



Republika e Kosovës • Republika Kosovo • Republic of Kosovo
Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

REPORT WITH RECOMMENDATIONS OF THE OMBUDSPERSON

C.no. 869/2018

Versus

Ministry of Finance

Related to the restriction of the right to access public documents

Addressed to: Mr. Naim Baftiu, General Secretary
Ministry of Finance

Copy: Mr. Bedri Hamza, Minister
Ministry of Finance

Prishtinë, May 27, 2019

The purpose of the report

1. The purpose of this Report is to draw attention regarding the complaint of Lëvizja - Movement FOL (hereinafter FOL) for access to public documents filed against the Ministry of Finance (MoF), as well as review of the Law No. 03/L-215 on Access to Public Documents (LAPD) as per the given complaint, and obligations as well as responsibilities of public institutions/bodies in relation to the implementation of this Law in cases of receiving requests for access to public documents. Report is based on facts, evidence, and case files, in the 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, 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 aims to carry out these constitutional and legal responsibilities.

Description of the case

4. On November 19, 2018, FOL addressed an e-mail to the Ministry of Finance with a request for Access to Public Document, actually gaining access to the List with Identification Number of Plots with the estimated amount of each parcel, on private

ownership, evaluated by the Ministry of Finance in the process of expropriation within the project “*Construction of the road A7.1 – Crossroad on dis-level A6/A7.1 (Banullë) – Dheu i Bardhë: Crossroad on dis-level A6/A7.1 (Banullë) – Crossroad Bresalc - L=22.31km.* (with procurement number 205-17-2586-5-1-1), contracted by the Ministry of Infrastructure.

5. On November 21, 2018, FOL through email obtained information from the Ministry of Finance by which was notified that the access to requested documents has been denied with justification that publication of data required would be in contradiction with LAPD, actually in contradiction with Article 12, paragraph 1.2 and 1.6.
6. On November 22, 2018, based on Article 10 of the LAPD, the complainant lodged a complaint with the OI versus the MoF for rejection of access to public documents.
7. On December 5, 2018, FOL through an email addressed the MoF with the request for reconsideration of their decision for denying of the access.
8. On December 11, 2018, OI representative met with the Director of Property Tax Department of the MoF, from whom was informed that the Ministry of Finance has addressed the National Agency for Personal Data Protection (NAPDP) with the request for an Opinion, and upon admission of this opinion from the NAPDP, MoF will serve the response to the Ombudsperson regarding the given complaint.
9. On December 14, 2018, FOL, through an email, received a response from the MoF, notifying that the MoF, based on FOL's request, addressed the NAPDP with a request for an Opinion and, upon admitting it, will respond to the request for reconsideration.
10. On January 17, 2019, the OI representative, through an email, addressed the Director of the Property Tax Department of the MoF, requesting information on the actions that the MoF has undertaken with regard to FOL's request. On the very same day, the OI received a response, through which was notified that the MoF is still waiting for NAPDP's Opinion and upon its admission, a response will be served to the Ombudsperson as well.
11. On February 5, 2019, the Ombudsperson addressed a letter to the General secretary of Ministry of Finance, through which requested to be informed on actions that have been undertaken or planned to be undertaken in the future. Nevertheless, until the day of publication of this Report, no response has been delivered to the Ombudsperson by the Ministry of Finance.
12. On February 25, 2019, FOL informed the OI that the Opinion¹ issued by NAPDP on the request of the Ministry of Finance has been delivered to them, by which is recommended that: “[...] *the compensation amount for expropriation shall be available for the third parties.*”
13. Since no response has been delivered to Ombudsperson on the letter of 5th of February 2019, on March 12, 2019, the Ombudsperson again addressed a letter through which he reminded on the liabilities deriving from Article 132, paragraph 3, of the Constitution of Republic of Kosovo, as well as from Article 18, paragraphs 4 and 6, and 25 of the Law

¹ Opinion, 25/02/2019, No. Ref.10/2019, NAPDP.

No. 05/L-019 on Ombudsperson. Until publication of this Recommendation report no response has been served to the Ombudsperson by the Ministry of Finance.

14. Within the time period March 13 up to March 22, 2019, FOL addressed the MoF through an e-mail, requesting response on its request for reconsideration of the decision for access denying. On March 27, 2019, FOL received a response from the MoF by which was informed that the request has been rejected.

Legal instruments applicable in Kosovo

15. 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.”*
16. 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.”*
17. 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.”*
18. The freedom to provide and obtain information is foreseen with 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.”*
19. 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.”*
20. 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.”*
21. Law No. 05/L-031 on General Administrative Procedure, addressing the principle of open administration in Article 9, paragraph 1, defines: *“Public organs shall act with transparency.”*
22. Law No. 03/L-139 on Expropriation of Immovable Property, amended and supplemented by Law No. 03/L205, in Article 11, paragraph 4, stipulates what a Final Decision for

Expropriation should contain as well as includes also the amount of compensation from the Office of Immovable Property Valuation, which is ascertained/determined pursuant with the Law: “[...] 4.3.1. *the names and addresses of the Applicant, the Persons identified in the application pursuant to item ... [...] ;...[...] 4.3.2.1. the location and number of each and every parcel of immovable property that is to be expropriated; ...[...]; 4.3.2.3. the amount of compensation that the Office of Immovable Property Valuation has determined...[...]* ; 4.3.2.4. *the valuation determination prepared by such office as required by Article 22 of the present law; and 4.3.2.5. a description of any conditions that the expropriation is subject to.*”

23. Law No. 03/L-172 On Protection of Personal Data (LPPD),² in Article 3, paragraphs 1 and 2 [Principles of Data Processing], stipulates: “1. *Personal data shall be processed fairly and lawfully without violating the dignity of data subjects. 2. Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and /or further processed.*”
24. The Ombudsperson ascertains that exclusion of the right of access to documents is set forth in Article 12 of the LAPD. The information may be restricted only for the purpose of protecting legitimate public interests, of life or other legitimate private interests as defined by the LAPD and the Law on Classification of Information and Security.

Case analysis and the findings of the Ombudsperson

25. The Ombudsperson observes that the request for access to public documents of Levizja FOL of November 19, 2018, addressed to the MoF refers to access on the List with Identification Number of Plots with the estimated amount of each parcel, on private ownership, evaluated by the Ministry of Finance in the process of expropriation within the project “*Construction of the road A7.1 – Crossroad on dis-level A6/A7.1 (Banullë) – Dheu i Bardhë: Crossroad on dis-level A6/A7.1 (Banullë) – Crossroad Bresalc - L=22.31km.* (with procurement number 205-17-2586-5-1-1), contracted by the Ministry of Infrastructure.
26. The Ombudsperson draw attention on the Constitution of the Country, according to which: “[...] *The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*”³
27. The Ombudsperson notices that the Ministry of Infrastructure has accomplished expropriation procedures related to the “*Construction of the road A7.1 – Crossroad on dis-level A6/A7.1 (Banullë) – Dheu i Bardhë: Crossroad on dis-level A6/A7.1 (Banullë) – Crossroad Bresalc - L=22.31km.* (with procurement number 205-17-2586-5-1-1), according to the provisions foreseen by the Law No. 03/L-139 on Expropriation of

²Law No.06/L-082 on Protection of Personal Data has entered into force on March 12, 2019 and has abrogated the Law No. 03/L-172 on Protection of Personal Data.

³ Constitution of Republic of Kosovo, Article 46.

Immovable Property, amended and supplemented by the Law No. 03/L205. On October 23, 2018, the Government of Republic of Kosovo published in Official Gazette the Final Decision No. 12/71 (hereinafter the *Decision*).

28. The Ombudsperson reviewed this Decision and observes that in tabular section it holds data from the Office of Immovable Property Valuation, such as: the owner / the user (name, parent's name and surname), number of the property, agriculture / class- current usage, total area and surface for expropriation in m²; but not the estimated amount for compensation of expropriation, determined in accordance with the law.
29. Starting from the content of tabular data and based on the LAPD, FOL has presented to the MoF request for access to public documents. The Ministry has delivered response within timeframe legally determined and has rejected the request for access. Nevertheless, the given answer fails to enclose also the advice for the use of legal remedies as foreseen with Article 7, paragraph 8 of the LAPD: *“The public authority shall be obliged [...] to 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.”* Additionally, the response itself on request for review of the decision for rejection does not contain the advice for the use of legal remedies.
30. Apart the liability of the body determined by the LAPD, that on submitted request to decide by the decision upon the case, the Law No. 05/L-031 on General Administrative Procedure, in Article 47, stipulates in detail manner the structure and statutory elements of the written administrative act, explicitly defining what should administrative act contain of.
31. Further, the LPPD, in Article 2, paragraph 1, sub-paragraph 1, determines what is personal data: *“**Personal data** - any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity;”* Additionally, Article 3, paragraphs 1 and 2, of the LPPD stipulates that personal data must be accurate, adequate as well as relevant and to be processed without breaching the dignity of data subjects.
32. Publication of the Decision in the Official Gazette, in the given case, with personal information of immovable property owners, subject of expropriation, respectively restriction from the protection of their personal data, is reasoned since the expropriation is done for the public interest and the compensation for these properties is made from the budget of Republic of Kosovo. Nonetheless, the failure to disclose estimated amounts of expropriated parcels does not contribute to the public interest. Exactly, the estimated amount for expropriated plots should be published and be accessible for the interest of the public.
33. The Ombudsperson draws attention on ECtHR practice that according to Article 53 of the Constitution represents the bases for interpretation of human rights guaranteed by the Constitution. ECtHR, in its Judgment on the case *Observer And Guardian V. The United*

*Kingdom, points out: “To deprive the public of information on the functioning of State organs is to violate a fundamental democratic right.”*⁴

34. Further, ECtHR, in case *Steel and Morris v The United Kingdom*, of May 15, 2005, among others, 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 (paragraph 89).⁵
35. The Ombudsperson considers that the public interest on the use of public money and accountability is essential in promoting and strengthening of democracy and good governance. Civil society and the media have an important role in this regard.
36. Given what has been stated above as well as in respect of the right on access to public documents, as constitutional and legal right, and increase of transparency and accountability, and in order that this right is exercised by its citizens, as a powerful mean for controlling the work of the State bodies, the Ombudsperson :

Recommends

The Ministry of Finance

1. To grant access to Lëvizje FOL on the data requested

In compliance with Article 132, paragraph 3, of the Constitution of 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 the Law No.05/L-019 on Ombudsperson, (“*Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions ... must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question*”), You are kindly asked to inform us on steps to be undertaken regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson

⁴ Case of *Observer and Guardian V. The United Kingdom*, (Application no. 13585/88, 26 November 1991)

⁵ Case *Steel and Morris v The United Kingdom*, (Application No. 68416/01, 15 May 2005).