A document of the Venice Commission for Democracy through Law (Venice Commission)⁸ elaborates the difference between “Good Governance” and good administration, as it is often said that good governance includes good administration. The principle of good administration is based on clearly identifiable procedural rights

⁷ UN Commission on Human Rights, *Commission on Human Rights resolution 2000/64 The role of good governance in the promotion of human rights*, 27 April 2000, E/CN.4/RES/2000/64, available at: <http://www.refworld.org/docid/3boof28414.html> (18 July 2018)

⁸ European Commission for Democracy through Law (Venice Commission), Study no.470/2008, Stocktaking on the notions of “Good Governance” and Good Administration”, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2011\)006-e_20.07.2018](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)006-e_20.07.2018).

whose alleged violation can be brought before a court. It is therefore widely recognized that good administration is by itself a legal concept enshrined in international documents and in the legal order of many states. Therefore, one should keep due account of such difference in nature so that good governance is not equated with good administration.⁹

Human Rights guide the work of the highest state bodies and affect the quality of laws, programmes and other means for increasing the quality of life. On the other hand, these rights could not be respected without a genuine organization of the administration, prepared for respecting human rights and freedoms, and without creating the prospect of exercising such rights. Public administration determines the entirety of activities carried out, those being carried out and those to be carried out, so as to respond to the needs and general interest of the population. Therefore, good administration is closely linked to the human rights and freedoms, which are already widely recognized as a standard of democratic governance. In that sense, good administration affects the right for a regular process, which is defined in Article 6 of the European Convention on Protection of Human Rights and Fundamental

⁹ Ibid, page 4.

Freedoms and its Protocols. Procedural guarantees of the right to a fair and impartial adjudication are applicable to administrative procedures that are subject to court revision – considering as part of the entirety of judicial process.

As a concept, good administration derives from English system; *positively* as *good administration* or *negatively* as *maladministration*.¹⁰

The European Code of Good Administrative Behaviour presents more broadly the substance and procedure as to good administration. The definition provided by the European Ombudsman and adopted by the European Parliament on the maladministration of the administrative activity of EU institutions is that:

*“Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.”*¹¹

As mentioned in the “Integrity Framework” of the Organization for Economic Cooperation and Development (OECD), the cornerstone

¹⁰ For more information, see: <https://api.parliament.uk/historic-hansard/commons/1966/oct/18/parliamentary-commissioner-bill> (17.07.2018).

¹¹ The European Code of Good Administrative Behaviour. For more information, see: http://ec.europa.eu/civil_society/code/index_en.htm, (17.07.2018).

of good governance and precondition of the legitimacy of actions of a government is ethics. With regards to ethics, the contemporary literature suggests the concept of “integrity” as well and often is suggested to address them jointly in order to provide the appropriate results towards prevention of corruption in public administration and strengthening the public administration’s¹² integrity.

The European Convention on Protection of Human Rights and Fundamental Freedoms and its Protocols, international agreements and other instruments for protection of human rights are guaranteed with the Constitution of the Republic of Kosovo, and their application prevails over domestic legislation. Even though these instruments do not foresee principles of good governance defined as such and packaged in the form of international standards, the same obliges the signatory states of conventions to ensure social rules in order to enable the exercise of fundamental rights of citizens (see Article 21 of the Universal Declaration of Human Rights).

¹² For more information, see: <http://www.oecd.org/gov/44462729.pdf> , (17.07.2018) .

In order for our state administration to have principles that will guide its work and thus take necessary step towards respecting human rights, it should firstly consider principles summarised therein, which derive from our laws, namely Law No. 03/L-149 on Civil Service, Law No. 05/L-031 on General Administrative Procedure, Law on Access to Public Documents and Law on Protection of Personal Data, in compliance with the existing definitions of the term “good governance”, which should be considered by the administration in its daily work towards respecting human rights.

In order to contribute to the increase the work ethics in administration and improve the administrative culture in general, and also for the best information of citizens, we present the “Principles of Good Administration – Summary by Ombudsperson”.

Summary of principles

Efficiency

Public authorities should strive to ensure effectiveness and serve the public interest, simultaneously guaranteeing the protection of rights and interests of natural and legal persons.

The administrative procedures' effectiveness means that the public body conducts the administrative procedure as fast as possible and with as little costs as possible for the public body and for the parties, but at the same time in such a manner as to obtain all that is required for a lawful and effective outcome.¹³

Lawfulness

Public administration bases all its work on law and the Constitution, and in general administrative acts applicable within competencies of the body. This especially applies in cases when

¹³ Principle of efficiency determined in Article 10 of the Law No. 05/L -031 on General Administrative Procedure (LGAP)

actions of the administration affect interests and rights of individuals. In such cases, actions of the administration should be specifically authorized by law.

In cases when the administrative body is authorized by law to act discretionarily, this discretionary power should be exercised in compliance with the limits set by law, in compliance with the general principles determined with the Law on General Administrative Procedure.¹⁴

Proportionality in cases when the rights and interests of parties are affected

Public bodies have competencies and obligations to protect the public interest with their decisions. However, whenever these bodies, by protecting public interest, are found in a situation to infringe or limit the rights of individuals, this infringement or limit should be proportionate so as to achieve protection of public interest.¹⁵

¹⁴ Principle of lawfulness is determined in Article 4 of LGAP.

¹⁵ Principle of proportionality is determined in Article 5 of LGAP.

Equality and non-discrimination of parties

Public bodies should make sure that people in the same situation are treated in the same manner. Specifically, public bodies are obliged to avoid any discrimination based on nationality, gender, race, colour, ethnicity or social origin, genetic characteristics, language, religion, political affiliation or other, nationality, property, birth, disability, age or sexual orientation.

Independence and impartiality

The public body should act in compliance with the law, in an objective and impartial manner, without being influenced by any person, institution or any interest of any public official or other persons. The public body is independent in exercising its functions, to the extent set by the law. The hierarchy between bodies of different levels in the administrative procedure applies only to procedures based on legal remedies and not direct impact of the highest body in the procedure conducted by the body in the lowest level of hierarchy.

Public body should ensure the impartiality of the body (authorized official) both in the subjective and objective point of view, namely both in terms of making sure that elements which would put the impartiality of the employee into question (relations with the party, interest on the matter and alike) do not exist, and in the objective point of view which means providing adequate procedural warranties that would avoid any possible doubt on the employees' or the bodies impartiality.¹⁶

Objectivity

When taking decisions, public bodies should consider relevant factors and weigh them individually in an objective manner, without being influenced by subjective factors, such as feelings, impressions, sympathies, antipathies, etc., excluding any unimportant element from the review of the case.¹⁷

¹⁶ Principle of impartiality is determined in Article 7 of LGAP.

¹⁷ Principle of objectivity is determined in Article 7 of LGAP.

Legitimate expectation, consistency and advice

Actions of public bodies should be predictable and adhere to the legitimate and reasonable expectation of persons.

An administrative action cannot be unjustifiably changed from a previous administrative practice of the body that was used for the same or similar cases.

When a public body, under lawful reasons, refrains from these practices in an individual case, they shall be recorded in written.

Where necessary, public body should advise the public on how an issue within its scope of work is to be addressed and how it will act in handling the issue.¹⁸

Open administration

Public bodies shall act with transparency. A public body shall guarantee the right of a party to be informed on the progress of the administrative proceeding, access to its files and documents,

¹⁸ Principle of legitimate expectation is determined in Article 8 of LGAP.

according to the applicable legal provisions¹⁹ and the right to be informed with appropriate means, except in cases foreseen otherwise by law, considering the necessity of protecting classified information, personal data or business related data.²⁰

Public administration should be accessible to the parties and ensure that parties can address public administration in the easiest manner and without unnecessary bureaucratic complications.²¹

Non-formality and efficiency of the administrative proceeding

Whenever possible, the public body should avoid unnecessary formalities.

The public body develops the administrative procedure as quickly as possible and with as little costs as possible, for both itself and the party, without questioning the legitimate and appropriate outcome of the administrative procedure.²²

¹⁹ Law on Access to Public Documents, Law on the Protection of Personal Data and Law on General Administrative Procedure

²⁰ Law on Classification of Information and Security Clearances, Article 4 and Article 5

²¹ Principle of open administration is determined in Article 9 of LGAP

²² The principle of efficiency is defined in Article 10 of the LGAP.

Information and active assistance

A public body conducting an administrative proceeding shall ensure that a party's obliviousness shall not affect the proper protection of rights and interests of the party as provided by law. The public body shall, in particular, inform the parties of their rights and obligations in the administrative proceeding and specify legal consequences of their actions or omissions during the proceeding.

A public body shall, when conducting an administrative proceeding, assist the parties in protecting and enjoying their legally recognized rights and interests as easily as possible, without affecting the rights and legal interests of other persons.

A public body shall provide interested persons with correct and understandable information concerning:

- the manner on how to initiate a specific administrative proceeding within the respective field of competence;
- legal substantial requirements, as well as proceedings and formalities required for the issuance of the administrative act

- or real act requested, including the documents and declarations that have to be submitted;
- time limit to notify a final decision; and
 - legal remedies available to the party and the way of their exercise²³.

Exemption from payments

For the party, administrative proceedings are free, unless otherwise provided by law.

In cases when the payment is foreseen by law, it shall not be higher than the average cost required for carrying out that type of administrative proceedings.

The public body conducting the procedure may decide to fully or partially exempt a party from paying the tariff foreseen by law, should it consider that the party cannot afford to pay, taking into account that his/her or family income are below minimum income

²³ Articles 9, 11 and 92 of the LGAP.

level. The public body shall, upon request by the party, issue a special administrative act for exemption from payment.²⁴

The right to legal remedies

Except when explicitly excluded by law, any person has the right to use the legal administrative and judicial remedies, as provided by law against any administrative action or omission, which affects his subjective right or legitimate interests²⁵.

Integrity

Civil servants should always behave according to expectations of their citizens. This obligation is not only fulfilled by the actions under the legal provisions during the exercise of their duties. Civil servants should not accept rewards, gifts, or acknowledgments for their work, and should always declare any potential private interests that relate to the exercise of their function. They should

²⁴ The principle of exemption from payment of the procedure is laid down in Article 12 of the LGAP.

²⁵ The right to legal remedies is defined in Article 124 of the LGAP.

avoid conflicts of interest, and avoid leaving impressions that there is a conflict of interest regarding an issue²⁶.

Prohibition to power abuse

Competences shall be exercised only for the purposes provided by relevant legal provisions. Public authorities, in particular, will avoid using these competences for purposes that are not based on the law or are not directed towards any public interest.

Courtesy

The public body needs to be servitor, correct, courteous and accessible in the relations with the parties. When responding to correspondence, telephone calls and e-mails, the Public Service Officer will try to be as useful as possible and will respond as fully and accurately as possible to the questions asked.

If the public body is not competent for the matter in question, it shall refer the party to the relevant public body.

²⁶See Article 5.1.8 of Law 03/L-149 on Civil Service of the Republic of Kosovo (LSC).

If an error occurs that adversely affects the rights or interests of a party, the public body shall apologize for it and try to correct the negative effects resulting from its error in the most appropriate manner and inform the party about any right of appeal in accordance with the relevant law.

Respect towards others

Civil servants should treat each other and parties with respect, be courteous, assistive, cooperative, and act on time. They must make an effort to understand the parties and express clearly and in an understandable language for the party.

Responses in the language of the party

The public body should ensure that any party who writes to the institution in one of the official languages of the Republic of Kosovo

or in the official language used in the municipality receives a response in the same language in which he/she has written.²⁷

Acknowledgment of receipt and note of the competent officer

Any letter or complaint on the institution must receive an acknowledgment of receipt within a reasonable time.

The reply or the acknowledgment of receipt must indicate the name and phone number of the official handling the case as well as the service to which he or she serves.

The public body may not send the acknowledgment of receipt and answer if the letters or appeals are abusive due to their excessive number or due to their repeated or meaningless character.²⁸

²⁷ The use of languages in the administration is in conformity with articles 71 and 72 of the LGAP, the Law on the Use of Languages in the Republic of Kosovo and the Constitution of the Republic of Kosovo.

²⁸ See Article 76 of the LGAP.

Obligation to transfer to the competent body

If a request or complaint is addressed to the wrong body, then the latter shall ensure that the file is forwarded without delays to the competent body.²⁹

Reasonable time limit for decision-making

The public body should ensure that a decision/response in the document is sent within a reasonable time and without delay.

In the event of failure to act within the deadline, the citizen should be informed on the delay and its causes.³⁰

Form of the written administrative act

When issuing written administrative acts the public body must make sure they are issued in the form prescribed by the Law on General Administrative Procedure or by a separate law within the scope of administration. In such cases, the written administrative act, as regards the aspect of the structure, should contain:

²⁹ See Article 75 of the LGAP.

³⁰ The deadlines for administrative procedures are determined by Article 78 of the LGAP and with special laws and by-laws.

- the introductory part, indicating the name of the public body that issued the act, the legal basis, the name of the person to whom the act is addressed, a brief note of the subject matter and the date of issue;
- the enacting clause indicating what has been decided, and the term, condition, obligation and costs of the proceedings, if applicable. The enacting clause can be divided into more points. The costs of the proceedings are set out in a particular clause of the enacting clause.
- reasoning part (rationale);
- the concluding part, indicating when the act enters into force, legal remedies, including the public organ or the court where the legal remedy may be lodged, its form, the deadline for lodging and the way such deadline is calculated. In case the lodging of an administrative appeal does not suspend the enforcement of the administrative act, the concluding part shall also contain this information as well as the reference to legal grounds for such exception.
- if the law does not provide otherwise, the written administrative act, shall also contain the signature or the written name and

surname of the responsible official or the chair of the collegial body and the minutes-taker.

In addition to the above-mentioned legal obligation, it is recommended that public bodies of the same administrative area and of the same administrative unit practice the issuance of special administrative acts of the same form and avoid diversity in the appearance of special administrative acts.³¹

Administrative silence is an exception

Despite that the law foresees the silence of the administration and its legal consequences, public bodies should, during their work, consider the silence of the administration only as an exception rather than as a rule.³²

³¹ See Article 47 of the LGAP.

³² See Article 100 of the LGAP.

The right to be heard

Each party has the right to present its stances, views and claims before a public body which decides on a party's right or obligation. The parties should be given the right to be declared before making a decision.³³

Obligation to provide the reasoning of the decisions

The public body shall clearly justify its decision by showing the facts on which a particular decision has been grounded, as well as the proofs considered as true and those considered as false, giving the decisive reasons for this. The administrative body shall always avoid formal and general reasoning and “sample” reasoning which are same or similar for all cases. Since all cases are different, the reasoning of the decisions shall be individualized.³⁴

³³ The right to be heard is determined by Article 95 of the LGAP.

³⁴ Articles 47 and 48 of the LGAP.

Data protection

The rights, responsibilities, principles and measures with respect to the protection of personal data are determined by the Law on the Protection of Personal Data³⁵. This law also defines the body responsible for monitoring the implementation of the rules for the protection of personal data.³⁶ Personal data is processed impartially and legitimately without prejudice to the dignity of data subjects³⁷.

Sensitive personal data must be specifically protected and classified to prevent any unauthorized access and use, except in instances when the data subject has made them public without evidently or explicitly restricting their use.³⁸

³⁵ Law no. 03/L-172 on the Protection of Personal Data.

³⁶ Ibid, Article 2, paragraph 1.19, the National Agency for the Protection of Personal Data

³⁷ Ibid, Article 3. Principles of Data Processing

³⁸ Ibid, Article 7, Protection of sensitive personal data

Retaining adequate files

The public body shall keep adequate records and files regarding the correspondence received and sent as well as regarding the measures taken by the body.³⁹

³⁹ Law on Office Work Administration

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