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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

**REPORT WITH RECOMMENDATIONS
OF
THE OMBUDSPERSON**

C. No. 826/2018

against

Kosovo Police

Regarding limitations of the right of access to public documents

To: Mr Rashit Qalaj, Director General
Kosovo Police

Copy: Mr Baki Kelani, KP Press and Public Relation Office

Ms Samira Kika, the Office on Human Rights and Diversity
Kosovo Police

Prishtina, 26 April 2019

The purpose of the report

1. The purpose of this report is to draw attention regarding the complaint of A.D. (complainant) for access to public documents filed against the Kosovo Police, analysing the Law No. 03/L-215 on Access to Public Documents (LAPD) concerning the complaint in question, as well as the duties and responsibilities of public institutions/authorities in relation to the implementation of this law in cases of receipt of requests for access to public documents. The report is based on facts, evidence, and case files, which the Ombudsperson Institution (OI) has available.

Constitutional and legal basis

2. According to Article 135, paragraph 3, of the Constitution of the Republic of Kosovo: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*
3. Also, Law No. 05/L-019 on the Ombudsperson, in Article 18, paragraph 1, provides that the Ombudsperson, among others, has the following responsibilities:
 - *“To investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them”* (point 1);
 - *“to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases”* (point 2);
 - *“to inform about human rights and to make efforts to combat all forms of discrimination through increasing of awareness, especially through information and education and through the media”* (point 4);
 - *“to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination”* (point 5);
 - *“to publish notifications, opinions, recommendations, proposals and his/her own reports”* (point 6);
 - *“to prepare annual, periodical and other reports on the situation of human rights and freedoms, equality and discrimination and conduct research on the issue of human rights and fundamental freedoms, equality and discrimination in the Republic of Kosovo”* (point 8);

By submitting this report to the responsible institutions, the Ombudsperson intends to carry out these constitutional and legal responsibilities.

Description of the case

The evidence and information that the OI owns, provided by the complainant and evidenced by the investigation conducted on the case are summarized as follows:

4. On 24 September 2018, the complainant sent a request via e-mail to KP asking for statistics on traffic fines imposed by the Kosovo Police during 2017, disaggregated by type of violation.
5. On 25 September 2018, the complainant received a response, via e-mail, informing him of the actions that the KP has undertaken within its scope in the preventive aspect and in the active operational aspect, as well as the table with statistics on accidents and the number of tickets issued by the KP for January - August 2017 and January - August 2018. On the same day, the complainant again addressed the KP with the request for the statistics on fines imposed to be explained in detail in terms of the reasons why they have been imposed.
6. On 9 November 2018, based on Article 10 of the LAPD, the complainant submitted a complaint to the IO against the KP on the grounds of his right to access public documents being restricted, namely due to restriction of his right to information.
7. Based on the position of the complainant and the KP in the communication between them, the representative of Ombudsperson, on 23 November 2018, addressed the KP Press and Public Relation Office and the Office of Human Rights and Diversity in KP via e-mail requesting information regarding the request of the complainant, respectively information on whether the KP is able to breakdown data required under the request of the complainant.
8. On 26 November 2018, the IO representative received a response from the Office of Human Rights and Diversity, through which they report that the complainant may repeat his complaint to the KP Press and Public Relation Office.
9. On 27 November 2018, the KP Information Office communicated with the complainant via e-mail, referring to the correspondence with regard to his request, whereby *inter alia* states that they have responded to his initial request, but insofar the additional request is concerned, they claim to have forwarded the same to the competent department, while inviting him to submit the identification document along with a statement on the purpose to which such information/statistics will serve.
10. On 2 December 2018, the complainant, referring to the right guaranteed under the LAPD, respectively Article 1, addressed the KP via e-mail informing that his request for access to the requested document, namely to the required data, still continues.
11. On 5 December 2018, the KP addressed the complainant via e-mail, informing him that the KP reviewed his request for additional clarifications regarding the disaggregation of the data. Furthermore, the complainant was informed that the issue of allowing access to the requested data is being disputed, but rather that the complainant's claim is considered incomplete/ambiguous due to the lack of identification of the complainant. Also, the KP has informed the complainant about the provisions of Article 13 [Refusal of access to official documents], paragraph 1.1 of the LAPD. However, the KP has expressed its willingness to provide additional clarification so that the complainant can provide the required information/statistics.

12. On 6 December 2018, the complainant addressed the KP again, providing the necessary clarifications for his request.
13. On 11 December 2018, the Kosovo Police addressed the complainant via e-mail inviting him to the KP Press and Public Relation Office (IPRO-DPP-Prishtina) to obtain the statistics after the final clarification, or otherwise his complaint will remain unfulfilled.
14. On 15 December 2018, the complainant replied the KP informing that he stands by his request of having the concerned data sent to him, stating that he was unable to appear before the KP offices and that the request of him presenting at the KP offices is considered as an obstacle to accessing the required data.
15. On 17 December 2018, the KP, responded via e-mail to the complainant, referring him to the clarifications given in correspondence conducted via e-mail.
16. On 18 January 2019, the OI representative met with the Supervisor of the KP Office for Human Rights and Diversity, from which it was informed that the issue in question should be handled with representatives of the KP Office of Information and Public Relations. On 1 February 2019, a meeting was held with the Head of the Press and Public Relations Office and the position regarding the request of complainant was the same as in the KP response to the complainant, dated 27 November 2018.
17. On 7 March 2019, the Ombudsperson addressed a letter to the head of the KP Press and Public Relations Office, through which, inter alia, reminded him of the LAPD, in particular articles 6, 7 and 11 of this law and requested to be notified of the actions to be undertaken, so that the case of the complainant is handled in accordance with the legal provisions in force.
18. On 15 March 2019, the Ombudsperson received a response from the Chief of Staff of the Director-General of KP, whereby, inter alia, he informed the Ombudsperson that the KP was ready to provide, after obtaining clarification and the official documentation, according to the foreseen procedures, the party with the requested statistics, disaggregated for the requested time period, but the document seeker has not expressed the willingness to contact the KP neither through the telephone line nor meet with KP officials. Also, in this response, he considers that they have acted according to the foreseen legal.

Legal instruments applicable in Kosovo

19. The Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), in Article 41, paragraph 1, provides for the right of access to public documents, which defines: *“Every person enjoys the right of access to public documents.”*
20. Paragraph 2 of the same Article of the Constitution provides that the documents held by all institutions are accessible to all, with the exception of those documents the access to which is limited by law: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”*
21. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19, which defines *“Everyone has the right to freedom of opinion and*

expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

22. Freedom to hold opinions and to receive is provided also in Article 10, paragraph 1, of the European Convention on Human Rights (ECHR) - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”*
23. The spirit of Article 41 of the Constitution is also transposed in Article 1 of the LAPD: *“This Law shall guarantee the right of every natural and legal person to have access, without discrimination on any grounds, following a prior application, to official documents maintained, drawn or received by the public institutions.”*
24. Article 6 of LAPD [Applications for access to official documents] defines:
 - “1. Applications for access to a document shall be made in any form, which enables the public institution to identify the document.*
 - 2. The applicant of a document shall not be obliged to state the reasons to have access to documents.*
 - 3. If an application is not sufficiently precise, the public authority shall ask the applicant to clarify the application and shall assist the applicant in doing so.*
 - 4. The applicant of a document shall have the right to remain anonymous against the third parties.*
 - 5. The public institutions shall provide information and assistance to persons on how and where applications for access to documents can be made.*
 - 6. Formalities for applications shall not override what is crucial for processing of applications.”*
25. Article 7, paragraph 8, of LAPD expressly emphasizes: *“The public authority shall, within seven (7) days from registration of the application, be obliged to issue a decision, either granting access to the document requested, or provide a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make an application for review. Refusal of the request is done with a decision in writing for its refusal.”*
26. Article 11, paragraph 1 [Types of access to official documents], of LAPD defines: *“Where access to a document is granted, the applicant shall have the right to choose whether he or she will consult the original or a copy, or whether he or she will receive a copy of the document in any available form or format at his or her choice.”*
27. Law No. 05/I-031 on General Administrative Procedure, addressing the principle of open administration in Article 9, paragraph 1, defines: *“Public organs shall act with transparency.”*
28. The Ombudsperson concludes that exceptions from the right of access to documents are provided in Article 12 of LAPD. Information may be limited only for the purpose of

protection of legitimate public interests, life or other legitimate private interests, as defined in the Law on Personal Data Protection and the Law on Classification of Information and security clearances.

Case analysis and the findings of the Ombudsperson

29. The Ombudsperson observed that the complainants request for access to public documents, dated 24 September 2018, submitted to KP, relates to the statistics of fines imposed on traffic by KP during 2017, disaggregated by type of violation. On 25th of September 2018, he resubmits the request for statistics on fines imposed to be analysed for the purpose they have been imposed. This application, the KP Information Office considers this as an additional application, despite the fact that its content is the same since the beginning.
30. Additionally, on 15th of March 2019 in the clarification provided in the letter by KP, addressed to the Ombudsperson "*Request-1*" and "*Response-1*", it is stated that the complainant was provided with more information and statistics than requested, as the same are made public on the website and the annual KP report.¹ However, despite the fact that the requested data and information are not classified data, which the KP also confirms in its letters, the complainant was **not** provided with the data and information as he requested. He has been provided with general information regarding actions that KP has taken under its preventive and operative operational aspect, as well as statistics tables for accidents and the number of tickets issued by the KP for the period January - August 2017 and January - August 2018.
31. Moreover, in the letter dated 15th March 2019, in the "*Response-2*" to "*Request-2*", it is stated that the complainant was provided with information beyond those requested, but insofar the analysed statistics are concerned, referring to Article 31, point 8 of the Law No. 04/L-076 on Police, the complainant was invited to provide identification documentation, along with the intended use.² However, the provision on which the KP is based does not require the legitimation of the party and the purpose of application. Furthermore, in the complainant's application is stated: "*... statistics of fines imposed on traffic by Kosovo Police during 2017, according to the type of violation ...*" Whereas, in the clarification by KP for "*Request-2*" and "*Response-2*", it is stated that, for the case in question, the explanations and reasons/documentation by the requesting party were not provided, necessary for the use of the required data. In this regard, the Ombudsperson draws attention to Article 4 [The right of access to documents], paragraph 3, which defines "*Applications of the applicants for access to public documents, submitted in any way permitted with the provisions of previous paragraph of this Article, by the public institution to which the applicant addresses, shall be treated as equal and official...*", implying that no matter who the applicant is, the response to application must be treated as equally and officially, regardless of the form in which the applicant submitted the application. Whereas Article 6, paragraph 1, which defines: "*Any applicant of document shall have the right of access to documents of the public institutions, complying with*

¹ KP letter (no.pr.01/0185, 14/03/2019) as a response to the Ombudsperson letter, dated 15 March 2019, page 2.

² Ibid, page 2.

principles, conditions and limitations established under the Law". Consequently, it is understood that the applicant's identification is not necessary since the possibility of submitting a request for access in any form remains open.³ For the responsible authority, it is necessary to clarify the type of document requested, but irrelevant as to who is requesting it, as all requests are treated based on principles, in an impartial and official manner. Basically, the scaling of access to documents is established lawfully, with the purpose of preventing arbitrariness with regard to the decision on granting or rejecting access to documentation.

32. Further, in the letter in question,⁴ in the "Response-3" for "Request-3", it is stated that the KP addressed the complainant with a detailed explanation regarding official actions and affirming that it is not disputable provision of statistics. In order to avoid miscommunication, according to KP, they invited the complainant to contact KP officials through fixed and mobile numbers. While in the explanation, at this point, it is stated that the applicant has not been collaborative. The Ombudsperson draws again attention to Article 6, paragraphs 1 and 2, according to which the applicant can submit an application in any form, sufficient that the application identifies the requested document. Also, in the present case, the required data do not consist within the exemptions provided for in Article 12 of the LAPD. Moreover, from the correspondence made via electronic mail between the KP and the complainant, it is noted that the application was clear and not complicated.
33. At the end of the letter, dated 15 March 2019,⁵ it is stated that the KP was willing, after the clarifications and upon submission of official identification documents pursuant to the procedures set, to provide the requested data, disaggregated for the requested time period, but as the KP considers the applicant to not have been cooperative and lacked the willingness to have an official meeting, these data have not been provided to the complainant. The Ombudsperson finds that KP's response and stance are in violation of Articles 1, 6 and 11 of the LAPD, as well as with the case law of the European Court of Human Rights (ECtHR). Failure to comply according to the legal provisions in force constitutes misadministration.
34. The Ombudsperson draws attention to the practice of the ECtHR that, under Article 53 of the Constitution, provides a basis for the interpretation of the human rights guaranteed by the Constitution. The ECtHR in the case of *Társaság Szabadságjogokért vs Hungary (Application No. 37374/05)* observes that, "[...]...the information required by the applicant in the present case was available and at disposal (see, to the contrary, *Case of Guerra and Others v. Italy, 19 February 1998, § 53 in fine, Reports of Judgments and Decisions of 1998-I*) and did not require data collection from the Government. Therefore, the Court considers that the State was obliged not to interfere with the flow of information requested by the applicant."(paragraph 36)⁶

³ LAPD, Article 4, paragraph 3.

⁴ KP letter (no.pr.01/0185, 14/03/2019) as a response to the Ombudsperson letter, dated 15 March 2019, page 2.

⁵ Ibid.

⁶ Case of *Társaság a Szabadságjogokért V.Hungaria (Application no. 37374/05, 14 April 2009)*

35. Furthermore, the ECtHR emphasizes that the delays in the provision of information may constantly reduce the value of the information and interest, because news is a service that soon fades and the delay in its publication, even for a short period of time, may deny the whole value and interest of it (see Case of *The Sunday Times v. The United Kingdom*).⁷
36. The Ombudsperson appreciates the willingness of the KP to communicate with the applicant/citizen and the OIK, but reiterates the legal obligations deriving from applicable legislation in function of transparency and democracy. The responsibility to respond to various citizen letters, including those for access to documents and official information, among others, is also emphasized in the judgment of ECtHR, Case *Observer and Guardian V. The United Kingdom*: “To deny the public information regarding the functioning of state organs implies to violate fundamental right to democracy.”⁸
37. Based on the above, and in order to respect the right of access to public documents as a constitutional and legal right, as well as to increase transparency and accountability, in order for citizens to exercise this right, as a powerful instrument for controlling the work of the authorities, the Ombudsperson:

Recommends to the Kosovo Police

1. Grant access to all data required, without conditioning him to personally appear at the KP offices.

Pursuant to Article 132, paragraph 3, of the Constitution of the Republic of Kosovo (“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”) and Article 28 of Law no. 05 / L-019 on the Ombudsperson (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, including disciplinary measures, must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”), and please kindly inform us about the actions you will take regarding this issue.

Respectfully submitted

Hilmi Jashari

Ombudsperson

⁷ Case Of *The Sunday Times V. The United Kingdom*, (Application no. 6538/74, 26 April 1979)

⁸ Case Of *Observer And Guardian V. The United Kingdom*, (Application no. 13585/88, 26 November 1991)