Case:

No: 090-29/2009, May 4, 2009
Časopisna hiša Dnevnik d.d. (News publisher Dnevnik), vs. decision of the Slovenian Government

Applicant's request:

The applicant filed a request with the Slovenian government to obtain the information produced by the Slovenian Intelligence and Security Service (SOVA), i.e. a transcript, or a photocopy of voice records and transcription of these records obtained during the surveillance of Mr. Ivo Sanader, the Prime Minister of the Republic of Croatia in the period from Jan 1, 2004 to Dec 1, 2004. The applicant requested this information in the form of a DVD, or a photocopy.

In addition to the request for access to public information, the applicant also required abandonment of classification of these documents. The Government of RS refused both requests (the request for access to public information, and the request for abandonment of classification).

Having received the decision of the Slovenian Government the applicant filed an appeal with the Information Commissioner, claiming that the government decision was unlawful and non-eligible, both in procedural and substantive terms, adding that the information about wire-tapping and partially also the contents of interceptions and persons that were being wire-tapped, had already been made public. This information was publicly confirmed by official representatives of Slovenia, i.e. by the state body. The applicant claimed that the wiretapping, and the contents of conversations were unlawful since this surveillance involved a Slovenian citizen who was wire-tapped on a domestic territory and on a private phone. For this reason SOVA had no legal basis for surveillance. From what the body stated in the decision it was clear that a Slovenian citizen had been wiretapped intentionally or unintentionally, which is not legal. The applicant believes that this information was illegally marked as secret and claims that illegally obtained information cannot be designated as secret; however documents can be designated as secret under some other statute or by another procedure. The applicant believes that in this case this was not possible due to the prevailing interest of the public because of the information itself and because of the position of these persons in the society. The applicant referred to the provision from Art. 6 of the Classified Information Act (Official Gazette RS, No. 50/2006 - official consolidated text; ZTP-

UPB2), which stipulates that the information that has been defined as classified in order to cover up a criminal offence, the exceeding or abuse of authority, or some other unlawful act or behaviour is not considered to be classified. Obviously, violations of the law had happened before, since it was found out that the Republic of Slovenia filed criminal information for the illegality and abuse of authority.

Further on, the applicant made reference to judicial practice in other countries whereby the information which has been designated as classified, loses the marking of classification after the information has become public. In this case the information became public at the moment when it was made available to a broader public, i.e. to unauthorised persons. The applicant presented in detail some documents and statements which in his belief clearly indicated that the documents had already been seen by unauthorised persons. Since the information has already been made available to the public, this information has become public information. Once the information becomes public, it can no more be treated as a secret, even though the persons who disclosed this information might have been violating the law. The request for abandonment of classification was substantiated by the applicant's belief that the information was not secret any more since various unauthorised persons could access this information. The Government released public information that the information was disclosed to a large number of unauthorised persons and that the disclosure of this information could not jeopardise the interests based on which ZTP permits designation of documents as secret; the government also stated on several occasions that the act of wiretapping was illegal and served the purpose of political abuse. Therefore, the applicant believes that according to ZTP, the documents and the information could not be assigned a classification marking.

The exemption the body made reference to:

The body made reference to the exemption to the protection of classified data under Subpara 1, Par 1, Art. 6 of ZDIJZ by which a body may deny access to the information, which pursuant to the Act governing classified data, is defined as classified and represents an exemption from access to public information.

Commissioner's decision:

The applicant's appeal is refused as a whole.

Grounds:

1. The concept and existence of Public Information

The ZDIJZ (Access to Public Information Act of Slovenia) makes manifest the constitutional right of access to public information (as per the second paragraph of Article 39 of the Constitution of the Republic of Slovenia) and hence in the first paragraph of Article 1 ensures everyone free access to public information held by organs of the state, public agencies, public funds and other entities under public law, as well as holders of public power and contracted providers of public services. In including a massive swathe of public sector bodies within its embrace, the ZDIJZ encompasses a broad spectrum of public sector operations.

The scope of the ZDIJZ's domain is also manifested in the definition of that which constitutes public information. Public information, according to Paragraph 1 of Article 4 of the ZDIJZ is deemed to be information pertaining to the field and scope of work of public sector bodies and may occur in the form of a document, a case, a dossier, a register, a record, or other documentary material, drawn up by the body, by the body in co-operation with another body, or acquired from other persons. The above provision defines three basic criteria according to which public information can be defined:

- the information must stem from the field of work of the body;

- the body must possess the information;

- the information must exist in a material form, as a document and/or documentary material.

This means that the body needs to produce such public information within the scope and procedures of its work for which the body is liable to general regulations. The information does not have to be produced by the body but it must be related to its work. Such information can be obtained from other persons, even from persons under private law, which are not bodies in terms of the provisions of Art 1 of ZDIJZ. What is important is that the body has obtained such information within the scope of its competencies (for more information see doctoral dissertation by Urška Prepeluh, The right of access to public information, Ljubljana 2004, p. 148).

Public information can only be a document which already exists, or has been produced, or a document which the body has obtained or produced within the scope of its work. The bodies, liable to ZDIJZ, must allow access to the information which already exists, but they are not obliged to produce a new document, or collect information, perform research or analyse information to satisfy the request of the applicant. The only exemption to this is the information which exists in computer databases and has been produced within the scope of

the activities of the body. Obligation to make information available thus refers only to the so called »raw information«[1].

On March 26, 2009, during the inspection *in camera* at the SOVA premises, the Commissioner found out that the documentation existed in materialised form (the body did not deny this fact in the contested decision). In the decision making process the body followed the provisions under Art. 130 of ZUP, and based on the applicants' request, assigned by the National Assembly of RS and SOVA, had to decide not only on the question of abandonment of classification, but substantively on the request for access as well. The body refused both, the request for abandonment of classification and the request for access to public information. As can be seen from the grounds of the decision of the body, this information was held by the body, however the request was denied on the grounds of the provisions under Subpara 1, Par1, Art. 6. of ZDIJZ (classified data under the act governing classified data).

According to Par 2 and 3, Art. 21 of ZDIJZ , if the applicant requests the abandonment of classification, it is the body which conducts the case and brings a decision upon the proposal of the director of the body. Par 2 and 3, Art. 21 of ZDIJZ stipulate that in case of requests for the abandonment of classification the decision is brought by the Government, when the body liable is a government administration body, public prosecutor's office, attorney general's office, entity of public law, the founder of which is the state, public powers holder or public service contractor on a state level. In this particular case the proposal for the abandonment of classification was given by the director, as well as the assignment of the applicants' requests which the applicant addressed to the SOVA and the National Assembly of RS, and further on combined proceedings with the requests which had been addressed to the Office of the Prime minister of RS and the working party of the Government of RS for the assessment of the performance of SOVA. The information is thus undoubtedly related to the work of the body, i.e. the information has been obtained within the scope of the activities and authorities of the body as provided under Par 2 and 3, Art. 21 of ZDIJZ. Considering that the body was deciding on the request for the abandonment of classification from documentation, the Commissioner concluded that the body possessed the documentation (or that the documentation was in its possession during the process of decision making).

[1]Ref: Commentary to the Access to Public Information Act, by Dr. Senko Pličanič et al, Institute of Public Administration, Faculty of Law, Ljubljana, 2005, p. 83.

With all the above it is clear that the documentation in question meets all the criteria to qualify for public information under Art. 4 of ZDIJZ; the Commissioner established that the documentation in fact existed, it was in a material form, the body possessed the documentation and it was the result of the activities of the body.

2. Inspection in *camera* according to Art. 11 of ZInfP

To clarify the situation, the Commissioner made an inspection *in camera* at SOVA on March 26, 2009, following the provisions of Art 11. of ZInfP. The Commissioner needs to respect the principle of substantive truth under Art 8. of ZUP, which stipulates that it is necessary to find out real state of affairs and to identify all the facts to bring a lawful and correct decision.

SOVA made the documentation available for inspection, and within a protected environment at the SOVA, the Commissioner, having the statutory power to inspect the data with the highest level of classification, inspected the documentation which was the subject of the applicant's request.

The Commissioner established that the documentation was designated as SECRET according to the four levels of classification.

Having inspected the documentation, the Commissioner found out that SOVA had made two orders in compliance with Art. 21 of the ZSOVA, and based on which the documentation both orders were designated as SECRET under Art 10. of ZTP. The authorising officer in both orders was Dr. Iztok Podbregar. The orders referred to wiretapping of a particular telephone number abroad and one contained the information on the persons who were involved in the surveillance of international telephone communications.

The Commissioner further on found out that on Jan 23, 2009, the Commission for the assessment of the prevailing interest of the public for the disclosure of data which are designated as secret, prepared an opinion which the Commissioner did not have in the files. For this reason the Commissioner requested inspection of the minutes of the Commission. The opinion of the Commission was written under item 5.4., which was in fact literally copied and used in the justification of the Government’s decision No. 09001-19/2008/15, of Feb 12, 2009, indent IV.

3. Exemptions from free access to public information according to Art. 6 of ZDIJZ

Having established that the documents which the applicant requested are in fact public information, the Commissioner needed to establish whether the information could be treated as freely accessible public information, or if there might be some exemptions to free access. If the documents contain public information it means that anyone can access such information under the provisions of ZDIJZ. The only reason for denying access can be an exemption which must be provided either by international legal acts, the constitution, or a another statute.

4. Communication privacy

By careful analysis of the documents the Commissioner established that in addition to the exemption of confidential data to which the body made reference to, there was primarily also a constitutional impediment for the protection of communication privacy, due to which the applicant's request had to be refused.

The aspect of privacy, which refers to the freedom of communication, is protected twice by the Constitution: Art. 35 of the Constitution sets out a general rule for inviolability of human privacy, while Par 1, Art. 37 guarantees the privacy of correspondence and other means of communication.

In several other cases the Constitutional Court interpreted the inviolability of human privacy which is guaranteed by Art. 35 of the Constitution: Human privacy means a complex dimension within the range of human existence, a more or less integrated unit of human behaviour, activities, feelings and relationships. It is characteristic that individuals themselves form such dimension and maintain it, or establish it with the people living in their intimate relationships (e.g. with a spouse), and within this individuals feel safe and protected against the intrusion of the public or any unwanted person (decision No. Up-32/94 of April 13, 1995, OdlUS IV, 38). An important aspect of this dimension is person’s conduct. It also includes the right of individual to his/her own voice. It ensures that anyone, while communicating with another can decide about the image of his/her personality since human personality is expressed through person’s communication.

Anyone has the right to speak freely, without embarrassment and in normal circumstances. This is best expressed by the proverb *"verba volant, litterae scriptae manent"*.[2] This protection gives individuals a possibility to react individually in a communication and to adapt to every addressee in a most suitable way.

This basic right also ensures that a person can decide who is going to be the recipient of the message: a partner in discussion, or a certain group of people, or the public. Therefore, the decision about one's own words also includes the decision who should be the recipient of the message. Every person is entitled to know whether his/her voice will be taped and eventually given to a third person. When this happens, the words of the speaker and the voice become separated from the owner and become independent. A taped record assumes power over a person, or person's property since the recording can be repeated and thus it encroaches into the exclusive right of an individual to dispose of his/her own words and to decide who should, or who may hear the conversation. Human communication is protected by Art. 35, and in particular by Art. 37 of the Constitution in that the words (i.e. a reckless or impulsive statement, superficial opinion, or the content of communication, or tone of voice) can not testify against the person who uttered the words. This is why persons are protected against (secret) wiretapping without the knowledge of all the persons involved in conversation. Protection is not ensured only against voice recording but also against other forms of misconduct. It extends also to situations, when one person involved in conversation includes a third person in conversation as a listener without the knowledge of the first person. Protection of this right is irrelevant to whether such an act is qualified as a criminal act under Art. 148 of the Penal Code (Official Gazette RS, No. 63/94 and the succeeding - KZ). Criminality of conduct may indicate that a certain, specifically protected good has been affected, however, for constitutional protection of the right to privacy it is not decisive whether the legal order also protects surveillance and wiretapping of telephone conversations between two persons. The right to voice, as an expression of the right to privacy, is protected regardless of this. If a person behaves in a way that the words can be easily heard by a third person the consequences must be born by the person himself. What is important is that the person, considering the circumstances in a particular situation, reasonably expects that his voice will not be heard by a third person. The right is also not considered to be violated if a third person is given permission to record or to listen to a conversation. The right to voice is also not limited with regard to the content of conversation. For the protection of this right it is irrelevant whether the conversation was intimate, or if some confidential information has been exchanged (e.g. business secrets), and also

[2] "Words fly, writings remain."

irrelevant whether the two persons agreed that the conversation was confidential. Very often it is difficult to predict the course of conversation. A conversation, which was initially meant as a business conversation, may turn into a private talk, or the other way round. A partner in a dialogue has the right to take decisions on his/her life and should be able to change the topic of conversation without losing easiness of speech. The possibility of deciding on such matters entitles this person to take any possible legal consequences for such conversation. If the person knew that a third person was listening to or a recording of a conversation, this person might avoid a conversation topic which could have legal consequences. Therefore, the person is deprived of this possibility if there is no chance for one's own decision to allow someone else to listen or to record the conversation[3].

In this particular case the applicant requested the voice record of a private telephone conversation between a high ranking political official of a foreign country and a Slovenian opposition party political leader of that time and their conversation was not intended for some unknown people. The director of SOVA issued two orders for wiretapping international telephone conversations from a particular telephone number abroad (the orders contained specific telephone numbers). These telephone conversations were also recorded and none of the persons involved in communication knew that their conversation was under surveillance and recorded. Even though wiretapping may be considered as a normal and general practice in some situations, this however cannot replace the individual's consent to wiretapping. A voice record is an authentic record of the words which have been separated from the speaker. In this way a voice record assumes power over the person, or person's goods, since a recording can be replayed. If this is done without the knowledge of the person affected, or without any legal grounds, it means encroaching into the exclusive right of persons to dispose of their own words or voice.

This, however, does not mean that such encroachment into the right to privacy is not allowable under special conditions, but it requires special circumstances. Encroaching into the human right to communication privacy should have a special meaning when executing some other constitutionally protected right. In such cases it is necessary to apply the principle of proportionality, and carefully assess which of the rights is prevailing (Par 3, Art. 15 and Art. 2 of the Constitution).

In this particular case it was necessary to weigh between the constitutional right of individuals to communication privacy and the constitutional right of the applicant to access public information.

[3] Iz odločbe Ustavnega sodišča Up-472/02 z dne 7.10. 2004

The Constitutional Court of Slovenia has been dealing with such cases before: It has established that a constitutional right may be limited only in cases mentioned under Par 3, Art. 15 of the Slovenian Constitution, whereby human rights and fundamental freedoms can be limited by the rights of others only in cases provided by the Constitution. According to standard constitutional court judgements, limitations of constitutional rights are permissible if they comply with the principle of proportionality and are necessary to protect the rights of others. Therefore, each case needs to be treated individually and carefully assessed to find out whether the encroachment into the constitutional right is in agreement with Par 3, Art. 15 of the Constitution.[4]

According to the generally accepted notion, limitations of constitutional rights are permissible only if in agreement with the so called principle of proportionality, meaning that three criteria need to be met for such encroachments: urgency, adequacy and proportionality in their narrow sense. Firstly, the encroachment must be urgent in the sense that the goal cannot be reached by any milder encroachment into the constitutional right, or even without it; secondly, the encroachment must be adequate to reach a desired and constitutionally permissible goal (e.g. protection of rights of others, or public interest, when the protection of public interest is a constitutionally permissible goal in its direct or indirect sense. i.e. that the rights of others are protected via the interest of the public and it is adequate in the sense that the goal can be reached. Thirdly, the proportionality principle in its narrow sense means that in assessing the urgency of encroachment we need to weigh between the relevance of the right which is being affected and the right which is to be protected, and determine how urgent the encroachment is in proportion to the effects and consequences. Only if the protected right is so important that needs to be given absolute priority, a serious encroachment into the first right is permissible - otherwise the level of encroachment into this right must be proportional to the relevance of the other protected right, meaning that an encroachment, which is otherwise urgent to completely protect the right is not *a priori* permissible, when the other right also deserves the same level of protection. When there is such collision of two rights it is necessary to allow only such encroachment which will not give absolute protection to one right but protect it in proportion with the other one (this means that the two rights are mutually limited by one another)[5].

During the appellate procedure in this particular case, the applicant did not try to provide the rationale for the encroachment into a constitutionally protected right of an individual; the

[4] To načelo je Ustavno sodišče že večkrat uporabilo, tako npr. v odločbi št. U-I- 137/93.
[5] Ref: decision of the Constitutional Court, No. U-I- 137/93 of June 2, 1994.

appeal referred to other questions related to the case. Therefore, the proportionality test was carried out by the Commissioner who assessed that encroaching into the constitutional right to communication privacy in order to reach the goal which the applicant was pursuing, is urgent since without it the applicant could not become informed about the content of the document. This is the so called contradiction in terms (*contradictio in adiecto*), namely that the encroachment into a protected right is adequate for reaching the goal (which is constitutionally permissible). This goal can be reached, however we need to consider the so called proportionality in its narrow sense. Proportionality, in its narrow sense in this particular case, shows that the relevance of the right which is being affected is incomparably smaller compared to the right which needs to be protected. The Commissioner believes that the right to communication privacy in this case needs to prevail over the right to access public information, since the consequences, or the effects of encroaching into the communication right would be much greater than the consequences by which the applicant would be affected due to encroachment into the right to access public information. Encroachment into the communication privacy means interference with the most intimate sphere of human life and can have numerous consequences. On the other hand, encroachment into the right to access public information can not possibly have any far-reaching consequences.

5. On the exemption to the protection of classified data and requests for the abandonment of classification

Regardless of the Commissioner's conclusions that access to the requested data needs to be denied in this case also for the reason of constitutionally guaranteed protection of communication privacy, the Commissioner substantiated the aspects of the protection of confidential data to support its decision.

One of the exemptions from free access to public information (Subpara 1, Par 1, Art. 6 of ZDIJZ) stipulates that a body may deny access to the requested information if the information which, pursuant to the Act governing classified data, is defined as classified. This exemption reflects the need to protect fundamental interests of the state, or the society, and at the same time represents the most delicate exemption for the activities of government bodies which are otherwise public. If some data are determined as classified, it means that they are subordinated to a special regime of protection by which access is denied to all unauthorised persons, and hence the public. What is important is that under exemptions ZDIJZ defines only the information which is designated or categorised as classified information based on the act governing classified data (ZTP). ZTP regulates the designation,

protection and accessibility of public data uniformly and comprehensively for all governmental bodies.

Therefore, in this appeal it was crucial to know whether the requested information fulfils the conditions to qualify for the category of classified data according to ZTP. By this act, a data can be classified only if the material and formal conditions are met cumulatively. For this reason, in weighing the contested decision it was important to know whether the documents were justifiably determined as classified according to ZTP, and also according to Subpara 1, Par 1, Art. 6 of ZDIJZ.

The material criterion focuses on the content of the information by which a data may be defined as classified only if some detrimental effects on the security of the state or its political and economic interests could be expected if the information was disclosed to an unauthorised person. This strictly refers to the areas of: public security, defence, foreign affairs, intelligence and security service activities of governmental bodies, and refers to the systems, appliances, projects and plans or scientific, research, technological, economic and financial affairs of importance to the above goals (Art. 5, ZTP). Thus, the material criterion has two aspects: the first is that by disclosing the information certain damage could, or might be caused, and the other relates to the effects on the interests of the state, listed under Art 5. Both material aspects are reflected in the formal criterion of classified information. A data may be justifiably determined as secret only if the following three criteria are met: (1) a data may be determined as classified only by an authorised person, which is in principle the director of the agency, or a high-ranking officer (Art 10, ZTP). This ensures that decisions on designating information as classified are brought by persons who have sufficient information and knowledge to estimate possible detrimental consequences of disclosing such information. ZTP also defines the procedure for determining the level of classification which must be done upon previous written assessment of possible adverse effects of the disclosure of information (Art 11, ZTP). This written assessment represents the second formal criterion and must include the object which is to be protected. The object of protection is the interest which could be jeopardized if the information was disclosed. In addition to this, the assessment must also estimate the level and intensity of possible adverse effects. The assessment is kept by the body as an attachment to the document which has been designated as classified. From the aspect of ZDIJZ, such assessment, which describes possible adverse effects, allows for later checking or identification of the reasons and circumstances for which a document was designated as classified. The third formal criterion refers to furnishing documents with an appropriate marking of the level of classification; only

a document which has been suitably marked can be considered as classified (Art. 17, ZTP). Depending on the level of possible negative effects on the state security or its political and economic interests, classified information is ranked into four classification levels: top secret, secret, confidential and restricted (Art 13, ZTP).

After the inspection *in camera* the Commissioner found out that all the documents requested carried the marking SECRET and all of them had written assessments on possible adverse effects which were kept as attachments to the documents. The assessments were prepared by the director of SOVA, acting as an official representative of the agency. It was found out that the data contained in the documents fulfilled both criteria (material and formal) for determining documents as classified since they were designated by the director of the body, and had the assessment describing the level of possible adverse effects which was attached to them. The documents were also correctly marked.

In the appeal the applicant pointed out that the information could not be considered as classified since the documents were not legally designated with the level of secrecy, and if they had been obtained illegally, they should have not carried a confidentiality marking. Here the applicant made reference to Art. 6 of the Classified Information Act (Official Gazette RS, No. 50/2006 - official consolidated text ; ZTP-UPB2), which stipulates that the information that has been defined as classified in order to cover up a criminal offence, the exceeding or abuse of authority, or some other unlawful act or behavior, is not considered to be classified. The applicant believes that violations of laws in this case had been found since the Republic of Slovenia filed criminal information for illegality and abuse of authority. Therefore, for these reasons, the data could not be determined as secret.

The Commissioner clarified that from Art. 6 of ZTP-UPB2 it derives that classified information is not the data which has been designated as secret in order to cover up an illegal act or abuse of authority: this was not even proved in this case. The provision from this article sets two conditions: the information should be obtained by a criminal offence, abuse of authority, or some other punishable act, and then, in order to conceal such act, the document is designated as secret.

The Commissioner agrees with the applicant in that the data have probably been obtained illegally (the applicant correctly alleged this in the appeal saying that some high-ranking state official expressed a doubt). However, in a state governed by the rule of law, expressing a only a doubt, or claiming that several criminal complaints have been laid for alleged

violations and abuse of classified data, it is not enough to conclude that the data in this particular case have been obtained in the circumstances provided under Art. 6 of ZTP. Until the procedure has not become final with a decision, it is premature and impermissible to draw conclusion on the unlawfulness of the matter.

With all the above, the Commissioner concludes that at the time when the body made its decision, the data which the applicant requested, were determined as secret according to ZTP and therefore represent an exemption under Subpara 1, Par 1, Art 6. of ZDIJZ. In this part, the applicant's appeal is unjustified, because (as explained in the previous paragraph), the conditions by which the data lose confidentiality character are not met (Art. 6 of ZTP).

6. On the publicity of classified information

Among other things, the applicant stated that classified data become public at the moment when the information is made available to a broader circle of unauthorised persons. Of course, the Commissioner agrees with the above statements in that protecting the information which has already been disclosed to the public should not be justifiably and appropriately treated as confidential because, conceptually, the material conditions for confidential data, as derives from Art 5. of ZTP, are not be met. This interpretation can be confirmed by several cases: The first one derives from historical interpretation of ZTP. During the first reading phase, the proposal for this act contained a provision that »the confidentiality of information does not terminate if it is disclosed to an unauthorised public, or if an identical or similar information is disclosed« (Par 2, Art. 7 of the proposal of the Classified Information Act, first reading Poročevalec DZ, No. 10/00 of 18.2.2000, p. 134). Later on, this provision was removed from ZTP, however, it is obvious that the purpose of the legislator was to harmonise the law with legal practice of foreign countries, and in particular with the practice of the European Court for Human Rights. In numerous cases, e.g. (The *Observer and The Guardian vs. United Kingdom* of Nov 26, 1991, series A, No. 126; *Sunday Times II vs. United Kingdom* of Nov 26, 1991, series, No. 217; *Vereiniging Weekblad Bluf! vs. The Netherlands* of Feb 9, 1995, series A, No. 306-A) the European Court took a position that in a democratic society, government measures to protect classified information in order to ensure national security are urgent only to the moment when the information has been disclosed, regardless of the source from which the disclosure came from (e.g. disclosure by the public media, or by publishing a book). Equal position can be found in the US legal practice where there is an additional provision, namely that the source which disclosed the confidential data should be an officially recognised source, or a state body, that the disclosed information should be specific and that it should correspond with the information which was

designated as secret. If such information was still treated as secret, even though it was disclosed to the public, the basic principles of transparency would be jeopardised.

However, the Commissioner established that there were only some speculations about the content of the documents among the public, and that the public was never informed about the real content of original documents. This is also evident from the applicant's appeal where the real contents of the documents is never mentioned. Based on incomplete and de-contextualised statements the public can only speculate about the real contents of documents. Therefore, the Commissioner established that the public knew about the existence of documents whose contents was presumably controversial. However, a document cannot be proclaimed as public based on some public presumptions about the content of the document, even though the applicants' arguments for the termination of the classification of documents, whose contents has been disclosed to the public, are of course correct.

7. Conclusion

In this particular case it was most important to assess, or to weigh, between the constitutional right of individuals to communication privacy and the constitutional right of individuals to obtain public information. Here, the Commissioner took a position that the right to communication privacy should prevail.

In indent 6 of this decision, the Commissioner elaborated when particular data fulfil conditions to be treated as classified, and form an exemption to free access to public information. However, this factor was not decisive for the Commissioner's decision.

The Commissioner refused the applicants' appeal based on Par 1, Art. 248 of ZUP, by which a body of the second instance can refuse the appeal if it is found out that the previous procedure in the case was correct, that the decision of the first instance body was correct and legally substantiated, and if the applicants' appeal was unfounded.