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RECOMMENDATION REPORT

OF THE OMBUDSPERSON OF REPUBLIC OF KOSOVO

Complaint No. 662/2019

Versus

Ministry of Education, Science and Technology

Regarding restriction of the right to Access Public Documents

Addressed to: Mr. Ekrem Kastrati, Secretary General

Ministry of Education, Science and Technology

Prishtinë, 5 November 2019

Purpose of the Report

The purpose of the Report is identification of violations of fundamental rights and freedoms conducted by the Ministry of Education, Science and Technology (MEST) in relation to complaint submitted by Ms. Edona Kutleshi, journalist at Koha Ditore, (hereinafter referred to as the complainant), for access to public documents; reviewing of the Law no. 06 / L-081 on Access to Public Documents (LAPD) concerning the complaint subject of this Report; as well as identification of duties and responsibilities of institutions / public authorities in relation to the application of this Law in the course of admission of requests for access to public documents, as well as the constitutional liability to cooperate with the Ombudsperson.

CONSTITUTIONAL AND LEGAL BASES

1. Pursuant 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.”*
2. Further, by Law no. 05 / L-019 on the Ombudsperson, with the responsibilities set out in Article 18, paragraphs 1, 2, 4, 5, 6 and 8.

By submitting this Report to the responsible institutions, the Ombudsperson intends to accomplish these constitutional and legal responsibilities.

Description of the case

The evidence and information available to the Ombudsperson provided by the complainant as well as recorded by the investigation conducted related to the case are summarized as follows:

3. On 12 June 2019, the complainant through the email addressed to MEST the request for access to the: "Report related to the Actual Status of Higher Private Education Enrolment Books, of 11 February 2019". Until the day the complainant has filed a complaint with the Ombudsperson, she received only confirmation of the admission of the request, but no reply has been served to her.
4. On 29 August 2019, pursuant to Article 21 of Law no. 06 / L-081 on Access to Public Documents (LAPD), the complainant filed a complaint with the Ombudsperson against MEST for the failure to gain access to public documents.
5. On 2 September 2019, Ombudsperson's representative had a meeting with the Head of Public Relations Division in MEST, in the course of which she pointed out that they were aware of the request submitted and that the request was forwarded to the responsible officials, but so far has not received any response from them in order to respond to the complainant.
6. On 13 September 2019, the Ombudsperson addressed a letter to MEST's Secretary General requesting to be informed on actions taken and those planned to be taken regarding complainant's request. Since the Ombudsperson did not receive a response to this letter, on 15 October 2019 he addressed again a letter to the Secretary General of MEST, but no response has been served to the Ombudsperson on the given letter as well.

7. On 31 October 2019, the representative of the Ombudsperson met the Head of Public Relations Division in MEST, on which occasion she claimed that she did not yet received a response from the Secretary General regarding the complaint in question.

Legal instruments applicable in Kosovo

8. Constitution of Republic of Kosovo, in Article 41, paragraph 1, stipulates : *“Every person enjoys the right of access to public documents.”*; and in paragraph 2 determines: *“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.”*
9. Universal Declaration of Human Rights, in 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.”*
10. European Convention on Human Rights and its Protocols (ECHR), in Article 10, paragraph 1, guarantees the freedom of expression, the right which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. While paragraph 2 of this Article determines formalities, conditions, restrictions or penalties which 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.
11. International Convent on Civil and Political Rights and its Protocols, in Article 19, paragraphs 1 and 2, guarantees the freedom of expression, including the freedom of requesting, obtaining and dissemination of information and ideas of any kind: *“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.”*
12. Law No. 06/L-81 on Access to Public Documents, in Article 1, follows 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.”*
13. Law No. 05/L-031 on General Administrative Procedure, by reviewing the principle of open administration, set out in Article 9, paragraph 1, stipulates: *“Public organs shall act with transparency.”*

Legal analyses and findings of the Ombudsperson

14. Article 22 of the Constitution of Republic of Kosovo determines: *“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 European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR) and the International Covenant on Civil and Political Rights and its Protocols.
15. Article 53 of the Constitution of Republic of Kosovo determines: *“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 regulated by applicable legislation.
17. While limitations regarding the right to access public documents are set out in Article 17 of the LAPD, according to which a public institution may not 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, and in the matter in question the public interest overrides the interest protected by MEST.
18. The Ombudsperson notes that the complainant's request for access to public documents of 12 June 2019 addressed to MEST concerns access to the Report related to the Actual Status of Higher Private Education Enrolment Books, of 11 February 2019, and the request in this document is in the public interest, as the applicant is a journalist and the requested document relates to its public information activity and is considered essential to conduct a debate in the interest of the public, and that media and civil society input is important in discussing issues of public interest.
19. From the investigation conducted related to the complaint in question, the Ombudsperson finds that the MEST has failed to responded on the request for access to public documents, which is in contradiction with Article 12, paragraph 1, of the LAPD, according to which the public institution shall, within seven (7) days from the date of recording the request, (confirmation of receipt of the request was sent to the complainant on 13 June 2019) to issue a decision to grant access to the requested document or render a justified decision for the full or partial refusal and inform the applicant of the right entrusted in this occasion. Whereas in cases when it is determined that the required documents contain any of the restrictions provided for in Article 17 of the LAPD, then public institutions are obliged to conduct a damage and public interest test (Article 18, paragraphs 1 and 2).
20. The Ombudsperson recalls that European Court of Human Rights (ECHR) practice, under Article 53 of the Constitution, constitutes the basis for the interpretation of human rights. The Ombudsperson observes that 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'.*¹

21. Further, ECtHR in its Ruling for the case of *Observer and Guardian V. The United Kingdom* stipulates: *“To deny information to the public on functioning of state bodies means to violate the basic right of democracy.”*²
22. Furthermore, ECtHR in the case of *Stell 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).³
23. 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 Court considers that obstacles created in order to hinder access to information of public interest may 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 vital role as “public watchdogs” and their ability to provide accurate and reliable information may be adversely affected (paragraph 38).

Obligation to cooperate with the Ombudsperson and the consequences of refusing to do so

24. Apart the failure to respond to the complainant's request for access to public documents, MEST has also failed to respond to the Ombudsperson's requests.
25. The Constitution of Republic of Kosovo, with Article 132, paragraph 3, stipulates: *“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.”*
26. While the Law No. 05/L-019 on Ombudsperson, Article 25, stipulates: *“(1) All authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request; (2) Refusal to cooperate with the Ombudsperson by a civil officer, a functionary or public authority is a reason that the Ombudsperson requires from the competent body initiation*

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

² Case *Observer and Guardian V. The United Kingdom* (Application no.13585/88, 26 November 1991).

³ Case *Stell and Morris v The United Kingdom*, (Application No. 68416/01, 15 May 2005).

of administrative proceedings, including disciplinary measures, up to dismiss from work or from civil service; (3) In case when the institution refuses to cooperate or interferes in the investigation process, the Ombudsperson shall have the right to require from the competent prosecution office to initiate the legal procedure, on obstruction of performance of official duty..”

Conclusion

27. In order to improve the respect of the right to access 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, that would influence on improvement of 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

The Ministry of Education, Science and Technology

- *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, to provide the complainant with access to the requested document.*
- *To respond to Ombudsperson’s requirements within the deadline determined by the Law No. 05/L-019 on Ombudsperson.*

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