

The case:

The journalist of Delo d.d., Marjana Hanc, vs. The Municipality of Medvode – a request and appeal by the Media Act

Applicant's request:

The applicant requested information about the costs of a professional excursion of the Agricultural Committee to Spain; and wanted to know from which budget item the money has been used (or would be used).

The exemption the body referred to:

The applicant received a reply from the body, saying that with regard to the applicant's request for access to public information, the only information they could provide was the number of the participants (eight) to the excursion to Spain, organised from Jul 10 – 13, 2008. The funds had been allocated from the budget, i.e. item 4.4.1.1 Agricultural reforms. The body stated that this was the only information on this matter they could provide.

Commissioner's decision:

The appeal is **granted** and the contested decision is annulled. The body shall, within five working days from receiving this decision, supply the following information to the applicant:

- Payment order, Ref. No. 101 082582 of Aug 20, 2008, indicating the sum paid for the excursion to Spain, and
- The invoice issued by the travel agency No. 2008/1-23, which the body had received on July 23, 2008, indicating the sum charged for the organisation of the excursion to Spain.

Grounds:**1. Relationship between information for the media and public information**

Since the applicant referred the question to the body in the capacity of a media worker, the Commissioner had to define the difference, or the relationship between the information for the media and public information, and the appellate procedure according to the Mass Media Act.

In modern democratic societies the media perform an important social and democratic public function. Having a significant power of scrutiny, they are regarded as »a watch dog« of the society. To better understand the supervisory function of the media and their role we need to understand the Act Amending the Mass Media Act (Official Gazette RS, No. 60/2006, hereinafter: ZMed-A), which became effective on June 24, 2006. According to the provisions of Art. 45 of ZMed the mass media are in a better position when they want to obtain information for their needs. A crucial characteristic of this privileged position is that it takes less time for decision making. This position, according to the definition form Par 1, Art 2 of ZMed, is given to all the mass media, including: newspapers and magazines, radio and television stations, electronic publications, teletext and other forms of editorially formulated programming

published daily or periodically through the transmission of written material, vocal material, sound or pictures in a manner accessible to the public

As defined under Art. 45 of ZMed the information for the mass media is the information which a body provides for the public by its own initiative, and information which a body provides to the media as a response to a question and which is related to the field of work of the body. The information on issues must be truthful, complete and up-to-date. Thus, the information for the media is not equal to public information as defined by ZDIJZ. According to the definition from this act (Par 1, Art 4 of ZDIJZ), public information is the information which stems from the field of work of a body, and exists in the form of a document, a case, a dossier, a register, a record or other documentary material (hereinafter: document), drawn up by the body, by the body in cooperation with another body, or has been acquired from other persons. Comparing the two definitions, the information for the media is a broader term than public information, since the former includes preparation of answers to the questions, and information, which the body, by its own initiative (i.e. without being asked a particular question), provides to the media.

Par 4, Art. 45 of the ZMed defines how public persons should act if they refuse to provide the answer to a question. In such a case the public person must give a written explanation with the reasons for refusal by the end of the next working day after receiving the requests. This means that if the body decides to give a response, the information must be provided in writing within maximum seven working days after receiving the question. Par 5, Art. 45 of ZMed also allows for refusal, however only in the case if the information is exempted from free access according to the statute regulating access to public information. This means that a body may, in such a case, refer to one of the eleven exemptions to free access to public information under the provisions of ZDIJZ. ZMed does not provide for any other refusal answers.

In any case, a body is obliged to provide a refusal answer to the media in writing. Par 7, Art. 45 of ZMed precisely defines what the answer must include, i.e. the name of the media requesting the information, the question, and the decision on refusal, or partial refusal. The answer to the question must also contain the name of the media requesting the information, the question itself and the answer to the question.

ZMed establishes a fiction, namely that the negative answer from Par 4 and 5, Art. 45 of ZMed is deemed as refusal decision. This means that the body does not need to provide a negative, or partial refusal reply in the form of a decision with all elements as provided by the statute governing general administrative procedures (introduction, title, decision, grounds, instruction on legal remedy, signature of the official representative, and stamp). Even though a letter of refusal is formulated as an ordinary letter, it is considered as a negative decision according to a clear provision by the law. In this particular case the reply of the body of Sept 15, 2008 is considered as a negative decision (hereinafter: decision).

A crucial provision relevant to this case is Par 9, Art. 45. of ZMed, according to which the appeal against negative decision, or against fictitious negative decision is allowed only if the negative or partially refused reply derives from a document, a case, a dossier, a register, a record, or another documentary material. This provision clearly

shows that the appeal is not always possible if the public media are not satisfied with the answer, but only when the answer to the question derives from a particular document which exists in a material form and which has already been produced, and only when the requested information has been exempted from free access according to the statute governing access to public information. Therefore, the appellate procedure according to ZMed can not lead to obtaining information according to Art. 45. of ZMed, but only to public information in terms of Par 1, Art. 4 of ZDIJZ.

For all these reasons the appellate procedure before the Commissioner, according to the provisions of Art. 45. of ZMed, is limited to only two subsequent phases:

1. formal testing, to define whether the answer to the question derives from a document in terms of Par 1, Art. 4 of ZDIJZ, and
2. testing whether the document is freely accessible, or falls under one of the exemptions under Par 1, Art. 6 of ZDIJZ.

Testing can be best implement after inspecting the documents which include the answer according to Art. 45. of ZMed. On Oct 16, 2008, the Commissioner, based on Art. 11 of ZinfP, made an inspection *in camera* (on-the-spot) to clarify whether the applicant's request referred to some actual documents which existed in a material form, and whether these documents and the information in it are actually public information.

The on-the-spot inspection, i.e. an inspection without the presence of the public or clients, involves carrying out the decision making procedure afresh. This means that the Commissioner, as the appellate body, needs to evaluate the facts pertaining to information that may have deleterious effects should it be made public. The Commissioner needs to have full authority to investigate the appeals, including the authority to request that the body of first instance provides all relevant documents for inspection. Such authority requires that the Commissioner respects the principles of material truth (Article 8. of the ZUP), meaning that the Commissioner needs to ascertain the actual state of affairs and support such with the facts, necessary for engendering correct and lawful decisions. Said inspection pertained to the documentation related to the information requested by the Applicant.

During the inspection on-the-spot (hereinafter: inspection *in camera*), the body explained that the professional excursion to Spain via the travel agency had been organised with the decision of the Committee of Agriculture and Forestry. The body submitted the following relating documents to the Commissioner: a photocopy of the minutes of the 10th meeting of the Committee of Agriculture and Forestry of June 30, 2008, a photocopy of payment order with reference No. 101 082582 of Aug 20, 2008, and a photocopy of invoice, No. 1008/1-23, which was received on July 23, 2008 from the travel agency. During the inspection *in camera* the body also explained that the invoice had already been paid in total, and covered from its own funds, i.e. from the municipal budget.

2. A question whether the answer derives from a document in terms of Par. 1, Art. 4 of the ZDIJZ

The ZDIJZ (Slovenia's Access to Public Information Act) 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 manifest 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.

According to ZDIJZ, the information which stems from the field of work of the body is the information which has been produced as a result of implementing the tasks under public law, or as a result of the activities of the body. Thus, the body needs to produce public information within the scope of its work and the procedures for which it is empowered according to general regulations. If the first condition is met, public information can refer to any content from all areas of the activities of the subject liable to the law, and can refer to its policy, activities and decisions which are part of its activities and responsibilities. What is important is that the information is related to the official activities of the body and that the information has been obtained within the scope of its activities and powers. (Ref. doctoral dissertation of Dr. Urška Prepeluh, *The right of access to public information*, Ljubljana, September 2004, p. 149).

The body was established as a local government body according to the Local Government Act (Official Gazette RS, No. 94/2007 and 76/08; hereinafter: ZLS), thus, by Par 1, Art 1. of ZDIJZ, it is liable to this act, meaning that it must provide public information. As defined under Art. 2. of ZLS, the municipality is a basic local self-governing community, which under the Constitution and other acts, can manage and administrate its own matters autonomously and executes the tasks conveyed to it by the laws. Based on the documents, which have been obtained during the inspection *in camera*, the Commissioner established that the documents contained

the information the applicant had requested, and that the documentation was related to the execution of the decisions from the 10th meeting of the Committee of Agriculture and Forestry, of June 30, 2008 concerning the excursion to Spain via travel agency. This proved that the documents represented execution of the tasks within its scope of activities of the body which is liable to provide public information.

Having established that the body is an entity liable to ZDIJZ, and that the requested information stems from its field of work, the Commissioner had to find out whether the body had the information in its possession and whether it existed in a material form.

Since in its reply to the applicant, dated Sept 15, 2008 the body stated that this was the only information available - while the applicant believed that such information did exist - it was further necessary to find out whether the document which contained the answer to the applicant's question did exist at all. As derives from Par 1, Art. 4. of ZDIJZ, as well as Par 1, Art. of ZDIJZ, public information is only the information which is contained in a document which already exists, or a document which has been obtained or created as a result of the activities of the body. This condition is known in theory as »criterion of materialised form«. Bodies, liable to ZDIJZ, must only provide access to the documents which already exist and are not obliged to create a new document, which did not exist at the moment when the request was put forward.

Having analysed the documents obtained during the inspection *in camera*, the Commissioner established that in this case the third condition for the existence of public information was met as well: the document which contained the answer to the applicants' question did exist in material form and was kept by the body. The document entitled »Payment order«, reference number: 101 082582 of Aug. 20, 2008, under indent (6) did contain the information on the sum which the body was to pay for covering costs of the excursion to Spain. The same information appeared also in the invoice issued by the tourist agency, No. 2008/1-23, which the body received on July 23, 2008, and carried a note »For payment«.

With all the facts above, the Commissioner concluded that the answer to the applicant's question derives from the documents as defined by the provisions under Par 1, Art. 4. of ZDIJZ, meaning that in this case all the three conditions for the existence of public information had been met cumulatively.

3. Is the document requested subject to the exemptions under par 1, Art. 6 of the ZDIJZ?

After establishing that the answer to the applicant's question was contained in the documents which should be considered as public information, the Commissioner had to further on appraise whether this public information is freely accessible: If the documents requested contain public information it means that anyone can have free access to this information according to ZDIJZ. The only reason for denying access could be if there are any exemptions as provided under ZDIJZ. A body may entirely, or partially, deny access if it is found out that the data, or the document represent any of the exemptions enumerated in Art. 6 of the ZDIJZ. This article defines 11 exemptions by which a body may deny access to the information.

After careful examination of the public information the Commissioner concluded that the data on the sum which the body had paid for the excursion to Spain for the Committee of Agriculture and Forestry, did not represent any of the exemptions under Par 1, Art. 6 of ZDIJZ. Therefore, the requested information could be considered as entirely free and accessible public information.

4. The scope of the Commissioner 's decision-making on the appeal

It should be noted that according to Art. 247 of ZUP, the Commissioner, being the body of second instance, has the authority to test the decision in the part which has been contested by the applicant. The decision must be tested within the limits of claims in the appeal, while by official duty the Commissioner also needs to test whether there have been any significant violations of the procedure, and whether no material law has been breached during the procedure at the first instance.

With all this, the Commissioner notes that the entire contents of the documents, containing the answer to the applicant's question did not refer to the applicant's question. Therefore, the Commissioner did not have to appraise whether other information items from the payment order (reference number, 101 082582, date Aug. 20, 2008, and transaction number of the agency No. 2008/1-23), were freely accessible public information. Therefore, under this provision the body is not required to disclose the remaining parts of the documents. The body may exclude such information by referring to the provisions under Art. 7 of ZDIJZ, and Par 1, Art. 21 of the Decree on the provision of public information, (Official Gazette RS, No. 76/2005 and 119/2007), where in the case that a document contains public information, which is defined as an exemption under Par 1, Art. 6 of ZDIJZ, and which could be excluded from the document without jeopardizing its confidentiality, the authorised person can exclude such information from the document and provide the rest of the contents to the applicant (partial access).

5. Conclusions

In conclusion the Commissioner makes reference to the following provisions: Par 2, Art. 5. of ZDIJZ, which stipulates that anyone can request and have the right to obtain public information from the body, either by consulting it on the spot, or by acquiring a transcript, a copy, or an electronic record, and subpara 2, Par 2, Art. 17 of ZDIJZ which stipulates that the applicant must define in what way the information should be supplied (inspection on the spot, a transcript, a photocopy, electronic record). This means that the applicant is the one who decides in what form the requested information should be provided. For this reason the body must supply the document mentioned under item 1 of this decision in the form as the applicant has requested.

Based on the information and the documents obtained during the inspection *in camera* and with the claims of the applicant, the Commissioner concluded that the appeal was founded, and that the body at the first instance had made an erroneous decision, and consequently misapplied the substantive law. Therefore, the

Commissioner sustained the request of the applicant, and pursuant to Par 1, Art. 252 of ZUP annulled the decision of the body and settled the case by herself and brought the decision as shown in the operative part of this decision.