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Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution

OMBUDSPERSON'S

RECOMMENDATION REPORT

Complaint No. 314/2019

Versus

Municipality of Fushë Kosovë/ Kosovo Polje

With regard to restriction of the right to access public documents

Addressed to: Mr. Burim Berisha, Mayor

Municipality of Fushë Kosovë/ Kosovo Polje

Prishtinë, 17 June 2020

Purpose of this Report

1. The purpose of this Report is to draw attention of the Municipality of Fushë Kosovë / Kosovo Polje to the complaint of A. G. (the complainant) for access to public documents and to the tasks and responsibilities of the relevant institutions deriving from Law no. 06 / L-081 on Access to Public Documents (LAPD).

Legal and Constitutional Base

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 pursuant to the Law No. 05/L-019 on Ombudsperson, with the responsibilities stipulated by Article 18, paragraphs 1, 2, 4, 5, 6 and 8.

By delivering this Report to the responsible institutions, the Ombudsperson aims to fulfill the above-mentioned constitutional and legal responsibilities.

Description of the case

Facts, evidence and information in the possession of the Ombudsperson provided by the complainant and gathered from the investigation conducted, are summarized as follows:

4. On 26 July 2018, the complainant submitted a request for information / access to official documents in: *The register of movable and immovable property that the municipality has in use and possession; Fushë Kosovë / Kosovo Polje Municipality Urban Plan; “Pajazit Islami” road asphaltting project, in Nakaradë.*
5. On 16 November 2018, the complainant submitted a request for information / access to official documents concerning the “*Project developed with the organization Caritas from 2016-2018, respectively the list of people employed through the project, employee contracts, qualification and budget allocated by municipalities for this organization; The list with names of employed teachers in Sh.M.U.(Lower Secondary School) "Michael Grameno" and the list of teachers' salaries.*
6. On 5 December 2018, complainant submitted a request for information / access to official documents in the *List with the number and names of licensed private kindergartens operating in Fushë Kosovë and the number of children registered in all private kindergartens, as well as in those public.*
7. On 22 October 2018, the complainant received a response informing her that the Urban Planning map has been designed in ArchiCaD program and that she is invited to the offices of the Directorate for Urban Planning to access it. But, the document in which the access was provided to her was not the document requested by the complainant.
8. On 12 November 2018, the complainant received a response from Fushë Kosovë / Kosovo Polje Municipality spokesperson informing her that the *Project for asphaltting the road "Pajazit Islami" in Nakarada is in the process of contract signing. Whereas, for the request for access to the Register of movable and immovable property that the municipality has in use and possession, the complainant was notified on the impossibility of gaining access in registers of all properties and demanded that the request is specified.*

9. On 29 March 2019, the spokesperson of the Municipality of Fushë Kosovë / Kosovo Polje, by e-mail, forwarded to the complainant the Urban Development Plan, which in fact was not the document for which the request for access has been filed.
10. On 19 November 2018, the complainant repeated the request and informed the spokesperson in Fushë Kosovë / Kosovo Polje Municipality that she had not received a response to the submitted requests.
11. While in the requests submitted on 16 November 2018 and on 5 December 2018, no response has been served to the complainant.
12. On 5 April 2019, pursuant to Article 10 of the LAPD, the complainant lodged a complaint with the Ombudsperson against the Municipality of Fushë Kosovë / Kosovo Polje for restriction of the right to access public documents.
13. On 25 April 2019, the Ombudsperson addressed a letter to the Mayor of Fushë Kosovë / Kosovo Polje, through which he requested to be informed on actions taken or planned to be taken regarding the complainant's requests for access to public documents.
14. On 15 and 16 May 2019, the Ombudsperson Institution had a communication with the spokesperson, in the course of which complainant's requests for access to public documents has been addressed once again.
15. On 17 May 2019, Municipality of Fushë Kosovë / Kosovo Polje provided a response to the Ombudsperson Institution, through which the Ombudsperson was informed on responses that the municipality has provided to the complainant.
16. On 21 May 2019, representative of the Ombudsperson Institution informed the spokesperson in the Municipality of Fushë Kosovë / Kosovo Polje that in the answers they had received it was only about three of the 6 requests that the complainant had submitted to the Municipality of Fushë Kosovë / Kosovo Polje. It is worth mentioning that the answers given were incomplete.
17. On 29 July 2019, the Ombudsperson addressed a letter to the Mayor of Fushë Kosovë / Kosovo Polje, requesting information on the actions that had been taken, but no response has been served to him.
18. On 24 October 2019, the complainant informed the Ombudsperson Institution that she has been granted with access to public document of 26 July 2018 request, *Urban Planning map of the Municipality of Fushë Kosovë*, but not to other requests.

Legal instruments applicable in Kosovo

19. Constitution of the Republic of Kosovo (henceforward the Constitution), in Article 41, paragraph 1, defines the right to access public documents: "*Every person enjoys the right of access to public documents*".
20. Paragraph 2 of the same Article of the Constitution stipulates that documents held by all institutions are accessible to all, except for those documents access to which 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.*"

21. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: “*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.*”
22. Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [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...*”
23. The spirit of Article 41 of the Constitution is conveyed also at Article 1 of the LAPD according to which: “*This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents.*”
24. Law No. 05/L-031 on General Administrative Procedures puts emphasis on principle of open administration, in Article 9, paragraph 1, which stipulates: “*Public organs shall act with transparency.*”

Case analyses

25. The Ombudsperson notes that complainant's requests for access to public documents, addressed to the Municipality of Fushë Kosovë / Kosovo Polje, relate to documents that must be accessible through proactive publication by the Municipality of Fushë Kosovë / Kosovo Polje, in accordance with applicable law. Also, some of the required documents are related to procurement activities which cannot be found on the E-procurement website, such as: contract management plan, payments, including purchase orders, economic operator invoices, reports of the contract manager, the final acceptance report, etc., which are documents produced by the municipal administration.
26. The Ombudsperson draws attention to the ECtHR case law which, under Article 53 of the Constitution, provides a basis for interpretation of human rights guaranteed by the Constitution. The ECtHR, in the judgment on the case: *Observer and Guardian versus United Kingdom* stipulates: “*To deny the public information on the functioning of state bodies is to violate the fundamental right to democracy.*”¹
27. Further, the ECtHR, in the case of *Stell and Morris versus the United Kingdom*, of 15 May 2005, considers, among other things, that in a democratic society even small and informal groups must be able to perform their activities effectively and that there is a strong public interest that enables external groups and individuals to contribute to the public debate by providing information of general interest (paragraph 89).²
28. Taking into account the legal obligations, responsibilities and competencies that municipalities have according to the legal provisions in effect, the Ombudsperson recalls the Administrative Instruction (MLGA) no. 01/2015 for the Transparency in Municipalities, which regulates the promotion and advancement of transparency of municipal bodies and municipal administration in informing citizens and other interest

¹ Case Of *Observer And Guardian V. The United Kingdom*, (Application no. [13585/88](#), 26 November 1991)

² *Rasti Stell and Morris v The United Kingdom*, (Aplikimi nr. 68416/01, 15 maj 2005).

groups. Also, this Administrative Instruction obliges the municipal bodies to make the activities of the municipality transparent and accessible to the citizens and interested parties and to guarantee access to public documents for natural and legal persons (Article 9).

29. The Ombudsperson estimates that exceptions to the right to access documents are set out in Article 17 of the LAPD. While information can only be restricted for the purpose of protecting legitimate public interests, life or other legitimate private interests, defined by the Law on Personal Data Protection and the Law on Information Classification and Security Verification.
30. The Ombudsperson finds that in the case of the complainant, the Municipality of Fushë Kosovë / Kosovo Polje has failed to fulfill the liability as per to enable, that is to permit access to public documents in accordance with the submitted request of the complainant, a right guaranteed by national acts, and by international instrument.
31. Additionally, the Ombudsperson ascertains that the Municipality of Fushë Kosovë / Kosovo Polje should do more to increase the capacity of its officials in regard to handling of requests for access to public documents and implementation of the LAPD.
32. The Ombudsperson emphasizes that the public interest on how the public money is used as well as the accountability, is essential in promoting and strengthening democracy and good governance. Citizens, civil society and the media play an important role in this regard.
33. In order to improve the respect for the right to access public documents, as a constitutional and legal right as well as increase of accountability and transparency so that citizens apply this right as a powerful tool for controlling the work of governmental bodies, the Ombudsperson

RECOMMENDS

Municipality of Fushë Kosovë/ Kosovo Polje

- *To handle complainant's request, to respond to it and provide access to requested documents pursuant to the Law No. 06/L-081 on Access to Public Documents as well as pursuant to relevant legislation at force.*

Pursuant to Article 132, paragraph 3 of the Constitution of the 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 the actions you will undertake regarding this issue.

Warmly submitted,

Hilmi Jashari
Ombudsperson