

Case No.: 090-37/2010/10
Date: September 1, 2010

The request of the Applicant:

The Applicant has requested information in relation with the construction of the “northern ring road” or reliever road in Lenart v Slovenskih Goricah, namely the Applicant has requested photocopies of the following documents:

- the entire study on traffic which indicates the economic viability of the construction of northern ring road,
- the documents indicating the course of action (extent, tasks, implementation) of designing the northern ring road in Lenart v Slovenskih goricah,
- the documents on listing of the design into the budget of the Republic of Slovenia.

The Applicant appealed only against the denial of access to document under the first indent (“the entire study on traffic which indicates the economic viability of the construction of northern ring road”).

Exemption to which the liable authority refers:

The authority denied the request of the Applicant for a study which indicates the economic viability of the construction of the northern ring road pursuant to Subpara 9, Art 6 of the Access to Public Information Act (ZDIJZ), since the documentation was still in the process of being drawn up and subject to consultation within the authority. According to the opinion of the authority, the internal review within the authority may only be concluded after an expert review of the documentation and after the adoption of the final version of the documentation which is than subject to further reviews and assessments performed by other bodies or public.

Decision of the Information Commissioner:

The Applicant's appeal is justified.

Reasons for the Decision:

1. The authority's field of competence and work

The Information Commissioner has established that the authority performs professional-technical, development, organisational and administrative activities for construction, maintenance and protection of main and regional roads and a part of expressways, tasks which are related to the transports in freight and passenger transport and the establishment of compliance of road vehicles. Preparation of proposals on investments into the national roads, coordination in design, construction and renovation of roads and buildings at these roads also appertain among the authority's activities. The authority collects and processes different data necessary for assessing the investments in roads and performs activities adopted by the Parliament, Government and Ministry of Transport. Considering the aforementioned and taking into consideration the fact that the Applicant requested access to study ordered by the authority within the framework of its competences, the requested document undoubtedly appertains to the field of work of the authority. Since the authority also disposes of the requested information and such information is found in materialised form, the Commissioner establishes that the requested information fulfils all three fundamental conditions for the existence of information of public character pursuant to Par 1, Art 4 of ZDIJZ.

2. Accessory intervenor in the procedure

The authority and the Commissioner are obliged to ensure ex officio that all those whose rights or legal benefits would the decision influence on are invited to participate in the procedure. Therefore, the Commissioner invited in the procedure TrafCons d.o.o., Ul. bratov Babnik 67, 1000 Ljubljana, as the company which draw up the aforementioned study, to declare whether the requested information represents any of the exemptions set forth in Par 1, Art 6 of the ZDIJZ for the company or if the requested information is protected in line with the law governing the copyright.

In their letter the company TrafCons d.o.o explained that they drew up the mentioned study in October 2009 and amended the said study in January 2010 after the review. In line with the contract the investor or the authority received five copies of the study and three copies of expert's detailed report on a CD. The company TrafCons d.o.o. declared that it is prepared to cooperate in the aforementioned procedure as an accessory intervenor yet as regards the disclosure of information they are bound by the contract with which the aforementioned study was ordered.

The authority bound them with the contract with which the study was ordered, namely that exclusively the investor disposes of the performed study and the results of the study. When the study or any other expert's detailed report is drawn up, exclusively the investor disposes of such expert's detailed report and the results of the study. In the event the company TrafCons d.o.o. wishes to disclose the results to other users, it needs to obtain a prior consent of the investor. Therefore, it proves less complicated that the study is submitted to the Commissioner or the party in the procedure by the ordering party of the said study, i.e. the authority.

3. Exemption pursuant to Subparagraph 9 of Paragraph 1 of Article 6 of the ZDIJZ

The authority may deny access to requested information in the event of any legally prescribed exemptions set forth under Par 1, Art 6 of ZDIJZ. For this part of the request the authority made reference to the exemption under Subpara 9, Par 1, Art. 6 of ZDIJZ, by which the authority is allowed to deny access to public information if the request refers to a data from the document which is still in the process of being drawn up and is still subject of consultation by the authority, and the disclosure of which would lead to misunderstanding of its contents.

Such definition contains three elements which must be taken cumulatively:

- the document must be in the process of production,
- the document must be subject of consultation by the authority,
- specific harm test (the disclosure would lead to misunderstanding of its contents).

More detailed criteria for defining documents which are in the process of production can be found in the Decree on the Provision and Reuse of Public Information (Official Gazette RS No.76/05, hereinafter: UPIJZ): Par 1 Art. 7 of UPIJZ stipulates that the data from the document in production are deemed to be the data from a document which was not signed or dispatched or in some other way closed by the responsible officer of the authority who has a decision-making power in accordance with the rules.

In their appeal the Applicant pointed out that in referring to the aforementioned exemption in the contested decision the authority failed to prove the existence of the condition that the disclosure of the requested document would lead to misunderstanding of its content. In assigning the appeal the authority thus explained that the working versions or materials may not be subject to public discussion before the review due to different interests of the industry, citizens and other interested public and consequently, pressures performed on the preparers of the study that the study need to prove the viability of construction. It is evident in praxis that there are many manipulations with data, e.g. with deliberate purchase of land on supposed route of future construction and then by setting extreme conditions for the repurchase of land for the purposes of construction. Additional problems may be caused by an inappropriate interpretation of data, such as traffic load and consequently, filed damages claims due to overload with traffic on the basis of work assessments and studies when there are still no results of the measurements.

The Commissioner establishes that in the case under review the required terms and conditions for the existence of an exemption under Subpara 9, Par 1, Art 6 of ZDIJZ are not fulfilled.

The requested document was drawn up within the framework of preparing expert grounds for the development of national roads which is within the competence of the authority. The authority performs professional-technical, development, organisational and administrative activities for the construction, maintenance and protection of national roads, the document, which is the subject matter of the review, was ordered with the external provider by the authority in order to establish the traffic-economic viability of the construction of the ring road in Lenart. This means that the authority did not run the procedure of preparation of the aforementioned document, yet it

was drawn up by the external provider, which submitted the signed document to the authority. The document is entitled "Study on the viability of the construction of the ring road in Lenart" which is composed of an introduction, body and conclusion. As such the study undoubtedly represents a concluded finding of experts who carried out the study, otherwise they would have not entitled the study in such a way or they would not have sent it to the ordering party or the authority. Whether the authority agrees or not with the study ordered, or whether the study shall be supplemented or amended, does not influence the conclusion that the concrete document is drawn up and as such represents an integral whole.

The facts that the study represents an integral whole, is not contested by the authority either since upon referring to the existence of an exemption under Subpara 9, Par 1, Art 6 of ZDIJZ, it does not claim that the document has not been finished yet only that the internal review by the authority is completed only after an expert review of documentation and after the final version of documentation, which is then subject to further reviews and assessments performed by other authorities or public. Considering the aforementioned the authority only identified the existence of the second condition (the document is still subject to consultation) of the aforementioned exemption, and not of the other two. With such an explanation the authority bound "the completion of the document" to the procedure under which the document was ordered, which is incorrect and contrary to the exemption to which the authority referred to. The explanation of this exemption in the manner as understood by the authority would in praxis lead to situation that public would be denied access to majority of documents drawn up in the process of adopting some key or final solutions; concretely in the procedure of constructing national roads, this would be contrary to public nature of work of the authority since the construction of national roads is in public interest (Art 25 of the Public Roads Act, Official Gazette of RS, No.: 29/1997 with amendments, henceforth: ZJC).

The Commissioner emphasises that the construction of national road is a complex procedure which includes the planning, designing and construction due to which in the nature of matters leads to documents that by themselves may not represent the final product in the meaning of completeness of a particular procedure. However, the fact that a certain document represents only one of the documents within the framework of the construction of national road does not mean that such concrete document is still in the process of being drawn up. Each document by itself in a particular phase of the procedure actually represents a document which is – if in possession of an authority liable pursuant to the ZDIJZ – information of public character pursuant to Art 4 of ZDIJZ, namely irrespective of the fact that the content of such document does not represent the final text of the document with which the procedure was concluded. Every such document actually represents individual information deriving from the authority's field of competence and work and may be found in the form of a document which the authority has drawn up by itself or in cooperation with another authority or which it obtained from other persons.

In light of the aforementioned the Commissioner concludes that in the concrete case it is not a matter of a document in the process of being drawn up under Subpara 9, Par 1, Art 6 of ZDIJZ. The fact that the document was already drawn up by an external provider and the authority is in possession of the document means that the document was already completed by the external provider pursuant to Par 1, Art 7 of the Decree and represents the final report on their findings. The fact that further reviews may follow, i.e. expert review and adoption of final version of the document, cannot represent a reason for labelling the requested document as the document in the process of production, since the said document, as mentioned before, was completed pursuant to Par 1, Art 7 of the Decree when the party responsible for the preparation of the document sent the document to the ordering party, i.e. the authority, which disposes of the document. We would be able to talk about the document in the process of production if the text of the study was not written in whole. In the concrete case it is a matter of substantially completed text of the study carried out by the external provider, i.e. a comprehensive and technically complete document irrespective of the fact that such text may be further amended and completed. In the event the authority required the external provider to supplement the study or asked for any other explanations or actions, this would represent a new final document in the phase of the study and would represent new information of public character within the meaning of Art 4 of ZDIJZ. It is thus evident that in the concrete case the conditions which need to be provided cumulatively (all together) are not fulfilled in order to be able to talk about the existence of the exemption under Subpara 9, Par 1, Art 6 of ZDIJZ, since even the absence of one of the conditions prevents referral to the aforementioned exemption.

The document as such would not stand the harm test under Subpara 9, Par 1, Art 6 of ZDIJZ, since the disclosure of such document cannot cause misunderstanding of its content. It is completely clear that it is a matter of study which is not a legally binding document yet only a professional-technical finding of experts who carried out the study on traffic-economic viability of the construction of the Lenart ring road. Consequently, such document most definitely cannot lead to misunderstanding of its content. The fact remains that the study contains position statement and findings reached by the party responsible for carrying out the study. Any eventual disagreement of the authority or any other person with the findings reached by the party responsible for carrying out the study cannot represent a reason to talk about misunderstanding of its content. Disagreements with proposed solution or possibilities that the authority reaches a different decision as proposed in the study may not be linked to misunderstanding of the content of the study. Moreover, the Commissioner cannot follow the authority's concerns that there might come to manipulation with real estate since such particular information are a part of the Decree on the national location plan which has been publicly available since 2004.

The Commissioner concludes that in the concrete case none of the three elements forming condition for the existence of an exemption under Subpara 9. Par 1, Art 6 of ZDIJZ is not given since the entire study indicating the economic viability of the construction of the northern ring road in Lenart, requested by the Applicant, is no longer in the process of being drawn up and is not longer subject to consultations. Moreover, the disclosure of the study would not lead to misunderstanding of its content within the meaning of Subpara 9, Par 1, Art 6 of ZDIJZ.

The Commissioner tested ex officio whether in the concrete case there might be exemptions pursuant to Par 1, Art 6 of ZDIJZ and established that no other exemptions exist.

5. Copyright and public information

Pursuant to Art 17 of ZDIJZ the Applicant has a right to set forth in which way they wish to be acquitted with the requested information. Therefore, the authority has no right to deny the Applicant's right to choose the form in which they wish to receive the requested information. The only restriction influencing the form of information is the provision of Par 2, Art 25 of ZDIJZ prescribing that the Applicant may only view the information which is protected in accordance with the law governing the copyright. Since the Applicant wished to receive the requested information in the form of a photocopy, the Commissioner studied the requested document also from the point of view of legal standard of "copyright work" set forth in the Copyright and Related Rights Act (Official Gazette of RS, No.: 94/2004 with amendments; ZASP).

Copyright works are individual intellectual creations in the domain of literature, science, and art, which are expressed in any mode, unless otherwise provided by ZASP. Legislation, court practice and legal theory formed criteria and presumptions for determining the copyright works. The presumptions which need to be checked in order to confirm the existence of copyright works are individuality, intellectuality, creation, areas of creativity and expression. Owing to their nature human expression is personal, original and individual. Individuality is a characteristic which separates the copyright work from a number of everyday objects and phenomena which are not protected with copyright, and also from artistic, scientific and cultural heritage which is in the property of public. In the event an author creates work with individual features without consciously or subconsciously taking directly from another work, such his/her creation is protected. From the author's point of view the creation is a copyright work, a subjective novelty. In relation with the individuality it is required also that the work reaches a particular creative level with a certain quantity of individuality included. Creation is a fundamental presumption of a copyright work, which means that it is a result of human behaviour since only a human being is capable of creating. Copyright work also needs to be expressed to the outside world in some manner. In Art 5 the ZASP lists the types of copyright works. Under Subpara 12, Par 1, Art 5 of ZASP architectural works are also listed as copyright works, e.g. drawings, plans, and implemented buildings from the field of architecture, urbanism and landscaping. The Commissioner assesses that the requested documentation fulfils all five fundamental presumptions of a copyright work in sufficient manner. Undoubtedly, the works are expressed, they represent creation of authors and an intellectual creation and at the same time they appertain to the scientific field of human creativity. The Commissioner assesses also that the requested

document has a sufficient level of individuality since owing to its nature it is a product of human individual and creative work.

It is evident from the contract on the order of the study, which the authority sent to the Commissioner on 2 August 2010 that the study was carried out for the ordering party (the authority) by the company TrafCons d.o.o., and the authority ordered and paid for the production of documentation. It is evident from the content of the contract and the provider's offer, which is an integral part of the contract that they were not concluded in the form of a copyright contract between the authority and the authors of works, but it was a matter of services which under the contract were rendered to the authority by the selected company and not directly by the authors. Since in its legal transactions the company offers services ordered by the authority and since such services are performed by the company's employees, it is obvious that the authors transferred their copyrights onto the company. Under Art 101 the ZASP prescribes that when copyright work is created by an employee in the execution of his/her duties or following the instructions given by his/her employer (copyright work created in the course of employment), it shall be deemed that the economic rights and other rights of the author to such work are exclusively assigned to the employer for the period of ten years from the completion of the work (the contract was concluded in 2003), unless otherwise provided by contract. Pursuant to the ZASP the company TrafCons d.o.o. thus lawfully disposes of economic rights to the entire documentation.

Regarding the relation between the authority and the company TrafCons d.o.o. the Commissioner stresses that the contract and the provider's offer, which is an integral part of the contract, fails to expressly solve the question of economic rights, which does not represent an obstacle for reaching a decision in the procedure. The Commissioner offered the company TrafCons d.o.o., which is pursuant to the provisions of the ZASP the holder of economic right to reproduction, a possibility to cooperate in the procedure in relation with establishing the method of accessing information of public character, whether the requested information is protected pursuant to the law governing copyright (view or photocopy). The company TrafCons d.o.o., as an accessory intervenor, stated in the aforementioned letter of 3 August 2010 that exclusively the investor disposes of the performed study and the results of the study and that they are not allowed to convey information without the consent of the investor, i.e. the authority. On 30 August 2010 the Commissioner carried out an additional inquiry at the company TrafCons d.o.o about the mentioned statement and obtained an explanation that in the given case the economic right was transferred onto the ordering party (the authority) and that pursuant to an agreement between the authority and the entity responsible for carrying out the study the authority alone decides on possibility of photocopying and forwarding of the requested document to other persons. Since the purpose of the exemption re the method of accessing public information is the protection of author's work or the holder of economic rights, the aforementioned statements evidently reveals that in the concrete case the company TrafCons d.o.o transferred exclusively onto the authority the economic right to reproduction; consequently, it neither needs nor expects the protection of its rights.

Considering the aforementioned it is the Commissioner's opinion that the purpose pursued by the provision of Par 2, Art 25 of ZDIJZ fails due to which photocopying of the document, as requested by the Applicant, is also permitted. Herewith the Commissioner derives from Par 6, Art 6 of ZDIJZ which speaks about the reuse. In the event a reuse of information is permitted (which also enables the photocopying), i.e. information to which the authority holds the economic right, since data protected with the rights of intellectual property of the third (those who have not transferred the economic right onto the authority) is excluded, then it is completely reasonable that access to information of public character in the form of photocopy is allowed.