



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

OMBUDSPERSON'S REPORT WITH RECOMMENDATION

Complaint No. 108/2019

Versus

Kosovo Police

Related to restriction of the right to access public documents

Addressed to: Mr. Rashit Qalaj, General Director
Kosovo Police

Copy: Mrs. Taibe Canolli Brajshori, Director
Head of Human Resources, Kosovo Police

Prishtinë, July 22, 2019

Purpose of the Report

1. The purpose of this Report is to draw attention of the Kosovo Police related to the complaint of A. N. (complainant) concerning the access to public documents; to review the Law no. 03 / L-215 on Access to Public Documents (LAPD); as well as tasks and responsibilities of the relevant institutions as per application of this Law when admitting requests for access to public documents. The Report is based on facts, evidence, as well as case files in the possession of the Ombudsperson Institution (OI).

Constitutional and legal bases

2. According to Article 135, paragraph 3, of the Constitution of 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, the Law No. 05/L-019 on Ombudsperson determines his/her liabilities in Article 18, paragraphs 1, 2, 4, 5, 6 and 8.

By submitting this Report to the responsible institutions, the Ombudsperson aims to achieve the following constitutional and legal responsibilities.

Description of the Case

The evidence and information available to the Ombudsperson Institution (OI), provided by the complainant and findings gathered in the course of investigation conducted regarding the case are summarized as follows:

4. The complainant applied in the vacancy announced by Kosovo Police for the position of Police Officers, on 26 April 2018 (Application No. 05/01254), in which the complainant was ranked 73rd, according to the points gained (87.80). On 30 November 2018, the complainant underwent a psychological and medical test at the clinic authorized for this purpose. Following the publication of the list by the Selection Committee for Recruitment Process Management (the Commission), it appeared that the complainant had failed in medical examination. On December 31, 2018, complainant filed a complaint with the Commission. The Commission for Recruitment and Selection Process of Police Officers issued a decision on 4 January 2019, by which it rejected the complaint filed by the complainant as ungrounded, ascertaining that at medical check-up phase, the complainant failed to meet the criteria set out in Standard Operating Procedure no. SOP 5:07.
5. On 15 January 2019, the complainant, via email, addressed the KP with a request for access to medical check-up records, namely access to medical expert report regarding his health.
6. On 25 January 2019, the complainant received a reply, by which the right to access his medical check-up records has been rejected, reasoning it by following: “[...] *all results and evaluations of the psychological-medical test are classified data and must be kept confidential [...].*”
7. On 13 February 2019, pursuant to Article 10 of Law no. 03 / L-215 on Access to Public Documents (LAPD), the complainant filed a complaint with the OIK against the Kosovo Police, due to restriction of the right to access public documents.

8. On 6 March 2019, the Ombudsperson, through a letter, addressed the Head of the KP Information and Public Relations Office, through which requested information on the actions to be taken, so that complainant's case is handled accordingly with the legal provisions in force.
9. On 18 March 2019, the Ombudsperson received a response from the KP General Director informing him on actions taken in relation to the complainant's request.

Legal instruments applicable in Kosovo

10. Constitution of Republic of Kosovo (henceforth: Constitution), in Article 41, paragraph 1, foresees the right for Access Public Documents, according to which it defines: *“Every person enjoys the right of access to public documents.”*
11. Paragraph 2, of the same Article of the Constitution, stipulates that documents held by all institutions are accessible to all, except 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.”*
12. The right to be informed is the 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.”*
13. Freedom to hold and to give 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...”*
14. The spirit of Article 41 of the Constitution has been forwarded also on 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.”*
15. Law No. 05/L-031 on General Administrative Procedure, stating the principle of open administration, in Article 9, paragraph 1, foresees: *“Public organs shall act with transparency”*
16. The Ombudsperson considers that the exceptions to the right of access to documents are set out in Article 12 of the LAPD. Whereas information may only be restricted for the purposes of protection of legitimate public interests, of life or other legitimate private interests, defined by the Law on the Protection of Personal Data and the Law on Classification of Information and Security Clearances.

Case analyses and findings of the Ombudsperson

17. The Ombudsperson observes that the complainant's request for access to public documents of 13 February 2019 addressed to the KP, concerns the access to his personal data, which has been collected/ produced in the course of recruitment procedure for the position announced by KP.

18. Related to this, LAPD, in Article 12, paragraph 1, explicitly defines situations for refusal of the right of access to public documents.; and paragraph 3 of this Article determines the possibility when remaining parts of the document can be made public, if only one part of requested document is covered by any of the exceptions listed in paragraph 1 of this Article.
19. While Law No. 03/L-172 on Protection of Personal Data (LPPD)¹, in Article 22, determines the right of the data subject, which is processed by the data controller, in the current case by the KP, respectively the claimant of the document, based on this provision, is entitled to full access to all his personal data. Article 23 of the LPPD stipulates the duties and obligations of the controller, in the present case of KP, that any information requested by the data subject full access should be granted.
20. In ECtHR practice, data protection is guaranteed by Article 8 of the ECHR [Right to respect for private and family life], as this right is not an absolute right, it must be balanced with other rights. As to the present case, the complainant requested access to the findings of the medical check-up, which he had undergone at one of the stages of the recruitment process, on the basis of which, the Commission has evaluated that complainant's medical check-up, did not satisfy. Complainant's right of access to data held by a public / state authority falls within the scope of Article 8 of the ECHR, as it relates to health data belonging to the complainant / claimant of the document.
21. The ECtHR considers that respecting the confidentiality of health data is a vital principle.² It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.
22. In case *Gaskin versus United Kingdom*³, the claimant had requested access to the entire file relating to the time he had spent under the custody of the State and had challenged the inability to grant him access to this data, considering it a failure to respect his private life, pursuant to Article 8 of the ECHR. The Court, since the records contained in the file concerned claimant's private and family life, had held that the case fell within the scope of Article 8 of the ECHR. Further, it continued to evaluate if a fair balance was struck between general interest of the community on maintaining confidential system of social services records and claimant's interest in having access to a coherent record of his personal history. In connection to the last, the Court observed that persons as claimant have a "vital interest" in obtaining information which is needed. [...].
23. In correlation to this, the Ombudsperson observes that complainant's refusal of access to the results of the medical test, which he had undergone at one of the stages of the recruitment process, on the basis of which the Commission found that complainant's findings in the course of medical check-up were poor, constitutes a violation of Article 8 of the ECHR. In the complainant's case, it is not about access to third person's data, but about the complainant himself, who, on the basis of which, has been disqualified from the recruitment procedure for a police officer.

¹ Law 06/L-082 on Protection of Personal Data has entered into force on 12 March 2019 and has abrogated the Law No.03/L-172 on Protection of Personal Data .

² *Z versus Finland*, Ruling of 25 February 1997.

³ *Gaskin versus United Kingdom*, Ruling of 7 July 1989.

24. Consequently, the Ombudsperson finds that the refusal of the complainant's request for access to the medical report in his file, as candidate in the police officer recruitment procedure, denies the complainant the right of access to public documents, a right guaranteed by the Constitution and by the law.

Therefore, in order to improve the respect of the right of access to public documents, as a constitutional and legal right, so that citizens can exercise this right as a powerful tool for overseeing the work of authorities, which might impact improvement of the work of state bodies and increase the transparency and accountability, the Ombudsperson, pursuant to Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

RECOMMENDS

Kosovo Police:

- 1. Pursuant to the Constitution and the Law on Access to Public Documents, grant complainant with the access to medical report in his file.**

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, including disciplinary measures, 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