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Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution

REPORT WITH RECOMMENDATIONS

C.no. 702/2015

Zharko Dejanovic

Against

Municipality of Klllokot – Vërbovcë

To: Mr Srecko Spasic, Mayor of Municipality of Klllokot – Vërbovcë

Issue: Regarding limitation of the right for access to public documents

Legal grounds: Constitution of the Republic of Kosovo, Article 135, paragraph 3, Law on Ombudsperson No. 05/L-019, Article 16 paragraph 8 and Article 27

Prishtina, 3 October 2016

Purpose of report

The purpose of this report is to draw the attention of Municipality of Kllokot - Vërbovcë (MAV) regarding the complaint filed by Mr Zharko Dejanovic, Chairperson of the Assembly of MAV, based on the facts and evidences, and based on case file documents available with Ombudsperson Institution (OI), regarding the limitation of the right for access to public documents.

Powers of the Ombudsperson

Article 135, par. 3 of Constitution empowers the Ombudsperson to make recommendations *“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.”*

In addition, Article 18.1.2 of Law No. 05/L-019 on Ombudsperson, the Ombudsperson is responsible to: *“To draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases”.*

Description of issue

Facts, evidences and information available with Ombudsperson Institution provided by the complainant and gathered from the investigation conducted, are summarised as follows:

1. On 2 October 2015, as municipal members agreed in the ninth meeting of Municipal Assembly that the access in the payroll list of all employees in the municipality is necessary, Chairperson of MAV addressed the Head of Personnel in MAV with a request (no.6403/2), for access to the “List of all employees in the Municipality”.
2. On 5 October 2015, Mr Zharko Dejanovic, received a response from the Head of Personnel (no.6410/3), according to which he was informed that his request for access to public documents should be addressed to the information officer or to the officer appointed by the Mayor, who is entitled and is obliged to carry out services required for access to public documents.
3. On 5 October 2015, acting according to the response of Head of Personnel, the complainant addressed Mr Vojislav Kostic, appointed by the Mayor with the request for access to public documents (no.6415/2).
4. On 7 October 2015, Mr Dejanovic, addressed with a request for access to public documents (no.6428/2) to the Director of Directory for Finance and Budget, Director of Directory for Education, Health, Social Issues, Culture, Youth and Sports, Director of Directory for Administration and Public Services, Director for Agriculture, Forestry and Director of Directory for Cadastre, Geodesy and Urbanism.
5. On 15 October 2015, since Mr Dejanovic received no response regarding his request, he addressed again Mr Nikola Nojkic with a request (6462/2), Director of Directory for Finance and Budget.

Actions in the Ombudsperson Institution

6. On 18 December 2015, Ombudsperson received a complaint from Mr Zharko Dejanovic, Chairperson of the Municipal Assembly Klllokot - Vërbovcë, regarding the failure of Municipality of Klllokot – Vërbovcë to respond to his requests no. 6403/2, 6415/2, 6428/2, 6462/2, for access to public documents, and the partial response (no. 6410/3) and unjustified response of Municipality, regarding the request protocolled with no. 6403/2.
7. On 5 January 2016, the representative of the Ombudsperson Institution (OI), for purposes of investigation of the case, visited Municipality of Klllokot - Vërbovcë and discussed with the Mayor, since he was not aware of the complainant's requests for access to public documents. He was initially informed about the requests and he was requested that responsible authorities should respond to complainant's requests. At the end of the meeting, the Mayor promised that he would find more about regarding the requests, and the complainant will receive a proper response.
8. On 21 January 2016, OI representative discussed with the complainant and was informed that he had not received a response.
9. On 4 February 2016, OI representative discussed with the Human Rights Officer, who claimed that a response was made to the complainant.
10. On 14 March 2016, complainant again claimed that he had not received a response.
11. On 15 March 2016, OI representative asked from municipal responsible officers, a copy of the response made to the complainant.
12. On 17 March 2016, municipal responsible officers provided OI with a copy of the response made to the complainant, however, the response provided no.6410/3 is dated 5 October 2015, which Mr Dejanovic received from the Head of Personnel according to which he was informed that his request for access to public documents should be addressed to the Information Officer or to an Officer appointed by the Mayor who is entitled and is obliged to carry out services required for access to public documents.

Legal instruments applicable in the Republic of Kosovo

13. Constitution of the Republic of Kosovo (hereinafter Constitution of Kosovo), Article 41, paragraph 1, sets forth the Right of Access to Public Documents, which defines that: *“Every person enjoys the right of access to public documents”*.
14. Paragraph 2 of the same Article of Constitution of Kosovo sets forth that documents held by all institutions are accessible to all, with exception to those documents the access to which is limited 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”*.
15. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, which guarantees to all: *“Freedom to seek, receive and impart information and ideas through any media and regardless of frontiers”*.
16. Freedom to receive and impart information is set forth also by Article 10, paragraph 1, of European Convention “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...”

17. Like Constitution of Kosovo, European Convention sets it forth as a right which is not absolute and limitation of this right can be done for specific reasons: *“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, 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”*.
18. The spirit of Article 41 of Constitution of Kosovo is pursued also by Article 1 of Law on Access to Public Documents 03/L-215 (hereinafter 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 institution”*.
19. Article 4, paragraph 1 of LAPD shall specify that: *“Any applicant of document shall have the right of access to documents of the public institutions, complying with principles, conditions and limitations established under the Law”*, while paragraph 4 specifies that: *“Public documents received from the applicant cannot be used for denigration, propagandistic and commercial purposes”*.
20. Article 7, paragraph 2, defines that: *“If the public institution does not possess or does not supervise the information, and has knowledge for respective body, its sector or other institutions, immediately or at latest five (5) working days, from the day of receipt of the request of the applicant in writing, is obliged to send the request to the respective body or to its sector, which possessed or supervises the information”*, while paragraph 3 determines that: *“The respective public institution, from paragraph 2 of this Article, is obliged to notify the applicant for these activities“*, same Article in paragraph 8 of LAPD specifies that: *“The public authority shall, within seven (7) days from registration of the application, be obliged to issue a decision, either granting access to the document requested, or provide a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make an application for review. Refusal of the request is done with a decision in writing for its refusal”*.
21. Article 12, paragraph 1 of LAPD, sets forth reasons for exception of the right for access to public documents: *Limitation of this right shall be exercised proportionally, and only for the purpose of protection of:*
 - 1.1. *national security, defence and international relations;*
 - 1.2. *public security;*
 - 1.3. *prevention, detection and investigation of criminal activities;*
 - 1.4. *disciplinary investigations;*
 - 1.5. *inspection, control and supervision by public institutions;*
 - 1.6. *privacy and other private legitimate interests;*
 - 1.7. *commercial and other economic interests;*
 - 1.8. *state Economic, monetary and exchange policies;*
 - 1.9. *equality of parties in court procedure and efficient administration of justice;*
 - 1.10. *environment; and*

- 1.11. the deliberations within or between the public institutions concerning the examination of a matter.*
22. Article 12, paragraph 2 of LAPD stipulates that: *“Access to information contained in a document may be refused if disclosure of the information undermines or may undermine any of the interests listed in paragraph 1 of this Article, unless there is an overriding public interest in disclosure”.*
23. Article 17, paragraph 1 of LAPD, *“The Ombudsperson Institution is an independent authority, which shall assist citizens to have access to the necessary documents being refused to them”.*
24. Law No. 03/L-40 on Local Self-Government (LSG), Article 4, paragraph 4, defines that: *“All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law”.*
25. Article 39, paragraph 2, defines that: *“A member of the Municipal Assembly may request information concerning municipal matters from the Mayor, or the chairperson of a committee. The request shall be dealt with in accordance with procedures to be set out in the Statute and Rules of Procedure.”*
26. While, paragraph 5 of the same Article defines that: *“A member of the Municipal Assembly may request from the Mayor information necessary for his work as a member. If he or she is dissatisfied with the response he or she may raise the issue with the Municipal Assembly.”*
27. Article 68, paragraph 5 of LSG defines that: *“Any person may inspect any document held by the Municipality, unless such disclosure is restricted in accordance with the Law on Access to Official Documents.”*
28. Article 9.1, of Law No. 02/L-28 on Administrative Procedure (hereinafter LAP), sets forth that *“The public administration bodies shall exercise their activity in a transparent manner and in close cooperation with concerned natural and legal persons”*, and 9.2. *“Any natural and legal persons, without disclosing his specific interest vis-à-vis public administration bodies, shall have the following procedural rights:*
- a) to obtain information available to public administration bodies,*
 - b) to obtain such information in a timely fashion,*
 - c) to obtain it in the same manner as any other person;*
 - d) to obtain it in a convenient and effective means or format”.*
29. Administrative Instruction No. 05/2013, on the Transparency in Municipalities, which aims at strengthening the transparency of municipality authorities through rules enabling the exercise and development of best administrative practices for access to public documents sets forth procedures for access of the public to public documents.

Analysis of case

Regarding the right for access to public documents

30. Based on analysis of legislation and facts presented above regarding the complaint of Mr Dejanovic for access to public documents in the Municipality of Klllokot - Vërbovcë, the Ombudsperson observes that this right is guaranteed by international instruments, Constitution, and other legal acts mentioned above.

31. On 2 October 2015, the complainant addressed respective public institution of Municipality of Klllokot – Vërbovcë with four requests: no. 6403/2, 6415/2, 6428/2, 6462/2, for access to public documents of Municipality (see item 6 of the report). But he received no response from Municipality of Klllokot - Vërbovcë, despite the right and legal obligation of Municipality for providing a response within a legal time of 7 days, from the date of submission of the request, in conformity with Article 7, paragraph 8 of LAPD “*The public authority shall, within seven (7) days from registration of the application, be obliged to issue a decision for granting full or partial access to the document*”.
32. In addition, the Ombudsperson also found that Head of Personnel in the concerned municipality, regarding the request with no. 6403/2, dated 2 October 2015, for access to public documents in the “*Payroll list for all employees in the Municipality*”, responded within the legal time. However, despite the response within the legal time, the Ombudsperson found that in the case concerned, public institution should have submitted the request in question to the respective person and should have respected paragraph 2 and 3 of Article 7 of LAPD, which determines legal obligation of public institutions to send the request to the respective body or to its sector, which possessed or supervised the information, and the respective public institution is obliged to notify the applicant (paragraph 3) for these activities, while in the case in question, according to the response, we found that rather than send the request to respective public institution, the applicant was notified to address other institutions, with a request, in the Municipality of Klllokot -Vërbovcë.
33. In addition, although according to the response we found that the request of Mr Dejanovic for access to payroll lists is rejected, the response in question did not contain the advice for use of legal remedies as is set forth in Article 7, paragraph 8, of LAPD: “*The public authority shall be obliged to [...] inform the applicant of his or her right to make an application for review*”.
34. European Court of Human Rights points out that delays in the provision of the information may constantly diminish the value of information, or the entire value to information and the interest associated, because a piece of news comprises a service which is quickly gone and the delay of its publication, even for a short period of time, may deny this piece of news the entire value or the interest (see the case *The Sunday Times V. The United Kingdom*)¹.

Findings of the Ombudsperson

35. The Ombudsperson finds that Mr Srecko Spasic, Mayor of Municipality of Klllokot - Vërbovcë, in the meeting he had with OI representative, on 5 January 2016, regarding the complainant’s case promised that he will engage so that the complainant will receive a response within a week, but which was not proved so far.
36. In addition, the Ombudsperson regarding the part of the response that: “[...] *the officer appointed by the Mayor is obliged to carry out the services required [...]*”, observed that provision of access to documents and provision with information is not a service, but is a right, guaranteed by international instruments, Constitution and other legal acts mentioned above. ECtHR in the case of *Autronic Ag V. Switzerland*,

¹ *Case of The Sunday Times V. The United Kingdom*, (Application no. [6538/74](#)), 26 April 1979

points out that “Freedom to receive information includes the right to seek and request information, through all legal means possible”²

37. On the other hand, Ombudsperson welcomes the will for cooperation and observes that the duty of the Mayor is key to strengthening the transparency and democracy and is a connecting bridge among public institutions, and between the Municipality and the citizen; therefore, he is under a legal obligation to respond to different citizens’ requests, including those for access to information. As is mentioned in the judgment of European Court of Human Rights *Observer and Guardian V. The United Kingdom*³ “Denial of information to the public on the functioning of state bodies shall mean violation of fundamental rights of democracy”.
38. The Ombudsperson, taking into account that “Only the law has the authority for determining rights and obligations for legal and natural persons”, and based on facts provided above, finds that failure of Municipality of Klllokot –Vërbovcë to respond regarding the request of Mr Dejanovic, and incomplete response to the request are in contradiction with provisions of LAPD.
39. In order to improve, therefore, the respect of the right for access to public documents as a Constitutional and legal right, and in order for citizens to use this right, as a powerful means to control the work of the state authorities, which would impact on improvement of the work of state authorities and the increase of transparency and accountability, the Ombudsperson, in conformity with Article 135, paragraph 3, of Constitution of the Republic of Kosovo and Article 27, of Law No. 05/L-019 on Ombudsperson provides the following:

Recommendations

- ***Municipality of Klllokot – Vërbovcë should review the request of Mr Dejanovic for access to public documents in conformity with Law on Access to Public Documents.***
- ***Municipality should undertake actions in capacity building of public officials regarding the implementation of Law on Access to Public Documents, and Law on Ombudsperson.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 28 of Law no. 05/L-019 on Ombudsperson, will you kindly inform us on actions to be undertaken by the Municipality of Klllokot -Vërbovcë about this issue, as a response to recommendations mentioned above.

Expressing our gratitude for the cooperation, please be informed that we would like to have your response regarding this issue within a reasonable legal time, but no later than 30 (thirty) days from the day of the receipt of this report.

Sincerely,

Hilmi Jashari

Ombudsperson

² *Case of Autronic Ag V. Switzerland, (Application no. 12726/87), 22 May 1990*

³ *Case Of Observer And Guardian V. The United Kingdom, (Application no. [13585/88](#)), 26 November 1991*