

Date: Aug 28, 2009
No: 090-103/2009

In the case referring to access to public information, the Information Commissioner (hereinafter: Commissioner) through the attorney Nataša Pirc Musar, and based on Art. 2 of the Information Commissioner Act (Official Gazette RS, No. 113/2005, with amendments, hereinafter: ZInfP), Par 3 and 4, Art. 27 of the Access to Public Information Act (Official Gazette RS, No. 51/2006 - UPB2, with amendments, hereinafter: ZDIJZ) and Par 1, Art. 259 in connection with Par 3, Art. 251 of the General Administrative Procedures Act (Official Gazette RS, No. 24/06 - UPB2, with amendments, hereinafter: ZUP), **in the appeal of Applicant**, against the decision No. Su 36-03/2009-79, of June 24, 2009, **of the Supreme Court of R Slovenia, Tavčarjeva 9, 1000 Ljubljana** (hereinafter: the body), issues the following

DECISION:

1. The decision of the body No. Su 36-03/2009-79, dated June 24, 2009, is annulled. The case shall be returned to the body for reconsideration. Without delay, or within 30 days at the latest, the body shall bring a decision about the applicant's request.
2. No expenses were incurred by this proceeding.

Grounds:

On May 15, 2009 the applicant addressed the body with a request for accessing public information. The applicant wished to know which Official Gazette of RS (which particular article, or regulation) contains the provisions upon which the body took its position which derives from the preliminary submission that the applicant had supplied together with the request.

The body turned down the request with the letter No. Su 36-03/2009-79 dated May 26, 2009 on the grounds that the applicant had not sufficiently specified the request. Reference was made to Subpara 1, Par 2, Art. 17 of ZDIJZ, which stipulates that the applicant needs to specify the information required. The body advised the applicant to find the document on a web site, adding that if the information could not be retrieved from that particular web site in electronic format, the applicant could file a new request for access to public information, however, the document would still need precise specification.

On June 16, 2009 the Commissioner received the applicant's appeal against the silence of the body, after which the Commissioner addressed a letter to the body (No. 0900-138/2009/2, dated June 22, 2009), requesting the body to reply within five days and explain why the decision had not been issued in due time, or to bring a decision according to ZDIJZ and to notify the Commissioner about this.

On June 24, 2009 the body issued its decision No. Su 36-03/2009-79, by which the applicants' request of May 15, 2009 was denied. In the grounds of the decision the body stated that the applicant had not sufficiently specified which document was requested, adding that the applicant had been notified that the body could not deal with the matter if the document was not precisely specified. The applicant was advised to refer to a database on judicial practice on a web site. In addition, the body claimed that even though the applicant had been requested by letter No. Su 36-03/2009-79 of May 26, 2009 to precisely specify the document, the applicant failed to do so, adding that it was not its duty to assist its clients to browse through its decisions to find documents which could be relevant to the applicant's judicial procedure. If the applicant had addressed the body and precisely specified the document, the body could have taken its position regarding access to this document. Therefore, referring to the provision under Art. 17 of ZDIJZ, and in connection with Art. 18 and 19 of ZDIJZ, the body declined the request on the grounds that process conditions had not been fulfilled (the applicant did not specify the document he wished to be acquainted with).

On July 3, 2009 the Commissioner received the applicant's appeal against the decision of the body No. Su 36-03/2009-79 dated May 26, 2009. The Applicant stated that the decision of the body was incorrect and that the purpose of the request was only to obtain the information in which Official Gazette, and in which law specifically he could find all legal rules that regulate gainful activity.

On July 16, 2009 Commissioner (letter No. 090-103/2009/1) sent the applicant's appeal to the body of first instance (which had been received by the Commissioner as the appellate body), asking to revise the appeal and

to act according to Art. 245 of ZUP. In its reply (letter No. Su 36-03/2009-79 of July 24, 2009, received by the Commissioner on July 27, 2009) the body stated that the appeal was permitted, filed in due time and by eligible person. The body also attached a copy of the whole file relating to this case.

The appeal is founded.

1. Testing limits of actions of the appellate body

Holding the position of a body of second instance, and according to Art. 247 of ZUP, the Commissioner is obliged to test the decision in the part which was contested by the Applicant. The decision must be tested within the scope of the appellant's allegations, and by official duty the Commissioner must also examine whether there had been any substantial violations and infringements of the material law during the proceeding at the first instance.

3. The concept of public information

ZDIJZ makes manifest the constitutional right of access to public information and hence in the first paragraph of Article 1 ensures everyone free access to public information held by public institutions, i.e. state bodies, local government bodies, public agencies, public funds and other entities of public powers holders (persons under obligation). Undoubtedly, ZDIJZ has a strong impact on the activities of public sector bodies, not only because it encompasses a wide range of public institutions at the first instance which need to follow the provisions of the statute, but also because of the definition of public information itself. These two are in the interest of the transparency of work of the entire public sector.

According to the free access principle provided under Art. 5 of ZDIJZ, every applicant should be able to have free access to public information and the right to acquire information by request from the body, either by consulting the information on the spot, or by acquiring a transcript, photocopy, or electronic record. What is important is that the applicant does not need to demonstrate its legal interest, i.e. a justifiable reason. The principle of free access also means that anyone can access any public information from persons under obligation to this law except if that particular information is exempted from free access, as stipulated by Art. 6 of ZDIJZ.

3. Obligations of the applicant according to ZDIJZ

According to ZDIJZ, when exercising the right to access public information, the applicant needs to fulfil some formal requirements when filing a formal (written) request. According to Par 1, Art. 17 of ZDIJZ, the request must contain the data about the body (name of the body), data about the applicant (personal name or the name of legal person with the address) or the address of his representative or plenipotentiary. In addition to this, Par 2, Art. 17 of ZDIJZ stipulates that the applicant must specify the information requested and suggest the method of providing information (examination on the spot, transcript, photocopy or electronic record).

The most important part of the request is providing the description of the public information and how the client's request is formulated in terms of Par 1, Art. 66 of ZUP. The information requested must be specified in such a way that the body can deal with the case, however, it is not expected that the information is described in full detail. The applicant is not expected to provide unnecessary details relating to the document if there is other sufficient information by which the document could be retrieved, even though this would require additional effort. For example, the body should not request the reference number of the document (the applicants are not expected to know the internal codes for document identification). Also, giving a precise date or the sequence number of the document, are not essential data if the applicant is able to indicate the time frame of some other information which can easify the retrieval of the document.

Of course, applicants need to be aware that providing as much information as possible will increase a chance to obtain the right document in a shorter period of time. For this reason the applicant should give all the information available about the document (when and where the document was created, by which body, who sent the document, the contents, number, format of the document, etc.). With such detailed description the applicant can avoid any further clarification, or even prevent refusal of the request (see Commentary to the Access to Public Information Act, Senko Pličanič et al., Institute of Public Administration, Faculty of Law, Ljubljana, 2005, p. 194).

Specification of public information means that the applicant needs to describe the information to such a level of

identifiability that the body can deal with the case (adequate level of identifiability), however it does not mean that the information needs to be precisely identified. Adequate identifiability means that the description needs to reach such precision level at which the information, or a document can become identifiable. The same derives from Art. 6 of the Regulation of the European Parliament and of the Council (ES) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter: Regulation), which stipulates that applications for accessing public information should be made in sufficiently precise manner to enable the institution to identify the document. If documents are stored in such a way that the requested information can be easily found, the body is not allowed to demand a detailed description or identification of the document from the applicant. Such requirement would be justifiable only if further details were essential for the body to deal with the case. The amount of effort which the body would need to put into retrieving the document is not relevant.

Thus, by ZDIJZ, the applicant is expected to define the information requested within reasonable limits, taking into account the applicant's limited knowledge about the work of the body. In practice, insisting on absolute identifiability of the information or a document requested would *de facto* mean negation of the right to access public information.

4. Obligations of the body according to ZDIJZ

If the applicant's request is incomplete and the body cannot deal with it, the body is obliged, under Par 1, Art. 18 of ZDIJZ, to invite the applicant to supplement the request within a time limit, not less than three working days. According to Art. 19 of ZDIJZ, and in connection with Par 3, Art. 18 of ZDIJZ, the body can refuse the request if the applicant fails to supplement it within the prescribed time limit, or if the supplemented request does not fulfil the conditions set out in Art. 17 of ZDIJZ by which consequently the body is unable to deal with the case.

In this particular case the Commissioner established that during the procedure at first instance the body did not comply with the provisions under Par 1, Art. 18 of ZDIJZ, i.e. the applicant had not been properly informed to submit a supplemented request within three days, and that the request was turned down without proper notification.

The Commissioner also refers to the provision under Par 2, Art. 18 of ZDIJZ, whereby the authorised body's official for supplying public information is obliged to give the applicant adequate assistance in supplementing a request. This provision reflects the principle of the protection of client's rights as stipulated by Art. 7 of ZUP and according to which the bodies must ensure that their clients can protect and exercise their rights. Neither ZDIJZ nor ZUP specify any concrete manner on how "adequate assistance" should be offered (in what form and scope). Nevertheless, if the body considers the request has not been specified enough to be dealt with, the body is obliged to establish a formal contact with the applicant to help clarify the applicant's request (by letter or by invitation) or less formal (by telephone) to clarify all the circumstances related to the information and documentation requested which is in the possession of the body.

With all the above, the Commissioner found out that the body, by not requesting the applicant to supplement the request, significantly violated the procedure. Therefore, based on Par 1, Art. 259 of ZUP, and in connection with Par 3, Art. 251 of ZUP, the contested decision had to be annulled and the case was returned for reconsideration to the body at first instance. Both, the Commissioner (having the position of the body at second instance), as well as the bodies at first instance, are obliged to respect the basic principles of administrative procedure as stipulated by Art. 14 of ZUP, which includes the principle of time efficiency in running the procedure as well. This means that the procedure must be conducted in a time efficient manner, with minimum delay for the client or other participants in the procedure, making efforts to establish the actual situation to protect the rights and legal interests of the client, and to issue a lawful and correct decision. In this particular case the Commissioner assessed that it would be easier to remove the deficiencies of the procedure at the first instance in a more time efficient manner by the body at first instance.

During the preliminary procedure the body should reconsider whether process assumptions have been fulfilled for bringing a decision in compliance with Art. 15 through 19 of ZDIJZ, and ask the applicant to supplement the request dated May 15, 2009 within the time limit set out by the body (which should not be shorter than three days). The body is obliged to act according to the provision under Par 2, Art. 18 of ZDIJZ i.e. assistance to the applicant should be offered by the official authorised for supplying public information to supplement the request, and the final decision should be brought according to Art. 15 through 26 of ZDIJZ.

5. Conclusion

The Commissioner found out that some essential violations of the procedure had been made in the process of decision making at the first instance. Therefore, based on the provisions under Par 3, Art. 251 of ZUP and in connection with Par 1, Art. 259 of ZUP, as well as based on the facts elaborated in the grounds of this decision, the contested decision was annulled and the case was returned to the body of first instance for reconsideration. In reconsidering the case, the body must follow the Commissioner's instructions as given in this decision.

Instruction on legal remedy:

No appeal or administrative dispute may be lodged against this decision.

Procedure conducted by:

Mojca Komac, B.L.
Researcher

Information Commissioner:
Nataša Pirc Musar, B.L.
The Commissioner