



ON THE AIR

Media and the Protection of Personal Data



INFORMATION
COMMISSIONER

Information Commissioner Guidelines

The purpose of the Information Commissioner guidelines is to clarify the significance of human rights and their protection, as well as to answer, in a clear, comprehensive and useful way, frequently asked questions relating to personal data protection and the responsibility of those who control personal data together with those who express their opinion in public and are mandated to provide information.

Legal basis for the issuing of the Guidelines is provided to the Information Commissioner by Article 49 of the ZVOP-I-UPBI, which inter alia stipulates that the Information Commissioner shall issue non-binding opinions, clarifications and positions on issues in the area of protection of personal data, and publish them on the website or in another appropriate manner as well as prepares and issues non-binding instructions and recommendations regarding protection of personal data in individual fields.

See also:

- Opinions and Decision of the Information Commissioner:
<http://www.ip-rs.si/index.php?id=383>
- Publications of the Information Commissioner:
<http://www.ip-rs.si/index.php?id=388>
- Guidelines, issued by the Information Commissioner are accessible from:
<http://www.ip-rs.si/index.php?id=308>

Introduction

The field of human rights and fundamental freedoms has seen intense development since the 17th Century, whilst the notion has witnessed particular expansion since the Second World War, in an era when various international organizations have endeavoured to uphold – through the adoption of legal statute – various aspects of the rights of the individual. States have committed themselves to respect the rights of the individual in such a way that authorities shall not unjustifiably encroach upon such rights as the right to life, freedom, privacy, and title to property. Besides this, the rights of the individual also need to be protected against encroachment by other individuals, and especially against impingement by organized concentrations of power, such as companies and organizations, including the media.

In Slovenia, the protection of human rights is provided at various judicial levels, by public authorities as well as by the criminal and civil justice system. Protection at the level of public authorities is provided principally by respecting and upholding the Constitution of the Republic of Slovenia as well as international agreements adopted globally by the United Nations (UN) as well as regionally, and in Europe particularly those prescribed by the Council of Europe (CE) and the European Union (EU). Legal protection under criminal law is provided by the state, which, in the public interest, imposes a range of sanctions for offences which are against the law; even attempts to commit an offence are penalized. Protection under civil law protects the interests of an individual and seeks to balance their personal interests with those of others. It looks into the cause of the issue between parties as well as the culpability of those involved; penalties are predominantly of financial nature and sanction dependant upon the consequences of the perpetrator's offence, namely on the damage caused or the benefits gained by such offence. The prohibition of actions is warranted only when it is still possible to prevent or ameliorate the damaging consequences of such actions.

Some General Issues in Relation to the Protection of Human Rights

Legal bases for the protection of human rights in the Republic of Slovenia



The protection of human rights is guaranteed in the Constitution of the Republic of Slovenia (Official Gazette of RS, No. 33/1991-42/199), where the individual rights are stated and general rules pertaining to their protection are set forth.

Among the international laws, ratified by the Republic of Slovenia, which are, in pursuance of Article 8 of the Constitution, applied directly, the following are of particular significance:



- UN treaties, namely: the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (both Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 7/1971 – MP and the Official Gazette of the

Republic of Slovenia, No. 35/1992 – MP, No.9), whereas in the field of the protection of personal data, in particular the UN General Assembly's 1990 *Guidelines for Computerized Personal Data Files* shall apply;

- among the European treaties, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR, Official Gazette of RS, No.33/1994-MP, No.7) is particularly important, also germane is the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ECPIAPPD- Treaty 108, Slovene abbreviation: KONVOP, Official Gazette of RS, No. 11/1994-MP 3/94) as are various CoE Recommendations; and
- EU legislation, in particular the *Charter of Fundamental Rights* of the EU and individual Directives which have provided the basis for Slovenia's *Personal Data Protection Act* together with other related legislation.

Individual rights and freedoms are described in a more general manner in the abovementioned treaties, conventions and statutes. Broad and unclear definitions can lead to certain doubts as to interpretations, as provisions tend merely to set forth certain guidelines as to the implementation of legal standards. Pursuant to Article 15 of the Constitution of the Republic of Slovenia, however, it is possible to prescribe a more exact manner of exercise and protection through the provision of law (acts). Accordingly, Slovenia's parliament has adopted more precise regulation through the adoption of various acts and statutes. Among such laws, the following are pertinent:

- Penal Code of the Republic of Slovenia (KZ-I, Official Gazette RS, Nos. 55/2008-66/2008) which defines individual criminal offences and prescribes penalties.

- Code of Obligations (Obligacijski Zakonik, Official Gazette RS Nos. 86/2004-47/2007) which foresees general rules on damages as well as on unreasonable acquisition.
- Personal Data Protection Act (ZVOP, Official Gazette RS, Nos. 86/2004-67/2007) which determines what is defined as personal data, as well as who can control such data, as well as the prevention of unlawful encroachment into the privacy and dignity of an individual in the processing of personal data.
- Access to Public Information Act (ZDIJZ, Official Gazette RS, No. 51/2006 – official consolidated version), which warrants the public nature and openness of the work of public authorities and the public sector, and provides for access to information to all.
- Media Act (ZMed, Official Gazette of RS, Nos. 54/2002 – 36/2008) which sets forth the rights, obligations and responsibilities of legal entities and individuals as well as public interest in the field of media. Critical situations that might be precipitated by a too broadly implemented right of expression is limited by a more precisely defined right to correction and reply to published information which is guaranteed to the affected party by ay of Article 40 of the Constitution. In its Article 45 Slovenia's Media Act also defines special rights which enable representatives of the media to obtain data which is of a broader spectrum than that provided in the ZDIJZ.

When deciding on individual cases, the application of rules is frequently supplemented by case-law (precedent). In such cases the jurisprudence of the European Court of Human Rights (ECtHR), which interprets the European Convention on Human Rights, is of particular importance. Slovenia's courts also observe the ECtHR, namely: the Constitutional Court of Republic of Slovenia (CC) - when deciding on complaints relating to breaches of human rights and fundamental freedoms - as well as also other general courts, among which the Supreme Court of the Republic of Slovenia (SC), the highest appellate court in the country, decides on various forms of protection in all relations between individuals and legal entities and the state, as well as between legal entities and individuals. Various forms of protection are provided in parallel, in relation to which the SC has in the past decided that the affected party could choose various forms of protection (for example, an action for pecuniary damages in a civil procedure may be permitted prior to the submission of a criminal complaint or an affected party's request for the publication of a correction or reply).

Right to privacy

A fundamental human right, the right to privacy is one and is protected by Article 35 of Slovenia's Constitution which guarantees the inviolability of the physical and mental integrity of every individual, their privacy, personality and rights. The notion of a right to privacy is indeed a broad one, and only defined in a general sense. For this reason the jurisprudence (case-law) of the ECtHR and the Slovenia's Supreme and Constitutional Courts is important; namely, they examine each case separately, and try to define the scope of the right to privacy in the hearing of a given case. "Private life" is oft defined the as the right to that part of life which is not dedicated to the public, and to which third persons, as a rule, do not enjoy access. It is the matter of a right where every individual lives in



accordance with their own wishes and is protected from the public eye. To a certain extent, the right to initiate contacts and develop relationships is usually added to the element of secrecy and intimacy, because only in such a way is it possible for a person to realize their own development as well as the fulfilment of their own individual personality.

In its Article 15, Slovenia's Constitution guarantees judicial protection of human rights and fundamental freedoms, as well as the right to obtain redress for the violation of such rights and freedoms. Since the right to private life has a public legal character, the individual is protected from undue interference by the state and its various organs. Besides which, it also has a civil character which means that the individual is also protected in their relationships with others. Limitations to this right are set forth in the second and third paragraph of Article 15 of the Constitution, which provides that:

- the manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom.
- human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by the Constitution.

We should also mention the limitation arising from Article 16 which provides that the human rights and fundamental freedoms provided by the Constitution may, exceptionally, be temporarily suspended or restricted during a war or state of emergency.

Also important is the provision of Article 8 of the ECHR which in its first paragraph states that everyone enjoys the right to respect for their private and family life, their home and correspondence; its second paragraph prescribes those circumstances when a public authority can interfere with the exercise of this right, namely:

- if such is in accordance with the law, and
- if it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Protection of the right to privacy is guaranteed to everyone, which means that the protection is guaranteed to all natural persons, regardless of their citizenship or capacity to contract, thus it also applies to minors. Legal entities also enjoy protection, provided that the protected rights may also be related to them.

Right to the protection of personal data

The right to privacy also extends to data relating to the person. Such rights have developed in relation to the emergence and development of information technology, which has enabled automated data processing. The rapid evolution of technology and unbridled data processing have jeopardized the individual's right to privacy; indeed, this right of privacy in relation to data which pertains solely to them is becoming even more vulnerable. The right to protection of personal data is often described as one of the aspects of the right to privacy; namely, the individual's information privacy. Such is also encompassed in Article 8 of the ECHR, as a part of the right of privacy which enables a person to withhold all information about themselves, and proscribes other persons from becoming acquainted with such information. The Constitution of the Republic of Slovenia defines the protection of personal data as a special right; Article 38 states:

The protection of personal data shall be guaranteed. The use of personal data contrary to the purpose for which it was collected is prohibited.

The collection, processing, designated use, supervision and protection of the confidentiality of personal data shall be provided by law.

Everyone has the right of access to the collected personal data that relates to them and the right to judicial protection in the event of any abuse of such data.

The protection of personal data is guaranteed to the individual (an identified or an identifiable natural person) but not to a legal entity. The individual is protected against interference from the state and other public sector bodies and authorities, against commercial companies and other entities in the private sector; the person also enjoys protection against interference from other individuals on the basis of private or public sector personal data collections. Personal data is namely any data relating to an individual, irrespective of the form in which it is expressed.

In the same manner as for the protection of human rights in general, protection under both criminal and civil law (besides public law) is also guaranteed for the protection of personal data. However, in the case of the protection of personal data not collected by an individual, the law also foresees administrative supervision, because such crucially pertains to the issue of human rights, although many are not sufficiently aware of this. Slovenia's Personal Data Protection Act (ZVOP-I) foresees protection by the Information Commissioner who helps to protect the data through reaction to individual events; further to this, and at its own initiative, the Information Commissioner can also exercise supervision over the collection and processing of personal data, as well as instigate penalties for any offences as stated and foreseen by law.

Article 38 of Slovenia's Constitution foresees the regulation of the collection and processing of personal data under the law. Such is indeed primarily and generally regulated by the ZVOP-I (Personal Data Protection Act), a most comprehensive piece of legislation encompassing the principles and general provisions, as well as the rules, on the processing of personal data; it also determines the rights of individuals, the institutional protection of personal

data, the export of personal data and various field-specific regulations. The ZVOP-I is, however, not the only legislation governing the realm of personal data protection; there are also a series of special statutes protecting personal data in various specific areas, such as medical records and criminal records.

Point 3 of Article 6 of the ZVOP-I prescribes that personal data processing is any operation or set of operations performed in relation to personal data which is intended for its inclusion in a filing system. The ZVOP-I further provides examples and explains that such encompasses the collection, acquisition, recording, organisation, storage, adaptation or alteration of personal data, as well as its retrieval, consultation, use, disclosure by transmission, communication, dissemination or otherwise making available; the alignment or connection, the blocking, anonymising, erasure or destruction of personal data shall also be considered as data processing.

The ZVOP-I only allows the processing of personal data if specific provision for such is provided by statute, or if the personal consent of the individual concerned has been expressly provided (Article 8 of ZVOP-I).

It has to be emphasized that ZVOP-I shall not apply to the processing of personal data performed by individuals exclusively for personal use, family purposes or for other domestic needs (e.g. addresses and notes of friends, family photos and suchlike); also, not all articles of the ZVOP-I shall apply either to personal data processed by political parties, trade unions, associations or religious communities which pertains to their own members or which is processed by the media for the purposes of informing the public.(Article 7 of the ZVOP-I).

ZVOP-I more precisely defines the first paragraph of Article 38 of the Constitution, the provision which prohibits the use of personal data contrary to the purpose for which it was collected. Principally this means that personal data



shall be collected lawfully and fairly (Articles 2, 8, 16 and 18 of the ZVOP-I) and that the general rules governing its processing shall be prescribed by statute, whilst all persons who process the data, shall act fairly.

Fair practice is a legal standard which imposes that the controller of a personal data collection acts accurately and expediently; it also prohibits the collection of personal data on the basis of consent obtained from the individual by coercion or deception, or through not clearly stating the purpose for which the data was collected, or concealment of the other purposes for which the data is to be used.

In addition to all of this, the principles of proportionality and legitimacy are also important. These provide that the personal data which is being processed must be adequate and in its extent appropriate and strictly proportional and limited to the purposes for which it has been collected and further processed (Article 3 of the ZVOP-I). A strict test of proportionality is employed in such instances, since any collection of personal data represents encroachment into the rights of the individual. Legitimacy and proportionality also necessarily involves a balancing of interests, in which case the general public interest (or the interest of other individuals) may prevail over the interest of the individual whose data is being collected.

The third paragraph of Article 38 of the Constitution, provides the individual with the right of access to the collected personal data which pertains to them. The law enables transparency and supervision over the permissibility of the processing of personal data, whereby the individual enjoys the opportunity to exert an influence over the collection of data. Such rights are more precisely defined in part III of the ZVOP-I where the right to examine the register controlled by the Information Commissioner - as well as to consult individual data collections, and supplement, correct, block, erase and object to - are provided, as is the right to judicial protection.

Article 36 of Slovenia's Constitution iterates the restrictions of the rights of an individual for reasons of protection of national sovereignty, security and defence, as well as the maintenance of constitutional order and the political and economic interests of the state; the exercise of the responsibilities of the police, the prevention, discovery, detection, proof and prosecution of criminal offences, together with other interests which are precisely defined and exist only to the extent necessary to achieve the purpose for which the waiver is provided.





Right to freedom of expression and information

The right to freedom of expression is multifaceted and also encompasses, besides the right to disseminate information, the right to receive opinions and information. Freedom of expression is one of the fundamental preconditions for the functioning of a democracy, especially in the dissemination of information and the consequent enabling of the formation of opinions. As stated in one of the decisions (Up-106/01) of Slovenia's Constitutional Court, a free and independent press helps to impartially create and fashion an informed public, preconditions for the public to competently oversee all branches of the state apparatus and government as well as ensure the effective operation of a political opposition. Such thus enables the balanced operation of authorities as well as the oversight of political and governmental structures. Freedom of expression is hence one of prerequisites for the self-fulfilment of each individual and their autonomy in decision making, whereas at the same time it enables their becoming informed on public matters. The transmission and receipt of information and opinions is thus protected by the Constitution.



Article 39 of the Constitution of RS guarantees freedom of expression of thought, the freedom of speech and public appearance, as well as freedom of the press and media together with other forms of public communication and expression. The word 'expression' shall be interpreted broadly, in that it does not merely refer to the spoken word, but also to images, radio and television broadcasting, electronic media as well as other forms of articulation and action which may express a certain idea (e.g. the way a person dresses). Every person may freely choose, receive and disseminate news and opinions. According to the Constitution of RS, everyone shall also be allowed access to information which is of a public nature. Such not only encompasses ascertainable data regarding facts, but also opinions, critique and speculations; further to this, the notion not only embraces that information and those ideas which have been accepted or approved, but also those which are insulting, shocking and disturbing.

Article 10 of the European Convention of Human Rights also defines the right to freedom of expression. This right shall include freedom to hold opinions and, regardless of frontiers, to receive and impart information and ideas without interference by public authorities. The Convention also expressly mentions operators in the field of broadcasting, namely radio, television and cinema, whereby it expressly allows states to impose

licensing and restrictions as to the exercise of such rights.

All of these liberties, of course, do not mean that the right to freedom of information and expression are absolute and unrestricted. The rights of the media are governed through the necessity to maintain an appropriate balance of interests, and are thus also restricted by law. The limitations are set forth in the second and third paragraphs of Article 15 of the Constitution RS. As already explained in the chapter on the right to privacy, the manner in which the right of expression may be exercised shall be regulated by law whenever such is necessary due to the particular nature of an individual right or freedom, or when the rights of others may be impinged by its exercise. Article 16 of the Constitution provides that certain human rights and fundamental freedoms may exceptionally be temporarily suspended or restricted during times of war or a state of emergency.

The second paragraph of Article 10 of the European Convention of Human Rights defines those restrictions more broadly and in more detail than it does for the right of privacy; namely: that the exercise of these freedoms - since such carries with it duties and responsibilities - may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law; these are deemed necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The case-law of the European Court of Human Rights (ECtHR) grants states considerable autonomy and leeway in the balancing of proportionality in relation to any assessment as to which legal restrictions may be necessary in maintaining their own (moral) environment.

Protection of the right to information and of expression is guaranteed to everyone; moreover, each person, who is in fact not the holder of an opinion, but is the holder of the means of communication thereof (e.g. the organizer of an exhibition) is also protected. Whereas the European Court of Human Rights has not clearly expressed whether or not the state is obliged to provide appropriate information to everyone, Article 39 of the Constitution of RS provides that except in those instances which are expressly provided by law, everyone has the right to obtain information of a public nature to which they have a well-founded legal interest under the law.



Conflicts of interest in the exercise of an individual's human rights

The human rights of the individual may be thought of as a free balloon, in that each has its own space, content and trajectory; the paths of such balloons may cross in the air; however, if they collide, the body of one may not impinge upon the space of another. The task of the state, as legislator, is to create a legal order which balances their paths and, within reasonable scope, restricts them. When it comes to more serious conflicts between the rights of individuals, then the state should further prevent collisions through appropriate legal means and offer legal protection to an affected party.

Conflict between the right of privacy and the right to protection of personal data on one side, and the right to free expression and information on the other, is both common and indeed frequent. Such occurs between individuals, and even more frequently between individuals and the media. The right and the duty of the state is to restrict the right of media when it excessively impinges upon the right of privacy and the protection of personal data. This restriction of rights shall be limited within reason and with consideration of values, whereby the individual has to endure certain interferences which cannot be reasonably avoided; namely, individuals may, to a certain extent, be called upon to sacrifice their own rights for those of the common public interest.

The European Court of Human Rights (ECtHR), which often has to decide upon restrictions as to the right to free expression and information, must first - pursuant to Article 10 of the European Convention of Human Rights - assess whether the restriction is set forth by law and whether such is necessary in a democratic society. The expression 'set forth by law' shall not mean that it should only be assessed in a formal way, but requires that it is concordant with the *acquis communautaire*. Three elements have to be fulfilled in the process of such conceptual assessment. The first of these requires that the rules of law are accessible and known; namely: that citizens have access to information which sufficiently clarifies which rule applies in a certain instance. The second element requires the predictability of same, which means that such rules of law must be formulated precisely enough for an individual to behave in compliance with them. The third element pertains to the legitimacy of the objective which a legal ruling should achieve. The authority of the state shall not be unlimited, and hence the scope and the mode of the exercise of powers shall be determined in such way that an individual is granted appropriate protection against arbitrariness.

When the European Court of Human Rights establishes that a restriction is set forth by law, it also assesses whether the intervention is necessary in a democratic society. In this process, the tension between the interests

of an individual and the interests of society is brought to the fore, and ECtHR admits that each individual country is best familiar with the circumstances in their own society, and it hence allows a certain degree of discretion to the country in question. Nevertheless, the ECtHR reserves the right to supervise the exercise of discretionary power in a signatory state. For this reason, in a democratic society, the terms of any necessary restriction must derive from and pertain to one of the restrictions which are clarified in a sufficiently general way in the respective second paragraph of Article 10 of the European Convention of Human Rights (e.g. for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others etc.). The expression: 'necessary' is not interpreted as a synonym for 'indispensable' by the Court, but it rather interprets it more broadly, as a synonym for acceptable, common, beneficial, reasonable or appropriate.



Questions pertaining to the Right to Privacy and Personal Data and the Right to Freedom of Expression

Are the limitations to the right to freedom of expression and information always the same?

No, they are not the same. A difference needs to be made between the relation of media towards the state and towards an individual. The state holds a superior position; it thus has fewer rights and can impose fewer restrictions on media which performs a very democratic mission of critical supervision in the society. However, interests of the state also bring restrictions, i.e. measures set forth in the legislation and which are necessary in a democratic society in support of national security, fight against terrorism, in order to prevent turmoil or crime, to protect health or morale, to protect confidential information or to protect authority and impartial judicial administration.

In case of protection of an individual, the rights of media are more limited. However, neither the right to privacy nor the right to information has any precedence since they are both equally important. In protection of an individual the difference is made between protection of an ordinary citizen or a public figure. The requirement for respecting privacy is automatically reduced for as much as the individual himself enters into public life or has contact with other protected interests. On principle, data on public figures may be published without express consent of the person involved. Case law distinguishes between absolute and relative persons of the modern life. The first group includes persons who are always under the inspection of public due to their role and function in the society (e.g. politicians, performing and other artists, professional sportspersons, officials, etc.). Relative persons of the modern life are those persons interesting for public only temporarily due to their connection with a certain event (e.g. winners of different competitions or events, lottery winners, serious crime offenders and others). Data on relative public persons may be published only when these persons are interesting for public due to an event and not later. The aforementioned is also valid for publication related to criminal offence or facts which have occurred long time ago since in such events there is no public interest. Sensationalism and tasteless quoting of useless information is allowed neither for absolute nor for relative public figures in order not to encroach upon their right to privacy, not to interfere with their entirely private life. Thus was decided by the European Court of Human Rights which gives the states a substantial amount of freedom to decide pursuant to circumstances and criteria established in a particular society. However, European standard dictates that private and family life must be protected also in a case of the so-called public figures. In the case of Von Hannover versus Germany she was not a politician but a member of an established royal family who participated in cultural and charity events. Newspapers published her photos which

were private and showed scenes from her everyday life, private visits to restaurants, her sports engagements, on strolls and holidays. The court expressed its conviction that in competition of interests of an individual and public, narrower interpretation needs to be applied in such cases and thus protect the right to privacy. Although public figures are exposed to public, reports on their private life are not allowed.

How is the media obliged to report?

The right and obligation of media in informing the public depends on their authenticity. People have a right to be informed accurately. Although speed of information is important in news, the information may only be useful if we can believe it. This does not mean that only objective facts need to be published; however, published facts need to be appropriately checked, information carrier needs to satisfy the obligation of truth. Accuracy check of collected information – prescribed in more details in the Code of Journalists – is not always necessary. Exception to the aforementioned is when a journalist discovers certain data from the state authority, e.g. at the press conference. In such a case it is deemed that the information is checked and in the event the information is incorrect or protection of privacy is violated, journalist is not held responsible but the state authority conveying such information is.

The situation is different in the case of expressing an opinion or comment where strong subjective component is involved and it is hard to establish whether it is genuine or not. The right to express own opinion is wider than the right to information and an individual has a right to express his/her opinion even if he/she does not share it with others. However, limits exist also in this area. An opinion must not be offensive towards an individual. Each person needs to discuss in a manner fit for a civilised society and in line with good manners and behaviour. Rough discussion is not worth being protected since it is unproductive. However, a discussion may be emotional, in particularly as a response to a challenge. There is less tolerance in political discussions yet nondemocratic tone which leads to unwanted consequences cannot be supported. Politicians are no outlaws; consequently, a debate needs to be objective, cultured and needs to respect human dignity.



Freedom of expression is thus limited, however, more it proves important for the public interest, fewer restrictions there are (valid also in the case of conveying facts and opinions). Adverse opinions interesting only to an individual and not the entire public yet they serve pure entertainment, contentment or pure curiosity, are not allowed. Therefore, media may publish news and opinions carefully checked and holding an objective interest even if they encroach upon individual's privacy. More these news and opinions encroach upon the right to privacy, less space they have for publishing.



Questions related to the publication of personal data

What is personal data and what is the difference between the defined and definable individual?

Pursuant to Point 1 of Article 6 of the Personal Data Protection Act personal data is defined as data related to an individual, regardless of the form in which it is given. So personal data is not only a name, surname or individual's address, but also his/her medical data, picture, voice recording and other biometrical data (i.e. physical, physiological and behavioural characteristics unique to each individual, e.g. finger or hand print, form of an earlap, colour and pattern of iris, body posture, etc.). Email address, unique personal identification number, tax number and suchlike have become an important data with the development of IT.



In other words, personal data is data which in its own way defines whether data relates to defined or definable individual. Defined individual is a person directly defined (identified) by personal data, e.g. Dr. Danilo Türk, Borut Pahor, and Dr. Pavel Gantar. Definable individual is a person who may be identified with indirect referencing to one or more characteristics which enable recognition without excessive efforts, time or costs. In Slovenia, Janez Novak is recognised as a definable person due to the frequency of the name. If data on function performed by this person is added to the said person, there is only one Supreme Court judge Dr. Janez Novak in Slovenia.

Does a photo represent personal data?

How are photos protected?

Person's photo is a set of relatively complete and detailed characteristics of an individual since a photo is carrier which is a type of technical copy of individual's characteristics on a particular medium. Modern legal theory and case law agree that taking a photo of a person without their knowledge and consent is in principle allowed; however, a publication of such photo in printed or internet medium is questionable.

In order to publish a photo, consent from a photographed person needs to be obtained; such consent needs to be given voluntarily. Permission is then valid only for a particular person to whom consent is given, and only for an agreed period of time, manner and purpose of publication. Publica-

tion of a person's photo more times if the consent has been given only for a single publication or publication of a photo by more persons (e.g. in a number of media) is deemed an abuse of consent and consequent encroachment upon someone's privacy. Publication without consent of the person involved is only allowed when in public interest which means publication of a photo on public places (photos from different events, photos of a park, street or square and suchlike). Particularly, public figures can expect greater encroachment upon their privacy on public places. Publication of such photo is allowed unless the photo represents a snapshot of their everyday or intimate life.

In the case of *Friedl v Austria* the European Court of Human Rights was assessing whether collecting data, such as photos of individuals in public represents infringement of a right to privacy. The Court did not establish any infringement when the police had taken photos of a public demonstration. Furthermore, the Court concluded that such photos did not encroach upon someone's internal, intimate circle of an individual since the photos had been taken at a public event in which the complainant had also participated voluntarily and which had been taken and archived for the purposes of establishing the nature of manifestation and behaviour of persons present in light of the future investigation of actions or criminal offences. Information Commissioner also issued two opinions related to the taking photos of an individual or a crowd of people in a public place by journalists or other persons as well as recording in public place (no. 0712-768/2007/2 of September 6, 2007 and no. 0712-990/2007/2 of November 8, 2007), in which she established that a publication of a photo or a snapshot of an individual on the internet or in other media does not necessarily represent a breach of provisions of the ZVOP-I since such action does not represent personal data processing if such data is not a part of database of personal data and is not intended to be included in such database. General penal and civil protection is envisaged for such actions similarly than in cases of encroachment upon the right to privacy.



Does ZVOP-I allow publication of personal data and when?

Firstly, it is important to emphasise that the ZVOP-I is not applied for the same personal data processing which is performed exclusively by individuals for their personal use, family life and domestic needs. If such persons publish personal data illegally, they face penal and civil consequences.

As for the personal data collected by a personal data administrator be-

side the aforementioned protection a special protection is envisaged by the ZVOP-I. The Act does not prohibit publication of all kinds of data but pursuant to Articles 9 and 10 allows the publication of personal data when

- persons to whom the data relates to agree to such publication;
- thus prescribed by law; or
- processing of such data is necessary for the execution of certain competences, tasks and obligations of a body or organisation, and unless such processing encroaches upon individual's legitimate interest whom the data relates to.

What is the procedure as regards the consent of a person whom the personal data relates to?

Consent or approval of a person whom the personal data relates to needs to be given voluntarily without the use of force, threat or ruse. Consent or approval is given in a written or verbal manner. A standpoint has been created in the court practice that a person needs to give their consent for a particular publication and that their statement must not be misused. Thus for example a telephone directory contains a number of personal data in order for the others to search for and enable communication with an individual whom such data relates to. However, court practice prescribes consent for a specifically defined purpose. Consent for a single publication for a specific purpose does not allow multiple publications or publication for other purposes.

Which acts prescribe consent for a publication of personal data?

Laws are many and since many refer to public data not all can be listed. Therefore, a review as per group should suffice.

One of the allowed grounds is a publication of data contained in public records. These are records which are collected pursuant to the legislation and for particular purposes. Such records are for example Land Register, Court Register (of Companies), Register of Radiation Practices, Share Register, Register of Freelance Journalists and Cultural Professionals, Register of Attorneys, Sworn Translators, Official Receivers and other records.

In relation with the publication of data from a Share Register in the newspaper, Information Commissioner issued her opinion (no. 0712-1128/2007/2 of December 30, 2007) that the publication does not represent an infringement if the newspaper published name and surname of person who wished to purchase shares of NKBM since pursuant to the right to freedom of expression the journalist used opinions and findings collected from publically available sources regardless of the fact that no consent had been given by individuals whom the data related to.

Published data was obtained from the Share Register which pursuant to Article 84 of the Book Entry Securities Act (ZNVP) is managed by the Central Securities Clearing Corporation. The Information Commissioner established that the aforementioned case represents a legally permissible form of personal data publication which includes the transmission of personal data for a publication in a newspaper.

The second large group consists of data which relates to information of public nature. Pursuant to the provisions of the Personal Data Protection Act (ZVOP-I) the purpose of the said Act is to ensure open operation of different bodies and informing the public about their operation. In accordance with Article 4 of the Act on the Access to Information of Public Character (ZDIJZ) public information shall be deemed to be information:

- originating from the field of work of the body, which means that such information is related to the work of the body which obtained this information under public law competence whereat it is not important whether the body has drawn up or obtained such information;
- the body has at its disposal such information (and does not have to draw it up);
- information is in physical form.

Herewith, a question frequently arises: what is a public interest and when information is considered in public interest? In order to answer such questions a special test is applied which weights between two opposing interests and establishes whether public interest will be met if data is disclosed or information is blocked. Does a right to information thus prevail over exceptions set forth in Article 6 of the ZDIJZ. Special rights related to collecting information are held by journalists, editorial personnel and authors/creators of programming pieces, who are entitled to collect information pursuant to Article 45 of the Media Act (ZMed).

In relation with the information of public interest, the Information Commissioner issued a decision (no. 020-55/2004/9 of April 11, 2005) instructing the Ministry to enable access to documentation on granted non-refundable funds for the construction of infrastructure from 1970 to 2000. Similar decision (no. 0900-23/2008 of April 9, 2008) was issued to the Municipality. The decision instructed that within 30 days a Municipality needs to enable partial access to financial accounts which disclose data on received donations after floods that affected the Municipality and data on paid funds of humanitarian help to physical and legal persons whereat all names, surnames and addresses of physical persons need to be concealed. In decision no. 021-81/2007 the Information Commissioner consent to petitioner who demanded a copy of minutes and other deeds on opening, review and elimination of incomplete applications received for a particular workplace. Considering the fact that a number of applications

was low and that the candidates possessed similar characteristics, there was a likelihood of recognition. Since applicants were easily identifiable with name and surname or level of education and work experiences, Information Commissioner enabled partial access to such data, namely access to data on selected candidate. In doing so Information Commissioner took into consideration decisions issued by the European Court for Human Rights and Constitutional Court of the Republic of Slovenia which decided that a public official is not entitled to expect privacy as regards their name and surname, title, position, salary, official address and parts of successful application for a workplace which indicate person's qualifications necessary for a particular job. A person employed in public sector has a substantially reduced level of privacy due to the principle of responsibility which demands transparent operation of different bodies with the purpose of co-operating with citizens. This included payment of royalties to professors performing services at part-time study, post-graduate study at the faculty which is not financed from the budget like graduate study but from students' contributions yet provision of such study falls under public law. Consequently, Information Commissioner in her decision (no. 021-17/2007 of August 5, 2008) instructed the Faculty to send a journalist a copy of a list of payments of all royalties in 2006; i.e. royalties related to study (full-time or part-time, graduate and postgraduate). When persons are not employed in public sector, their privacy needs to be respected. Subsequently, Chief National Supervisor for Protection of Personal Data at the Information Commissioner's Office imposed a fine to the newspaper which published data on salaries of persons employed at the other newspaper publisher.

Personal data related to court proceedings fall under a special group.

What is the procedure in relation to personal data used in court proceedings?

So far courts have decided on this question many times. The European Court of Human Rights has decided on the operation of countries and their obligation to protect the right of an individual against excessive encroachment of state bodies during an investigation in criminal proceedings; in particular, in relation with supervision of correspondence and telephone tapping. Hence, for example in the case *Klass at al. versus the Federal Republic of Germany* the court believed that secret supervision did not infringe the right to privacy and correspondence since procedures for supervision were envisaged in sufficient details and rigorously enough. The court deemed a need to ensure state security and prevent disorder or crime as an act necessary in a democratic society. Differently, the European Court of Human Rights ruled in the case *Malone versus the United Kingdom* in which permissibility of police telephone tapping and managing a "register" of phone numbers called from a particular phone connection were reviewed. Infringement was established since the possibility of telephone tapping in the United Kingdom was excessively arbitrary. In relation with the list of called phone numbers, the Court assessed that such action

is legal and common in business world; however, transmission of such data to the police represents an unjustified encroachment upon the right to privacy since no legal authorisation or consent of the affected parties existed.

The case *Sciaccò versus Italy* relates to the publication of a photo of a person in criminal proceedings. The case addressed a suspicion of criminal act performed by a number of persons who were suspected of blackmail, fraud and forgery in a private school in Sicily. Among them was also a teacher reported to the financial police and later held in a house arrest. At the time the police took his photo and fingerprints. At the press conference public prosecutor circulated his photo to the journalists who published the said photo in different newspapers. Regardless of the fact that the suspect was later imposed a prison sentence and a fine, publication of photos was deemed an encroachment of privacy. Since he failed to obtain satisfaction at the Italian judiciary, the European Court of Human Rights ruled in the case and decided that the publication represented a breach of the right to privacy given that the publication of a photo was not necessary, and in particular publication of a photo was not allowed since it was taken at the police for different purposes.

Similarly, the Constitutional Court of the Republic of Slovenia decided in its decisions *OdIUS VI*, 158, U-I-25/95 where it assessed the conformity with the provisions of the Criminal Procedure Act and in *OdIUS VII*, 56, I-I-158/95 the conformity with the provisions of the Internal Affairs Act, i.e. provisions related to phone tapping and other so-called special methods and means. Pursuant to the principles that everything which is not specifically allowed is prohibited meant that every encroachment upon the individual's right to privacy is prohibited save those specifically allowed. The Court highlighted that the individual's right to privacy ends only when and where it collides with legally demonstrated stronger interests of others.

Rights and obligations of states are not only limited when its bodies encroach upon the rights of individuals and they need to respect particular measures (negative obligations) but they are also responsible for adopting positive measures and ensure adequate judicial protection of individuals against other individuals. The European Court of Human Rights had thus ruled on the misuse of internet before the apposite EC recommendations, UN resolutions and the EU Directive no.: 2006/24/EC, amending the Directive no.: 2002/58/EC, were adopted. The EU Directive no.: 2006/24/EC imposed on the states to adopt apposite measures for oppressing cyber crime. Comparative study carried out by the European Court of Human Rights established that many countries enacted obligation of the telecommunications providers to submit the computer data (also that on subscribers) regardless of the nature of the criminal offence. Consequently, the Court granted the appeal of a father of a 12-year-old in the case of *UK versus Finland* since neither its Court of First Instance nor appellate court protected psychological and moral interest of an individual (in particularly an adolescent or deprived person), who became a target of paedophiles. In that particular case somebody committed a crime

by publishing an internet ad indicating that a 12-year-old boy wishes to have intimate contacts with a boy of the same height or taller who would “show him the way”. The person detailed the adolescent boy’s personal data, including the date of birth, description of his physical characteristics and added a link to his internet page which contained his photo, email address and telephone number. The Court demanded the state to take appropriate measures and ensure actual and efficient measures to identify the person who published the ad and thus enable criminal prosecution.

Pursuant to the first paragraph of Article 6 of the European Convention of Human Rights the European Court of Human Rights decided also about the public nature of court proceedings. The Court believed that the public nature of court proceedings is not only interesting for parties involved but also for the public in general. Public nature of the proceedings ensures a fair trial to all parties involved, in particular when standing against the state (mainly in criminal procedure). Public court proceedings prescribed pursuant to Article 24 of the Constitution of the RS are also in public interest since it ensures trust in the administration of justice (courts, State Prosecutor’s Office, attorney-ships and notary offices). That is why a secret hearing is an exception set forth by law and may be in the interest of morale, public order, state security, official or business secret or privacy protection (in particular when an adolescent is involved). The decision must of course be delivered publicly.

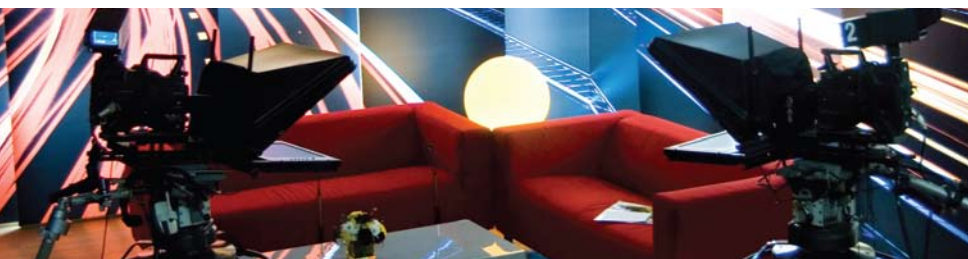
The Information Commissioner’s opinion (no.: 0712-524/2007/2 of July 5, 2007) in relation to the public nature of the main hearing emphasised that the ZVOP-I protects only those personal data which are a part of a collection, and not a particular datum which is not a part of a collection. If pursuant to the right to information a journalist published personal data on people, who are parties, witnesses or expert witnesses in criminal or civil proceedings, the Information Commissioner would have no authorisation since personal datum has been published at the main public hearing. However, penal or civil protection would be possible in the case of the breach of right to privacy.

How are penal and civil protection of the right to privacy and personal data regulated in Slovenia?

Penal protection is envisaged in the Penal Code (KZ), in particular in Chapter 16 in which punishable acts against human rights and freedoms, e.g. unsubstantiated phone tapping and secret recording (Article 137 of the KZ), unsubstantiated picture taking (Article 138 of the KZ), breach of the secrecy of means of communication (Article 139 of the KZ), prohibited publication of private writings (Article 140 of the KZ) and in particular a misuse of personal data (Article 143 of the KZ) are indicated. Furthermore, criminal offences against honour and reputation are set forth in Chapter 18 (Article 158 – 169 of the KZ), namely insult, defamation, offensive accusation, defamatory remark, reproach of criminal offence with the purpose of disdain, insulting the Republic of Slovenia, insulting foreign country or an international organisation

or insulting Slovenian nation or national communities. A fine and prison sentence is prescribed for the aforementioned committed crimes. Moreover, the proceeds acquired with such criminal offence or as a result of such offence are forfeited. In the event of criminal offences against honour and reputation committed by printing, aired on the radio, television or with any other mean of mass communication or at the public gathering are punishable by stricter penalty (twofold) and pursuant to Article 169 of the KZ a court may decide that the sentence is published at convict's expenses in the same manner as the criminal offence has been committed in whole or in extract. Criminal offences against honour and reputation may be committed by anyone even a journalist. Article 166 of the KZ envisages a special fine for responsible editor when criminal offences are committed by a public publication in media (except in the event of live transmission and criminal offence could not be prevented) and for publisher (if criminal offence is committed in non-periodic printed publication) or producer (if criminal offence is committed on a record, CD, film, DVD and other video, sound or similar means intended for a wider population).

Civil protection is envisaged by the Code of Obligation (OZ), namely covering different areas. Chapter on causing damage (Article 131 – 189 of the OZ) prescribes different measures. When the breach is imminent and may be prevented, measures for preventing danger and cessation of criminal act are prescribed; however, when the damage has already arisen, compensation claim is possible for the material and non-material damage caused. Each reduction or prevention of its increase is deemed material damage. Non-material damage reflects as bodily pains or fear or mental pain due to deformity, reduced life activity or encroachment upon honour or reputation, freedom or other human rights. On principle, honour or reputation is strived to be restored in non-material area, e.g. with an apology, withdrawal of statement, publication of sentence or other apposite measures or money. Pecuniary indemnity due to encroachment upon person's privacy, his/her honour and reputation, right to healthy environment is different, depending on the degree and duration of "mental pain" and other circumstances of a particular case. Pecuniary indemnity (punitive damages) in the Slovenian case law amounts to from less than 1000 €, in the case of breach among private entities, to around 10,000 € and up to a maximum of 27,000 € for the most serious infringements caused in media. In comparison with case law in some other states, average awarded amounts might be acceptable; however, the highest indemnities are low. This





is not only the case in the UK and the USA where in certain cases punitive damages are acknowledged as a fine but also in the neighbouring Austria, Italy, France, Spain and Germany. The latter indicates the need to increase punitive damages, in particular since our legislation subjective amount of damages for material damage may be awarded if the damage has been caused deliberately. The Code of Obligation envisages also the protection due to unjustified acquisition of what illicitly encroaches upon the right to privacy or the right to personal data protection. Article 190 of the Code of Obligation prescribes that the received must be returned or the

value of acquired benefits must be indemnified. For example the return of the received benefits may be requested when a perpetrator receives a payment and the value of acquired benefits in media would reflect in greater number of sold copies of publication or increased rating; although this is hard to prove.

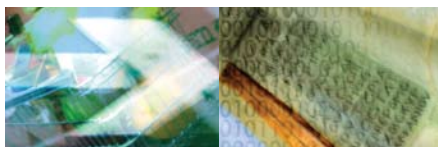
The ZVOP-I prescribes also administrative procedure and fines for misdemeanours which may be imposed to legal person or sole trader, namely from 2086.46 € to 12,518.18 € and responsible person from 417.29 € to 2086.46 €. Chief National Supervisor for Protection of Personal Data at the Information Commissioner's Office has already imposed fines; however, not in the amount sufficient to form standard practice. Newspaper publisher was imposed a fine in the amount of 1,000,000 Slovene Tolars or 4,173 €, responsible editor 200,000 Slovene Tolars or 835 €, since the autopsy report on three victims who lost their lives in front of the Lipa discotheque in Spodnje Pirniče, Slovenia was published in the newspaper on March 7, 2006. The same fine was imposed in the case of a publication of data on the salaries of the employees employed by the publisher of the competing newspaper.

The Media as Personal Data Processors – The Competencies of the Information Commissioner

The Media's Obligation to Abide by the Provisions of the Personal Data Protection Act

Question: When is the media bound by the provisions of the Personal Data Protection Act?

Answer: The Information Commissioner is competent merely for that part of the right to privacy which relates to the protection of personal



data, and is thus regulated by Article 38 of the Constitution of the Republic of Slovenia (Official Gazette of RS, No. 33/1991, with amendments and supplements). The broader limitations of the media are laid down in Article 35 of the Constitution which provides that the inviolability of the physical and mental integrity of every person, their privacy and personality rights shall be guaranteed. These rights are guaranteed under the law and accordingly afforded judicial protection.

In any understanding as to the competences of the Information Commissioner, it is important to appreciate some general notions as laid down by the Personal Data Protection Act (ZVOP-I). According to the provisions of Para 1 of Article 6 of the ZVOP-I, personal data is defined as any data pertaining to an individual, irrespective of the form in which it is expressed. The second paragraph of the same Article further provides that an individual - is an identified or identifiable person to whom personal data pertains; said person may be directly or indirectly identifiable, in particular by way of reference to an identification number or to one or more factors specific to the physical, physiological, mental, economic, cultural or social identity of the individual, where the method of identification does not incur large costs, or disproportionate effort, or require a large amount of time. Pursuant to its Article 1, Slovenia's Personal Data Protection Act determines the rights, responsibilities, principles and measures to prevent unconstitutional, unlawful and unjustified encroachments upon the privacy and dignity of an individual in the processing of personal data. With regard to the provision of Para 3 of Article 6 of the ZVOP-I, processing is considered - in particular - the collection, acquisition, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, communication or dissemination of data, or otherwise making data available; it accordingly encompasses any operation or set of operations performed using, or related to, personal data; thus the term embraces both automated and manual processing in relation to a filing or retrieval system. Pursuant to the provisions of Para 5 of Article 6 of the ZVOP-I, a filing system is defined as

any structured set of data containing at least one piece of personal data, which is accessible according to criteria enabling the use or combination of the data, irrespective of whether said set is centralised, decentralised or dispersed on a functional or geographical basis; a structured set of data is information organised in such a manner as to identify or enable identification of an individual.

The publication of personal data in the media, per se, does not represent an infringement of the provisions of the ZVOP-I. As arises from the terms stated in the previous paragraph, the publication of personal data could represent an infringement of personal data protection if the data had been illegally supplied from collections of personal data. If the media publishes personal data, which is a part of a collection or is intended for inclusion in a collection, and there is no legal basis or the individual's consent for such, then this could represent an infringement of the provisions of the ZVOP-I. In the event that there is the publication of data, which merely represents the confirmation of some facts and does not in itself represent personal data emanating from a collection, then this shall not be deemed an infringement of the provisions of the ZVOP-I; this, however, does not mean that an aggrieved party shall not be entitled to judicial protection.

If an operator in the media infringes a provision of the ZVOP-I, then it is possible to file an application for the misuse of personal data. More information about how to file an application can be accessed from the Information Commissioner's website, where you can also find a sample of an application. The application on the misuse of personal data needs to include precise clarification of the circumstances of the alleged infringement, and must also enclose proofs substantiating the allegations of the applicant. Only under these conditions can the Information Commissioner, as the inspection body, take action in accordance with its competences.

Publication of Personal Data by the Media in Relation to Court Proceedings

Question: Is the publication of a document issued by a law enforcement authority admissible?

Answer: Let us take - as an example - an investigation in relation to a suspect, and information which usually includes first name, family name, date and place of birth, permanent residence and citizenship. Based on a weighing of the right to privacy against the right of freedom of expression, public interest in current events and the legal interest of a public authority in relation to the maintenance of law and order, the Information Commissioner establishes that - under certain conditions - the publica-

tion of the first name and family name of a suspect does not represent the infringement of the right of protection of personal data guaranteed by the Constitution, and delimited in the ZVOP-I. When processing other personal data, e.g. from a document given as an example, the provisions of Articles 3 and 8 of the ZVOP-I shall be respected.

According to the provisions of Para 3 of Article 6 of the ZVOP-I, the public processing of personal data as described in the previous paragraph, is admissible in accordance with Article 8 of the ZVOP-I if allowance for such data and its processing are provided by statute, or if the consent of the individual concerned has been provided. One should take into consideration the general principle of proportionality relating to the protection of personal data, as regulated by Article 3 of the ZVOP-I. According to this provision, the personal data being processed must be adequate and in its extent appropriate in relation to the purposes for which such is collected and further processed. This principle is hence compliant with the provision of the first paragraph of Article 6 of Directive 95/46/EC of the European Parliament and the Council of 24th October 1995 (Official Journal EU 281, 23.11.1995) on the protection of individuals with regard to the processing of personal data and on the free movement of personal data, which reflects the constitutional principle of proportionality. In accordance with this, and even in the instance of a limitation, both the type and the scope of the data being processed should be verified in any encroachment upon the individual's right to the protection of their personal data protection for reasons of public interest or the rights of third parties. The Constitutional Court of RS referred to this principle in its explanation of its Decision No U-I-238/99 of 9th November 2000 (Official Gazette of RS, No. 113/00) in which it is stated that according to the standard constitutional review, an encroachment upon the guarantee of personal data protection arising from Article 38 of the Constitution of RS is admissible, if it is compliant with the principle of proportionality.

This also means that a restriction needs to be both necessary and urgent for the achievement of the constitutionally admissible goal, as well as in proportion with the intention of that goal (see third paragraph of Article 15, and Article 2 of the Constitution RS). In the process of assessment - in the event of the collision of several fundamental rights and/or in the event of prohibition of excessive encroachment into such rights - it is forever necessary to assess whether the restriction of such rights or their encroachment are proportional and substantiated with a constitutionally admissible goal which intends to protect or provide some other social or public benefit, and when through the curtailment of such a right they are directly or indirectly protecting the rights of others. Such also encompasses the exceptions arising from Article 8 of the European Convention on Human Rights (further to which see the decision of the European Court of Human Rights of 26.03.1987 in the case of Leander vs. Sweden; Application No 9248/81) and influencing the rights and interests of the

affected parties to the smallest possible degree and/or assessment as to the eligibility of urgent encroachment in relation to the eventual consequences, as it arises *mutatis mutandis* from the Decision of the Constitutional Court RS - U-I-60/03 of 4.12.2003 (Official Gazette of RS, No. 131/03).

From the aspect of proportionality, which provides that the weight of the interference into a protected right - namely the protection of personal data - must be in appropriate and proportional with the purpose and importance of another constitutionally protected right or of public benefit (see Article 15 of the Constitution RS), as is manifest in Article 3 of the ZVOP-I, from which it arises that the publication of personal data must also be assessed from the aspect of the constitutionally guaranteed freedom of expression, laid down in Article 39 of the Constitution of RS and enacted through the Media Act (Official Gazette, No. 110/6). In relation to the implementation of the provisions of the ZVOP-I re the processing of personal data by the media for the purpose of public information provision, and by taking into consideration the provisions of the third paragraph of Article 7 of the ZVOP-I, one can thus conclude - by way of contrary argument - that the media in its processing of personal data, which are included in, for example, in its request for the opening of a investigation, are obliged to respect all provisions of the ZVOP-I, except the provisions of the second paragraph of Article 25, together with Article 26, Article 27, Article 28 as well as part V of that Act. Such also means that in the publication of personal data, the media must comply with Article 3 of the ZVOP-I, and employ the principle of proportionality.

Actual implementation of the principal of proportionality in such instances derives from the routine practice of the European Court of Human Rights, which has, in a number of cases - e.g. in the case of *Von Hannover vs. Germany* - decided as follows:

1. the media shall only be granted a narrower scope of right of interference into the privacy of those public persons who are not engaged in politics or who perform an official or political function (i.e. those public figures who cannot be classified as public figures 'par excellence');
2. the media shall not be granted the right to interfere into the privacy of those public figures who are not public figures 'par excellence' if the details of their private life are not relevant to the public discussion of the matters which are of general and/or in public interest;
3. the curiosity of the public and media providing public entertainment (such as tabloids or magazines) cannot be determined as public interest if it encompasses (illegitimate) interference into the privacy of public figures who are not public figures 'par excellence';
4. neither the freedom of expression nor the right for privacy are absolute in their character; and, for this reason, they must be appropriately balanced if they collide.

The European Court of Human Rights has ordered ECHR signatory states to more precisely define the notion of a public figure (see more in A. Teršek's Freedom of the Media and privacy protection: a critique of two precedents, proposal for the classification of a »public figure« and proposal for constitutional standards in Dnevi Civilnega Prava, Portorož, published by the Institute of Public Policy Ljubljana University's Faculty of Law, 2006).

If, in certain cases, persons cannot be classified as public figures 'par excellence' then the media is permitted any unlimited right to interfere in their privacy. In any such case, detailed personal data is most probably not important or germane to any public discussion of matters which are of general, or in the public, interest. In every individual case, it needs to be assessed whether full disclosure, or merely some personal data from a given document would be sufficient for the needs of public interest and the provision of information on current affairs. In the case of a request for investigation, such would, for example, mean solely the publication of the full name of the suspect. The publication of such minimal information would be sufficient to inform the public as to current affairs. Other personal data, which may usually be included in a request for investigation, is by no means data relevant as regards such issues as public interest or freedom of expression, since an individual - according to point 2 of Article 6 of the ZVOP-I - is fully identifiable from their full name provided in the context of other data arising from a published document.

Publication may be considered the manifestation of the public right to know prevailing over the right to protection of personal data; such, however, must be in compliance with the constitutional principle of proportionality. Further to this, the publication of the date and place of birth, permanent residence and citizenship of a suspect - for which the media have neither appropriate legal basis nor the personal consent of the individual - exceeds that which is mandated. Hence such would be deemed unwarranted processing of personal data and an infringement of the provisions of Article 3 of the ZVOP-I.

The Information Commissioner also advises that the publication of a surfeit of personal data in any request for an investigation is liable to be deemed an unwarranted encroachment into an individual's right to protection of personal data. Such could also lead to abuse (e.g. forgery of documents based on the detailed personal data which has been published, or interference with the privacy or home-life of the individual, and even a personal attack or other criminal offence against that person) or even interference with the law and the maintenance of public order.

Question: Is the publication of autopsy reports pertaining to victims permissible?

Answer: Autopsy reports necessarily include sensitive personal data, the processing of which is regulated by Para 8 of Article 13 of the ZVOP-I, which provides that personal data can only be processed if such is authorised by other law on the basis of public interest. This provision is materialized in statutes which regulate individual areas whereby the legislator sanctions the processing of sensitive personal data only when such data is strictly necessary in the legitimate sating of public interest, and when such general interest is deemed to prevail over the personal interests of an individual.



As regards the media, legitimate public interest is determined in Article 4 of the Media Act RS – which also defines that subject matter of which the state shall be supportive - whereas Article 42 regulates the right of reply to information published, which, according to the first paragraph, is intended to secure the interest of the public in terms of objective, multilateral and up-to-date information, as one of the essential prerequisites for democratic decision-making in public affairs. From this we may conclude that the Media Act does not define public interest within the meaning of Para 8 of Article 13 of the ZVOP-I, and we should hence conclude that the Media Act does not provide legal basis for the processing of sensitive personal data contained in an autopsy report. The Media Act limits the normative description of public interest merely to content which is not even remotely related to the publication of sensitive personal data.

The right of freedom of expression by the media is not an absolute right; as with all such rights and freedoms it may be subject to curtailment by the rights of others, as well as in such instances as are provided by the Constitution of RS (third paragraph of Article 15 of the Constitution of RS

As has already been established by the Supreme Court in Ljubljana in its Judgment VSL II CP 476/99 of 28th September 2000, the right to free expression shall be restricted if it encroaches upon other human rights; likewise, the right or duty to provide information shall be restricted when it encroaches upon the human rights of others.

In relation to this, it should be stressed that the right to freedom of expression is already restricted by Slovenia's Media Act itself, namely by Articles 6 and 45. Pursuant to the provisions of Article 6 of the Media

Act, the activities of the media shall be based on freedom of expression, together with the inviolability and protection of human personality and dignity, while the second indent of the fourth Paragraph of Article 45 of the Media Act clearly provides that the media shall not be entitled to information if this would entail infringement of confidentiality as to personal data in accordance with law, unless publication thereof would prevent a serious criminal offence or avert danger to human life or public property. The provisions of Articles 6 and 45 of the Media Act clearly point to public interest in connection with the publication of data that encroaches upon an individuals' right to personal dignity, privacy and protection of personal data: when exercising the right to freedom of expression, the media shall be obliged to respect the inviolability and protection of personality and dignity; the media may only impinge upon such rights in the event that publication would prevent a serious criminal offence or avert danger to human life or public property.

The publication of autopsy reports which pertain to a victim of crime necessarily involves the collision of two human rights: those of freedom of expression and those of personal data protection; appropriate reconciliation is provided in accordance with the constitutional principle of proportionality as determined in Article 3 of the ZVOP-I which states that the personal data being processed must be adequate and in its extent appropriate in relation to the purposes for which is collected and further processed (more information on this is provided in the answer to the first question herein in relation to implementation of the principle of proportionality). Through its implementing the provisions of Articles 6 and 45 of the Media Act RS, the media would be entitled to obtain and publish autopsy reports or parts thereof, providing such action would prevent a serious criminal offence or avert danger to human life or public property.

Question: Ali je dopustna medijska objava fotokopije osebne dokumenta osumljenca?

Answer: Let us take, as an example, the publication of a photocopy of the ID-card of a suspect, whereby the following personal is processed: a photograph of the individual, their name, surname, date of birth, place of birth, EMŠO (unique personal identification number, which all Slovene citizens possess), sex, ID-card number, date of issue of the ID-card, date of its expiry, place of issue and signature of the holder.

Pursuant to the provisions of Article 8 of the ZVOP-I, which are also binding on the media, the Information Commissioner wishes to stress that in order to publish personal data from an ID-card, there must necessarily be a legal basis for such action, or the provision of the personal consent of the individual whose personal data is being published, or overriding substantiation as to primacy of the public's right to know as regards all the personal data on the said ID-card. In this respect, all published personal data must be adequate and in its extent appropriate in relation to the purposes for which it has been

collected and further processed. Failure so to do would infringe the principle of proportionality (for more information on implementation of the principle of proportionality see in the answer to the first question of those Guidelines). From the above it is evident that prior to publishing a photocopy of the entire ID-card of a suspect, the media is obliged to conceal the following personal data: date of birth, place of birth, EMŠO (unique personal identification number), sex, ID-card number, date of issue of ID-card, date of expiry of ID-card, place of issue of ID-card and the signature of the holder.



Questions Pertaining to the Publication of Personal Data of Employees in the Media

Question: Is the publication of personal data in relation to private sector employees admissible?

Answer: If the media - for example - publishes the names and surnames of recipients of the highest gross and net salaries of employees in a company, and had neither legal basis nor the individual's consent for such processing of personal data, such action would represent the illegal supply of personal data to the public.

The processing of personal data of private sector company employees is governed by Slovenia's Employment Relationships Act. Pursuant to said Act, as well as with respect for the provisions of Article 8 of the ZVOP, the media may only publish the data on the recipients of the highest gross and net salaries in companies if such was necessary in the exercise of the rights and obligations arising from an employment relationship or related to an employment relationship, or if the consent of the individual to whom the data pertains, was provided.

The public nature of salaries is only prescribed for the public sector; whereby it is expressly determined that public enterprises and companies in which the state enjoys a majority shareholding or a prevailing influence, shall not be considered for such purposes as being in the public sector. If the media publishes such information, they may not invoke the right to freedom of expression and public interest because, pursuant to the third paragraph of Article 15 of the Constitution of RS, as well as Article 10 of the European Convention of Human Rights, such rights and freedoms are restricted by the rights of others. Moreover, the right to freedom of expression is restricted by the Media Act RS itself (more information on this topic can be found in the answer to the second question of this chapter of these Guidelines), according to which the media would not be entitled to obtain and publish such data, unless publication thereof would prevent a serious criminal offence or avert direct danger to human life or public property, which, in the particular example, is probably out of question.

Such publication of personal data would encroach upon the constitutional right of dignity of the individual, the protection of personality and privacy, as well as the right to the protection of personal data; whereas, the right to freedom of expression would, in such a collision of rights, not prevail.

Question: Katere podatke javnih uslužbencev je dopustno objaviti v medijih?

Answer: Pursuant to Article 1 of the Civil Servants Act RS (Official Gazette of RS, No. 63/2007; hereinafter: ZJU) civil servants are deemed

to be individual persons employed within the public sector. Pursuant to the second paragraph of Article 1 of the ZJU, the public sector shall be comprised of state authorities and bodies, together with the various administrations of self-governing local communities, public agencies, funds, public institutions as well as other entities subject to public law that directly or indirectly use public - state or local - funds.

With regard to processing the name and surname and some other personal data of civil servants, one has to consider the provision of the first indent of third paragraph of Article 6 of Slovenia's Access to Public Information Act (Official Gazette of RS, No. 51/06 – official consolidated version, and 117/06 – ZdavP-2, hereinafter ZDIJZ) which provides that without prejudice to the provisions of the first paragraph of Article 6 of the ZDIJZ (where personal data is stated as one of the eleven exceptions for which the body can deny an applicant's access to requested information), access to the requested information is sustained if it is considered information pertaining to the use of public funds, or information related to the execution of public functions or the employment relationship of a civil servant, except in cases (exceptions) from point 1 (classified information) and points 5. to 8 (i.e. confidential public archives, constituted as infringements of Tax Procedure Act, that such may be prejudicial in a criminal prosecution, or that such was drawn up in relation to – and is thus deemed prejudicial to – an administrative procedure). Article 6 of the ZDIJZ, as well as in those instances where Slovenia's 1999 Public Finance Act. (Official Gazette of RS No. 79/1999) and the 2000 Public Procurement Act (ZJN-2) stipulate otherwise.

The main objective of the system regulated by the Civil Servants Act RS is to provide a means of selecting civil servants based on objective criteria of professional competence. Such means of objectivity is provided, in particular, within the scope of the procedure for candidate selection in filling a vacant position. In this regard we should mention Article 7 of the Civil Servants Act RS which defines the principle of equal access, which means that the employment of civil servants shall be implemented so as to guarantee equal access to positions for all interested candidates under equal conditions, and to guarantee the selection of the candidate who is most professionally qualified for the performance of tasks in relation to the respective post. This principle is applied in relation to each and every vacant post, at least from the perspective of selecting the most professionally qualified candidate. Through the application of the criteria and implementation of this principle, competition, professionalism and efficiency are introduced into the civil service, while the potential for corrupt practice is diminished.

As regards access to the personal data of civil servants, it should be stressed that in the accordance with the doctrine of the expectation of privacy - as endorsed by the European Court of Human Right Rights in

the cases *Halford vs. United Kingdom* (25.6.1997, Reports 1997-III), and *Copland vs. United Kingdom* (3.4.2007, Application No. 62617/00), as well as by the Constitutional Court of RS in its Decision U-I-25/95 - civil servants are not entitled to expect privacy as regards their names, title, post, salary, business address and those sections of a successful job application which denote the applicant's qualifications in relation to occupation of a particular work post. Due to this principle of openness, which requires transparent operations of a public sector body with the objective of achieving a high degree of participation by citizens in executing the power of state authorities, those employed within Slovenia's public sector thus automatically experience significantly reduced expectations of privacy than those employed in the private sector. The provisions of the third paragraph of Article 6 of ZDIJZ is based on the above theoretical basis.

Taking into account the above, represents the first indent of the third paragraph of Article 6 of the ZDIJZ the legal basis for the media's publication of personal data, which pertains to the execution of a public function and/or employment relationship of a civil servant, and represents freely accessible public information.

The Information Commissioner however warns that such data related to the employment relationship of civil servants should be examined prior to the publication in the media, to ensure it does not represent an exception from freely accessible public information. The criteria used to carry out such examination are usually laid down in the internal act on the organization and classification of posts of the public sector body concerned, and/or in a public procurement specification. All personal data pertaining to civil servants which is not related to their employment relationship such as permanent address, date and place of birth, EMŠO (unique identification number of Slovene citizens), names of parents, number and names of children, private telephone number, number of exams passed and average marks during study etc., should be redacted or removed prior to publication. Such data indeed does not represent freely accessible public information, and hence belong to the category of protected personal data.

Media Publication of Recordings and Photographs in Relation to Personal Data

Question: Is it necessary to obtain the individual's consent prior to the publication of their photograph or voice or video recording in the media?

Answer: The publication of a photo or a recording of an individual in the media does not necessarily represent an infringement of the provisions of the ZVOP-I. Photographs or recordings would represent personal data collections protected under the ZVOP-I if they were published in such

way that the individual is identified. Such a collection could be established if, for example, an article or a feature included - besides photos or recordings - personal data (e.g. name and surname, date of birth or residence...) of the individual depicted or otherwise recorded. In any such instance, the provisions of the ZVOP-I must be respected, which means that publication or other processing of personal data shall only be permitted if it is in accordance with the law, or if the personal consent of the individual concerned has been provided (Article 8 of the ZVOP-I).

If there is no identification or personalisation as to photos and/or recordings, then the provisions of the ZVOP-I shall not apply; there exist, however, limitations imposed by the right to privacy of the individuals depicted, and any such individual may exercise their right to protection in a competent court.

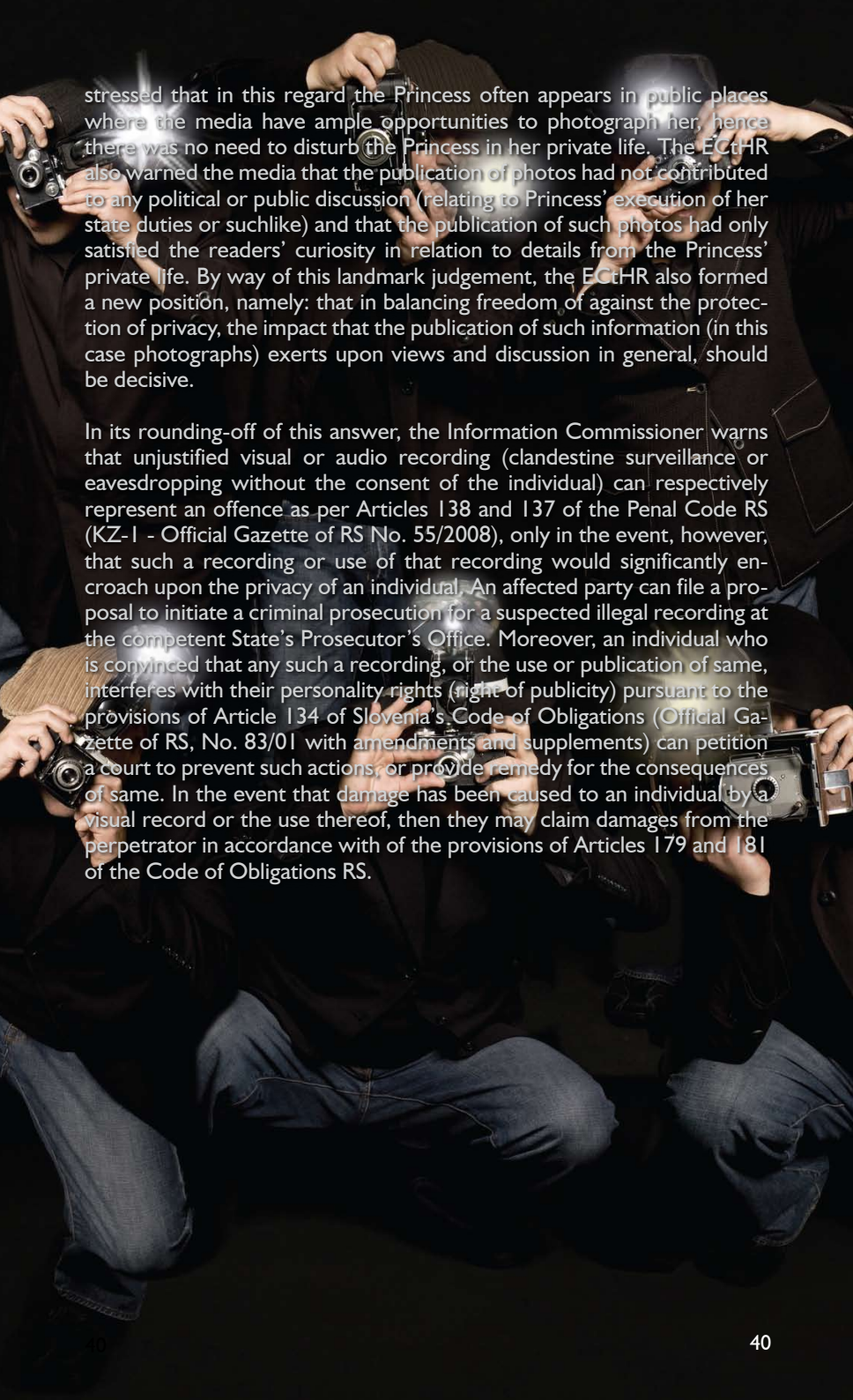
Despite the fact that the broader aspects of the right to privacy, the limitations of which are set forth Article 35 of the Constitution of RS, is no longer an area under the jurisdiction of the Information Commissioner, some concepts which are important to the understanding of privacy in relation to photography and/or recordings, as explained by contemporary theory and practice, should nevertheless be expounded herein. When examining encroachments into the right to privacy and personality, it is important to realise that each individual, who attends a public event (as a performer or a spectator) must be aware that there is a significant chance that they shall be photographed and/or recorded, and that hence said persons must be aware of this possibility. An individual may not be photographed as the focal motif of a photograph which is thence published; Nevertheless, photographing or otherwise recording a public event, as a record or documentary of that event, may also include an image of an individual (for more on this see A. Teršek's *Freedom of the Media and privacy protection: a critique of two precedents, proposal for the classification of a »public figure« and proposal for constitutional standards* in Dnevi Civilnega Prava, Portorož, published by the Institute of Public Policy Ljubljana University's Faculty of Law, 2006). In the context of a public venue, a private individual can expect a greater degree encroachment upon their absolute privacy and right to privacy as such.

Contemporary legal practice and case law agree that photographing and/or recording a certain individual without their knowledge and consent cannot be sanctioned (see page 132 of *Personality Rights* by A. Finžgar, Slovenian Academy of Sciences and Arts, Ljubljana, Slovenia; 1985.). Whereas the processing of photographs and/or recordings (save for instances when photographs are taken using powerful telephoto lenses, or small concealed cameras or when the person being recorded has explicitly forbidden such), shall not in itself be deemed to represent any encroachment upon the privacy of an individual; however, that is not the case with the publishing of a photographs and/or recordings in printed

media or on the Internet, which represents an encroachment upon the privacy and rights of the individual. The easiest way to ensure the legality of the publication of a portrait or a recording is to obtain the consent of the individual concerned. Theoreticians warn that such consent is valid only for a certain individual, who provides consent only for an agreed term solely in a manner and for the purpose of that publication (for more on this see page 105 of A. Finžgar's *Personality Rights*, Slovenian Academy of Arts and Sciences, Ljubljana, Slovenia; 1985.). The protection as to the right of publicity - the so-called personality rights - of a depicted individual is, however, not absolute.

Publication of the image of an individual can be justified by a higher private or public interest. Such instances need to be decided on a case-by-case basis on the basis of weighing the opposing interests. Such a conflict of opposing interests pertains to photos and recordings of contemporary personalities who in themselves evoke public interest. Legal practice has thus identified - and accordingly distinguishes between - two groups of personalities: so-called absolute and relative, each of which enjoy a reduced degree of protection. The *absolute* group encompasses individuals who are under constant and longstanding public scrutiny, due to their role or function in society (e.g. politicians, officials, artists and athletes etc.). The relative group includes persons who are only of temporary public significance, most often due to their connection with a certain event. *Relative* persons include, among others, perpetrators of crime (kidnappers, murderers etc.), winners of competitions or lotteries etc. The scope of protection of the right of publicity is dependent on the placement into one or other of the groups. The taking of photos or making other such records in relation to the private lives of persons from both groups is only permissible to a limited degree without the consent of the party concerned. A relative personality in contemporary life can only be depicted during the period when they are - due to a certain event - deemed of interest to the public, and not after that period. Attention should be paid in relation to both groups insofar that unmitigated or mere sensationalistic or tasteless pursuit of the individual is not permissible, and nor is the publication of images or information which is either irrelevant or encroaches upon the intimate and private domain of the individual. (For more on this subject see page 22 of K. Krapež's *Fotografija in Osebnostne Pravice – Photography and Personality Rights* - published in Slovenia within *Pravna Praksa* 16/2005).

A precedent in relation to current perspectives of the case-law in this area is the Judgment by the ECtHR in Strasbourg in the case of *Von Hannover vs. Germany*. German magazines published photos of Princess Caroline (of Hanover and Monaco) and her children during a shopping trip and participating in sporting activities at the Monte Carlo Beach Club. The European Court thus decided that the publication of the clandestine photos interfered with Princess Caroline's right to privacy. The Court

A group of photographers, mostly men, are crouching on the ground. They are holding various types of cameras, including DSLRs and video cameras, and are looking through the viewfinders, ready to take pictures. They are wearing dark clothing, and the scene is dimly lit, with some light reflecting off the camera lenses and the photographers' faces.

stressed that in this regard the Princess often appears in public places where the media have ample opportunities to photograph her; hence there was no need to disturb the Princess in her private life. The ECtHR also warned the media that the publication of photos had not contributed to any political or public discussion (relating to Princess' execution of her state duties or suchlike) and that the publication of such photos had only satisfied the readers' curiosity in relation to details from the Princess' private life. By way of this landmark judgement, the ECtHR also formed a new position, namely: that in balancing freedom of against the protection of privacy, the impact that the publication of such information (in this case photographs) exerts upon views and discussion in general, should be decisive.

In its rounding-off of this answer, the Information Commissioner warns that unjustified visual or audio recording (clandestine surveillance or eavesdropping without the consent of the individual) can respectively represent an offence as per Articles 138 and 137 of the Penal Code RS (KZ-I - Official Gazette of RS No. 55/2008), only in the event, however, that such a recording or use of that recording would significantly encroach upon the privacy of an individual. An affected party can file a proposal to initiate a criminal prosecution for a suspected illegal recording at the competent State's Prosecutor's Office. Moreover, an individual who is convinced that any such a recording, or the use or publication of same, interferes with their personality rights (right of publicity) pursuant to the provisions of Article 134 of Slovenia's Code of Obligations (Official Gazette of RS, No. 83/01 with amendments and supplements) can petition a court to prevent such actions, or provide remedy for the consequences of same. In the event that damage has been caused to an individual by a visual record or the use thereof, then they may claim damages from the perpetrator in accordance with of the provisions of Articles 179 and 181 of the Code of Obligations RS.

Publication of Personal Data which is the Result of an Analysis of Published Data

Question: Is publication of the list of 100 richest Slovenes admissible?

Answer: Pursuant to Article 39 of the Constitution of RS, freedom of expression of thought, freedom of speech and public appearance, of the press and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive and disseminate information and opinions. The notion of expressing opinion and conscience relates to spoken words as well as to images, the press, electronic media and *“all actions which have the purpose of expressing an idea or an opinion, or the presentation of news or information... Dissemination of information and opinions as well as receiving and collection thereof shall be guaranteed”* (page 419 Commentary on the Constitution of RS, edited by Slovenia’s former justice minister Lovro Šturm, published by the Postgraduate School of State and European Studies, Ljubljana, Slovenia). This does not, however, mean that such freedom of expression extends merely to ascertainable data and information, since the right arising from Article 39 of Slovenia’s Constitution also extends to opinion, critique and speculation, similar to that which arises from the Judgment of the European Court of Human Rights in the case *Lingens vs. Austria*, of 8.7.1986, Application No. 9815/82. From the ECtHR’s Judgment in the case *Thorgeir Thorgeirson vs. Iceland* of 25.6.1992, Application No. 13778/88, it also arises that expression of opinion does not include any obligation to prove veracity or truthfulness.

The Information Commissioner assesses that any list entitled the 100 richest Slovenes, published in the media, could be in the domain of the constitutional right for freedom of expression, which represents predominantly speculation and assessment based on estimates, obtained through unarticulated criteria of analysis of public and/or publicly accessible information (e.g. share and securities registers, the website of Slovenia’s Agency for Public Legal Records and Related Services, the Ljubljana Stock Exchange, the annual reports of companies, archives and information known to the media...). Such data is of public record, whilst estimates and calculations and conclusions which may derive from them are to a degree speculative and hence such data do not represent personal data which would be protected by the ZVOP-I.

The Information Commissioner hence assesses that within the scope of exercising its constitutional right to freedom of expression - which also includes the right to estimate and guess - the media is free to publish a list of the 100 richest Slovenes as described in the previous paragraph. In its doing this it would not infringe the provisions of the ZVOP-I, since the published material is not protected as personal data, but is rather estimation derived from publicly available data.

The Scope of Personal Data Sources which may Supply the Media

Question: Can a municipality supply the media personal data contained in a citizens' initiative calling for a referendum?

Answer: A public initiative calling for a referendum, which, in accordance with the Referendum and Public Initiative Act (Official Gazette of RS, No 26/07 – official consolidated text; hereinafter: ZRLI-UPB2), includes the personal data of signatories, is processed by a municipal authority. The ZRLI-UPB2 precisely defines the personal data which must be provided by a signatory when expressing their support for any such initiative, namely: name, date of birth, address and municipality of permanent residence, signature and date of signature. The purpose of obtaining such data is to enable verification as to whether or not enough (genuine) voters have supported the initiative to require the calling of a referendum, as well as to simultaneously prevent abuse (e.g. fictitious or ineligible persons, personation etc.). Once it has been established that the initiative calling for a referendum has the requisite bona fide support, the names and personal data of the voters is no longer relevant as the purpose of the collection has been achieved. For this reason, the personal data of those who gave their support for the calling of a referendum should not represent any part of documentation in the further referendum procedure, else the protection of their personal data should be provided in some other way.

Within the context of Article 16 of the ZVOP-I, the aforementioned ZRLI-UPB2 represents the legal basis for the collection of personal data for a single specific and lawful purpose; accordingly, unless otherwise provided by statute, this data may not be further processed in any manner contrary for the purposes for which was collected. Any communication, further processing (e.g. supplying to the media) or otherwise making available such data contained in the initiative would not be in compliance with the purposes determined in the ZRLI-UPB2 and would thus represent contravention of Article 16 of the ZVOP-I.

Question: Can a hospital supply data on the health status of a patient?

Answer: Article 13 of the ZVOP-I, as a legal basis for the processing of sensitive personal data, which pursuant to Para 19 of Article 6 of the ZVOP-I also encompasses data on health status, provides that processing may only be carried out if the individual has provided their explicit personal consent for such; as a rule, this consent must be in writing, and, in relation to any information provision by a public sector institution, such must also be stipulated by statute.

The Health Services Act (Official Gazette of RS, No. 36/04 – official consolidated text, hereinafter: ZZdej-UPB1) and the General Practitioners Services Act (Official Gazette of RS, No 72/06 – official consolidated text; hereinafter:

ZZdrS-UPB3) provide that health care and allied professionals are obliged to safeguard as a professional secret all information on the health status of patients, as well as on the causes, circumstances and consequences of any condition a patient may have. Accordingly, such data cannot be supplied to third parties or otherwise made public. Only a patient, or a court, pursuant to the law, or the parents or guardians of a minor, can relieve a medical professional from this obligation. Data as to the health status of a patient can only be supplied to the patient's immediate relatives or a guardian by the doctor treating the patient. A hospital so cannot supply the media any information as to the health of any patient unless they have been provided the necessary explicit written consent.

Article 23 of the ZVOP-I should be taken into account regarding the protection of personal data of deceased patients, and the related rights of third parties as to the inspection or familiarization with pertinent personal data. The first paragraph of Article 23 of the ZVOP-I provides that a data controller may only supply data on a deceased person to those persons who are, in accordance with statute, authorised to process personal data (e.g. courts of law for the needs of solving inheritance issues or maintaining the central register of deaths). Irrespective of the first paragraph, the data controller shall supply data on a deceased individual to the immediate relative who under the statute governing inheritance is the deceased person's next of kin (spouse, antecedent or descendant) and legal heir if they demonstrate a lawful interest in the application of such personal data, and the deceased person did not prohibit, in writing, the supply of such personal data. It is hence evident that the media are not among those subjects who are entitled to familiarization with data on deceased patients; this means that any hospital or health care professional would be infringing the provisions of the ZVOP-I by supplying such personal data to the media.

The Information Commissioner would like to add that the fact that the media may already be partially or totally familiar with the personal data, which they have obtained from other sources, does not provide a hospital or healthcare professional with any legal basis for the disclosure and/or supply of data contained in medical documentation.

Question: Can the media publish the names and surnames of pupils which may occur in a document proclaiming parental support for a teacher?

Answer: The Information Commissioner is of the opinion that the Media Act RS does not define the public interest within the meaning of Article 8 of the ZVOP-I (for more on this see the answer to the second question in the second point of this chapter of guidelines) and hence it provides no legal basis for the processing of personal data in the case in question (listed names and surnames of pupils). The Media Act's definition of publication in the public interest does not extend to content which is not remotely related to personal data, thus in this context and under this legislation the publication of personal data is unwarranted.

By publishing the names and surnames of pupils who the media would, under Article 38 of the Constitution RS, contravene the right to protection of the pupil's personal data; such action would also be in contravention of Article 8 of the ZVOP-I. Encroachments upon the rights deriving from Article 38 of the Constitution RS are, in principle, not sanctioned; potential exceptions need to be strictly assessed and only permitted if deemed urgent or pressing from the perspective of public interest, whereby the invasion of privacy would have to be carried out to the minimum possible extent. In any such instance it would also be necessary to carry out a strict assessment as to the encroachment of rights pertaining to the protection of personal data.

It is necessary to stress that the notion of *public interest* - if we regard it as something which is not determined or institutionalized by the legislator, but rather as something which is germane to some specific public - should not merely represent something which is *interesting to the public*. Popular curiosity and interest of the public is entirely different than *an issue or information of public interest*. Hence the former is no justification in itself for any encroachment of the rights enshrined in Article 38 of the Constitution RS. Further to this, and by taking into account the third paragraph of Article 15 of the Constitution it may be concluded that the freedom of expression and public interest does not provide a basis for railroading Article 38 of the Constitution RS or the provisions of Article 8 of the ZVOP-I (for more information on the implementation of the principle of proportionality in practice, see the answer to the first question in the second point of this chapter of these Guidelines).

In Conclusion

Overall, the right to privacy (together with the right to protection of personal data), as well as the right to expression and information, can be deemed as exceptionally important human rights which can often collide, for which reason journalists must undertake their work with a deal of sensibility, while information they provide must be true, up-to-date, and verified. Reporting shall not be insulting towards those who are the subject of it, and must not interfere with their privacy. Additional attention has to be paid when juveniles or endangered persons are involved.

Notably, the interests of the individual's right to privacy together with public interest and the right to information - without which there is no right interfere in personal data - forever needs to be weighed. The general guidance shall be to weigh the interests, which was also performed by the European Court of Human Rights in the case of *Birink vs. the Republic of Lithuania*, where the court protected the right of privacy over the alleged public interest, when the headlines of a newspaper reported that living in a certain village was thirty-year-old Gitana Birink, a mother of two children, who was infected by HIV virus. Since she was leading a promiscuous life and was looking for male company - which she had until then no problems finding, local wives were supposedly shaking with fear as to the lethal infection their husbands might contract, and hence had bought up all the condoms in the area... The provision of such information may be in the interests of some; however, its main intention was entertainment, titillation and sating public curiosity.



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