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Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution

OMBUDSPERSON'S REPORT WITH RECOMMENDATIONS

Complaint No. 742/2019
Versus
Kosovo Intelligence Agency

Related to restriction of the right to access public documents

Addressed to: Mr. Kreshnik Gashi, Director
Kosovo Intelligence Agency
Str. Lidhja e Pejës (M9)
10000 Prishtinë

Prishtinë, 19 December 2019

Purpose of the Report

1. The purpose of this Report is to draw attention of the Kosovo Intelligence Agency (henceforward: KIA) on the need to take appropriate actions to implement the right to access public documents, related to the complaint of the Youth Initiative for Human Rights (hereinafter: YIHRKS), filed against the KIA.

Responsibility of the Ombudsperson

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. Furthermore, based on Article 18, paragraph 1.2, of the Law on Ombudsperson, the Ombudsperson “*[...] has responsibility to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases [...]*”.

Description of case circumstances

4. The complainant is the YIHRKS, Non-Governmental Organization, whose mission is also protection of human rights, strengthening the rule of law and the role of youth in Kosovo.
5. On 16 and 29 of July, 2019, YIHRKS, via email, addressed the KIA with a request for access to information, with the following questions:
 - a) How many cases the KIA has intercepted during 2018?
 - b) How many people were intercepted during 2018?
6. On 19 July and 16 August 2019, YIHRKS received a response from the KIA through which they were informed that access to them has been denied under Article 32 of the Law on the Kosovo Intelligence Agency and pursuant to Article 12, paragraphs 1 and 2, of the Law No.03 / L-215 on Access to Public Documents, and in accordance with Law No.03 / L-178 on Classification of Information and Security Clearances.
7. On 30 August 2019, YIHRKS filed a complaint with the Ombudsperson against the KIA for restricting access to public documents / information.
8. On 27 September 2019, the Ombudsperson addressed a letter to the KIA Director requesting to be notified on actions that the KIA has taken or plans to take in response to the YIHRKS request for access to public documents. On 11 October 2019, the Ombudsperson received a response from the KIA informing him on actions taken by KIA in relation to the complaint and the legal basis on rejecting the YIHRKS’s request for access to public documents / information.

Legal instruments

9. Constitution of Republic of Kosovo, in Article 41, paragraph 1, foresees: “*Every person enjoys the right of access to public documents,*” and in paragraph 2 reads: “*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.”

10. The Universal Declaration of Human Rights, Article 19 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.”*
11. European Convention on Human Rights and its Protocols (ECHR), in Article 10, paragraph 1, guarantees the right to freedom of expression, a right which includes freedom of thought and freedom to receive or impart information and ideas without the interference of public authorities. While paragraph 2 of this Article stipulates conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
12. International Covenant on Civil and Political Rights and its Protocols, in Article 19, paragraph 1 and 2, guarantees the right to freedom of expression including the freedom to ask for, receive and impart information and ideas of all kinds:” *Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”*
13. The Law No. 06/L-81 on Access to Public Documents, in Article 1, promotes the spirit of Article 41 of the Constitution, 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”.*

Legal Analyses

14. Article 22 of the Constitution of Republic of Kosovo stipulates that: *“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions”.* Among these international instruments are included Universal Declaration of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols as well as International Covenant on Civil and Political Rights and its Protocols.
15. Article 53 of the Constitution of Republic of Kosovo stipulates that: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.*

16. Law No. 06/L-81 on Access to Public Documents (LAPD) applies to all public documents produced, admitted, maintained, or controlled by public institutions, unless otherwise limited by applicable law.
17. Until the refusals of the right of access to public documents are set out in Article 17 of the LAPD, pursuant to which a public institution cannot refuse to inform on whether it has a document in its possession or refuse access to a public document, unless it performs a damage and public interest test to determine whether the damage caused to the protected interest overrides the public interest in accessing that public document..
18. In the present case, the YIHRKS request relates to the number of cases and the number of persons KIA intercepted during 2018. Furthermore, in Law No. 03 / L-063 on Kosovo Intelligence Agency, in Article 2, defines the scope of the KIA, and, inter alia, information gathering opportunities, including mobile and static interception; technical tapping, such as listening, tapping and tracking equipment; (Article 2, paragraph 2.2). So it is not about disclosing classified intelligence methods and information, as stated in the KIA's response to YIHRKS, because the methods are expressly provided for in the KIA law and are not about access to other data related to statistics.
19. 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. Furthermore, the Ombudsperson observes that the ECtHR in its practice continuously has 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 favorably 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’”* (Case of *Observer and Guardian V. The United Kingdom*, (Application No. 13585/88, 26 November 1991, paragraph 59 (a) (b)).
20. Furthermore, on the case of *Társaság a Szabadságjogokért versus Hungary* (Application No. 37374/05), the Court has more thoroughly interpreted the notion of *freedom to receive information*, and that in the core, this right basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (paragraph 35). Moreover, the State's obligations in matters of freedom of press include elimination of barriers in exercising press functions on issues of public interest, where such barriers exist solely because of an information monopoly held by the authorities (paragraph 36). The ECtHR practice has consistently recognized the significant contribution of civil society to the discussion of issues of public interest (Application 37374/05, 27 27).

21. In the present case, the LAPD (both the prior¹ law and the applicable law²) has defined situations where access to public documents may be refused in order to avoid an arbitrary decision to refuse access to public documents.
22. Furthermore, the ECtHR has held that obstacles created to prevent access to public information can discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their leading role as "public observers" and their ability to provide accurate and reliable information may be adversely affected (paragraph 38).
23. Moreover, the case of YIHRKS versus KIA is a similar case to the one handled by the ECtHR and found to have violated Article 10 of the ECHR. (*Youth Initiative for Human Rights vs. Serbia* Application No. 48135/06, Judgment of 25 September 2013). In this judgment, the Court reiterated that "*freedom to receive information*" includes the right to access information. Moreover access to information in addition to media and print media was extended to non-governmental organizations. The Court has also noted that when a non-governmental organization is involved in matters of public interest, such as the current applicant, it exercises the role of a public observer of similar importance (paragraph 20).

Findings of the Ombudsperson

24. The Ombudsperson, in the present case, finds that the KIA has failed to comply with positive obligations regarding permitting, namely granting access to public documents at the request of YIHRKS, the right that is guaranteed by local acts and international instruments. Furthermore, the Ombudsperson considers that, in the present case, the KIA should have acted in accordance with Article 13, paragraph 2, of Law no. 03 / L-215 on Access to Public Documents, which stipulates that the applicant has the right, upon filing the request, to obtain a reasoned written decision from that public institution regarding the refusal and to issue a ruling indicating reasons for refusing access to public documents. Respectively, with the entry into force of Law no. 06 / L-081 on Access to Public Documents, the KIA should act in conformity with Article 17, paragraphs 7 and 8, of this Law.
25. In the view of above and the case law of the ECtHR, the Ombudsperson finds that the request of YIHRKS was addressed to the KIA, based on Law No. 06 / L-81 on Access to Public Documents, which applies to all public documents that are produced, admitted, maintained, or controlled by public institutions, apart otherwise restricted by applicable law. Request for access to this data is of public interest, given that the document seeker is a Non-Governmental Organization which requested this data within development of its activities and is considered as essential element to conduct a debate on public interest and the contribution of civil society is important in discussing issues of public interest. The Ombudsperson considers that the KIA did not provide sufficient legal grounds for restricting access to the requested data, as it did not prove

¹ Law No.03 / L-215 on Access to Public Documents.

² Law No. 06/L-81 on Access to Public Documents.

that by allowing access to such data, the damage caused to the protected interest overrides the public interest in accessing those documents.

26. The Ombudsperson considers that YIHRKS has requested from KIA presenting of factual data regarding the use of electronic surveillance measures, a legitimate requirement that includes collection of information of public interest in order to provide this information to the public, contributing in this manner to public debate, which is part of the NGO's role as a "public observer". The Ombudsperson further considers that if public authorities continue to refuse presentation of at least statistical data, it is almost impossible analyzing actions of public authorities by the general public, particularly by experts.

27. In order to improve the respect of the right of access to public documents, as a constitutional and legal right, so that citizens and civil society can exercise this right as a powerful tool for controlling the work of the authorities, which would improve the work of state bodies and increase transparency and accountability, the Ombudsperson in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo;

RECOMMENDS

Kosovo Intelligence Agency

- *To provide the YIHRKS with access to the requested document having in regard the Constitution of the Republic of Kosovo, the case law of the ECtHR, and Law no. 06 / L-081 on Access to Public Documents.*

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