



## PERSONAL DATA PROTECTION IN VIEW OF THE FREEDOM OF EXPRESSION AND PROTECTION OF PRIVACY

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In modern world, the media have become extremely powerful; hence they are called »seventh power« or »fourth branch of government«. Having such power, the media can sometimes intrude too much into our privacy. When this happens, we talk about the collision between the freedom of expression and the right for privacy. This may happen also, when the media do not comply with the regulations on the protection of personal data. Personal data protection has not been instituted as a concretisation of the right for privacy in the field of personal data processing only; it also serves for the protection of information privacy. Personal data protection is a relatively new area in human rights protection, but under the ever-growing influence of globalisation trends and rapid advancements in information technology it develops rapidly. For this reason the media need to be well acquainted with the regulations and current practice in this field. This article presents how this area has been regulated in the European Union and in the Republic of Slovenia (which is its member state), and presents some actual cases and judgements of the European Court of Human Rights.

### Legal framework of personal data protection related to the media in European Union and R Slovenia

One of the results of the ever-growing globalisation and rapid development of modern technologies is an increased flow of personal data. This situation calls for adequate regulation of information privacy at the international level. On December 2000, the Charter on Fundamental Rights was adopted in Nice by the European Union. Article 8 of the Charter refers to the right to personal data protection.<sup>1</sup> This document is legally not binding; however, it has a political and symbolic power, particularly in adopting and implementing measures of the bodies of the European Union and its member states. For the protection of information privacy, the EU has brought a Directive 95/46/ES on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which is a binding legal framework.<sup>2</sup> Within this general regulation on the protection of individuals in personal data processing there are some exemptions, particularly when it is necessary to balance between the basic human rights and the freedom of informing, and especially with the right to receive and transmit information, provided by Art.10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>3</sup> Based on the Convention, the Directive 95/46/ES

<sup>1</sup> Art. 8 of the Charter of Fundamental Rights

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

<sup>2</sup> Official Journal of the European Communities, No. L 281, 23.11.1995, hereinafter: Directive 95/46/ES.

<sup>3</sup> Act on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, changed with protocols No. 3, 5 and 8 amended with protocol No. 2, and its protocols No. 1, 4, 6, 7, 9, 10 and 11

(Art 9) regulates personal data processing and freedom of expression as a special form of data processing. Article 9 refers to the provisions of the chapter on special types of processing, information transmitted to individuals the information refers to, and to the chapter on exemptions and limitations. By this article it is provided that member states can define exemptions or derogations from the provisions for personal data processing, and is meant for journalistic purposes, or for artistic or literary expression. However, member states can determine such exemptions and derogations only if this is necessary to harmonise the right to privacy with regulations on freedom of expression.

Personal data protection in the Republic of Slovenia is one of the constitutional rights and basic freedoms and belongs to the domain of rights of privacy protection, laid down by the Constitution of R Slovenia, Art 38<sup>4</sup>, by which personal data protection is regulated by a systemic law and also by field-specific laws. Concretisation of this constitutional provision is regulated by Personal Data Protection Act<sup>5</sup> which is a systemic law<sup>6</sup> in this area and is entirely in line with the provisions of Directive 95/46/ES.

For an efficient implementation of the provisions of Art 9 of the EU Directive 95/46/ES in Slovenian legal order, par 3, Art 7 of ZVOP-1 provides an exemption for the media when processing personal data for the purpose of informing the public, and for which the provisions for protecting the data under Par 2, Art 25 of ZVOP-1, the provisions on notification of filing systems (Art 26., 27. and 28 of ZVOP-1), and provisions on transfer of personal data to other countries (part V of the Act), do not apply. It needs to be emphasized that these exemptions apply only to personal data which are processed by the media for the purpose of informing the public, however, they do not apply to personal data collections which are not related to creating programme contents of a public medium (e.g. collection of personal data on subscribers, or the employees of the media house). Therefore, all other provisions are binding to the media as well.

When we talk about exemptions to the provisions of ZVOP-1, it needs to be made clear that the provisions of this Act are not used for those personal data which do not originate from personal data collections or administrative, court, or other proceedings, or when personal data are not collected for creating a personal data collection or for conducting various proceedings. Such cases may occur, for example, when a journalist obtains personal data from neighbours, friends, or relatives or from witnesses of a certain event and when these data are then published in the media. In such cases we cannot talk about violations of ZVOP-1, however, an individual may enforce or protect his/her own rights as a criminal offence against honour and good reputation (insult, defamation, offensive accusation, slandering, alleging criminal offence to despise someone). Such cases are prosecuted by private legal action.<sup>7</sup>

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(Official Gazette of R Slovenia-MP, No. 7/1994, RS, No. 78/2006 Odl.US: Up-555/03-41, Up-827/04-26, hereinafter: CPHRF).

<sup>4</sup> Official Gazette of R Slovenia, No. 33/1991, 42/1997, 66/2000, 24/2003, 69/2004 in 68/2006, hereinafter: Constitution of RS.

<sup>5</sup> Official Gazette of R Slovenia, No. 86/04, 113/05, 51/07– ZUstS-A in 67/2007– ZVOP-1A, hereinafter ZVOP-1.

<sup>6</sup> ZVOP-1, Part IV is also the so called field-specific law, which gives direct legal grounds for personal data processing in the field of direct marketing, video surveillance, biometrics, registering entries and exits from premises, and professional surveillance.

<sup>7</sup> N.Pirc Musar, S. Bien, J. Bogataj, M. Prelesnik, A. Žaucer, Personal Data Protection Act with commentaries, GV Založba, Ljubljana, 2006, pp. 72 and 73.

## Cases from the Information Commissioner's practice

The Information Commissioner of R Slovenia has been established as a state supervisory body for personal data protection. Cases from practice frequently show that there is a collision between the right to privacy and the right to freedom of expression. According to the Commissioner's authority these cases need to be treated particularly from the aspect of personal data protection.

One of the cases I would like to expose is related to the protection of sensitive personal data, regulated by subpara 8, Art 13 of ZVOP-1, by which sensitive personal data processing is permissible if so provided by another statute in order to implement the public interest. This provision can be concretised by other field-specific laws, where the legislator can give legal authorisation for processing sensitive personal data only if such processing is necessary to execute public interest and where the interest of the public will outweigh the interest of an individual. An example of such public interest is The Media Act<sup>8</sup>, deriving from the decision of the state supervisor<sup>9</sup> for personal data protection, i.e. the Information Commissioner, who imposed a fine for the offence to the newspaper house which published sensitive data, thus violating the provision under Art 8 of ZVOP-1 (general definition of personal data processing) in combination with subpara 8, Art 13 of ZVOP-1. The administrative offence body found out that the publisher had no legal grounds for publishing sensitive personal data since under no law such personal data can be public. The newspaper house referred to the provisions of ZMed, claiming that this act gives sufficient legal basis for publishing autopsy reports: since public interest was expressed, the administrative offence body found out that this situation could not be subsumarized under the provision of ZMed particularly for the reason that it did not correspond with the criteria of permissible processing of sensitive personal data under subpara 8, Art. 13 of ZVOP-1. Public interest in the field of the media is defined in Art 4 of Zmed. This provision lists contents of programmes, while Art. 42 regulates the right to react to the information published, which, according to Par 1, is meant to satisfy the interest of the public to be objectively and timely informed, and which is a precondition for a democratic decision-making in public matters. Thus, ZMed does not define public interest in terms of the provisions of subpara 8, Art 13 of ZVOP-1. For this reason, the state supervisor for the protection of personal data established that in the given case there were no legal grounds for processing sensitive personal data. Public interest, as a normative concept by Zmed, is limited only to the contents of programmes, and has no connection whatsoever with publishing sensitive personal data. Since in this case the newspaper house referred to the basic human right to freedom of expression, the administrative offence body explained that this right is not absolute; the right to freedom of expression, like any other basic human right, can be limited by other human rights (Par 5, Art 25 of the Constitution of RS). In this concrete case, there was a collision between two human rights. To determine the borderline it was necessary to apply the principle of proportionality, defined by Art 3 of ZVOP-1, by which personal data being processed must be adequate, and in their extent appropriate in relation to the purposes for which they are collected and further processed. If the provisions of ZMed were applied in this case, the legal person would be liable to obtain

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<sup>8</sup> Official Gazette of R Slovenia, No. 35/2001, with amendments, hereinafter: ZMed.

<sup>9</sup> Decission of the Information Commissioner, No. 0613-1/2006 of 2.6.2006.

and publish autopsy reports (or parts of them) only if a serious criminal offence or direct danger for human lives, or their property could be prevented by such act, which, of course, was not the case in this situation. Therefore, the newspaper house had no legal grounds for publishing sensitive personal data.<sup>10</sup>

Another case of the collision between the right to privacy and the right to freedom of expression occurred when a weekly journal<sup>11</sup> published the names of 86 employees of a newspaper company who received top salaries (with information on gross and net incomes). In this was they illegally disclosed personal information about 86 persons even though they had no legal grounds for such action, nor personal consent was given.<sup>12</sup> This was considered as processing personal data of the employees of a newspaper house, which is a private sector institution, for which processing and protection of personal data are regulated by the Employment Relationships Act.<sup>13</sup> According to this act, and under the provisions of ZVOP-1, the information about the salaries of the employees could be published only if this was necessary for exercising the rights and obligations deriving from employment relationships or in relation to employment relationship, or if personal consent of the individuals, to whom these data referred to, had been given. The information on salaries can be made public only for the public sector<sup>14</sup>, while it is explicitly determined that public enterprises and commercial companies with the majority holding of the state, or a prevailing state influence (i.e. a newspaper company), are not part of the public sector. The weekly journal referred to the freedom of expression and public interest, but disregarded the provisions of Par 3, Art 15 of the Constitution of R Slovenia, and Art. 10 of CPHRF, according to which human rights and freedoms are limited by the rights of others. In addition to this, in the Media Act<sup>15</sup> too, there are limitations to the right to freedom of expression: a journal is entitled to obtain and publish the disputed data only for the purpose of preventing a serious criminal offence or to avoid direct or indirect danger for the people or their property. However, this was not the case in this situation. By publishing the data the journal encroached into constitutional rights to personal dignity, protection of privacy and personality rights, and the right for the protection of personal data. Thus, the right to freedom of expression was not a prevailing factor in this case.

In modern legal theory and practice, various theories have emerged with different criteria for weighing between the right for privacy and the right of freedom of expression. Regardless of the theory it needs to be primarily established which area of human life has been affected by such encroachment (intimate sphere, family, privacy, public sphere) and what type of an individual is in question (a private person, or a relative public, or absolute public figure). This means that the less intimate the sphere of an individual, the higher the tolerance for encroaching into the person's privacy. With absolute public figures the threshold is the highest. Another important criterion in such

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<sup>10</sup> N.Pirc Musar, S. Bien, J. Bogataj, M. Prelesnik, A. Žaucer, Personal Data Protection Act with commentaries, GV Založba, Ljubljana, 2006, pp. 135 and 136.

<sup>11</sup> Decision of the Information Commissioner, No. 0613-4/2006-19 of 8.6.2006.

<sup>12</sup> The Information Commissioner Decision on the offence of the newspaper house was affirmed by the Ljubljana Local Court on March 2007 in the proceedings for judicial protection.

<sup>13</sup> Official Gazette of R Slovenia, No. 42/2002, 79/2006-ZZZPB-F.

<sup>14</sup> Public Sector Wage System Act (Official Gazette of R Slovenia, No. 56/2002).

<sup>15</sup> Official Gazette of R Slovenia, No. 110/2006, official consolidated text.

matters is also how relevant is such information for a public debate on a matter which has a general social meaning.<sup>16</sup>

The Information Commissioner is frequently approached by the people who believe that their privacy has been affected after the media published their photographs.<sup>17</sup> On the other hand, the media too are becoming more and more aware of the limitations to their freedom of expression for publishing photos<sup>18</sup>. However, it needs to be emphasized that not all personal data as such are protected by the provisions of ZVOP-1. Such protection is provided only if personal data is part of a structured set of data as stipulated by subpara 5, Art 6 of ZVOP-1. For example, a photograph can give a relatively complete and precise picture of an individual: characteristics of a person can be technically copied to a medium (photographic paper). Thus, if a photograph contains sufficient number of personal information by which an individual can be easily and precisely identified, a photograph is considered a personal data. However, publishing a photo in a journal does not necessarily mean violation of ZVOP-1. If a photo is furnished with other personal data about the individual (e.g. name, surname, date of birth, residential address, or which class of a school the persons attends...), this would be considered a collection of personal data (a filing system) according to ZVOP-1, and this would give sufficient grounds for legal protection of photographs. In such cases the media too, would need to comply with the provisions of ZVOP-1.<sup>19</sup> Of course, the Information Commissioner is not empowered to deal with every photograph published in the media. This only means that in such cases we are dealing with limitations to the freedom expression which has collided with the right to privacy of a person. For this reason, each case needs to be weighed individually, and if necessary, the person can exercise his/her rights through court.

With issues of publishing photos, people need to be aware that the media always appear in public places, which means that there is a great chance for a person to be captured in a picture. When photos are taken during public events, the photographer is not allowed to focus on an individual as a central image. However, it is allowed to make a photo about a public event, or make a documentary, which will also include the image of an individual.<sup>20</sup> Of course, the so called public life figures, or absolute persons of public life who appear in public places need to expect to be in greater focus which means greater encroachment into their privacy.

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<sup>16</sup> For further reading on the criteria for weighing between the right of expression and the right for privacy see article by A. Teršek, Freedom of the Media and privacy protection: a critique of two precedents, proposal for classification of »public figure« and proposal for constitutional standards, Dnevi civilnega prava, Portorož, zbornik, IPP at Pravna fakulteta, Ljubljana, 2006.

<sup>17</sup> For further reading see the Information Commissioner Decision, No. 0712-816/2007 of 10.9.2007.

<sup>18</sup> For further reading see the Information Commissioner Decision, No. 0712-768/2007 of 6.9.2007.

<sup>19</sup> With publishing photographs the important provisions are those which relate to permissible processing of personal data. If in a given case the question was personal data processing by the public sector, the data can be processed only under provisions of the statute. However, if personal data administrator is a holder of public authorisation, who processes data as an activity outside the tasks of the holder of public authorisation, such activities can be performed with prior personal consent of an individual, without any legitimate basis. A private sector personal data administrator can process the data either based on a law, or upon personal consent of the individual.

<sup>20</sup> A. Teršek, Freedom of the Media and Privacy Protection: a critique of two precedents, proposal for classifying »public figures« and a proposal for constitutional standards, Dnevi civilnega prava, Portorož, Proceedings, IPP at Pravna fakulteta, Ljubljana, 2006.

Modern legal theory and judicial practice are unanimous in that photographing individuals without their prior personal consent is not allowed.<sup>21</sup> While the act of taking a photo itself does not represent encroaching into the privacy (except when photos are taken secretly, with teleobjectives, or by hidden cameras, or when a person explicitly prohibits photograph taking), publishing a photo of a person by the media is regarded as encroachment into a protected personality asset, i.e. the person's image. To avoid the offence, the easiest way is to obtain the person's consent. Theoreticians warn that the consent can only be given personally, should refer to a particular person only and is valid only for a defined period of time, and for the method and purpose of publication.<sup>22</sup>

However, protection of personality rights of a photographed person can not be absolute. If there is a higher personal or public interest, encroaching into a personal image is justifiable. In such cases we need to weigh between the two opposing interests, which may be different, depending on the case. One such example is photographing persons from public life, who are interesting for the public. According to judicial practice we can talk about two groups of people: in the first group are persons, who due to their position in the society enjoy much lower protection of their personality. These are absolute persons from public life, who are constantly under the focus of the public due to their function in the society (politicians, officials, artists, sportsmen, etc.). Relative persons from public life are those persons who are interesting for the public only occasionally, usually because they appeared at an event. This group includes actors of criminal offence (kidnappers, serial killers), sport champions, or lotto winners). Thus, protection of personality rights depends on which group a person belongs to. According to German judicial practice, photographing individuals of both groups is allowed without any previous consent. However, photographs of relative public life figures can be taken and published only at a certain event which is interesting for the public and not after it. With both groups it is necessary to try to avoid sensationalistic, improper and irrelevant informing and avoid interfering with the intimate and private sphere when publishing photos.<sup>23</sup>

## **Legal practice of the European Court of Human Rights related to freedom of expression and privacy rights**

In the practice of the European Court of Human Rights in Strasbourg (hereinafter: ECHR), there have not been many cases dealing with the collision between articles 8 and 10 of CPHRF. However, the judgements of ECHR are significant for the formation of European criteria and help us better understand the concepts of freedom of expression and privacy rights. It is useful to look at the ECHR court practice in this field since personal data protection is closely related to privacy rights (moreover, personal data protection has recently become a special field for the protection of human rights within a broader framework of the right for privacy). The ECHR court practice can provide better understanding of the meaning of the provisions of CPHRF.

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<sup>21</sup> A. Finžgar, Personality rights, Slovenska akademija znanosti in umetnosti, Ljubljana 1985, pp. 132.

<sup>22</sup> A. Finžgar, Personality rights, Slovenska akademija znanosti in umetnosti, Ljubljana 1985, pp. 105.

<sup>23</sup> K. Krapež, Photography and Personality rights, Pravna praksa, letnik 2005, No. 16, pp. 22.

From the court cases: *Handyside*<sup>24</sup> (1976), *Lingens*<sup>25</sup> (1986) and other similar cases we can see that the court decided to put greater weight on the protection of freedom of expression. Many times ECHR would tolerate the encroachments of the media into the privacy of persons because of the significant role the media had played during the process of democratisation in the member states. However, the character of the media has changed over the course of time. Today, under strong competitive influence among the media the emphasis has shifted: from the role of spreading ideas for accelerating democratic processes, towards marketing media products and advertising. This, of course, may have future impacts on how ECHR will weigh between the right to freedom of expression and other rights.<sup>26</sup>

In the court case *Tammer vs Estonia* we can see shifts towards greater protection of privacy. ECHR found out that the conviction of Tammer, the Estonian journalist, was not a violation of Art 10 of CPHRF. He was convicted by the Estonian court for publishing an interview with the biographer of the ex-wife of the president of the Estonian government in which he said that she is »unsuitable and irresponsible mother and a marriage breaker«. ECHR found out that when this interview was published she was no longer the wife of the president and had no public functions. Since the journalist referred to her private life, his conviction was made within the framework of the implementation of the legitimate goals of a democratic state.

A precedent case, which illustrates current judicial practice in dealing with the collision between the rights for privacy and freedom of expression, is the verdict of ECHR in the case of *Von Hannover vs Germany*. In this verdict, including some other decisions of the bodies of the Council of Europe (Resolution PS SE 1165), we can see that the pendulum, which had long been on the side of freedom of expression, has now moved to the opposite direction, i.e. towards greater protection of personality rights.<sup>27</sup> In this case the German newspapers published photographs of *Caroline von Hannover*, the Princess of Monaco, and her children, being engaged in shopping and sports at a public place. ECHR delivered a verdict that “the German courts had not weighed correctly between the right for privacy and freedom of expression and by publishing the photographs the newspapers encroached into the privacy of the princess”. According to ECHR, privacy also includes elements of personal identity (e.g. name and image) as well as human physical and mental integrity which ensures that by privacy individuals can develop their own personal relationships with others without external influence. ECHR emphasised that freedom of expression is fundamental to any democratic society; however, the media must not transgress their limits, particularly not on the account of the rights of others. ECHR further elaborated that the princess frequently appears at public events which gives the media numerous chances to take her photos, therefore there was no need to interfere with her private life. Also, publication of her

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<sup>24</sup> In the substantiation of the verdict the ECHR emphasised that role of the media is not only to transmit the information which is benevolent, not insulting, or irrelevant. Freedom of speech protects also the information and ideas which can be insulting or shocking, or can disturb the state, or part of the population. These are simply the characteristics of any democratics society: pluralism, tolerance and freethinking.

<sup>25</sup> The court substantiated the decision by saying that the freedom of press is a means of conveying the opinions and actions of politicians to the public, in order to form public opinion about them. Therefore, the limits in criticising a politician are broader than criticising ordinary people.

<sup>26</sup> L. Wildhaber, lecture: »The right to offend, shock or disturb? – Aspects of freedom of expression under the European convention on human rights«, Dublin, Oct 2001.

<sup>27</sup> J. Rovšek, *The problem of private and public in the media: legal order and practice in Slovenia*, Mirovni inštitut, 2005, pp. 54.

photos did not contribute to any political or public discussion (the photos were not depicting her official duties) so the photos were obviously published only to show some details from her private life to satisfy the curiosity of the readers. In this case ECHR took a new standpoint, namely that the decisive factor in weighing between the freedom of expression and privacy protection, is the impact a published information will have (a photograph in this case) on the views and debates which are of general interest. The German courts have taken the view that the Princess of Monaco is an absolute public life figure; therefore photos of her can be taken outside her home. On the other hand, ECHR believes that the princess is a member of a duke family but performs no official duties in Monaco. For this reason details from her private life cannot contribute to discussion on relevant public matters in a democratic society. A different situation is with politicians, where the media in democratic societies play the role of a watchdog which allows them to encroach into their private sphere. By the opinion of ECHR, the freedom of speech from Art 10 of CPHRF needs to be interpreted in a limited sense. As for the categorisation into absolute and relative public life figures, the court emphasized that the borderline between the two rights needs to be made clear and be regulated, so that one knows exactly what to do in a particular situation.

In the ECHR practice there have not been many similar cases simply for the reason that those who have been affected due to inadequate weighing between the right to privacy and freedom of expression by the state, have neither time nor money for long judicial procedures. However, the decision of ECHR in the case of Von Hannover will definitely have impact on the behaviour of the European media and their attitudes in dealing with personal data protection.