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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

REPORT WITH RECOMMENDATIONS OF THE OMBUDSPERSON

Complaint no. 542/2018
Non- Governmental Organization “Iniciativa për Progres-INPO”
against
Ministry of Education, Science and Technology

regarding the restriction of the right of access to public documents

Addressed to: Mr. Ekrem Kastrati, Secretary General
Ministry of Education, Science and Technology

Copy: Mr. Shyqiri Bytyçi, Minister
Ministry of Education, Science and Technology

Prishtina, 27 May 2019

Purpose of the Report

1. The purpose of this report is to identify violations of fundamental rights and freedoms by the responsible authorities regarding the complaint of the NGO "Initiative for Progress-INPO" (hereinafter: INPO) for access to public documents, filed against the Ministry of Education, Science and Technology (MEST); analysing the Law no. 03 /L-215 on Access to Public Documents (LAPD) regarding this complaint; as well as identifying the duties and responsibilities of public institutions/ authorities in relation to the implementation of this law upon receiving requests for access to public documents. The report is based on facts, evidence, and case files, which are in possession of the Ombudsperson Institution (OI)

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, Article 18, paragraph 1, stipulates 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.

Case description

The evidence and information available to the OI, provided by the complainant and evidenced by the investigation conducted regarding the case, are summarized as follows

4. On 17 July 2018, INPO has addressed a request, via e-mail, to the head of the Public Communication Division in MEST for access to the assessments of the legality of normative acts in the field of education, science and technology, on which MEST worked on during 2017, as well as for the period January - June 2018
5. On 1st of August 2018, INPO, by electronic mail, has repeated the request for access to the assessments of the legality of normative acts in the field of education, science and technology on which MEST worked on during 2017, as well as for the period January - June 2018
6. On 6 August 2018, based on Article 10 of Law no. 03 /L-215 on Access to Public Documents (LAPD), INPO filed a complaint with the OI against MEST for not replying on the request for access to public documents.
7. On 13 August 2019 the Ombudsperson addressed a letter to the Secretary General in MEST, through which he requested information on actions that had been taken and those planned to be undertaken in relation to INPO's request. Since the Ombudsperson had not received a reply to this letter, on 30 October 2018, a letter was again addressed to the Secretary General in MEST, but no reply was received to this letter.
8. On 15 November 2018, the OI, through e-mail, addressed the head of the Public Communication Division of MEST, regarding the INPO complaint, but did not receive a reply.
9. On 19 November 2018, the representative of OI met the head of the Public Communication Division of MEST, who claimed that they were in preparation of a response for Ombudsperson and INPO. Since neither the representative of OI or INPO have received a reply, on 6 December and on 24 December 2018, through e-mail, addressed the head of the Public Communication Division of MEST, regarding the complaint of INPO, but yet did not receive a reply.
10. On 16 January 2019, the representative of OI contacted the head of the Public Communication Division of MEST regarding the matter in question, who claimed that they were awaiting a reply from the legal office within MEST and once they receive such reply, the same will be forwarded to INPO.
11. On 7 February 2019, the representative of OI, through e-mail, received a reply from the head of the Public Communication Division of MEST. The same reply was received by INPO. In this reply, MEST has listed documents that were legally assessed but has not sent the documents.
12. On 11 March 2019, the representative of OI, through e-mail, addressed the head of the Public Communication Division of MEST asking that the documents subject to the request be provided to INPO which in the response sent by e-mail were listed as documents that MEST was required to assess the legality, but did not receive a reply.

Applicable legal instruments in Kosovo

13. Constitution of the Republic of Kosovo (hereinafter referred to as: Constitution), in Article 41, paragraph 1, stipulates the right of access to public documents, whereby it defines: *“Every person enjoys the right of access to public documents.”*
14. Paragraph 2 of the same Article of the Constitution stipulates that documents held by all institutions are accessible to all, with the exception of those documents whose access is restricted 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.”*
15. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which stipulates: *“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.”*
16. Freedom to receive and provide information also envisages 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...”*
17. The spirit of Article 41 of the Constitution is also reflected in Article 1 of the LAPD, according to which: *“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.”*
18. Article 7, paragraph 8 of the LAPD explicitly states: *“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.”*
19. Law no. 05 / L-031 on the General Administrative Procedure, addressing the principle of open administration, in Article 9, paragraph 1, stipulates: *“Public organs shall act with transparency.”*

Case analysis and findings of the Ombudsperson

20. Ombudsperson notices that INPO’s request for access to public documents of 17 July 2017 addressed to MEST, is related to access on assessment of normative acts legality in the field of education, science and technology, on which MEST has worked during 2017 as well as for the period January-June 2018, documents that are not excluded from the right of access to public documents as stipulated in article 12 of LAPD.
21. Based on the investigation conducted with regard to INPO’s complaint, the Ombudsperson finds that MEST has not replied to any of the requests for access to public documents, which is violation to Article 7, paragraph 8 of the LAPD, according to which,

the public authority is obliged to issue a Decision within seven (7) days from the registration of the request. Moreover, MEST, in addition to not replying on INPO's request for access to public documents, i.e. documents that are not limited by LAPD, has also failed to reply to Ombudsperson request. Thereof, the Ombudsperson reminds MEST about the legal obligation deriving from Article 25 of the Law No. 05/L-019 on Ombudsperson.

22. The Ombudsperson draws attention to the ECtHR practice, which, according to Article 53 of the Constitution, provides the grounds for interpretation of human rights that are guaranteed by the Constitution. The ECtHR in its judgment *Observer and Guardian V. The United Kingdom* states: "To deprive the public of information on the functioning of State organs is to violate a fundamental democratic right..."¹
23. Furthermore, ECtHR, in the case *Stell and Morris v The United Kingdom*, of 15 May 2005, amongst other considers that in a democratic society even small and informal campaign groups, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest.²
24. Given the above, and with the aim of respecting the right of access to public documents, as a constitutional and legal right, as well as increasing transparency and accountability, and in order for citizens to exercise this right as a powerful tool for controlling the work of the authority bodies, the Ombudsperson:

RECOMMENDS

the Ministry of Education, Science and Technology

1. To grant the non-governmental organization "Initiative for Progress-INPO" access to requested documents.

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."), please kindly inform us of any the actions that you will undertake regarding this issue.

Respectfully,

Hilmi Jashari
Ombudsperson

¹ Case Of *Observer And Guardian V. The United Kingdom*, (Application no. 13585/88, 26 November 1991)

² Case *Stell and Morris v The United Kingdom*, (Aplikimi nr. 68416/01, 15 maj 2005).