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Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution

Prishtinë, October 7, 2019

Mr. Betim Reçica, Secretary General
Ministry of Infrastructure and Transportation

RECOMMENDATION LETTER

Complaint No. 290/2019
Versus
Ministry of Infrastructure and Transportation

Dear Mr. Reçica,

The Ombudsperson Institution, pursuant to Article 16, paragraph 1, of the Law No. 05/L-019 on Ombudsperson and according to Article 10 of the Law No. 03/L-215 on Access to Public Documents (LAPD), on March 20, 2019, admitted a complaint of Mrs. Arta Berisha, the journalist engaged in “The truth Online” Project, which has been accomplished in cooperation with Association of Journalists and Balkan Investigative Reporting Network (BIRN), lodged versus the Ministry of Infrastructure and Transportation (MIT), due to partial response on her request to gain access to public/information documents. Complainant on October 11, 2018, through the e-mail, submitted the requested for access to official documents and information, actually for access on the following data: *Does the Ministry of Infrastructure and Transportation have a budget for online and social media marketing, which are the media and social networks where the budget is spent, and for what time period the contracts have been signed.* The following data has been requested for 2017 and 2018.

On November 1, 2018, the complainant received a response from the Information Officer through which was informed related to the amount spent for marketing during 2018, for publication of information on portals and newspapers as well as for information campaigns. Nevertheless, MIT has not provided information related to this issue concerning 2017 as well whether the contract has been signed, and if positive, then for which time period the contract has been signed.

The Ombudsperson, on April 24, 2019, addressed a letter to the Secretary General of the MIT, through which he requested to be informed regarding actions that the MIT has undertaken concerning complainant’s request for access to documents required. Since the Ministry has failed to reply on the letter delivered on 24 April 2019, the Ombudsperson, on 20 of June 2019, sent a repeating letter to the Secretary General, but no reply has been served to him. On 23 and on 24 of May 2019, Ombudsperson Institution (OI) contacted officials of the MIT, actually officials from Office of Public Communication related to the given

complaint, but regardless claims that the request of the complainant will be reviewed and the answer will be provided, the response has not been served neither to the OI nor to the complainant.

The Ombudsperson reiterates that the Constitution of Republic of Kosovo (henceforward the Constitution), in Article 41, paragraph 1, foresees the right to Access Public Documents: *“Every person enjoys the right of access to public documents”*. While paragraph 2 of the same Article stipulates that: *“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”*

The right to be informed is the right guaranteed by the Universal Declaration on Human Rights, Article 19 of which determines: *“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.”* 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...”*

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.”*

The Ombudsperson observes that the failure of MIT to respond on complainant's request, despite the fact that is in contradiction with the LAPD but it is also opposite with the Law No. 05 / L-031 on General Administrative Procedure, actually the principle of open administration, set out in Article 9, paragraph 1: *“Public organs shall act with transparency.”* Additionally, the lack of decision in the form prescribed by law draws also the lack of notification of the party to the right of appeal, which also constitutes a violation of the right to use legal remedies

The Ombudsperson reiterates that the European Court on Human Rights (ECtHR) practice, which according to Article 53 of the Constitution, represents the bases for interpretation of human rights. In case *Observer and Guardian versus United Kingdom*, ECtHR judged that: *“Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph (2) of Article 10 of the ECHR and is applicable not only to 'information' or 'ideas' that are favourably received or regarded [...] Not only does the press have the task of imparting such information and ideas but the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog’.”*¹ Furthermore, in case *Lingens v. Austria*, the ECtHR recalls: *“[...] Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society’”*. *These principles are of particular importance as far as the press is concerned.”*[...]

The Ombudsperson estimates that exceptions from the right of access to documents are

¹ Case of *Observer and Guardian V. The United Kingdom*, (Application no. 13585/88, 26 November 1991. Paragraph 59 (a and b).

stipulated in Article 12 of the LAPD. Information can be limited solely on the purpose of protection of public legitimate interests, of life or other private legitimate interests, determined by the legislation at force.

The Ombudsperson finds that, in the complainant's case, the MIT has failed to comply with the positive obligations related to permitting, namely granting access to public documents in accordance with the request filed by the complainant, which is sanctioned by national acts as well as international instruments.

Legal obligation for cooperation with the Ombudsperson Institution

The Ombudsperson ascertains that the MIT apart the failure to meet obligations which derive from the Constitution of Republic of Kosovo (Article 41 and Article 132, paragraph 3), has also failed to fulfill obligations which arise from the LAPD and the Law on Ombudsperson (Article 25), based on which, all authorities have the liability to respond on Ombudsperson's request for conducting investigations as well as provide appropriate assistance according to his requests. Refusing of civil servant, public official or public authority to cooperate with the Ombudsperson is a reason why the Ombudsperson may request, from competent authority, initiation of administrative proceedings, including disciplinary measures undertaking, dismissal from a workplace or civil service. In case the institution refuses to cooperate or intervenes into the investigation process, the Ombudsperson has the right to request from the competent prosecution, initiation of legal proceedings for intrusion in accomplishing official duties.

With the aim to increase respect of the right to access public documents, as an constitutional and legal right, so that citizens and civil society exercises this right, as a firm tool for overseeing the work of authorities that would influence on improving the work of state bodies and increase transparence and accountability, the Ombudsperson, pursuant to Article 135, paragraph 3 of the Constitution of Republic of Kosovo,

RECOMMENDS

The Ministry of Infrastructure and Transportation

- ***To review complainant's request and to respond to her requirement, in consistency with the Law on Access to Public Documents and in conformity with relevant legislation at force.***
- ***To respond to Ombudsperson's requirements.***

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