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Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution**

OMBUDSPERSON'S REPORT

Complaint No.700/2020

**Islam Morina
Versus**

MINISTRY OF ENVIRONMENT, SPATIAL PLANNING AND INFRASTRUCTURE
with regard to complainant's allegations on not responding to his request and on an appeal

Addressed to:

Mr. Liburn Aliu, Minister

Ministry of Environment, Spatial Planning and Infrastructure

Copy for:

Mr. Habit Hajredini, Director

Office of good Governance - Office of Prime Minister

Prishtinë, 24 February 2022

THE PURPOSE OF THE REPORT

1. The aim of this Recommendations Report is assessment of actions and inactions of the Ministry of Environment, Spatial Planning and Infrastructure (MESPI), previously Ministry of Infrastructure (MI), as the responsible authority with regard to handling of the request of Mr. Islam Morina (hereinafter: the *complainant*), through which he requested to obtain a certificate of pension contribution and withholding tax on wages, as well as the handling of his appeal on the same issue.
2. Report with Recommendations aims to draw attention and provide specific and appropriate recommendations with regard to the actions that MESPI should take to fully comply with applicable laws and human rights.

OMBUDSPERSON'S RESPONSIBILITIES

3. Constitution of Republic of Kosovo in Article 132, paragraph 1, stipulates: "*The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.*" While in Article 135, paragraph 3, defines: "*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.*" Ombudsperson, according to the Law No. 05/L-019 on Ombudsperson, among others, has the following powers and responsibilities:
 - "*To investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.*" (Article 16, paragraph 1);
 - "*To draw attention to cases when the institutions 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*" (Article 18, paragraph 1, subparagraph 1.2);
 - "*To make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination*" (Article 18, paragraph 1, subparagraph 1.5);
 - "*To publish notifications, opinions, recommendations, proposals and his/her own reports*" (Article 18, paragraph 1, subparagraph 1.6).

CASE DESCRIPTION

4. The Ombudsperson Institution (OI), based on Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson, on 23 November 2020, admitted Mr. Islam Morina's complaint filed against the Ministry of Infrastructure (MI) for not providing response to his request and an appeal.

5. According to complainant's allegations and documents submitted to the OI, as of 20 November 2017 until 30 September 2019 the complainant worked under a contract for special services in the Division of Public Communication in MI. On 6 March 2020 the complainant through application (no. 2684) addressed to MI had requested to be provided with a certificate of pension contribution and withholding tax on wages, for the period of his employment in MI. As the complainant has not been served with the response to this request, he repeated his request through email on 24 June 2020. As no response has been served to him again, he on 8 July 2020, addressed the MI with an appeal for non-responding to the request.
6. On 16 July 2020, the complainant was served with the response through e-mail by Accounting officer in this Ministry, informing him that the responsibility for issuing a certificate of pension contribution and withholding tax on wages rests on other officials of the Ministry and not on her.
7. On 19 August 2020 the complainant again addressed the Ministry with an appeal.
8. The complainant pointed out that until submission of his complaint to the OI, he was not served with any response from the MESPI to his request and an appeal.

ACTIONS UNDERTAKEN BY THE OMBUDSPERSON

9. On 6 January 2021, the representative of the OI, by e-mail addressed a letter to the Secretary General of MESPI, requesting information on the reason for non-responding on complainant's request and the actions that this Ministry has taken or planes to undertake with regard to the issue.
10. On 1 February 2021, the representative of the OI, by e-mail addressed a reminding letter to the Secretary General of the Ministry.
11. On 4 March 2021, OI representative, by e-mail addressed a reminding letter to the Secretary General of MESPI.
12. On 4 March 2021, MESPI Secretary General, forwarded the e-mail of OI representative to the competent officials of the Ministry and requested from them to act in accordance with applicable law and within the legal competencies regarding the issue. Apart this communication for which the OI representative was notified, the OI did not receive any response from MESPI.
13. On 21 May 2021, the complainant was notified on OI's actions in relation to his case. Furthermore, the complainant informed the OI representative that he still did not receive any response from the Ministry regarding his requests.

LEGAL BASES

14. Article 21, paragraphs 2 and 3, of the Constitution of Republic of Kosovo (henceforward: Constitution) defines as follows: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution. Everyone must respect the human rights and fundamental freedoms of others.”*
15. Law No. 05/L-031 on General Administrative Procedure, in Article 73, paragraph 1, determines: *“Except in cases when the law foresees a specific form, a request initiating an administrative proceeding may be done: 1.1. in writing; 1.2. by verbal declaration in*

front of public organ and to be recorded by the public organ; 1.3. in any other appropriate and possible form.”

16. Paragraph 1 of Article 74 of the Law No.05/L-031 on General Administrative Procedure stipulates: *“A request may be submitted directly to public organ to which it is addressed as well as to any of its local branches or offices, if any.”* While paragraph 5 defines: *“A written request may be submitted also by mail or electronically, directly to the official address of the organ to which is addressed to. If the sent document is not readable, public organ shall inform the sender without delay and shall require him to submit the request in another suitable form. [...]”*
17. Paragraph 1 of the Article 75 of the Law No. 05/L-031 on General Administrative Procedure determines: *“When a public organ receives a written request for which it is not competent, it shall forward it without delay to the competent organ and notify the submitter about it.”*
18. Paragraph 1 of Article 98 [*Deadlines for termination of administrative proceedings*] of the Law No. 05/L-031 on General Administrative Procedure reads: *“An administrative proceeding, instituted upon request, shall be terminated as soon as possible, but no later than within the deadline established by law for that type of proceeding”*, while paragraph 2 of this Article defines as follows: *“In case the special law provides no deadline, as provided under paragraph 1. of this Article, the general deadline applicable to the conclusion of administrative proceedings shall be forty-five (45) days from the date of its institution.”*
19. Paragraph 1 of Article 124 [*Locus standi and grounds to an administrative remedy*] of the Law No. 05/L-031 on General Administrative Procedure stipulates: *“1. A party shall have the right to legal remedy against every administrative action or inaction, if it claims that its right or legitimate interests are infringed by such action or inaction. A member of a collegial organ shall have the right to legal remedy against procedural actions or inactions. [...]”*
20. Paragraph 1 of Article 125 [*Appeal*] of the Law No. 05/L-031 on General Administrative Procedure determines: *“1. Unless otherwise provided by law, an administrative appeal, may be submitted against an administrative act. It may also be submitted against administrative inaction, if the public organ has kept silent within the established deadline (hereinafter referred to as “appeal against administrative silence”).”*
21. Paragraph 1 of Article 135 [*Deadline for appeal decision*] of the Law No. 05/L-031 on General Administrative Procedure defines: *“1. Except when the law explicitly defines a different deadline, the appeal decision shall be made and notified to the party, within thirty (30) days from the filing of the appeal.”*
22. Law No. 05/L-028 on Personal Income Tax, Article 38 [*Source Withholding Tax on Wages and Source Withholding of Contributions*], in paragraph 6, defines: *“Each employer or person required to withhold at source according to paragraph 4¹ of this*

“4. Pensions paid by, or on behalf of, Kosovo Pension Saving Fund, or by an authorized supplementary pension fund regulated by the law on pension contributions as well as the health insurances according to the Law on Health Insurance, shall be subject to withholding by the payer of such pensions and health insurances at the rates provided in Article 6 of this law.”

Article shall provide by 1st of March of the year following the tax period to every employee from whom wage tax has been withheld, a certificate of tax withholding in a form specified in a sub-legal act issued by the Minister.”

23. Administrative Instruction No.01/2016 on Implementing the Law No.05/L-028 On Personal Income Tax, Article 42 [*General provisions which apply to source withheld taxes*], paragraph 3, determines as follows: “*A taxpayer who withholds tax at source pursuant to Chapter IX of the Law, during a tax period, under the request of the recipient of the income is required to provide the same with a certificate of source withholding tax in the form specified by TAK.*”

LEGAL ANALYSES

24. The Constitution of the Republic of Kosovo, as the highest legal act, protects and guarantees fundamental human rights and freedoms, therefore the implementation, respect and fulfillment of these rights is of interest and contributes to rule of law functioning. The Constitution of the Republic of Kosovo in Article 21 explicitly defines the obligation of all bodies to respect the freedoms and rights of others and as such, this principle is a necessity of the time and must be respected by all.
25. The Constitution in Article 32 [right to Legal Remedies] plainly stipulates: “*Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.*” On this direction, the Law No. 05/L-031 on General Administrative Procedure explicitly stipulates the right to exercise legal administrative remedies, which in Article 124, paragraph 1 specifically determines: “*A party shall have the right to legal remedy against every administrative action or inaction, if it claims that its right or legitimate interests are infringed by such action or inaction. [...].*”
26. Among the basic principles of Law no.05 / L-031 on General Administrative Procedure are the principle of lawfulness, the principle of informality and efficiency of administrative proceedings, the principle of information, active assistance and the principle of the right to legal remedies. The principle of lawfulness (Article 4, paragraph 1) of administrative bodies requires: “*Public organs shall act in accordance with the Constitution, legislation in force, as well as with the applicable general administrative rules, within their competencies and in conformity with the goal for which these competencies have been granted*”. While paragraph 2 defines: “*2. All administrative actions capable of affecting the subjective rights or legitimate interests of any person must be authorized by a law.*” Based on given provisions, administrative procedures shall be conducted in such a way as to respect and protect the subjective rights and legitimate interests of all persons involved. The law constitutes the basis and limits of the activity of the state, which means that all the activity of public bodies must be in accordance with the law.
27. The principle of non-formality and the efficiency of the administrative proceeding, in Article 10, paragraph 2, clearly defines: “*Public organ shall conduct an administrative proceeding as fast as possible and with as little costs as possible, for the public organ and for the parties, but at the same time in such a manner as to obtain everything that is necessary to a lawful and effective outcome.*” Full implementation of the requirements and provisions of the law should be seen as the most

important function of administrative bodies. Functions must protect and promote the public interest as well as the legitimate interests of individuals. Respecting and protecting these interests means fulfilling and exercising legal duties efficiently, fairly and appropriately and as soon as possible.

28. The principle on the right to legal remedies emphasizes the importance by setting the principle of exercising administrative legal remedies as everyone's right: *"Except when explicitly excluded by law, any person has the right to use the legal administrative and judicial remedies, as provided by law against any administrative action or omission, which affects his subjective right or legitimate interests."* (Article 13).
29. The Ombudsperson recalls that the administrative procedure is defined, first of all, as a set of legal norms which regulate the manner of conduct of state bodies, these bodies which, applying the norms of substantive law, issue administrative acts by which they decide for the rights, obligations or interests of the relevant subjects of law.
30. The Ombudsperson notes that Law no. 05/L-031 on General Administrative Procedure, in Article 75, paragraph 1, clearly defines: *"When a public organ receives a written request for which it is not competent, it shall forward it without delay to the competent organ and notify the submitter about it."* Consequently, this provision for clarification of competencies also applies to organizational bodies / units within the same institution. From the response that the complainant received on 16 July 2020 from the Accounting Officer in this Ministry, through which the complainant was informed that she was not responsible to handle his claim, but competent in this matter were other officials in the Ministry, the same had not notified whether the same request had been sent to the competent official, leaving the complainant's request without conclusion. We remind you that in case of a conflict concerning the competence within the same institution, the conflict of competence must be resolved correctly and professionally in order not to create other legal situations and avoiding delays in the administrative procedure. A general and effective rule opens new perspectives relevant to the advancing processes of increasingly quality cooperation between administrative bodies and the parties to the proceedings. Furthermore, we recall that the Law on General Administrative Procedure, in Article 26, paragraphs 1 and 2, stipulates as follows: *"1. A competent public organ shall act in an administrative proceeding through the responsible official assigned in accordance with the rules provided in this article. 2. If not determined directly by special law, by secondary legislation or by the internal administrative rules of organization, the head of public organ shall preliminarily determine, in accordance with the rules on the internal organization, a responsible unit for each type of administrative proceeding under its competence. The decision is made public by appropriate means including website of the public organ."*
31. The Ombudsperson reminds that the administrative procedures must be performed in full compliance with the Law no. 05/L-031 on General Administrative Procedure, which among other things defines that the administrative procedure initiated upon request will be completed as soon as possible, and if the special law has not provided for a deadline, as provided in paragraph 1 of this Article, the general deadline applicable for the completion of the administrative procedure is forty-five (45) days from its commencement (Article 98, paragraphs 1 and 2).

32. In this case, the failure to provide response by the Ministry to complainant's request has created other legal situations in the administrative procedure, as Ministry's non-responding to Mr. Morina's request has directed the same as a party in the administrative procedure in initiating appeal procedures for non-response to the request for which he also had not received a response. The Ombudsperson reminds that the appeal, as a regular legal remedy in administrative procedure, which is right against any administrative inaction, is explicitly regulated by Law no. 05 / L-031 on General Administrative Procedure. In this regard, public bodies are obliged to respond within the deadlines and conditions set by law. The Law on General Administrative Procedure, in Article 135 [Deadline for notification of the act resolving the complaint], in paragraph 1, explicitly stipulates: *"Except when the law provides for a different deadline, the administrative act resolving the appeal shall be issued and notified to the party within thirty (30) days of the filing of the appeal."*
33. The Ombudsperson brings to your attention that according to Law no. 05/1 -028 on Personal Income Tax, each employer is responsible to withhold tax from taxable salaries paid to its employees, including payments for professional, technical, management, financial services, payments for contracts on deed etc. [...]. Furthermore, Article 38, paragraph 6, of the law obliges every employer to provide each employee with a withholding tax certificate: *"Each employer or person required to withhold at source according to paragraph 4. of this Article shall provide by 1st of March of the year following the tax period to every employee from whom wage tax has been withheld, a certificate of tax withholding in a form specified in a sub-legal act issued by the Minister."* According to the legal basis given above, the Ombudsperson considers that the complainant's request to the Ministry, through which he had requested to obtain a certificate of pension contribution and withholding tax on wages, for the period of his employment in the Ministry, was a requirement fully supported by law and as such is the right of every employee guaranteed by law.
34. Furthermore, the obligation of the taxpayer to provide the recipient of income with the tax certificate withheld at source, in the form specified by the Tax Administration of Kosovo, is regulated by Administrative Instruction no. 01/2016 on the implementation of Law no. 05 / L-028 on Personal Income Tax, which in Article 42 [General provisions which apply to source withheld taxes], paragraph 3, determines as follows: *"A taxpayer who withholds tax at source pursuant to Chapter IX of the Law, during a tax period, under the request of the recipient of the income is required to provide the same with a certificate of source withholding tax in the form specified by TAK."*
35. On the other hand, the Ombudsperson recalls that the non-response of the MI in the OI's letters regarding this case, is undoubtedly non-cooperation of this Institution with the OI in the investigation of this case. In this regard, the Ombudsperson recalls that Article 132 of the Constitution, in 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.**"* While Law No. 05/L-019 on Ombudsperson, in Article 18, paragraph 6, defines: *"The Ombudsperson has access to files and documents of each authority of the Republic of Kosovo, including medical files of the people deprived from liberty, in accordance with the law and can review them regarding the*

cases under its review and according this Law, may require any authority of the Republic of Kosovo and their staff to cooperate with the Ombudsperson, providing relevant information, including full or partial file copy and documents upon request of the Ombudsperson”; while Article 25, paragraph 2, determines: “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 of administrative proceedings, including disciplinary measures, up to dismiss from work or from civil service”; while paragraph 3 of this Article determines: “ 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.”

FINDINGS OF THE OMBUDSPERSON

36. The Ombudsperson, based on the above given findings, considers that the failure of the Ministry to response to Mr. Morina’s request for equipment with the certificate of pension contribution and withholding tax on wages, for the period of his employment in MI, is in contradiction with the Law no.05/L-031 on General Administrative Procedure. The failure of the competent body to base its actions concerning this issue on the principle of lawfulness, the principle of informality and efficiency, the principle of information and active assistance, as basic principles that ensure the functioning of a democratic state, is an indicator of clear violation of the complainant's rights to ensure an effective administrative process in accordance with the law.
37. The Ombudsperson considers that the non-response and the failure to handle Mr. Morina’s appeal, regarding non-response to the request, is in contradiction with the Law no. 05 / L-031 on General Administrative Procedure, regarding the general provisions on administrative remedies as well as the general rules and conditions for handling the complaint.
38. According to the Ombudsperson, delays in responding to the requests / complaints of the party in the administrative procedure contradict the principle of efficiency of the general administrative procedure defined by Law no. 05/L-031 on General Administrative Procedure, which in Article 10, paragraph 2, explicitly specifies: *“Public organ shall conduct an administrative proceeding as fast as possible and with as little costs as possible, for the public organ and for the parties, but at the same time in such a manner as to obtain everything that is necessary to a lawful and effective outcome.”*
39. Given the special importance, the necessity of handling every request and administrative remedies in full compliance with Law no. 05 / L-031 on General Administrative Procedure, the Ombudsperson considers that any inaction of the public body in this regard constitutes a violation of the right to a regular and effective process in administrative procedure.
40. Furthermore, the Ombudsperson considers that the inaction of the Ministry for providing the certificate of pension contribution and withholding tax on salary, for the period of employment of the complainant in MI, is opposite to Law no. 05/l-028 on Personal Income Tax as well as in contradiction with the Administrative Instruction no. 01/2016 on the implementation of Law no. 05 / L-028 on Personal Income Tax.
41. Therefore, based on the above given findings, the Ombudsperson finds that in the case of

Mr. Morina, MI had failed to fulfill the legal obligations arising from Law no.05/L-031 on General Administrative Procedure as well as the Law no. 05/l-028 on Personal Income Tax.

Based on what has been stated above, the Ombudsperson, in accordance with Article 135, paragraph 3,² of the Constitution of the Republic of Kosovo and Article 18, paragraph 1.2, of Law no. 05 / L-019 on the Ombudsperson³

RECOMMENDS

The Ministry of Infrastructure:

- ***To undertake all necessary actions with regard to complainant's request and provide him with the response, in accordance with Law no.05 / L-031 on General Administrative Procedure and Law no. 05 / l -028 on Personal Income Tax.***

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,

Naim Qelaj

Ombudsperson

² 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 Article 18, paragraph 1.2, of the Law No. 05/L-019 on Ombudsperson, Ombudsperson: “(...) has the responsibility to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases (...).”