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No.: 090-59/2009/
Date: Jul. 9, 2009

The Information Commissioner (hereinafter: Commissioner), through the attorney, Nataša Pirc Musar, based on Par 3 and 4, Art. 27 of the Access to Public Information Act (Official Gazette RS, No. 51/2006 – official consolidated text, and 117/2006 – ZDavP-2; hereinafter: ZDIJZ), Art. 2 of the Information Commissioner Act (Official Gazette RS, No. 113/2005 and 51-07 – ZUstS-A, hereinafter ZInfP), Par 1, Art. 248 of the General Administrative Procedures Act (Official Gazette RS, No. 24/2006 – official consolidated text, 105/2006 – ZUS-1, 126/07- ZUP-E and 65/08-ZUP-F; hereinafter: ZUP), in the applicants' appeal of May 6, 2009, against the decision of the Ortopedska bolnišnica (Orthopaedic Hospital) Valdoltra, Jadranska cesta 31, 6280 Ankaran (hereinafter: the body) No. 265/2-09 of May 22, 2009, issues the following

DECISION:

1. The appeal is rejected as unfounded.

2. No expenses were incurred by this proceeding.

GROUNDS:

On April 17, 2009 the applicant filed a request with the body for accessing public information. The request referred to the research the applicant was carrying out, namely on the types of desks and chairs the employees are using at their work. The purpose of the research was to inform all persons concerned with health conditions of Slovenian citizens. The applicant requested the body to provide, within the legal deadline (i.e. 20 working days), the information about the employees of the body, i.e.: - names, surnames and professional titles of all specialists in orthopaedics, traumatology and rehabilitation medicine with their e-mail addresses.

The body rejected the applicant's request entirely by issuing a decision No. 265/1-09 of May 4, 2009 on the grounds that the request referred to personal data of the employees which need to be protected according to the Personal Data Protection Act and that the disclosure of such information to unauthorised persons would mean violation of the rights of the workers to personal data protection, as well as the right to communication privacy. Since in this case the question was about two legally protected values, i.e. the right to access public information, and the right for personal data protection, the body weighed both interests: the public interest and the right to privacy. The body is an institution performing activities under public law, and is therefore liable to supply information pertaining to its activities, i.e. performing health services. The principle of transparency of work of a body means that individuals too are entitled to obtain the information about the activities of the body. On the other hand, the body is also a manager of personal data and based on the statute governing personal data protection, it needs to protect the information about its employees and can only process these data for the purposes for which the data have been collected, and can not make the data available to others without grounds in a law, or without personal consent of the holders of these data. Regardless of the fact that for public sector employees, the principles of transparency of the operations of the body privacy is less protected, the body believes that personal data, i.e. names, surnames and professional titles of doctors are not directly related to the activities of the body, and for this reason these data need not be publicly accessible. Also, such need does not derive from the employment relationship of these professional and the tasks they are performing for the body. The body established that in this particular case there were no such circumstances for which the right to personal data protection should be limited according to Art. 36 of Personal Data Protection Act (e.g. due to national security, defence, public security, the prevention, discovery, detection, proving and prosecution of criminal offences and minor offences, the discovery and punishment of violations of ethical

norms for certain professions, monetary, budgetary or tax reasons, supervision of the police, and protection of the individual to whom the personal data relate, or the rights and freedoms of others). For this reason the body believes that the information requested is the information which is protected by the law. Moreover, the body believes that business e-mail addresses too are personal data since they allow for personal identification. Therefore, the body believes that e-mail is protected by the statute governing personal data protection. Should e-mail addresses of the employees be disclosed this would mean encroachment into their right to privacy (communication privacy) since electronic communication is not directly related to obligations from employment relationship (or does not derive from) work tasks of the doctors. The body believes that its decision is not in conflict with the principle of transparency of the work of the public sector institutions; the body, as a provider of health services within the public health network, appears as a body, and represents its employees, and for that reason the applicant should inform the body about the results of the study. The data about the providers of health services in a public health network (including private doctors with concession), are published on the web page of the Zavod za zdravstveno zavarovanje Slovenije (Health Insurance Institute of Slovenia). The body emphasizes that by refusing the request the applicant could be deprived in any way of the possibility to convey the results of the study: these can be sent any time by electronic mail (or by post or other official way) to the official address of the body, which is published on the web sites and is also available from the catalogue of public information. If the results are sent officially to the body, the body will inform its employees about the matter in the same way as other official matters are treated. For this reason it is not essential whether personal information of doctors (i.e. names, surnames, professional titles and their e-mail addresses) are accessible to the applicant or not.

After receiving the decision of the body, the applicant filed an appeal with the Commissioner on May 6, 2009, expressing disagreement with the negative decision of the body and asking for action.

Based on Par 2. Art 239 of ZUP, the Commissioner (on May 7, 2009) referred the applicant‘s request to the body, requesting to act according to Art. 240 (and further provisions) of ZUP.

The body, based on Art 243 of ZUP, replaced the decision No. 265/1-09 of May 4, 2009 with a new one (No. 265/2-09 of May 22, 2009), by which part of the applicant’s request was granted (i.e. the request referring to names, surnames, and professional titles of orthopists and rehabilitation medicine), however, rejected the supply of their e-mail addresses. With this decision the applicant filed an appeal with the Commissioner on May 28, 2009, after which the Commissioner, acting upon the provisions of Par 2. Art 239 of ZUP, referred the case to the body.

On June 4, 2009, the body referred the applicant’s appeal, considered as filed in due time, permitted, and filed by an eligible person, to the Commissioner.

On June 10, 2009, the Commissioner addressed the body by a letter No. 090-59/2009/6 requesting to provide the documents needed for solving the case, i.e. the list of e-mail addresses as requested by the applicant. The body sent the reply on June 16, 2009, stating that no separate documents existed in the form of a directory of e-mail addresses and that all electronic mail addresses were kept in the so called active directory of their computer domain; when internal e-mail messages are sent, the computer offers a list of recipients to chose from and no hand typing is necessary. It would be possible, of course, to export the data from the active directory, however, only a complete list of all the employees because orthopaedic specialists are not separately marked in the active directory. This would mean that to meet the request, it would be necessary to create a new document which would include the names and surnames with corresponding e-mail addresses of these persons. With this, the body believes that under provision of Par 1, Art. 4 of ZDIJZ the body is not obliged to do this. The body emphasized again that for business purposes a unique e-mail address is used which is also accessible online and therefore no one is deprived of a possibility to communicate officially by e-mail.

The appeal is not founded.

The Commissioner firstly explains that being the body of the second instance, and under provisions of Art. 247 of ZUP it is liable to test the decision in the part which has been contested by the complainant. The commissioner needs to test the decision within the scope of appellant’s allegations, and by official duty it needs to test whether there have been any violations during the procedure at the first instance and whether the material law has not been breached.

1. Inspection *in camera*

The provision under Art. 11 of ZInfP empowers the Commissioner to carry out a procedure related to the request for access to public information without the presence of the client requesting such information if this is necessary to prevent access to the information before the final Commissioner's decision. The inspection *In camera,* without the presence of the public and the client, means in theory that the decision is carried out *de novo*. The Commissioner, as the appeal body, needs to make the assessment by itself to find out if there are any facts which might lead to adverse effects should the information be disclosed. The Commissioner as an appeal body must be fully authorised to investigate the complaint, and has the right to request and inspect all the relevant information or documents from the body at first instance. With this role, the Commissioner needs to respect the principles of material truth (Art. 8 of ZUP), which stipulates that the Commissioner has to find the actual state of affairs and the facts necessary for bringing a lawful and correct decision.

To verify the actual situation, and to find out whether the body had the document on disposal or not, the Commissioner carried out inspection *in camera* at the premises of the body on July 2, 2009. The body made the computer program Exchange available and the inspection showed that the active menu of the program did not have an option for filtering employees' addresses by groups (e.g. generating a list of orthopists). Thus, it was found out that there was no such a list of electronic mail addresses of the employees in the form in which the applicant requested. However, it was found out that by exporting all e-mail addresses from the mail server the body could make a list of all current and former users of e-mail, but the list would not indicate which users are orthopists. At the same time the body handed in a printout of all e-mail addresses and a sample of a printout of one particular user (a print screen of the user with e-mail address). The body also noted that the institution has an official e-mail address for public communication but their doctors are not obliged to use this business electronic mail since this is not part of their job description. Thus their employees can decide for themselves whether to use the official mail address or not.

2. The concept of public information

The body was established by the Institutes Act (Official Gazette RS, No. 12/91, with amendments) and operates as a public institution in the area of health. The body is engaged in medical activities at a secondary level, and treats disorders and injuries of the locomotion system. The institution is specialised particularly in arthroplastic surgery, treatment of disorders and deformations of spine, endoscopy, sport-induced trauma, bone and joint tuberculosis and orthopaedic septics on the territory of Slovenia.

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. The concept of public information is defined in Par 1. Art. 4 of ZDIJZ: it is deemed to be the 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, and must be met cumulatively:

- 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.

In this appellate procedure the applicant requested a document which referred to the employees of the body. The body did not deny the fact that it is liable to ZDIJZ and that the requested information derives from its activities. For this reason, the Commissioner did not take this question into consideration. However the body claimed that it did not possess the document, and referring to Art. 4 of ZDIJZ, stated that it was not obliged to produce such a document. Therefore, the Commissioner had to primarily find out whether a list of orthopists with their e-mail addresses existed or not.

As derives from Par 1, Art. 4 of ZDIJZ, the body is not obliged to create, to obtain or provide abstracts of a document which did not exist when the applicant filed a request. By definition of public information, answers to questions, clarifications, explanations, making statistics, commentaries or analyses, do not represent public information. Public information is only a document which already exists, has been created, or has been obtained by the body within the scope of its activities. This is a condition, which in theory is referred to as a »materialised form criterion«. The bodies, which are liable to ZDIJZ, are not obliged to produce a new document from the documents they already have, except in cases when only some easy computer operations are needed to retrieve the information from the computer databases.

During the inspection *in camera* the Commissioner checked the computer program to find out that the program did not allow filtering the data (i.e. electronic mail addresses) by categories of the employees. This means that the body could not easily retrieve the data from the program to obtain the electronic mail addresses of the orthopists because the data on a particular employee, or the user, are not referenced to their work positions. This means that a list of orthopists with corresponding e-mail did not exist in the form as requested by the applicant.

Considering the fact that any request to access public information needs to be treated in terms of the purpose of the law, which is to ensure the transparency of work of the bodies and to provide the possibilities for executing the rights of individuals and legal entities to acquire such information, it is the duty of the bodies to enable access to the information which is in their possession, even if the information does not exist in exactly the same form as the applicant requested, but it is possible to produce such a document. In this case we are talking about the so called raw data. The Commissioner found out that the body did not possess the list of e-mail addresses of the orthopists employed by the body, but it would be possible, by exporting the data from the mail server, to easily make a list of all e-mail users. Such list would not show which persons are orthopists, but from this list the applicant could create its own list of orthopists together with their e-mail addresses. Previously, the body had already provided the list of all orthopists with names and surnames. Also, their names are displayed on the web site: http://www.ob-valdoltra.si/index.php?page=CakalneDobe. In this case the Commissioner could not agree with the body that the requested information did not exist since it was found out that all this information was available in a materialised form.

After the Commissioner found out that the information requested met all the three basic criteria for public information, stipulated by Par 1. Art 4 of ZDIJZ, a test was applied further on to check if the information could represent any of the exemptions under Par 1, Art. 6 of ZDIJZ, as derives from the contested decision.

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

A body can entirely or partially deny access if it is found out that the information, or a document represents any of the exemptions from free access to public information, listed in Par 1, Art 6 of the ZDIJZ (there are eleven exemptions listed in this paragraph). Therefore, the Commissioner had to establish whether the required information could be freely accessible, or represents any of the exemptions under this provision.

3.1 Exceptions from personal data protection

Subpara 3, Par 1, Art 6. of ZDIJZ stipulates that a body may deny access to public information if the request refers to personal data, the disclosure of which could mean violation of personal data protection according to the statute governing personal data protection. Thus, if there is a case of an exemption to personal data protection, ZDIJZ refers such cases to Personal Data Protection Act (Official Gazette RS, No. 94/07 – UPB1; hereinafter ZVOP-1 – UPB1).

According to Art. 6 of ZVOP-1-UPB1, personal data is any data relating to an individual, irrespective of the form in which it is expressed. An individual is an identified or identifiable natural person to whom personal data relates; an identifiable natural person is one who can be identified, directly or indirectly, in

particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, where the method of identification does not incur large costs or disproportionate effort or require a large amount of time.

Considering the provision of ZVOP-1 – UPB1 cited above, the Commissioner explains that a name and surname alone, without additional data (e.g. address, education, date of birth, personal identification number or other unique identification number), is not necessarily personal data. Personal data can only be when other data referring to an individual complete the identification of a person. This interpretation also derives from the decision of the Constitutional Court of Slovenia (No. U-I-229/03-18, of Feb 9, 2006), in which the Court decided that a name and surname are not sufficient for the identification of an individual and additional data need to be provided. Thus, the exemptions from ZDIJZ can not be the data about a person, by which the person could not be identified, or could be identified by incurring large costs, or some disproportionate effort, or a large amount of time. The criterion for the possibility of person's identification needs to be assessed by the standard of an average reasonable person, meaning that it would be wrong if the possibility of identification was narrowed down to a particular or a very small group of persons. In this case the applicant requested from the body both, the names and surnames of orthopists together with their e-mail addresses, which can be treated as personal data since based on this information it is possible to precisely identify the individuals. Thus these data undoubtedly represent personal data in terms of Art. 6 of ZVOP-1-UPB1.

Disclosing personal data, according to Subpara 3. Art 6. of ZVOP-1-UPB1, represents processing of personal data. In order to assess the permissibility of disclosure of such information it is necessary to consider the general provisions for processing personal data, as defined by Art. 8. and 9. (public sector) of ZVOP-1-UPB1. The general rule, as derives from these provisions, is that processing of personal data is permissible if provided by the statute, or if a personal consent of the individual is given.

Subpara 3, Par 1, Art. 6 of ZDIJZ also provides that not every personal data has simultaneously the status of protected personal data, meaning that the disclosure of such data can be allowed in some cases. The disclosure of personal data may be, under particular circumstances, permissible also in executing the right to access to public information: By Subpara 1, Par 3, Art 6 of the ZDIJZ it is stipulated that notwithstanding the exemption under Subpara 3, Par 1, Art 6 of the ZDIJZ, access to the requested information is allowed if the information is related to the execution of public functions or employment relationship of a civil servant except in cases under Subparas 1. and 5. to 8, Par 1, Art 6 of the ZDIJZ and in cases, when the law governing public finances, or the law governing public procurement stipulate otherwise. By adopting this provision, the Slovenian legal order was approximated to the legal order of the developed countries which distinguish between two elements: expectations for privacy and entitlement to expectations. It has been accepted that functionaries, or public servants are not entitled to expect privacy in questions of their names, position, salary, business address and all other data related to performing their public function, or employment relationship.

The crucial question in this appellate procedure was whether e-mail addresses represent personal data related to employment relationship of public servants, and whether it is permissible to disclose such data during the procedure for accessing public information.

According to Art. 1 of the Civil Servants Act (Official Gazette RS, No. 56/2002, with amendments), a public servant is defined as an individual in employment relationship with a public sector institution. Public sector institutions, according to this act, are state bodies and managers of local self-government units, public agencies, public funds, public institutes and public commercial institutions and other persons established under public law, if they are direct users of the state budget or local community budgets. With this definition it is clear that the orthopists employed by the body are undoubtedly public servants.

Further on it was necessary to clarify whether electronic mail addresses are related to the employment relationships with the body.

In questions of which data, relating to the employment relationship between a public servant and the body, are allowed to be disclosed based on Subpara 1, Par 3, Art 6 of ZDIJZ, the Commissioner notes that this provision represents an exemption form exemptions and it needs to be interpreted in a very narrow sense, and according to the purpose the ZDIJZ is pursuing. The purpose of ZDIJZ, which is

defined in Art. 2, is to ensure transparency of work of the bodies and to ensure the execution of the right of individuals and legal entities to acquire public information, where the bodies must strive to their maximum to keep the public informed about their activities. Thus it is necessary to distinguish between those personal data which are directly related to performing duties under public law and spending public funds by public servants, and other personal data which the body, as a manager, keeps about its employees (public servants) according to Art. 46 of the Employment Relationships Act (Official Gazette RS, No. 42/2006, with amendments, hereinafter ZDR). Under this provision of ZDR (Par 1) personal data of the employees can be collected, processed, used and provided to third persons only if provided by this or some other statute, or if this is necessary for the purpose of executing the rights and duties from the employment relationship, or from some other employment relationship. For the purpose of executing the rights and duties from the employment relationship, the body, as the employer, needs to collect and process numerous types of personal data (e.g. data on invalidity, sick leave, number of family members, etc.). Under Art. 46 of ZDR the body, being the employer, has no legal grounds for collecting and processing other data of the employees than those which are related to the employment relationship.

Regardless of what has been found out, namely that all personal data which the body handles about its employees (public servants), are personal data which stem from the employment relationship, and considering the purpose of ZDIJZ, it is not possible to take a position that these data could be freely accessible to the public. Public servants, who enter an employment relationship with a public sector institution, do not entirely lose their privacy. The purpose of the provision under Subpara 1, Par 3, Art. 6 of ZDIJZ is that freely accessible data from employment relationship of a public servants are those data which relate to the execution of their public task, the use of public funds, the work of the body as a whole, or data which indicate faults in the procedures carried out by the body. The same can be found in the practice of the European Court for Human Rights which in the case of *Halford vs United Kingdom* (June 25, 1997, Reports 1997-III) established the so called doctrine of expected privacy. According to this theory it is necessary to weigh between two elements: expectation of privacy and entitlement to privacy. There is no doubt that public servants are not entitled to expect privacy in questions of their name, title, position, salary, business address and those elements from their job applications which show professional qualifications necessary for a particular position. However, this does not mean that a public servant has no right to privacy at work. Thus, the Court decided that telephone calls from work *prima facie* represent part of their private life and correspondence. Another similar decision was taken by the European court in the case of *Copland vs United Kingdom* (April 3, 2007, Appl. No. 62617/00), where the court decided that the expected privacy applies for electronic mail and for the information which originates from monitoring the use of the Internet. In the *Halford* case the plaintiff was not warned that her calls were going to be monitored and normally expected privacy, similarly the plaintiff in the *Copland* case expected that her mail would not be monitored without previous warning. Thus in questions of expected privacy the Constitutional Court of Slovenia in its decision No. U-I-25/95followed the same line.

In this case the Commissioner also established that e-mail addresses of orthopists, which the applicant requested are not directly linked with their employment relationship in terms of the provision under Par 3, Art. 6 of ZDIJZ. Communication of the bodies' employees via electronic mail does not represent an obligation which stems from the employment relationship; the use of business mail is optional, meaning that an employee may or may not use business mail without any obligations. Also, the body has no internal rules for limiting the use of its business mail system to business purposes only. Thus the employees can use their business mail for private purposes as well. With no such limitations in communication the employees have legitimate expectation of privacy of their electronic communication and also for their e-mail addresses. This was confirmed by the Commissioner's inspection *in camera* where it was found out that the body uses the so called open e-mail system, meaning that the employees can access their business mail externally, without using any special tools. As the body claimed, business mail has been offered to its employees as an option and only for the purpose to easify internal communication and not for communicating with the public. This can be supported by the fact that the body has several official mail addresses available for communicating with the public: info@ob-valdoltra.si, informacije@ob-valdoltra.si, and some mail addresses of its managerial staff: (venceslav.pisot@ob-valdoltra.si, ciril.mezek@ob-valdoltra.si, mira.savora@ob-valdoltra.si). All these mail addresses are published on the web site of the body and can be accessed freely. This is in agreement with the provision under Par 2. Art 106 of ZVOP-1, whereby the managers of personal data can have the right to publicize personal names, position or function, official telephone number and business electronic mail address of the managers and the employees holding a leading position and those employees whose work is related to communication with clients or users of services, until the enactment of a special law governing these questions.

Notwithstanding the principle of free access to public information, by which the applicant does not need to show legal interest, or state why the information has been requested, the Commissioner wants to make reference to the provisions of the Directive 2002/58/ES of the European Parliament and Council of 12 July, 2002 on processing personal data and protection of privacy of electronic communications (Directive on the privacy of electronic communications). Art. 13 of this Directive stipulates that member states must take appropriate measures to ensure that free of charge, unsolicited communications for purposes of direct marketing in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications. The choice between these options needs to be determined by national legislation. This directive was implemented in the Slovenian legal order by the Electronic Communications Act (Official Gazette RS, No. 13/07, hereinafter ZEKom -UPB1). Unsolicited communications are regulated by Art. 109 of this act which stipulates that sending electronic mail for purposes of direct marketing is allowed only upon previous personal consent of the subscriber. For this reason too, the body needs to carefully protect electronic mail of its employees. The decisions taken during the public information access proceedings are made on the principle of *erga omnes,* which means that if a particular information has been defined as freely accessible information, this applies to everyone, and not only to the applicant requesting such information. In this case it would mean that the list of electronic mail addresses of the employees of the body should become completely accessible to the public, including those who would wish to use this information for direct marketing purposes. This, however, needs to be prevented according to the European Directive 2002/58/ES and ZEKom -UPB1.

The Commissioner also established that the applicant could address the body using one of the mail addresses published on the web site which are meant for communicating with the public. Therefore, denying access to the list of mail addresses in no way limits the possibility of communicating with the body. The applicant is not entitled to request the body to provide mail addresses of the orthopists since these are protected personal data, and are not directly connected with performing the tasks deriving from the employment relationship of a public servant. The decisive factor in this case was that communicating via e-mail is not an obligatory task of the orthopists which derives from employment relationship with the body, and that the body has no internal rules which would limit the use of business mail service to business purposes only. In this part, the employees have the right to privacy and consequently the right for their mail addresses not to be supplied to the public.

With all the above it was established that e-mail addresses of orthopists, as requested by the applicant, are protected personal data, which do not meet the conditions from Subpara 1, Par 3, Art. 6 of ZDIJZ. These are protected personal data, which under Subpara 3, Par. 1, Art. 6 of the ZDIJZ represent an exemption from free access to public information, and for this reason the applicant's appeal had to be rejected.

As derives from the grounds of this decision, the applicant's appeal is unfounded, therefore the Commissioner, referring to Par 1. Art. 248 of ZUP, rejected the appeal and affirmed the contested decision.

Instruction on legal remedy:
This decision cannot be appealed, but the applicant can initiate administrative dispute against the decision of the Ortopedska bolnišnica Valdoltra No. 265/02-9 of May 22, 2009. The administrative dispute can be initiated by a lawsuit, which must be filed within 30 days after receiving this Decision with the Administrative Curt, Fajfarjeva 33, Ljubljana. The lawsuit can be sent by registered mail or filed directly with the Court. If the lawsuit is dispatched by registered mail, the date of delivery to the post office shall deem to be the day of delivery to the court. The lawsuit together with attachments must be filed in three copies. It must contain the attachment with this Decision in original, or in a copy form.

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Procedure conducted by:
Kristina Kotnik Šumah, BL.
Deputy Commissioner

Information Commissioner:
Nataša Pirc Musar, BL