



## The Information Commissioner's competencies in decision procedure under FOIA

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Information Commissioner Act<sup>1</sup>, which came into force 31. 12. 2005, introduced several important changes in Slovene legal order in spite of the fact that it is one of the shortest laws. Namely by this law a new public body – Information Commissioner was created which exercises several competencies both in the sphere of access to public information and in the sphere of personal data protection. ZInfP regulates procedural particularities of access to public information and certain common features or obligations of Information Commissioner with regard to access to public information and protection of personal data.

By 2005 approximately 2 years of practice in implementing appeal proceedings with regard to access to public information showed that provisions of the law regulating general administrative procedure are not always appropriate procedural basis. This was the reason why acquisition of requested information and documents, procedural actions and examination of the records is now specifically regulated by ZInfP.

According to the specific provision of the General administrative procedure Act the body liable for providing access to public information is obliged to attach to the complaint all the “records” which relate to the matter. The difficulties have been encountered especially in interpretation of what is included under the term “record” in the context of the proceeding of access to public information. Information Commissioner has to have at its disposal the claim, the decision of the body of first instance and the complaint to be able as appeal body for access to public information to decide in a regular manner on all procedural and material facts; by nature of things the “record” includes also information which was subject to the request for access. Without it the Commissioner can not decide in a lawful and regular manner whether the information in question is of public character or whether it is only partially information of public character. Neither can the appeal body form a specific operative part of the decision without thorough examination of the document which was requested by the applicant.

Due to problems of interpretation of the term “record” and to avoid delays in relinquishment of jurisdiction over the complaint to responsible body for decision, ZInf stipulates that the responsible person of the body of first instance at request of the Information Commissioner has to immediately send to it the documents, files, dossiers, registers, records or documentation requested by the applicant. The authority of the Information Commissioner in this context includes the right of access to data representing tax secrecy. The head of appeal body – Information Commissioner has also the right of access to all classified data without prior obligation to acquire specific permission for such access which points to the extent and completeness of the right of access to documents<sup>2</sup>.

<sup>1</sup> Official Gazette of RS, No. 113/2005 and No. 51/07 – ZUstS-A, hereinafter ZInfP.

<sup>2</sup> According to the provisions of third Paragraph of Article 31 of the first law amending ZDIJZ, ZDIJZ-A.

These competencies are dictated by the principle of substantive truth<sup>3</sup>, which requires establishing the true factual situation in the proceeding and for that purpose all the facts which are relevant for lawful and regular decision should be established. If the liable body according to ZDIJZ does not send all the requested information and documents to the Information Commissioner and the later suspects in deciding on the complaint based on the record supplied by the body of first instance that the body of first instance has at its disposal requested information but is for different reasons refusing to disclose them partially or in whole, the Information Commissioner has competencies according to the law regulating the inspection proceeding. The competencies in these cases are stipulated in Article 19 of Inspection Act<sup>4</sup>. The supervisor has among other things the right to examine the premises, buildings, installations, devices, equipment, circuits, objects, goods, materials, books, contracts, letters and other documents as well as operation and documentation of state authorities, commercial companies, institutions, other organizations and associations and private persons. Furthermore the supervisor has also the right to acquire and use free of charge, personal and other data from official records and other databases, relating to the person liable and necessary to perform the inspection, to photograph or film on another media the visual data of a person, premises, buildings, installations, circuits and other previously mentioned objects and to seize objects, documents and samples for protection of evidence and perform other duties in accordance with the purposes of inspection.

ZInfP contains also provisions on minor offences. All relate to the responsible person of the body which is in the case of access to public information the public information officer competent for providing access to public information. If the head of the body did not adopt a decision appointing public information officer, the responsible person is the head of the body. Fines vary on a range from 420 EUR up to 1050 EUR. Failure to cooperate is also sanctioned as minor offence namely if the body does not send at the assignment of the complaint to the Information Commissioner also requested document, file, dossier, register, record or documentation even though it has them at its disposal.

In practice the competencies of the Information Commissioner to seek document or information in accordance with the Inspection Act have only been used twice (Faculty of Economics in Ljubljana and University medical centre in Ljubljana). Request to deliver all the information and threat of a fine in accordance with provisions on offences have proved in practice as sufficient measure to achieve the goal, thus acquiring information in the procedure of processing of the appeal.

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<sup>3</sup> This principle is implemented by Article 8 of the General administrative procedure Act.

<sup>4</sup> Official Gazette of RS, No. 43/2007, official consolidated version, hereinafter ZIN.