Republic of Serbia

COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PERSONAL DATA PROTECTION

REPORT

ON IMPLEMENTATION OF THE LAW ON FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE AND THE LAW ON PERSONAL DATA PROTECTION IN 2011

B e l g r a d e
March 2012

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on Implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection
in 2011

1. FOREWORD AND COMMISSIONER'S GENERAL ASSESSMENT OF CURRENT SITUATION WITH REGARD TO FREEDOM OF INFORMATION AND PERSONAL DATA PROTECTION

This Report on Implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection in 2011 is the seventh annual report submitted by the Commissioner for Information of Public Importance and Personal Data Protection to the National Assembly of the Republic of Serbia.

The structure of the report is shaped to reflect the specific competences of the reporting authority. Thus, reports for 2005, 2006, 2007 and 2008 related solely to the situation in the field of freedom of information, while from 2009 onwards they have covered both the field of freedom of information and the field of personal data protection.

Once again it has to be underscored that, until as late as 2008, the Republic of Serbia was one of the few countries that had no legislation that would define and determine the manner of collecting, using, processing and keeping of personal data and systematically regulate the issues of personal data protection. Indeed, a Law on Personal Data Protection did exist (it was enacted in 1998, as a federal act of the then Federal Republic of Yugoslavia), but in practice there was virtually no data protection.

Even after several years of application of the Law on Personal Data Protection, the effects of this are still felt, as reflected in the different assessments of the situation in the two respective spheres of competence of the Commissioner for Information of Public Importance and Personal Data Protection.

On the one hand, although many problems are evident and although some of them have persisted for years, as explained later on in this report, what is apparent is that, in the field of freedom of information, the process has been one of continual progress over the years, from the very beginning to this date. Even more importantly, it is equally apparent that, taking into account all relevant circumstances, this positive process is irreversible and needs only to be improved and maintained over time.

In this context, it is paramount that all those responsible focus their efforts on affirming modern concepts of the essence of freedom of information – those based on the view that this freedom, from the aspect of public authorities, along with a passive component, necessarily includes also an active one. Thus, it is not sufficient for public authorities to treat freedom of information requests appropriately and fairly and to honour them; rather, public authorities are encouraged to publish as much information about their work as possible on a proactive basis, without specific requests. Means and methods of electronic communication immanent to this day and age and modern technology in general significantly facilitate the realisation of this idea. It is undoubtedly a positive development that, even with all the problems, the results are increasingly visible.

On the other hand, the situation could not be more different when it comes to personal data protection. Negative effects of the delays mentioned earlier are exacerbated by a number of negative facts, two of which stand out in particular.

Firstly, the Commissioner – the very institution that must continually contribute and, in spite of everything, actually does contribute significantly to the implementation of the law – operates with absolutely insufficient staff, as a direct result of the Government's reluctance to make the necessary office space available to this institution.

Secondly, another very much negative development is the fact that the Government and other public authorities have failed to comply with their duties under the Law on Personal Data Protection. In an otherwise difficult situation, this only aggravated the matter further.

A rough but reasonable estimate is that there are several hundred thousands of public and private entities that process personal data in Serbia. Most of them – public authorities in particular – have at their disposal several personal data collections or databases, so the total number of records is estimated to be in excess of one million. These include records kept by government agencies, the military, police, pension and health insurance institutions, education institutions, banking system institutions and credit bureaus, social welfare institutions, public utilities, associations and various human resources departments in companies, to name but a few. In many instances they process personal data without specific legal basis and/or without the consent of data subjects; in other cases, the law does not regulate the purpse and scope of personal data processing, the duration of such processing etc. Worse still, in many cases processing involves sensitive data, such as medical treatment information, information on social status etc.

The risks of illegal data processing are increased with the use of biometric personal data, the increasing prevalence of video surveillance and other technologies, electronic communications etc.

Undoubtedly, the right to data protection, as part of a fundamental human right – the right to privacy – is becoming increasingly difficult to maintain in this day and age. Developments in science and technology, in particular the emergence of modern communications, introduction of new information systems and creation of large data banks in all areas, while certainly beneficial in many ways, have created new ways of violating human privacy and abusing personal data. Information on the basis of which a person is identified or identifiable has the potential for abuse in that it can be used for surveillance and for direction of a person’s behaviour and habits, for trading and exchange of personal databases in the market, for identity theft, for attempts at implementing totalitarian concepts of control of the society and various other forms of abuse.

As regards personal data protection, we are at the very beginning of a process which needs to be expedited and enhanced. As early as in the summer of 2010, fter seemingly endless procrastrination, the Government of Serbia, acting on initiative from the Commissioner for Information of Public Importance and Personal Data Protection on the basis of a draft prepared by his staff in cooperation with European Commission Experts, adopted a Personal Data Protection Strategy, but failed to adopt an Action Plan for its implementation. It is now a year and a half since the period of three months in which this Action Plan had to be adopted expired, but the Plan remains a dead letter.

As regards secondary legislation necessary for the implementation of the Law on Personal Data Protection, the only instruments adopted on time were those the adoption of which was the responsibility of the Commissioner. Other secondary legislation, for which the Government and certain Ministries were responsible, has either been adopted after considerable delays or, worse

still, has not been adopted at all. In this context, a particularly "grave" case, one that carries much weight, is the failure of the Government to adopt, even after more than two years, a decree that would provide for the protection of the so-called sensitive personal data (ethnic or religious affiliation, political beliefs, nationality, health status information etc.). In the absence of concrete guarantees, it is abundantly clear that the protection of this data enshrined in the law remains an empty promise, which in turn prevents Serbia from complying with specific commitments it assumed under CoE Convention No. 108.

There are virtually no efforts to harmonize further the Law on Personal Data Protection with relevant European standards. This beggars belief, not least because, as early as in September 2010, European Commission experts had prepared analytical material within the program "Support to the Institution of the Commissioner for Information of Public Importance and Personal Data Protection", which provided a more than sufficient basis for such action. This, in turn, is directly related to the fact that there is as yet no law that would regulate some areas which are essential for personal data protection – video surveillance, biometrics, private security etc.

From the foregoing it follows that the attitude of the society and the government towards privacy, and personal data protection in particular, needs to undergo fundamental changes. It is therefore no small feat that, in the face of all adversity, in 2011 we managed to achieve first significant results in this field. This fact, combined with the fact that the field of personal data protection will necessarily become the focus of various public authorities in the context of Serbia's EU integration processes and, even more importantly, in the context of necessary improvement of human rights protection, certainly merits the attention of the National Assembly and that is why this Report focuses in detail on specific cases in this field.

2. RIGHTS ENFORCED BY THE COMMISSIONER

2.1. Freedom of Access to Information of Public Importance

In Serbia, freedom of access to information of public importance ("freedom of information") has been exercised and has enjoyed special protection for seven full years. **I**t was introduced by the Law on Free Access to Information of Public Importance (Official Gazette of the Republic of Serbia Nos. 120/2004, 54/2007, 104/2009 and 36/2010, hereinafter referred to as the "Law on Access to Information". Under the said Law, it essentially encompasses access to documents held by public authorities, as part of the right to information and the freedom of opinion and expression.

The Serbian Law on Access to Information is based on a concept according to which access to information of public importance is the principle, while confidentiality is an exception. Access to information can be restricted in individual cases solely for reasons and under the conditions provided for in the Law. For this reason, in matters of freedom of information, the Law on Access to Information is a *lex specialis*, meaning that it prevails in cases where freedom of information provisions of other laws are in colision with this Law.

Freedom of information is also enshrined in the Constitution, as part of the right to information - Article 51 of the Constitution of the Republic of Serbia, and it is also an integral part of the **freedom of opinion and expression** – Article 46 of the Constitution.

Freedom of information is enforced by the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter referred to as "the Commissioner") in a second-instance procedure following complaints and by the Administrative Court of Serbia in admionistrative proceedings.

Complaints with the Commissioner are not admissible against the highest authorities: the National Assembly, the President of the Republic of Serbia, the Government of the Republic of Serbia, the Supreme Court of Cassation of Serbia, the Constitutional Court and the Republic Public Prosecutor.

Judicial protection in administrative disputes is ensured before the Administrative Court, which rules on the legality of the Commissioner's decisions and the decisions of the six highest authorities against which complaints with the Commissioner are not admissible. A complaint may also be lodged by a party who is not satisfied with a decision and by the Republic Public Prosecutor in cases where a decision harms a public interest.

2.2. Right to Personal Data Protection

In Serbia, the right to personal data protection is enshrined in the Constitution. Article 42 of the Constitution of the Republic of Serbia guarantees protection of personal data and provides that collection, storage, processing and use of personal data are to be regulated by a law. Furthermore, this constitutional provision stipulates that use of personal data for any purpose other than the one they were collected for is prohibited and punishable in accordance with the Law, unless this is necessary to conduct criminal proceedings or protect safety of the Republic of

Serbia, in a manner stipulated by the law. Finally, the same provision also stipulates that everyone has the right to be informed about personal data collected about him/her, in accordance with the law, and the right to judicial protection in case of their abuse.

The constitutional right to personal data protection is regulated by the Law on Personal Data Protection (Official Gazette of the Republic of Serbia Nos. 97/2008 and 104/2009 – new law, hereinafter referred to as "LPDP") of 27 October 2008, which came into force on 4 November 2008 and took effect on 1 January 2009. Under LPDP, the duties of personal data protection are entrusted to the Commissioner, as an autonomous public authority, independent in the exercise of his/her duties.

LPDP is a general, umbrella law in the field of personal data protection. The principles and other provisions of LPDP should be developed and made specific through special, sector-level laws. At present this is not the case, because **only a handful of special, sector-level laws contain these provisions that fully govern this subject matter. Conversely, the majority of those special, sector-level laws, in particular those enacted before the enactment of LPDP, either contain no provisions at all pertaining to the issues of collection, storage, processing and use of personal data protection or contain provisions that regulate these issues in an incomplete or inappropriate manner.** Wherever one of these two inappropriate situations exists in sector-level laws, competent public authorities usually regulate personal data processing by secondary legislation or, less frequently, fail to enact any provisions to that effect even in secondary legislation.

Apart from the lack of appropriate provisions in sector-level laws, certain provisions of LPDP are also not fully harmonized with relevant international documents and certain issues are not regulated by LPDP at all. This and other issues have been pointed out and dealt with in detail in the lengthy Report of the EU Delegation's Expert Team under the project "Support to the Commissioner for Information of Public Importance and Personal Data Protection". This report should serve as the basis for drafting of a new LPDP or amendment and modification of the existing LPDP.

LPDP provides that various and numerous actions taken in connection with personal data, jointly referred to as personal data "processing", can as a rule be taken when there is legal basis or consent of the data subject. Accordingly, if neither of these two conditions for processing exists – law or consent of the data subject – personal data should not be processed. Exceptions to this rule are set out restrictively in LPDP and all data controllers should treat them that way.

Furthermore, LPDP regulates the rights and responsibilities of individuals and data controllers. Basic rights of individuals include: right to notification of data processing - every person has the right to be accurately and fully informed by a data controller whether he/she is processing data on him/her, which data are processed, for which purposes data are processed and on which legal grounds data are processed, from whom he/she collects the data; which data files contain the data, who uses such data, which data are used, for which purposes data are used and on which legal grounds data are used; as well as to whom data are transferred, for which purposes and on what legal grounds; right to access - every person has the right to request to access data relating to him/her; right to a copy - every person has the right to request from data controllers to obtain copies of data relating to him/her and he/she bears only the necessary costs of making and providing – submission of copies of data; and rights upon obtaining access to data - every person has the right to require of data controllers to correct, modify, update or delete data, as well as to a stay and suspension of processing, provided that conditions specified by the law are met.

Of the many powers the Commissioner has in the field of personal data protection, two merit special attention in this context – 1) supervision of implementation and enforcement of LPDP and 2) deciding on complaints.

The Commissioner's powers under the Law on Access to Information are somewhat different from those under LPDP. Namely, the Commissioner decides on complaints as the authority of second instance in both cases, but he has the power to supervise the implementation and enforcement of the law only under LPDP, while the implementation and enforcement of the Law on Free Access to Information is supervised by the ministry responsible for public administration and local self-government.

3. COMPLIANCE OF PUBLIC AUTHORITIES WITH THE LAW ON ACCESS TO INFORMATION OF PUBLIC IMPORTANCE

Background

Exercise of the freedom of information has been gaining momentum since 2005. The Law on Access to Information enables citizens to obtain information they need to counter unaccountability of public authorities and illegal use and handling of public resources and powers, to exercise other rights or interests, as well as to make a meaningful contribution to democratic processes and to influence the way in which public policies are shaped in matters of common interest. Apart from citizens and various citizens' association, the freedom of information has also been exercised by the public authorities themselves, by journalists, media outlets, lawyers, members of political parties, businessmen and others.

The increasing number of freedom of information requests, as a reflection of growing awareness among the citizens of the need to stand up for their rights, has resulted in a roughly 40% increase in the Commissioner's caseload in 2011 compared with the previous year. One in twenty requesters who sought information from a public authority lodged a complaint with the Commissioner after having been unable to exercise their rights. Just over 90% of those who addressed the Commissioner in this way have succeeded in obtaining the requested information after he intervened.

However, the fact that the list of authorities that failed to make requested information available in 2011 includes those that failed to do so even after being ordered to disclose information by the Commissioner or even in the enforced procedure, as well as those that refused to pay more than one imposed fine to the national budget, seems to confirm that, **in some instances, certain public authorities stubbornly refuse to comply with the Commissioner's orders and grossly violate the Law on Access to Information.**

In this context, a particular reason for concern is the fact that **even such authorities**, just like all other authorities that dismissed the freedom of information to requesters or failed to comply with other statutory obligations under the Law on Access to Information, **suffered virtually no legal consequences at all,** because the ministry responsible for enforcement of the Law on Access to Information did not file a single request for institution of infringement proceedings in 2011. The most persistent among information requesters took it upon themselves to file lawsuits as plaintiffs before magistrates' courts for violation of their rights, but even then they frequently faced obstacles.

Information disclosure on the so-called proactive basis was improved in 2011, as a result of publication of the Commissioner's new Instructions on Publication of the Information

Booklet on Operations of a Public Authority in 2010 and activities taken to implement the Instructions and increase transparency in the work of public authorities.

As regards legislative provisions governing the freedom of information, **Serbian Law on Access to Information, with its three amendments since its enactment and the fourth amendment in the pipeline, provides a solid basis for sound exercise of this freedom,** as evidenced by the fact that it was ranked as the best in terms of quality in an analysis carried out in 2011 by the Canadian Center for Law and Democracy and the Spanish organisation "Access info Europa". The analysis used the following evaluation criteria: right of access, response procedure, exceptions, penalties and promotion of the law. **Unfortunately, this alone does not mean that the rights guaranteed by the Law are fully exercised in practice, because a gap still remains between the level of guaranteed rights and the actually achievable level.**

The process of improvement of freedom of information legislation continued in 2011. Following an earlier initiative by the Commissioner, the ministry responsible for human and minority rights and public administration proposed amendments to the Law on Access to Information towards the end of the year and on 26 January 2012 the Government endorsed the Draft Law and submitted it to the National Assembly for expedited enactment.[1]

The proposed amendments to the Law on Access to Information (2012) are vital for elimination of certain obstacles to the exercise of rights. Thus, for example, they empower the Commissioner to file requests for institution of infringement proceedings before competent courts for violations of the freedom of information (the relevant provisions will take effect only after six months of the date when the Law comes into force) and to suggest to competent authorities measures that should be taken to protect information sources. Amounts of fines imposed for infringements are increased. The scope of the Law is extended to private entities that hold public office or exercise public powers. Provisions pertaining to the obligation of public authorities to publish information on a proactive basis have been improved and the Law has been harmonized with the Law on Personal Data Protection and the Law on Data Confidentiality. Provisions relating to information for the media and prohibition of discrimination have been improved. The concept of abuse of rights has been reduced to the extent that is strictly necessary. Other provisions of the Law have also been improved.

The Draft Law on General Administrative Procedure endorsed by the Government in late February 2012 also contains improved provisions on freedom of information. Unfortunately, the enactment of this Law has been delayed even though it is included in the list of priorities for EU integration.

However, the limited office space available to the Commissioner for as long as seven years now threaten to jeopardise the painstakingly achieved effects of implementation of the Law on Access to Information. The results of the Commissioner's work, recognised by the citizens and the public and praised internationally, may be called into question due to his inability to timely carry out relevant procedures within his mandate. The steady increase in the number of requesters who seek the Commissioner's protection, the continual increase in workload and introduction of new competences, combined with the inability to hire more staff, directly and unavoidably result in delays in processing of certain cases, sometimes for as much as one whole year.

It beggars belief that the issue of office space available to the Commissioner has not been addressed properly in the past seven years. This issue was even highlighted by the

[1] As of the date of submission of this Report, the National Assembly has not yet enacted the Law.

European Commission as a short-term priority on the EU integration path; indeed, it was included as one of the political criteria. All this casts a doubt on the actual willingness of those in power to make adequate office space available to the Commissioner and to treat all public authorities equally in terms of provision of necessary assets and staff for their operations.

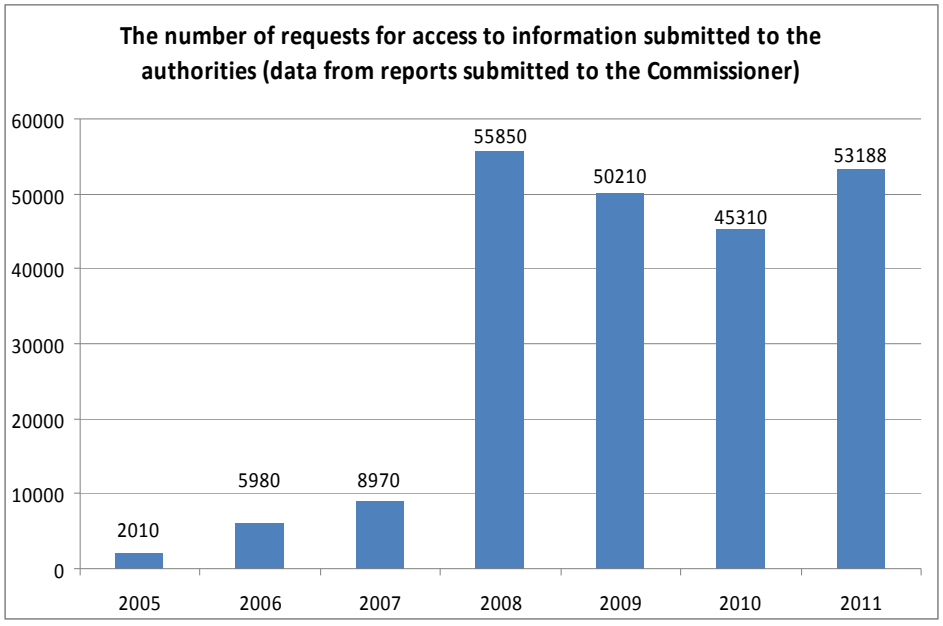
This issue is addressed in detail in the part of this Report dealing with obstacles in the Commissioner's activities, in section 6.4.5. – Issue of Premises.

3.1. Who are information requesters and which authorities they most frequently addressed

The Commissioner's conclusion regarding information requesters and the authorities they most frequently addressed is based on the information disclosed in annual reports of those public authorities that submitted reports on implementation of the Law on Access to Information in 2011. There were 697 of those authorities, or one quarter of the total number of public authorities subject to this legal obligation (about 2,839). For this reason, the information cannot be taken as absolutely accurate as regards the actual number of requests submitted to all public authorities ion Serbia, as they are practically based on figures for one quarter of those public authorities that are subject to mandatory reporting, which in turn account for about 25% of the total number of public authorities (some 11,000) for which this Law is binding.

However, reporting information undoubtedly indicates **a high level of interest on behalf of the general public in the activities of public authorities in 2011.** This is witnessed by more than 53,000 freedom of information requests – a 17 % increase compared with 2010 or several hundred times more than the 2,000 requests submitted in 2005, the initial year of implementation of the Law.

Graph 1. Number of freedom of information requests by years



In 2011, the most frequent information requesters were **individual citizens and citizens' associations (62.76%),** e.g. professional associations, associations of bidders in public procurement procedures, shareholders' associations, trade unions, property restitution associations, lawyers, businessmen etc.

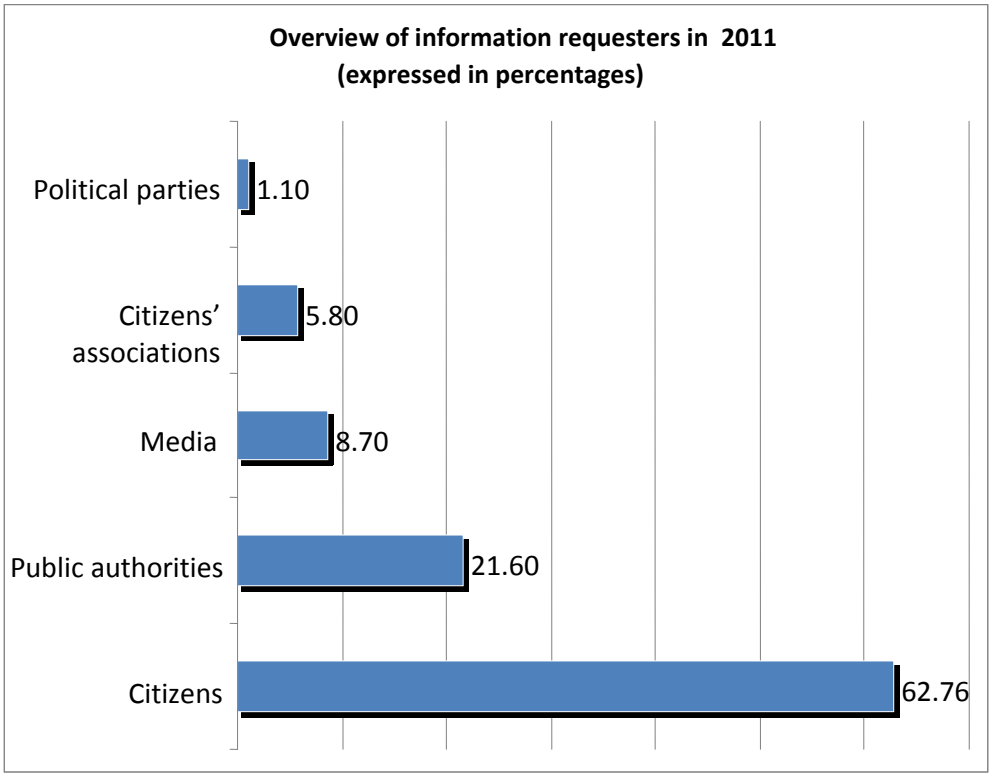
It is rather telling that **in 2011 there were much fewer freedom of information requests submitted to public authorities by the media.** The number of requests by journalists/media outlets in 2011 was 4,621, or **8.7 % of the total number of requests**, which was significantly below the 2010 figure, when they accounted for 21.6 % of the total number of requests.

What is unusual is that **public authorities themselves** were forced to invoke the Law on Access to Information and submit requests to other authorities in cases where they were unable to obtain information on the basis of the good governance code and the well-known legal duty of their mutual cooperation. Their requests accounted for **21.6 %** of the total number of requests, which shows that referring to the Law on Access to Information is a more frequent method of obtaining information between public authorities than the usual exchange of information as part of regular cooperation.

In 2011 the freedom of information was also exercised by **members of political parties,** usually those in the opposition, including those who used to defy the Law during their days in office.

2011 saw an increase in the number of freedom of information requests submitted by **lawyers** and **economic operators**.

Graph 2. Percentages of requests by categories of requesters

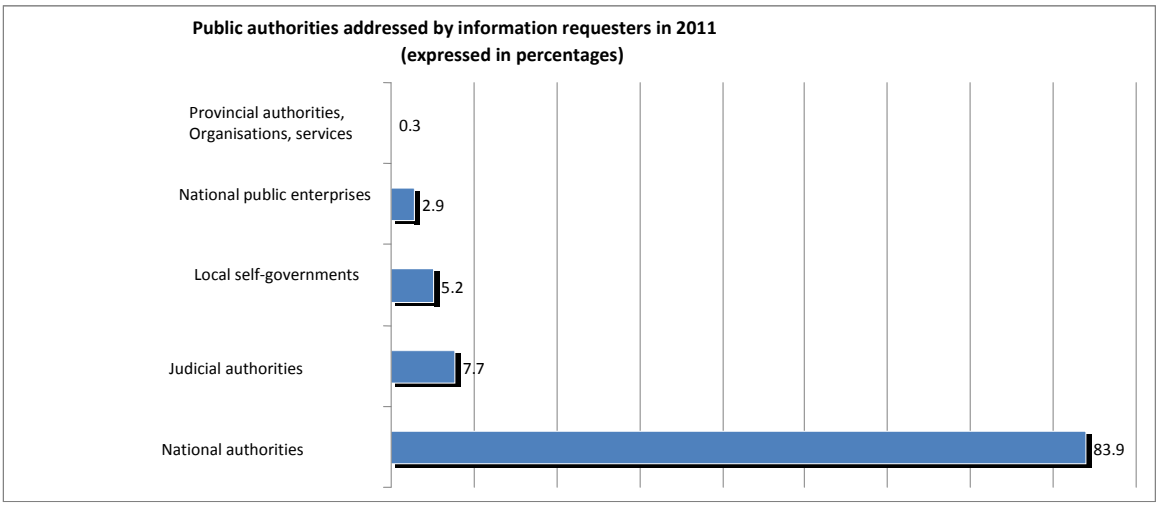


The obligation to honour freedom of information requests, pursuant to the Law on Access to Information, applies to: public authorities, territorial autonomy bodies, local self-government bodies, organisations vested with public powers and all other legal entities founded or fully or

predominantly funded by those authorities and bodies. According to the information available to the Commissioner, there are about 11,000 entities in Serbia that have public powers on one of these bases.

In 2011, citizens and other information requesters most frequently addressed national authorities and special organisations[2], followed by judiciary authorities, local self-governments, public enterprises and provincial authorities.

Graph 3. Public authorities addressed by information requesters



3.2. Information of greatest interest to the public

In 2011, citizens were mostly interested in procedures held before government authorities, including judicial authorities, prosecutors, the police, administrative authorities etc., and their requests tended to focus on **information concerning handling of public funds, budget money, information on salaries and number of employees and hired persons in the public sector, information on public procurements, privatisation, projects, investments, activities of public authorities that are relevant for property restitution, medical treatments, environmental and animal welfare measures and activities, information on the operations of local self-governments etc.**

Citizens frequently invoked the Law on Access to Information in cases where they received no feedback in connection with other submissions, requests, petitions, complaints or other instruments they had previously filed with public authorities. Requests frequently point to failure to act or long delays in the processing of requests for the exercise of certain rights before public authorities, mismanagement, suspected malfeasance of officials, corruption etc. Requesters are often the wronged party themselves.

In 2011 citizens showed a particularly high level of interest in **information concerning real property,** obviously as a result of enactment of the Law on Restitution. Requests related both to **registration and change of status for specific properties of interest to requesters, legalisation etc. and to changes in cooperative and other land and property complexes of**

[2]The majority of requests addressed to special national authorities and organisations were those addressed to the Republic Office of Statistics.

wider social interest, as well as to official data on total areas covered by certain categories of land, management and disposal of public property etc.

In connection with the implementation of the said Law and the Law on Planning and Construction, citizens and various restitution associations most frequently addressed competent cadastral services of the *Republic Geodesy Institute* and the Commissioner received 57 complaints against this institute alone. Citizens also requested this information from other authorities, including *the Ministry of Environment and Spatial Planning, the Ministry of Finance, the Republic Property Directorate, local self-governments, the State-owned Property Leasing Company ("DIPOS") etc.* In almost all cases ended pursuant to complaints, requesters were given access to available information, although sometimes requesters unfortunately received only a response from the relevant authority stating that it does not hold the requested information. However, all information about public property managed by DIPOS, the legal entities and individual who use those properties, the periods in which they use them and the consideration the pay, and this issue is pending enforcement.

In 2011, similarly as in the previous year, a large number of freedom of information requests **related to judiciary reform.** Judges and, to a lesser extent, prosecutors who were not elected requested from the *High Judicial Council* (HJC) and the *State Prosecutors Council* (SPC) and from the presidents of courts and public prosecutors' offices where they worked or applied to provide documentation in connection with the deliberation of their objections in the process of review of decisions against their election, information concerning their work performance evaluations, the opinions of staff boards of courts or public prosecutors' offices, as the case may be, and other information of relevance for those decisions. Professional associations of judges and prosecutors also requested relevant information from HJC and SPC in connection with the same issues. HJC alone received more 170 requests, in connection with which 53 complaints were lodged with the Commissioner (5 by the Association of Serbian Judges and 48 by individuals), which appears to indicate that **the objection review process was also not transparent, because Council sessions are not fully open to the public.** In the procedures which were ended before the Commissioner, upon his intervention HJC acted in 16 cases without a decision of the Commissioner and in one further case following orders stated in the Commissioner's decision; however, in four cases in which decisions were passed, HJC failed to make information available even after the service of such decisions. The State Prosecutors Council acted in all four cases in which complaints were lodged with the Commissioner, but in one case the requester expressed his doubts that he was given access to all available information and was accordingly instructed to demand inspection by an administrative inspector.

In 2011, the public took a great interest in **public procurement** procedures. Freedom of information requests were filed mostly by those who themselves participated in the procedures, including various economic operators, either directly or through their lawyers, as well as newly-formed associations for the protection of bidders in public procurement procedures. This appears to prove that public procurement procedures, in particular those where supplies are of small value, were not publicly announced, which in effect means they were not transparent.

A significant number of requests related to **information about contracts entered into by public authorities to hire individuals or specific services, including e.g. author's contracts, service contracts, marketing service contracts, contracts for subsidies to various sports and other associations etc.** This information was usually requested from public enterprises and agencies and the requests were as a rule dismissed, with information holders citing violation of the right to privacy, which caused requesters to complain to the Commissioner.

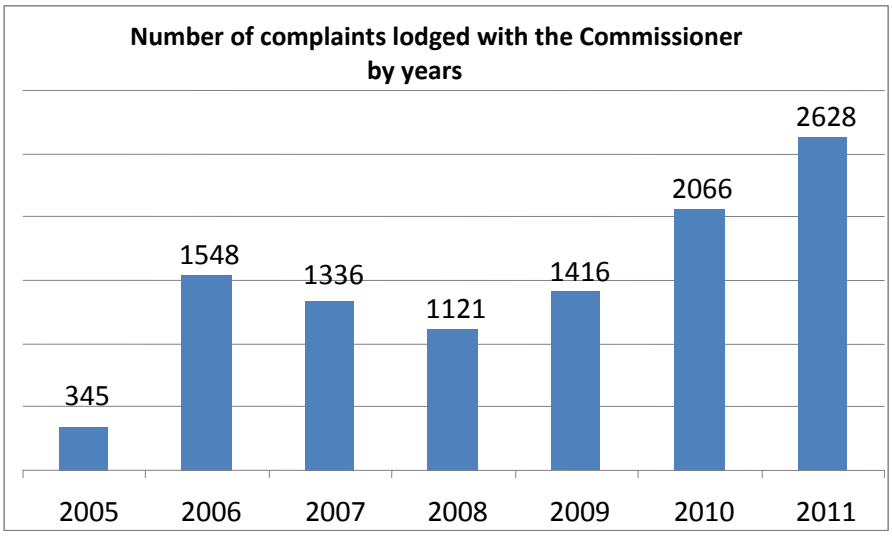
Other topics of interest included **privatisations and investments**, an issue which prompted even the Anti-corruption Council of the Government of Serbia, just as last year, to lodge 32 complaints with the Commissioner for failure of public authorities to comply with its requests, of which some complaints remain pending. In 9 cases, the Commissioner's intervention pursuant to complaints resulted in compliance with the requests; however, in 8 cases the Commissioner was forced to pass decisions and order the respondents to make information available. In 6 of those cases it was even necessary to initiate enforcement of the Commissioner's decisions, after which the Council generally received the requested information, except in four cases. Requests of the Anti-corruption Council were not honoured or were met with the provision of incomplete information by the *Securities Commission* in connection with the privatisation process and ownership of shares of the "Novosti" press company (two orders), *the Ministry of Economy and Regional Development* in the case of government's joint venture with the carmaker FIAT and by *Public Enterprise "Srbijagas"* in connection with an agreement with "Jugorosgas".

3.3. How authorities responded to freedom of information requests

The situation regarding implementation of the Law on Access to Information by public authorities can best be seen from figures on complaints lodged with the Commissioner. **In 2011 the Commissioner received 4,022 cases in the field of freedom of information – 1,123 or 40% more than in 2010. Of that, 2,628 cases were complaints for denial of access to information, meaning there were 562 complaints more than in 2010.**

The increasing number of complaints is the result of higher interest in access to information among the citizens and their growing awareness to stand up for their rights; on the other hand, it also speaks volumes of the lack of willingness on behalf of public authorities to honour freedom of information requests, in accordance with the standards set out in the Law on Access to Information, before requesters lodge a complaint. Indeed, sometimes complaints and even orders issued by the Commissioner were not sufficient to elicit a proper response.

Graph 4. Number of complaints by years



In 2011 the Commissioner closed the procedures pursuant to 1,614 lodged complaints - a 10 % increase compared with the previous year. The most frequent grievance of the complainants was once again **the so-called "administrative silence"** following freedom of

information requests. These are situation where an authority either fully ignores a freedom of information request or answers it cannot comply with a request without providing proper justification. Such situations occurred in **94.4%** of cases. That the share of cases of so-called "administrative silence" has remained so high is certainly a reason for concern, because, unlike most other administrative procedures, in freedom of information procedures "administrative silence" is not only inadmissible, but also constitutes an infringement punishable under the law.

In the remaining **5.6%** of cases, complaints lodged with the Commissioner were **against decisions** by which public authorities rejected freedom of information requests as unjustified. Three most frequently quoted reasons for rejection of requests included: invocation of confidentiality, protection of privacy and abuse of the freedom of information.

The nature of responses to freedom of information requests by public authorities can best be seen from the fact that **90.3% of complaints lodged with the Commissioner were found to be justified.** The Commissioner rejected complaints as unjustified or dismissed them as untimely, early, inadmissible or lodged by an unauthorised person in only 9.7% of all cases.

As regards the manner of responding to requests, judging by the reporting information, **the most frequently honoured freedom of information requests were those submitted by the media**, followed by those submitted by NGOs, political parties, other public authorities and, finally, citizens. Thus, only 10% of all journalists who made freedom of information requests were forced to lodge a complaint with the Commissioner. This seems to indicate that public authorities still "fear" the media more than any other category of requesters, while citizens are treated much less fairly when it comes to the exercise of their freedom of information.

Compared with the previous year, in **2011 the number of cases in which the Commissioner had to pass a decision pursuant to a complaint** and order respondents to allow access to the requested information **was about** 4**% lower**, which can be seen as a progress of sorts for public authorities. Meanwhile, there was an identical increase in the number of cases in which problems were resolved even without a formal order, where the Commissioner's intervention or request for a response from the public authority concerned was sufficient. This confirms what has been repeated for many years now: it only takes a little more willingness, knowledge and responsibility to respond to a large number of requests and thus boost public trust in the government, while at the same time avoiding unnecessary administrative actions in connection with complaints, with the costs and infringement liability that implies.

As regards situations where access to information was ordered by the Commissioner's decisions **(555 decisions),** from the feedback the Commissioner received it appears that in 2011 public authorities **complied with the orders in 87.3% of cases.** Realistically, this figure could be even higher, as it would be safe to assume that there were public authorities that complied with the Commissioner's orders, but failed to notify him of that. **Measured against the number of justified complaints (1,459), the success rate of the Commissioner's interventions is about 91.5%.**

In **125 cases** the Commissioner received **a proposal from the requester for enforcement of the relevant decision**. Acting on those proposals, the Commissioner passed 67 conclusions allowing the execution of his orders and 51 conclusions on fines and **imposed 51 fines - 28 of RSD 20,000.00 and 23 of RSD 180,000.00, payable to the national budget of Serbia. In 70 cases enforcement was terminated** because the authorities concerned had in the meantime complied with the Commissioner's orders or conclusions allowing the execution of his orders. For more information on these measures, see the section on enforced execution of the Commissioner's orders (section 6.1.3.2.).

In three cases the Commissioner filed petitions with competent courts for judicial enforcement of fines which authorities refused to pay. In two cases these petitions were upheld and courts carried out enforced collection. In both cases the authorities concerned were institutions of higher education. However, in the third case, in which the respondent was the Higher Court of Belgrade, the First Primary Court declined jurisdiction over the Commissioner's petition, justifying its decision by claiming that enforcement should be carried out in the accordance with special rules of general administrative procedures. This could indirectly be interpreted, in view of such opinion of the Court, as implying that the Tax Administration has jurisdiction over this issue; however, the Tax Administration had also declined jurisdiction for the collection of this public revenue a year before and referred the Commissioner to court proceedings for the enforcement of financial obligations.

Such arbitrary attitude of a court in a situation where a fine needs to be collected from another court is extremely worrying and the Commissioner made an objection against such decision to the competent judicial council, which has no yet decided on the objection although the statutory limit for deciding on it has expired.

In 2011, just as in previous years, in situations where he had exhausted all other measures at his disposal, the Commissioner addressed the Government to enforce his decisions by implementing its measures, including direct enforcement, as provided for in the Law. In connection with **17 such cases**, he has received no information from the Government as to whether his decisions have been enforced and in how many cases they have been enforced. The Government's Annual Report on Implementation of the Law on Access to Information states that in such situations the Government's Secretariat General "sent communications to the ministry in charge of supervision of the authority concerned with a view to taking necessary enforcement measures." No other concrete information is provided and there are no indications of the outcomes of implemented measures.

Reasons most frequently put forth by public authorities as justification of denial of access to information essentially come down to the following:

- **Confidentiality or secrecy of information,** where public authorities allege this is provided for in regulations pertaining to their work, usually secondary legislation, or sometimes even confidentiality clauses contained in agreements which those public authorities accepted and agreed to on their own, in violation of the law;

- **Lack of so-called "justified interest"** on behalf of information requesters, or, as commonly phrased by public authorities, "the requester is not a party to the procedure in connection with which he/she requested information";

- **Protection of privacy,** in situations where a document also contains certain personal data that can be protected or even when they need no specific protection at all, e.g. names of officials to whom the requested information relates;

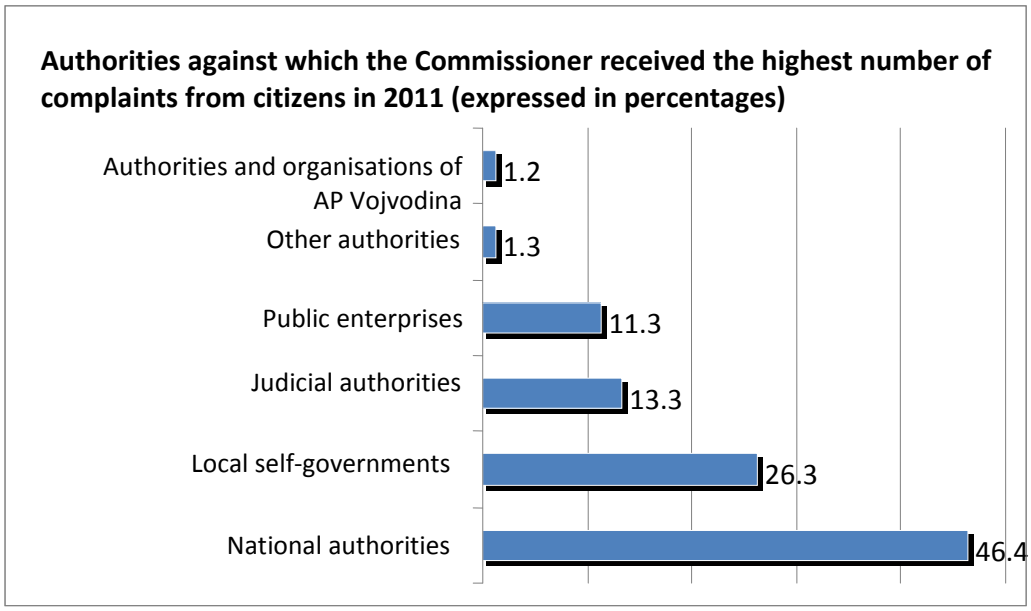
- **Abuse of freedom of information**, usually in situations where requesters addressed the same authority more than once (with different requests) or requested more than one piece of information, even where such requests were absolutely legitimate.

Actions of public authorities in case of denial of access to information to requesters and reasons for denial of requests in 2011 are dealt with in more detail in section 6.1.3.1 of this Report.

Where public authorities have an officer in charge of handling freedom of information requests appointed by the head of the authority and such officer has held this office for some time, it has been observed in practice that implementation of the Law on Access to Information tends to be better. This is explained by better opportunities for special education: those authorities that did not appoint authorised officers less frequently took part in various seminars. Another good practice for larger authorities, e.g. the Ministry of Internal Affairs, has been to set up special organisational units in charge of freedom of information.

In connection with violations of the freedom of information, **the citizens most frequently complained against the actions of public authorities, organisations, agencies and public enterprises of the Republic of Serbia.**

Graph 5. Authorities against which requesters lodged complaints



3.4. Charging of costs of procedures by public authorities

Under Article 17 of the Law on Access to Information, access to a document containing requested information shall be granted free of charge, while a copy of a document containing requested information shall be issued against reimbursement by the applicant of the necessary costs of reproduction to the public authority concerned.

On the basis of its powers under paragraph 3 of Article 17 of the Law, the Government of Serbia passed a Decree on Reimbursement of Necessary Costs of Reproduction of Documents containing Information of Public Importance (Official Gazette of the Republic of Serbia No. 8/06), which provides that that such costs constitute national budget revenue.

The Law on Republic-level Administrative Charges (Official Gazette of the Republic of Serbia Nos. 43/03, 51/03 – corrigendum, 61/05, 101/05 – new law, 5/09 and 54/09), under heading 1, item 4 explicitly states that freedom of information requests are exempted from administrative charges.

From the **reports submitted by public authorities** to the Commissioner it follows that in 2010 **public authorities collected a total of RSD 100,000.00 as costs of procedures;** this figure does not include the amount of more than RSD 10.6 million which primary courts stated in an obvious mistake and which is assumed to be the amount of court fees charged for copying of case files. As these are national-level figures, it appears that the amount collected by public authorities (other than the judiciary) for access was negligible except. National institutes and agencies and local self-governments had the highest collection rates for costs of access to information, while ministries for example grossed only RSD 471.00 on this basis.

According to the official figures of the Treasury Department of the Ministry of Finance, the total amount paid to the designated Treasury account 840-742328843-30 on this basis in 2011 amounted to **RSD 19,000.00** – less than one fifth of the amount stated in reports submitted by public authorities. This seems to confirm that **some authorities failed to pay revenue generated from this source to the designated account, opting instead to pay the sums collected to their own accounts.** These included a number of courts (magistrates' courts in Backa Palanka and Mladenovac, primary courts in Pozarevac, Cacak and Uzice, Commercial Court of Subotica, Court of Appeals in Belgrade, Administrative Court), the Higher Public Attorney's Office in Pancevo, the City of Kragujevac, PD "Elektrodistribucija Beograd" (Belgrade electricity company), municipalities of Beocin, Lazarevac and Obrenovac and the Republic Hydrometeorology Institute.

In 2011 the Commissioner received only two complaints for overcharged reproduction costs in excess of the necessary amount and in those two cases he cautioned the authorities concerned of their duty to comply with the Law and the applicable Decree with regard to the amount of costs.

What is also apparent is that **some courts charged document reproduction fees according to court fee rates,** instead of adhering to the cost rates set out in the Government's Decree passed pursuant to the Law on Access to Information. While it is an obvious violation of the said Law, the Commissioner believes the reason for this is the fact that the salaries of court staff are paid from collected court fees and it is therefore in the best interest of courts to ensure a regular inflow of funds from court fees.

Following an initiative made by the Commissioner, the issue of costs of procedures should be surmounted if the proposed amendments to the Law on Access to Information are adopted, because they provide for an arrangement under which all costs of access to information charged by public authorities will be included in the revenue of those authorities, rather than being diverted to the national budget.

3.5. How public authorities complied with statutory measures to increase transparency

Under the Law on Access to Information, certain categories of public authorities, in addition to their duty to honour freedom of information requests and to maintain data storage media in a condition that ensures efficient responding to requests, have also other duties aimed at increasing transparency. These include **preparation of information booklets on their work, staff training and reporting.**

These duties apply to some 25% of the total number of public authorities, including: national authorities, territorial autonomy bodies, local self-government bodies and organisations

vested with public powers – a total of approximately three thousand authorities according to available figures. However, this estimate should be taken with a pinch of salt, because the category of organisations vested with public powers is difficult to measure accurately without supervision and is liable to change. The rates of compliance with the duties listed below should thus be viewed in this context.

Graph 6. Overview of compliance with duties under the Law on Access to Information by public authorities:

Public authority	No. of public authorities	Report submitted – number and %	Information Booklet published on the web - number and %	Information Booklet prepared, but not published (text) - number and %	Staff training implemented- number and %	Maintenance of data storage media - number and %
Authorities referred to in Article 22 of the Law (National Assembly, President, Government, the Supreme Court of Cassation, the Constitutional Court and the Republic Public Prosecutor)	6	6 (100%)	6 (100%)	/	4 (66.7%)	6 (100%)
Ministries	17	17 (100%)	17 (100%)	/	10 (58.8%)	16 (94.1%)
Courts	128	124 (96.9%)	91 (71.1%)	26 (20.3%)	64 (50%)	98 (76.6%)
Prosecutor's offices	66	64 (97%)	16 (24.2%)	43 (65.2%)	37 (56.1%)	45 (68.2%)
Authorities and organizations of the Autonomous Province of Vojvodina	37	26 (70.3%)	21 (56.8%)	2 (5.4%)	18 (48.6%)	23 (62.2%)

Local self-government (cities and municipalities)	200	147 (73.5%)	118 (59%)	16 (8%)	88 (44%)	118 (59%)
Public enterprises (Republic and Provincial level) required to submit reports	33	27 (81.8%)	20 (60.6%)	3 (9.1%)	19 (57.6%)	22 (66.7%)
Other	2352	286 (12.2%)	167 (7.1%)	87 (3.7%)	201 (8.5%)	237 (10.1%)
Total	**2839**	**697 (24.6%)**	**456 (16.1%)**	**177 (6.2%)**	**441 (15.5%)**	**565 (19.9%)**

3.5.1. Reporting

In mid December 2011, as has become common practice every year, the Commissioner sent a letter to almost all authorities subject to the duty to report on implementation of the Law on Access to Information, in which he called on them to comply with this duty within the statutory time limit, i.e. by 20 January 2012.

As of the date of writing of this Report, **697 authorities submitted their reports** – nearly one quarter of the total number of authorities subject to this requirement (2,839). However, this figure should not be taken as absolutely accurate for reasons stated above.

Similarly as in the previous year, **education institutions** – from primary to higher education – **accounted for the largest share of those that failed to comply with this duty**. And these are authorities that are undoubtedly vested with public powers and are therefore subject to the reporting requirement. Thus, of more than 96 public university schools, only five have submitted their reports. None of the 44 advanced public schools has complied with this requirement; 20 of the total of 471 public secondary schools and 65 of 1,304 primary schools have submitted their reports.

The lack of infringement liability for non-compliance with the reporting requirement is the key reason why public authorities fail to comply with even the most benign of their duties. However, it also points to the need to raise the awareness of those public authorities that are obviously not aware of their status and corresponding duties under this Law.

3.5.2. Staff training and maintenance of data storage media

According to the reporting information of those authorities that submitted their reports to the Commissioner, **staff training for the purpose of introducing them to their rights and responsibilities under the Law on Access to Information is still largely neglected.** The fact that there were public authorities that stated they failed to arrange for training even though such failure is punishable under the law shows that some of them remain largely unaware of their

responsibility and of the importance of training. **Rates of compliance with this duty range from 40 to 70 %. National, provincial and local authorities tend to score better, while courts and prosecutors' offices are somewhat less compliant.**

As regards the legal duty of public authorities to regularly **maintain their data storage media** (hard copy documents, tapes, films, electronic media etc.), about **80% of the authorities that submitted their reports** stated they **complied** with this duty**,** while the remaining ones either took no measures to maintain data storage media or provided no information on this issue.

These figures show it is necessary for the Commissioner to continue raising the awareness of public authorities regarding the issue of education. Also, they show that, even with the numeorous training-related activities taken by the Commissioner and his Office, either independently or in cooperation with public authorities and the non-governmental sector, public much remains to be done by public authorities in order to improve their rates of compliance with these duties. Public authorities need to develop a more responsible attitude towards keeping and maintenance of their own documentation, as a prerequisite for more efficient retrieval of requested information.

Apart from education, it is also necessary to ensure effective supervision by competent administrative inspectors of compliance with these duties, which was either lacking or insufficient in previous years.

3.5.3. Preparation and Publication of Information Booklets

Compared to other duties of public authorities set under LFAIPI, publishing of information booklets is undoubtedly the most important from the aspect of citizen's interest and needs. **By publishing this document on their web presentations, public authorities make available to the citizens and the media the key facts about their operations, HR and other capacities, organization, powers, assets, spending of public resources, salaries, state aid, subsidies, grants, international and other projects and their implementation, public procurements, types of services they render and procedures for the exercise of requester's rights, available remedies in case of negative outcome before the authority concerned, types of information available to the authorities etc. even without a formal request to access in formation.** Preparing and updating this document gives public authorities a chance and sets a duty to review their organizations and procedures and to improve them, while at the same time affirming the body's operations.

Considerable progress was noted in 2011 with regard to publication of information booklets on the work of public authorities. Among the authorities that submitted their reports, **the number of those that posted the Information Booklets on the internet was** 25 **% higher** than in 2010. This was a **result of numerous activities taken by the Commissioner,** including in particular the new Instructions adopted in 2010 with regard to the manner of preparing and publishing information booklets on the work of public authorities, as well as organisation of seminars to assist the authorities in the implementation of the Instructions, numerous letters, suggestions and warnings sent to public authorities and other activities of the Commissioner, which influenced the authorities to improve the transparency of their work.

These activities of the Commissioner with regard to standardisation and publication of information were also supported by measures taken by the Government, more specifically the Digital Agenda Authority of the Ministry of Telecommunications and Information Society. Also,

even the inspection activities taken by the administrative inspectorate of the Ministry of Human and Minority Rights, Public Administration and Local Self-government in 146 cases, while insufficient to serve the actual needs, certainly contributed to more disciplined compliance with this duty.

Similarly as in previous years, in 2011 there was no consistent implementation of the legislative provisions limiting the number of employees in national and local administrations adopted in late 2009, under which national authorities, organisations, agencies and local self-governments are required to disclose on their Internet presentations the number of their employees and hired persons and their salaries and fringe benefits. This was due to the fact that the Ministry of Finance had failed to comply with its legal duty to publish an integrated register of this information.

As regards public authorities referred to in Article 22 of the Law on Access to Information, one Information Booklet worth highlighting is that of the *National Assembly*, which was the most complete of all in terms of content, supported by a very informative web presentation.

All ministries published Information Booklets on their web presentations, in compliance with the Commissioner's Instructions, and a qualitative improvement compared with the previous years is noticeable. There are, however, certain differences, because some ministries have not yet made their existing Information Booklets compliant with the new Instructions, which is why the Commissioner was forced to warn them to rectify the omissions and even to pass decisions ordering the authorities concerned to make their Information Booklets compliant. Examples of good Information Booklets include those of *the Ministry of Education, the Ministry of Defence and the Ministry of Human and Minority Rights, Public Administration and Local Self-government.*

The majority of other national-level authorities to which this duty applies have published their Information Booklets, with only a few exceptions, including e.g. the Games of Chance Administration and the National Council for Higher Education. In terms of quality, the Information Booklets of *the Ombudsman* and *the Serbian Chamber of Commerce* stand out in particular.

As regards national and provincial public authorities vested with public powers, the situation with regard to publication of Information Booklets has also improved – in terms of quantity at least – as some of those that had previously not had any Information Booklet have now complied with this duty. Those that did not include Public Enterprise "Sklonista Srbije" (Serbian Shelters) and power utility company "Elektrosrbija" Kraljevo; others, like the national parks of Kopaonik, Tara and Fruska Gora, have only partially complied with this duty.

More than 70% of the total number of courts published Information Booklets – 20% more than in 2010. According to the reports, the remaining courts have Information Booklets, but have not been able to publish them on their Internet Presentations for technical reasons, not least become some of them do not even have their own presentations. The situation is less favourable when it comes to prosecutors' offices: only one quarter of them published this document. Nevertheless, this was still a 15% improvement compared with the previous year. As regards other authorities, nearly 70% of them prepared their Information Booklets but failed to publish them, citing the same – hardly acceptable – reasons as the courts.

As regards local authorities, the situation in 2011 was an improvement from 2010, which can obviously be attributed to the activities taken by the Commissioner and other persons in connection with the creation of Information Booklets. More than 80%, or 118 cities and

municipalities of the total of 147 that submitted their reports, prepared and published their Information Booklets and a further 10% (16) have not been able to publish these documents even though they have created them. Even with the visible progress and maximum assistance with compliance with this legal duty, these authorities will have to make more effort on their own, because citizens are their most frequent users and, as a rule, they need information on their rights and on procedures more than any other category of users.

Issues most frequently quoted by public authorities in connection with the publication of Information Booklets include insufficient staff and technical issues. However, the overall impression is that, for those authorities that have the necessary technical capacities, the lack of staff seems to be much less of a problem than their apparent unwillingness to make this kind of information available to the public. This is confirmed by the fact that the most sensitive information, for example salary details, are either withheld or published only as coefficients; the situation is similar regarding public procurements or level at which budget execution is presented.

3.6 Acting of Administrative Court on complaints in administrative disputes

Together with the Commissioner for Information of Public Importance and Personal Data Protection, the Administrative Court plays a pivotal role in the exercise and protection of the freedom of information.

Under the Law on Access to Information, the Commissioner does not have competence over the six so-called highest authorities, including the Government of the Republic of Serbia. Namely, Article 22, paragraph 2 of the Law explicitly excludes the possibility of lodging a complaint with the Commissioner against decisions of the following authorities: the National Assembly, the President of the Republic, the Government, the Supreme Court of Cassation, the Constitutional Court and the Republic Public Attorney. Protection of the freedom of information for action or inaction of these authorities can be ensured by filing a lawsuit in an administrative dispute. Also, requesters who are not satisfied with the Commissioner's decisions seek the protection of their rights in the same way, i.e. by initiating a lawsuit before the Administrative Court (the Supreme Court of Serbia until 1 January 2010).

Although it would be reasonable to assume that, due to the fact that it is the authority of second instance in relation to the six public authorities listed above and taking into account the quantity, type and importance of information available to those authorities, the Administrative Court would have a vast body of case law, this assumption could not be further from the truth.

Indeed, in its Report on Implementation of the Law on Access to Information, the Administrative Court stated that in 2011 it received no complaints against the decision of the following public authorities: the National Assembly, the President of the Republic, the Government, the Supreme Court of Cassation, the Constitutional Court and the Republic Public Attorney, in cases where they reject a freedom of information request or fail to honour such request.

As this was seen as rather indicative, given that the Commissioner received 28 complaints against the same authorities which he had to dismiss as inadmissible on formal grounds, without deciding on their merit, the Commissioner requested an information check from the Registry Office of the Administrative Court. In its response, the Registry Office stated that **the Administrative Court did indeed receive complaints in 2011 – a total of 8 – against the**

highest public authorities (those listed in Article 22, paragraph 3 of the Law), including 4 complaints against the Constitutional Court, 2 complaints against the Republic Public Attorney's Office (RPAO), one against the Government and one against the President of the Republic. The Court ruled on six of these complaints, dismissing 2 complaints against the Constitutional Court and upholding the complaints against RPAO (2) and the President of the Republic, while proceedings pursuant to the complaint against the Government were terminated.

In the past six years, only 26 complaints were lodged with the Supreme Court of Serbia against these authorities, including: 9 against the Government, 7 against the Supreme Court, 6 against the Republic Public Prosecutor, 2 against the Constitutional Court, 1 against the National Assembly and 1 against the President of the Republic. Of the complaints on which the Court ruled, the majority (16) were dismissed on formal grounds, 2 were rejected and 3 cases were terminated.

This obviously very small number of complaints serves a reminder that, at the time of enactment of the Law and on many subsequent occasions, the validity of this legislative arrangement was called into question by numerous Serbian and foreign experts in the fields of freedom of information, good governance and fight against corruption. It was pointed out that exemption of certain public authorities from a general procedure, especially where a fundamental human right is concerned, was not common in comparative practice and that court proceedings as an arrangement for the protection of rights were by definition slower and less efficient than the administrative held procedure before the Commissioner. However, this legislative provision has remained unchanged through several amendments of the Law, including the most recent one that is pending.

The Administrative Court received 45 complaints against the Commissioner's decisions in 2011. It is rather alarming that, even though the Law has been in effect for nearly seven full years now, as many as **13 complaints were lodged directly by authorities of first instance, which do not even have the legal power to lodge complaints.**

The Administrative Court ruled on 30 of those complaints. Of that number, it rejected 10 complaints by information requesters as unjustified, thereby confirming the Commissioner's decisions, dismissed 15 as inadmissible, including those lodged by public authorities, and terminated the procedure in four cases. In the case of one complaint, lodged by the Republic Public Prosecutor's Office on special grounds against a decision of the Commissioner, the Administrative Court overturned the decision and returned the case for renewed deliberation, reasoning that sufficient justification was not provided for one part of the decision. The Commissioner obeyed the judgement and once again passed the same decision, this time unchallenged by the Public Prosecutor. **Barring this one case, there were no overturned decisions of the Commissioner in 2011, just as in 2010. From the aspect of judicial control of the legality of the Commissioner's work, this result is indeed praiseworthy.**

Inadmissible complaints of public authorities in 2011 included those lodged by the municipalities of Velika Plana and Pirot, Belgrade Fair, Telekom Srbija and the High Public Prosecutor's Office in Cacak.

The continued practice of some public authorities and state-owned enterprises – harmful both for the citizens' rights and interests and the reputation of those who resort to it – of trying to avoid or delay compliance with orders contained in decisions passed by the Information Commissioner (although they are binding, final and enforceable under the law) by filing

inadmissible complaints with the Administrative Court warrants special attention and appropriate reaction.

It is therefore all the more worrying that, **of the 198 complaints filed against the Commissioner since the beginning of implementation of the Law on Access to Information, as many as 80 have been inadmissible complaints by public authorities or state-owned enterprises**. The Supreme Court and, since 1 January 2010, in accordance with the new organization of the judiciary, the Administrative Court have so far ruled on 69 such complaints (the remaining ones are still pending), all with the same outcome. All those complaints were of course dismissed as inadmissible. However, some authorities (including even some courts) filed such inadmissible complaints once again even after that, under virtually unchanged circumstances.

In view of such practice, the Commissioner once again underscores that, although the number of such complaints is very small compared with the total number of cases handled by the Commissioner, it should be made absolutely clear that **the situation in which public authorities and public enterprises willingly ignore their duties, using illegitimate means to thwart the constitutional rights of Serbian citizens and taxpayers and, in doing so, waste the taxpayers' money, will no longer be tolerated.** Obviously, the only path available to counter such practice is the imposition of relatively small fines by the Commissioner, which the authorities more often than not refuse to pay voluntarily. All responsible parties, including the Government, the National Assembly and the High Judicial Council, are therefore urged to take due note of this issue.

3.7 Actions of the supervisory authority

As from 24 December 2009, supervision of implementation of the Law on Access to Information has been the responsibility of the ministry of charge of public administration, more specifically the Administrative Inspectorate. Until then, supervision had been the responsibility of the ministry in charge of information affairs, which lacked the necessary powers and capacities for those duties. The authority responsible for supervision also has the power to make requests for institution of infringement proceedings before the competent magistrate's court.

The amendments made to the Law in December 2009 considerably improved the penal provisions of the Law: the person responsible for an infringement is now the head of the authority concerned, rather than the authorised officer who handles freedom of information requests.

According to the report of the competent Ministry, in 2011 administrative inspectors carried out 146 controls of compliance with the duty to submit reports and publish information booklets by courts and public prosecutors' offices. They also acted in 202 cases in which public authorities failed to comply with the Commissioner's decisions. The report further states that the inspectors received feedback on 121 cases in which the authorities complied with the decisions, while the remaining cases are pending.

However, it is worrying that in **2011 administrative inspectors did not file a single request for institution of infringement proceedings for a violation of the freedom of information or for non-compliance with any other duties under the Law**. This means that, barring individual cases in which requesters themselves as the plaintiffs filed lawsuits before magistrates' courts, not a single responsible person in public authorities was held to account for the infringements made, of which there must have certainly been several hundreds in 2011 alone.

Indeed, the Commissioner himself forwarded the files to the administrative inspectorate for more than 200 cases of gross violation of the freedom of information by public authorities in 2011.

Even in situations where information requesters filed requests for institution of infringement proceedings as plaintiffs, there were cases when courts demanded of the plaintiffs to supplement their lawsuits with specific details concerning the defendants which are otherwise not mandatory in such situations under the Misdemeanours Law.

The level of compliance with the above legal duties, including the preparation and publication of information booklets on the work of public authorities, would undoubtedly have been much higher if the scope of supervision of implementation of the Law on Access to Information by the Administrative Inspectorate had been greater, if administrative inspectors had filed requests for institution of infringement proceedings and if those responsible for violations of the law had been held to account.

4. COMPLIANCE OF PUBLIC AUTHORITIES WITH THE LAW ON PERSONAL DATA PROTECTION

Background

Under the EU Stabilisation and Association Agreement, Serbia committed to harmonize its data protection legislation with *acquis communitaire* and international regulations pertaining to privacy and to set up an independent supervisory body provided with sufficient financial and human resources to effectively supervise and guarantee the implementation of national legislation on personal data protection.

However, even after more than three years since the enactment of LPDP (2008), numerous issues in this field are still left unaddressed. Thus, for example, a number of provisions of LPDP are not harmonized with the standards set out in relevant international documents, or indeed with the Constitution of Serbia, including in particular Article 42, paragraph 2, which provides that collection, storage, processing and use of personal data shall be governed exclusively by a law, while several provisions of LPDP (Articles 12, 13 and 14) stipulate that data processing (an umbrella term covering all actions taken in connection with data) can also be regulated by secondary legislation, other regulations or agreements.

Public authorities have not taken all necessary steps to ensure that various sector-level laws implement the principles contained in LPDP in an appropriate way by developing and/or concretising them.

The Government has not regulated the archiving and protection of sensitive data, although the deadline for this was May 2009. Moreover, the Government has not passed an Action Plan on implementation of the Personal Data Protection Strategy, with defined activities, expected outcomes, parties responsible for specific duties and timeframe for the completion of duties, although this should have been done by 20 November 2010.

The Commissioner and the Ombudsman jointly filed with the Constitutional Court a motion to review the constitutionality of the Law on Personal Data Protection (January 2010) and a motion to review the constitutionality of the Law on Electronic Communications

and the Law on Military Security Agency and Military Intelligence Agency (September 2010). The Constitutional Court has not yet responded to either of those two motions.

In 2011 the Commissioner filed 3 criminal reports for five criminal offences and 26 requests for institution of infringement proceedings.

Very few personal data controllers have submitted to the Commissioner records of personal data files for the purpose of registration with the Commissioner's Central Register.

4.1. Supervision of personal data controllers by the Commissioner

The Commissioner supervises the operations of personal data controllers. The key responsibility of a personal data controller is to collect personal data on the basis of relevant legal grounds. Before collection, a data controller must inform the data subject of his/her identity and all issues related to data processing. A data controller must: give the data subject accurate and complete information on all issues in connection with data processing; give the data subject access to all data relating to him; give a copy of the data; decide on requests for exercise of rights upon obtaining access to data (correction, amendment, updating, deletion, termination and suspension of processing); delete the data within 15 days of contract termination or withdrawal of consent, unless provided or agreed otherwise. Furthermore, the data controller must take all necessary technical, HR and organisational data protection measures in accordance with established standards and procedures that are necessary to protect the data against loss, destruction, unauthorised access, unauthorised modification, disclosure and any abuse and bind the persons in charge of processing to observe data confidentiality.

In the course of 2011, the Commissioner carried out 119 prior verifications of personal data processing activities, in accordance with Articles 49 and 50 of LPDP and the Bylaw on the Manner of Prior Verification of Personal Data Processing Activities. Of that number, 40 cases (33.61%) were found to be free from any irregularities, while in 79 cases (66.39%) the Commissioner found irregularities and pointed them to the attention of data controllers.

The structure of data controllers where the Commissioner carried out prior verification of personal data processing activities: manufacturing, trade and services – 61 (51.26%), associations – 6 (5.04%), banking sector - 28 (23.53%), public administration – 9 (7.54%), health care – 2 (1.68%), the judiciary – 3 (2.52%) and others – 10 (8.40%).

In 2011, the Commissioner carried out 159 inspections of compliance with and implementation of LPDP, of which 106 (66.67%) inspections were carried out on the premises of data controllers, while 53 (33.33%) were carried out through written communication. **Compared with 2010, when there were 71 inspections, this number has more than doubled.** This can be attributed not only to the improved staffing of the Commissioner's Office with inspectors (the number of employed inspectors grew from 5 to 9 in the course of 2011), but also to the greater experience of inspectors acquired through daily practice.

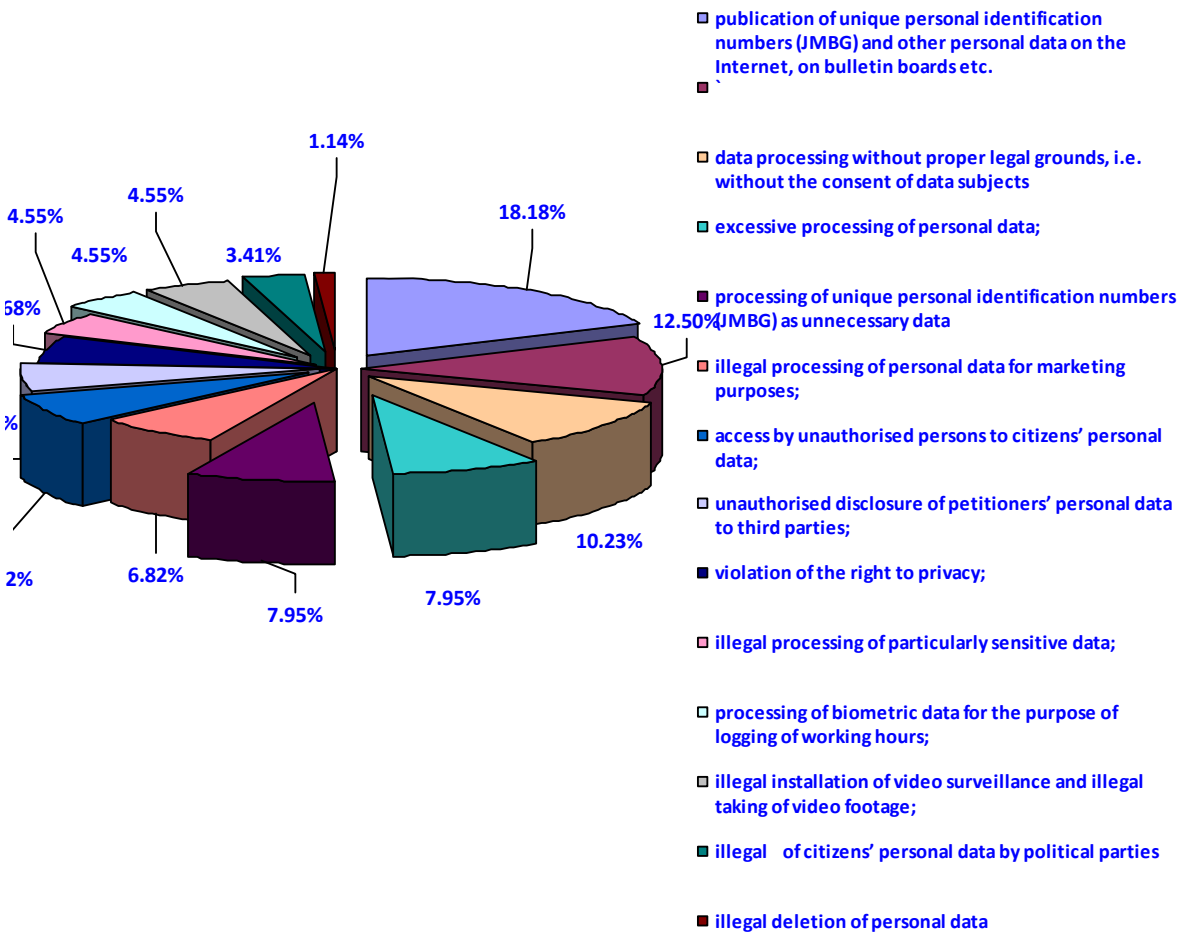
The Commissioner initiates inspections either on his own initiative or following reports by citizens. Of the total of 159 inspections initiated in 2011, in 71 cases (44.65%) the Commissioner initiated inspection on his own initiative and in 88 cases (55.35%) he initiated inspections following citizens' reports.

Inspections carried out on the Commissioner's own initiative (71) were mostly responses to current cases of possible violation of LPDP, in particular those that gained media coverage. The Commissioner also carried out inspections on his own initiative in cases where data file records were not registered with the Commissioner's Central Register.

As regards inspections of personal data controllers carried out by the Commissioner following citizens' complaints (88), reasons for initiation of the procedures were as follows:

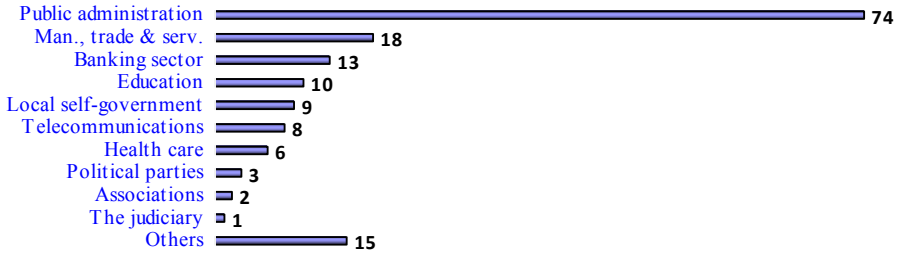
- in 16 cases (18.18%) reports related to the publication of unique personal identification numbers (JMBG) and other personal data on the Internet, on bulletin boards etc.
- in 11 cases (12.50%) reports related to illegal obtaining of photocopies of identity cards;
- in nine cases (10.23%) reports related to data processing without proper legal grounds, i.e. without the consent of data subjects;
- in seven cases (7.95%) reports related to excessive processing of personal data;
- in seven cases (7.95%) reports related to processing of unique personal identification numbers (JMBG) as unnecessary data;
- in six cases (6.82%) reports related to illegal processing of personal data for marketing purposes;
- in six cases (6.82%) reports related to access by unauthorised persons to citizens' personal data;
- in five cases (5.68%) reports related to unauthorised disclosure of petitioners' personal data to third parties;
- in five cases (5.68%) reports related to violation of the right to privacy;
- in four cases (4.55%) reports related to illegal processing of particularly sensitive data;
- in four cases (4.55%) reports related to processing of biometric data for the purpose of logging of working hours;
- in four cases (4.55%) reports related to illegal installation of video surveillance and illegal taking of video footage;
- in three cases (3.41%) reports related to illegal processing of citizens' personal data by political parties, and
- in one case (1.14%) the report related to illegal deletion of data.

Graph 7 – Reasons for initiation of inspection procedures following citizens' reports



The structure of personal data controllers (159) subjected to inspection of compliance with and implementation of LPDP by the Commissioner was as follows:

Graph 8 – Structure of personal data controllers (159) subjected to inspection of compliance with and implementation of LPDP by the Commissioner



In 2011, the Commissioner inspected the following data controllers: public administration – 74 (46.54%); manufacturing, trade and services – 18 (11.32%); banking sector -13 (8.18%); education – 10 (6.29%); local self-government – 9 (5.66%); telecommunications – 8 (5.03%); health care – 6 (3.77%); political parties – 3 (1.89%); associations – 2 (1.26%); the judiciary – 1 (0.63%) and others – 15 (9.43%).

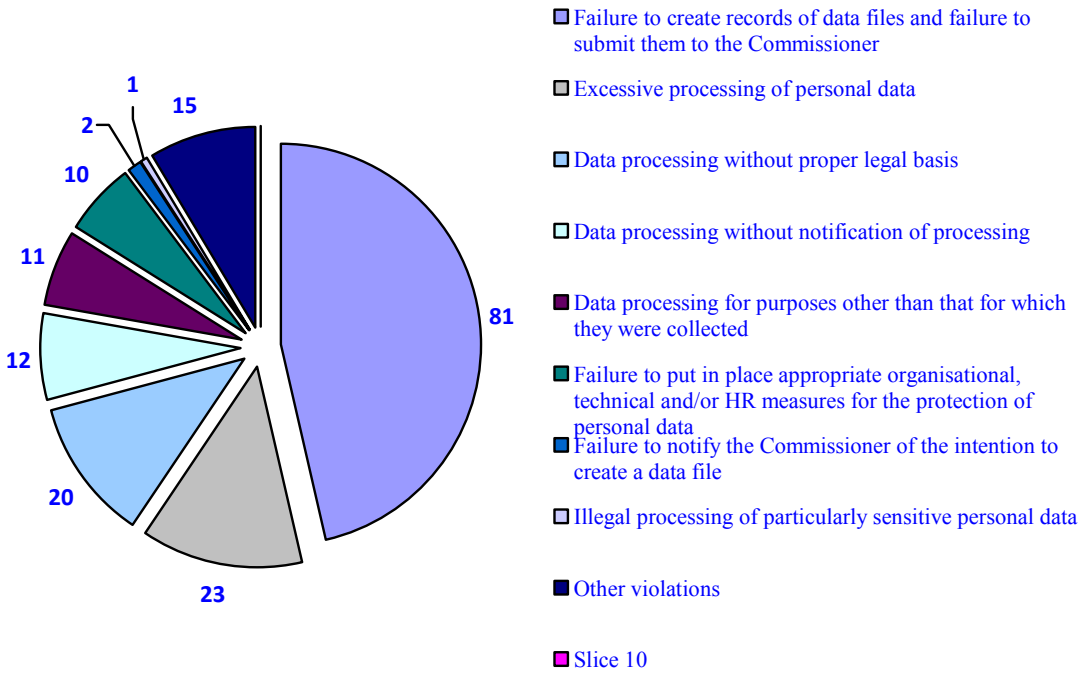
Of the total of 159 inspections, in 2011 the Commissioner ended the inspection procedure in 144 cases, while the remaining 15 cases were carried forward to 2012. In the closed cases (144), the Commissioner found violations of LPDP in 111 cases, while in 33 cases no violations were found.

As regards the cases where violations of LPDP were found (111), the total number of identified violations was 175, which practically means that in some cases the Commissioner found not only one, but two or more violations of LPDP.

The following violations of LPDP were found:

- Failure to create records of data files and failure to submit them to the Commissioner – 81 cases;
- Excessive processing of personal data – 23 cases;
- Data processing without proper legal basis - 20 cases;
- Data processing without notification of processing - 12 cases;
- Data processing for purposes other than that for which they were collected - 11 cases;
- Failure to put in place appropriate organisational, technical and/or HR measures for the protection of personal data - 10 cases;
- Failure to notify the Commissioner of the intention to create a data file - 2 cases;
- Illegal processing of particularly sensitive personal data - 1 case, and
- Other violations - 15 cases.

Graph 9 – Identified violations of LPDP



In cases where violations of the law were found, the Commissioner took the following measures:

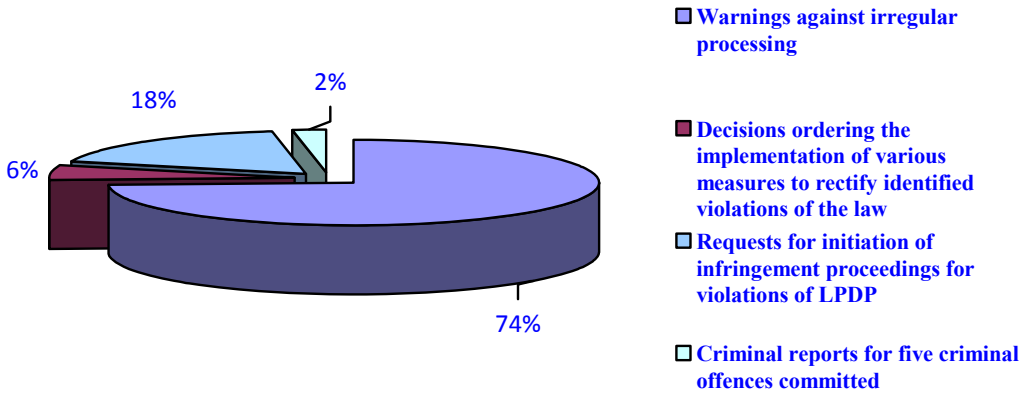
- **He issued 108 (75%) warnings against irregular processing. Data controllers responded to the Commissioner's warning as follows: in 94 cases they immediately and fully complied with the Commissioner's warning; in seven cases they partly complied with the warnings; and in three cases they failed to comply with the Commissioner's warnings. In the remaining four cases the time limit for compliance with the warnings had not yet expired as at 31 December 2011.** Interestingly, in three cases data controllers fully rectified all irregularities immediately upon inspection, so there was no need for the Commissioner to issue warnings;

- He passed 7 decisions (4.86%) ordering the implementation of various measures to rectify violations of the law. Three orders instructed the respondents to rectify the irregularities within a specified timeframe, three orders instructed the respondents to delete data collected without proper legal basis and one order temporarily banned the respondent from processing carried out in violation of LPDP. Six deisions passed by the Commissioner were fully complied with, while in once case the data controller concerned filed a complaint with the Administrative Court against the Commissioner's decision. (The Commissioner ordered the public utility company JKP "Parking servis" to rectify irregularities in personal data processing by bringing its Decision on the Procedure of Issuing Subscription Cards for General Parking Areas in compliance with LPDP and the data controller filed a complaint with the Administrative Court against this decision)

- **He filed 26 requests for institution of infringement proceedings (18.06%) for violations of the provisions of LPDP** (as at 31 December 2011, two proceedings were ended);

- **He filed 3 criminal reports** (2.08%) **for five criminal offences committed. As at 31 December 2011, prosecutors' offices provided no information to the Commissioner of the outcome of the proceedings pursuant to those criminal reports.**

Graph 10 – Measures taken by the Commissioner



4.2. Complaints against data controllers

In addition to his significant powers in the field of supervision of implementation of LPDP, the Commissioner is also vested with broad powers to act on complaints as the authority of second instance. The procedure of ruling on complaints by the Commissioner is governed by the Law on General Administrative Procedure, unless LPDP provides otherwise.

A person who previously addressed a data controller with a request for the exercise of rights in connection with data processing may lodge a complaint with the Commissioner in accordance with LPDP. The Commissioner rules on complaints within 30 days of lodging. Before passing a decision, the Commissioner forwards a complaint to the data controller concerned for a response. The Commissioner's decisions on complaints and binding, final and enforceable and, if necessary, they are enforced by the Government.

A person may lodge a complaint with the Commissioner against a decision of a data controller rejecting or dismissing a request; when a data controller does not decide on a request within the statutory period; when a data controller does not enable access to data or does not issue a copy of information or fails to do so within the period and in the manner provided for in LPDP; when a data controller makes the issuing of a copy of data conditional on the payment of a fee in excess of the necessary costs of reproduction; or when a data controller obstructs or prevents the exercise of a right in violation of the law.

The Commissioner may dismiss untimely and inaccurate complaints and complaints lodged by unauthorised persons. The Commissioner may reject unjustified complaints and when he finds that a complaint is justified, the Commissioner may override the first-instance decision of the data controller and return the case for renewed procedure, override the first-instance decision

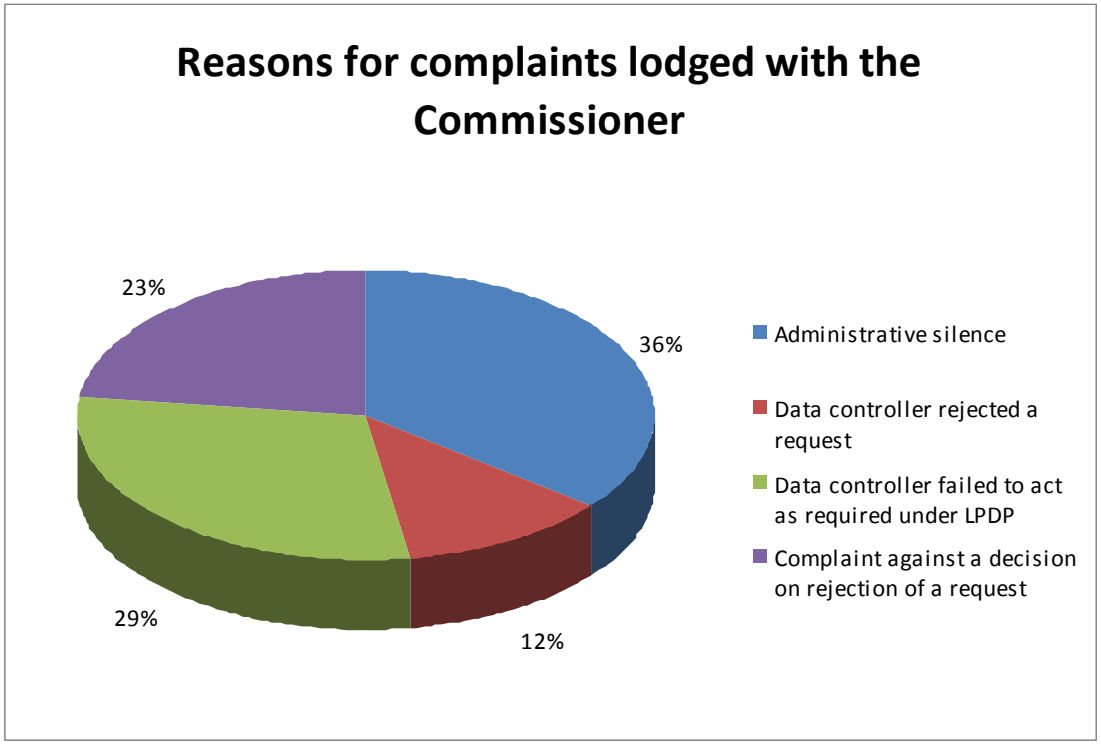
of the data controller and order the data controller to honour a request within a specified period or pass a decision on justifiability of a request.

In the course of 2011 the Commissioner acted on 88 complaints, 78 of which were received in 2011 (10 were carried forward from 2010). Compared with 45 complaints received in the course 2010, the 78 complaints received in 2011 constitute a 73% increase. Of the 88 complaints on which he acted, as at 31 December 2011 the Commissioner had closed the procedures pursuant to 68 complaints (58 received in 2011 and all 10 from 2010), while 20 complaints were carried forward to 2012.

In the complaints lodged with the Commissioner in 2011 (78), complainants stated the following reasons:

- data controller failed to decide on a request within the statutory time limit – so-called administrative silence (28 complaints);
- data controller failed to act as required under LPDP (23 complaints);
- data controller rejected the complainant's request by a decision (18 complaints), and
- data controller rejected the complainant's request by an instrument not having the form of a decision or conclusion (9 complaints).

Graph 11 – Reasons for complaints lodged with the Commissioner

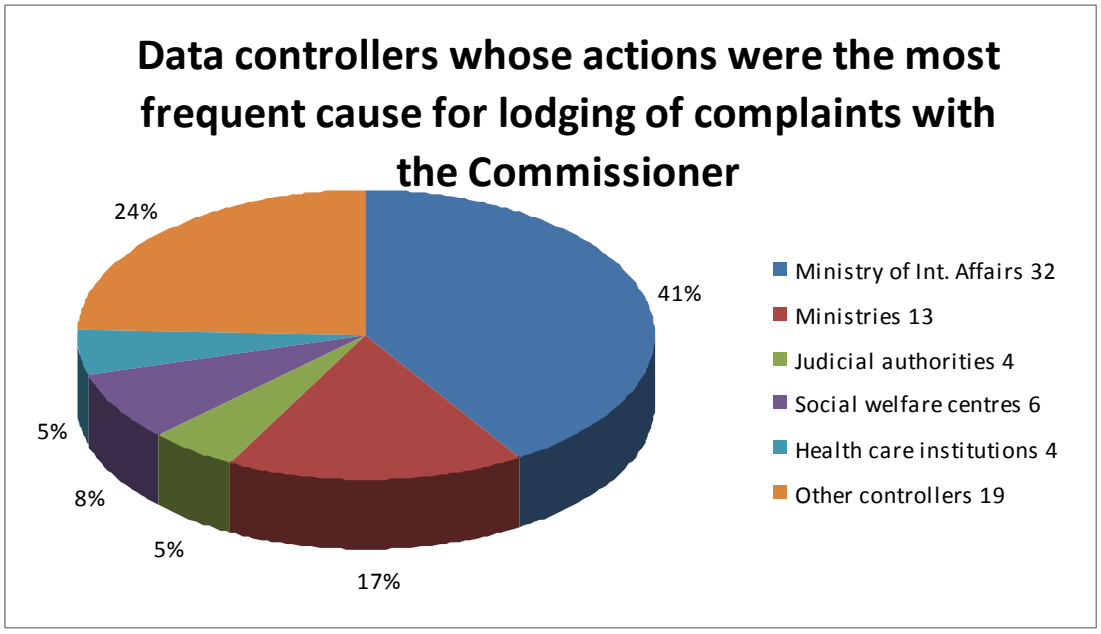


The most frequent reason for lodging of complaints with the Commissioner was failure of data controllers to decide on requests within the statutory time limit, the so-called administrative silence. However, compared with 2010, when 71% of all complaints received by the Commissioner were lodged for this reason, this form of non-compliance by data controllers has been halved in 2011. However, compared with 2010, when data controllers failed to act as required under LPDP (preventing or obstructing the implementation of the Law) in only 9% of cases, in 2011 this reason for complaints was more than tripled (29%). The share of complaints for rejection of requests has also changed: in 2010 they accounted for 20% of cases, while in 2011 data controllers rejected requests in 12% of cases and in further 23% cases rejected complaints lodged by persons against previous rejection of requests, which means that data controllers failed to honour requests in a total of 35% of all cases. From these figures on reasons for lodging of complaints with the Commissioner it appears that the decline in the number of cases of so-called administrative silence is a sign of growing awareness of the need to honour requests received from data subjects. At the same time, the increasing number of cases in which data controllers failed to act as required under LPDP and in particular the significant increase in the number of cases in which controllers refused to act in compliance with the content of requests made by data subjects seem to indicate that the knowledge of LPDP among data controllers has improved, not only in terms of growing awareness of the need to comply with LPDP, i.e. to answer the requests of data subjects, but also in terms of finding legal reasons to avoid responding to requests by data subjects.

Complaints lodged with the Commissioner related to data contained in: police records - 32, case files of social welfare centres - 6, records of testing for specific projects and job applications - 5, court case files - 4, medical records - 4, human resources records - 4, case files of the High Judicial Council - 2, transcripts of audio recordings, audio recordings and video footage - 3, pension and disability insurance - 4, registries of baptised persons - 2, and other - 22.

As regards requests made to data controllers by data subjects which were not honoured or were inadequately honoured by data controllers, complaints lodged with the Commissioner in 2011 (78) related to the actions of the following data controllers: the Ministry of Internal Affairs 32**,** centres for social work 6**,** judicial authorities of the Republic of Serbia 4, the High Judicial Council 2, health establishments of the Republic of Serbia 4 (Clinical Centre of Vojvodina 1, General Hospital Vrbas 2, Central Prison Hospital 1), Ministry of Defence 2, the Ministry of Agriculture, Trade, Forestry and Water Management 2, the Ministry of Finance 2, the Republic health Insurance Institute 2, the Pension and Disability Insurance Fund of the Republic of Serbia 2, the "Metroparking Banja" company, Vrnjacka Banja 2, the Law Office Simic, Belgrade 2, the Ministry of foreign Affairs 1, the Ministry of Labour and Social Policy 1**,** the Ministry of Economy and Regional Development 1, the Ministry of Education 1, the Ministry of Diaspora 1, the Government of the Republic of Serbia 1, the High Civil Service Council 1, the Military Security Agency 1, the Human Resource Management Service 1, the City Administration for Inspection of the city of Novi Sad 1, the Provincial Secretariat for Urban Planning 1**,** the Academy of Crime and Police Studies 1, the Diocese of Pozarevac and Branicevo 1, the Serbian Orthodox Church 1, secondary school in Knic 1, Secondary School of Graphic Design Belgrade 1.

Graph 12 - Data controllers whose actions were the most frequent cause for lodging of complaints with the Commissioner

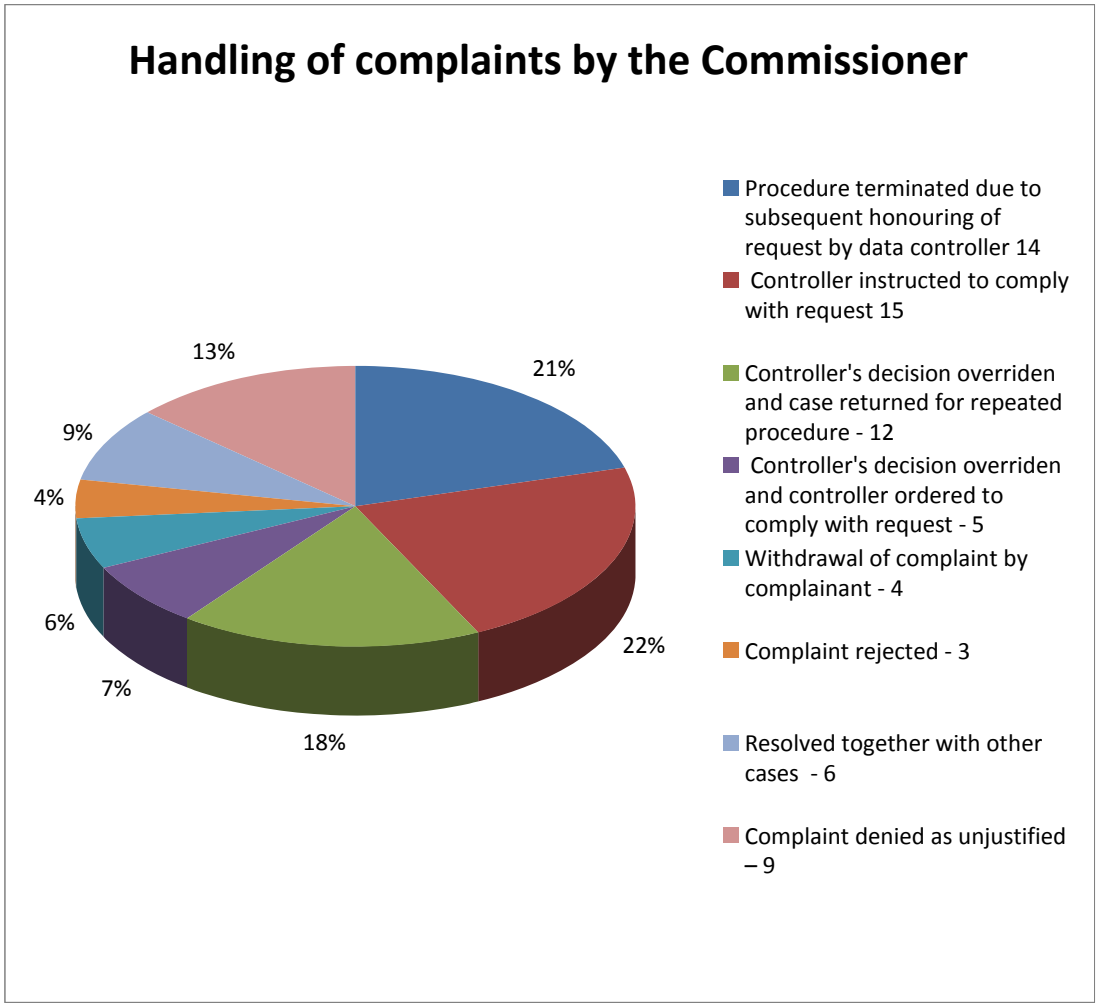


It is noticeable that the largest number of complaints (41%) related to data contained in police records, i.e. (in)action of the Ministry of Internal Affairs. The number of these complaints was more than double the number of complaints against all other ministries put together (17%). Complaints concerning (in)action of the Ministry of Internal Affairs usually related to data contained in various records of operational reports. Although this figures clearly show that the Ministry of Internal Affairs needs to make effort to improve its operations, it should nevertheless be pointed out that the Ministry of Internal Affairs, as one of the largest controllers of personal data in Serbia, has already improved its operations in that it has formed a special unit for personal data protection attached to the Minister's Cabinet. Also, it is one of two data controllers (together with the Ministry of Defence) that submitted the largest number of records of personal data files for registration with the Central Register and it responded positively to numerous requests by citizens, who therefore had no need to raise complaints with the Commissioner.

In 2011, the Commissioner closed 68 cases of complaints as follows:

1) Data controller ordered to honour a request – 15,
2) Procedure terminated due to subsequent honouring of a request by data controller – 14,
3) Data controller's decision overridden and case returned for renewed procedure – 12,
4) Complaint rejected as unjustified – 9
5) Data controller's decision overridden and data controller ordered to honour a request – 5,
6) Withdrawal of complaint by the complainant – 4,
7) Complaints dismissed – 3, and
8) Otherwise decided – 6.

Graph 13 – Handling of complaints by the Commissioner



Looking at the Commissioner's actions pursuant to complaints (ordering data controllers to honour requests – 22%, due to subsequent honouring of a request by data controllers – 21%, overriding of data controllers' decisions and returning of cases for renewed procedure – 18%, overriding of data controllers' decisions overridden and data controllers ordered to honour requests – 7% and withdrawal of complaints by complainants, which as a rule occurs where a data controller complies with a request before the Commissioner decides on the complaint – 6%), it is clear that the complaints lodged with the Commissioner were justified in 74% of all cases.

On the other hand, in 13% of cases the Commissioner rejected complaints as unjustified. The Commissioner dismissed complaints as untimely or incomplete in only 4% of cases. Finally, in 9% of cases complaints were resolved together with other cases.

Although the Commissioner's decisions pursuant to complaints are binding, final and enforceable, LPDP does not explicitly provide for an obligation of data controllers to notify the Commissioner whether and how they complied with the Commissioner's decisions pursuant to

complaints and for this reason the Commissioner does not have access to accurate figures in this regard.

In the course of 2011, the Administrative Court received one complaint against a decision of the Commissioner rejecting a complaint against a decision of the Ministry of Internal Affairs which rejected a request for deletion of data from criminal records. As at the date of submission of this Report to the National Assembly, the procedure before the Administrative Court was still pending.

4.3. Actions of data controllers in connection with submission of records of data files to the Commissioner for the purpose of registration with the Central Register

All controllers of personal data files are required under the law to submit to the Commissioner records of their data files and/or any changes thereof for the purpose of registration with the Central Register within 15 days of creation or change of such files, as the case may be**.**

The Central Register is public, kept electronically and published online. Data controllers register their data files electronically and subsequently submit a data file report on the requisite form.[3]

According to the Commissioner's rough estimate, there are about 350,000 controllers of personal data in Serbia, including public authorities, territorial autonomy and local self-government bodies and other authorities or organisations vested with public powers, legal entities and individuals who process personal data.

The level of (non)compliance of data controllers with this duty is indeed a cause for alarm.

The Commissioner is well aware that many data controllers – in particular individuals and sole traders – are ignorant of their duty under LPDP to submit records of data files they keep to the Commissioner. While this is understandable to a certain extent, it is beyond belief that government authorities, territorial autonomy and local self-government bodies and other authorities or organisations vested with public powers and many legal entities are not aware of this duty under LPDP and therefore do not comply with it.

The situation as regards registration with the Central Register as at 31 December 2011 shows that, of the estimated total of some 350,000 controllers of personal data, only 546 submitted to the Commissioner records of the 3,062 personal data files they keep[4]. This practically means that, as at 31 December 2011, less than 0.2% of personal data controllers had submitted records of personal data files they keep to the Commissioner.

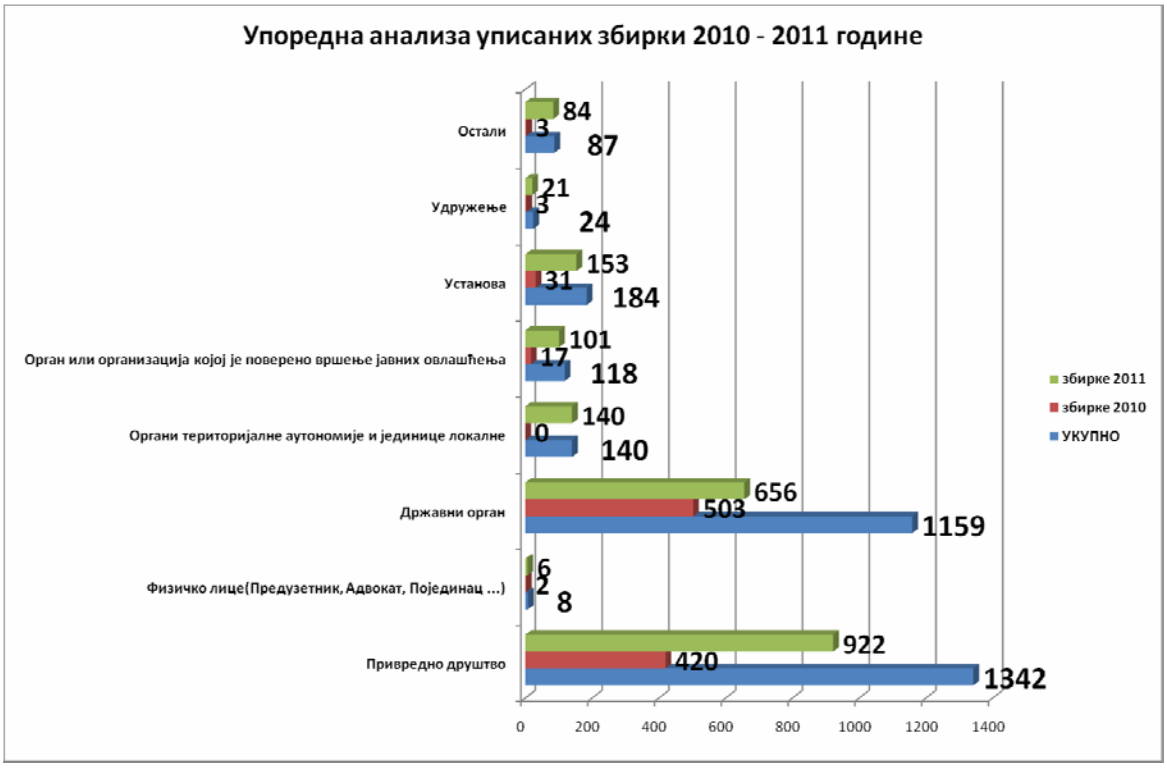
[3] However, the majority of data controllers submit records of data files to the Commissioner by completing the relevant form and affixing their stamp and signature to it, which means that the staff of the Commissioner's Office needs to type the records in order to have them available in the electronic form, thus performing the duty of registration with the Central Register instead of data controllers. The Commissioner therefore appeals to data controllers to first complete and submit the appropriate form electronically and then to produce a hard copy of the form, certified by signature and stamp.

[4] The situation as regards registration with the Central Register just before the submission of this Report to the National Assembly – in mid march 2012 – shows that 643 data controllers submitted to to the Commissioner a total of 4058 records of data files.

However, 2011 saw certain symbolic improvement compared with 2010. Namely, in the course of 2011, 394 data controllers submitted to the Commissioner 2,083 records of personal data files they keep, while in 2010 only 152 data controllers had submitted 979 records. This means that the number of data controllers and the number of records of data files have more than doubled in 2011 compared with 2010.

Graph 14 – Comparative analysis of registered data controllers in 2010-2011

Graph 15 – Comparative analysis of registered records of personal data files in 2010-2011

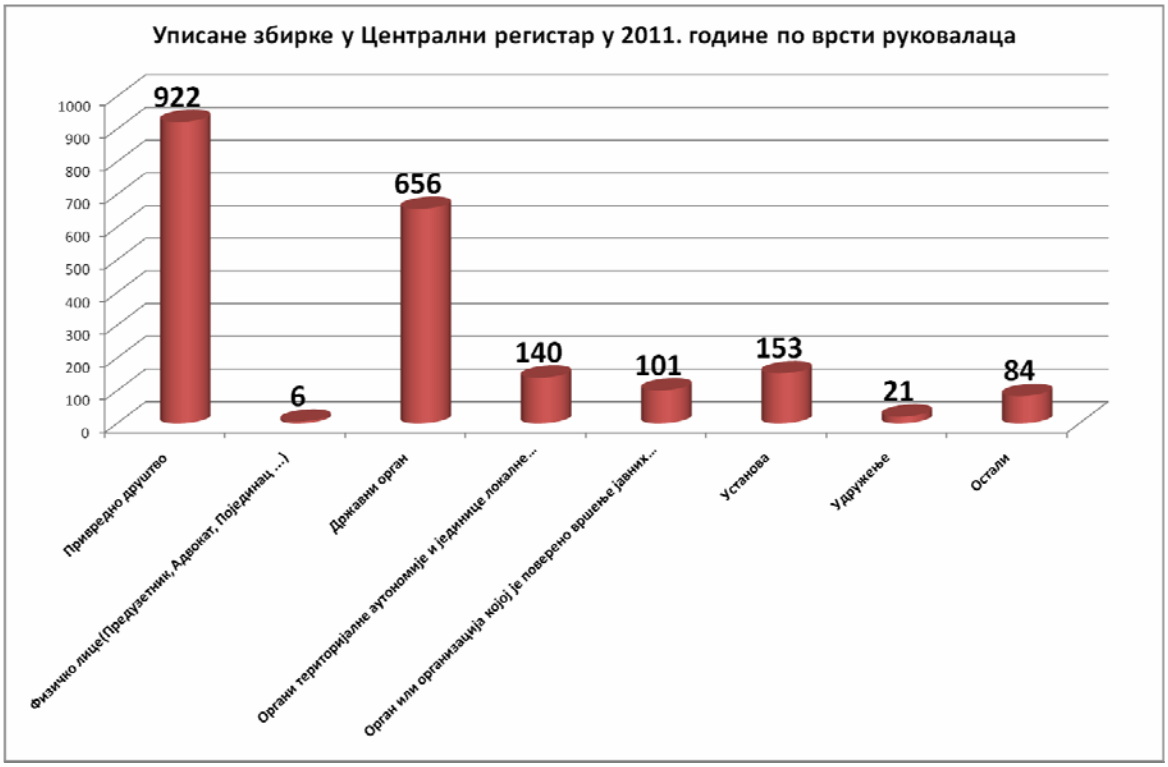


As regards submission of records of data files to the Commissioner for the purpose of registration with the Central Register in 2011, the highest response, although still weak, was among public authorities – 177 (including government authorities - 126, territorial autonomy and local self-government bodies - 33 and bodies vested with public powers - 18), which submitted a total of 897 records of data files (of which government authorities - 656, territorial autonomy and local self-government bodies - 140 and bodies vested with public powers - 101). Response rates were even lower among companies, with 149 of them submitting 922 records of data files. The remaining categories of data controllers fared even worse in terms of compliance. Also, the above categories of data controllers submitted the highest number of records of data files to the Commissioner (companies – 922, an average of 6.18 records of data files per company, and public authorities – 897, an average of 5.06 records per public authority).

It should be noted that in 2011, similarly as in 2010, compliance rates among data controllers with regard to submission of data files went up only after the Commissioner reacted by appropriate means. Thus, for example, the majority of data controllers registered with the Central Register only after the Commissioner sent a letter to all government authorities and organisations vested with public powers in connection with the submission of their annual reports for 2011, in which he highlighted examples of good practice in the implementation of LPDP and invited many authorities that had failed to comply with the duty of submission of personal data file records to do so. The outcome was similar when the Commissioner filed multiple requests for institution of infringement proceedings, which also gained media coverage.

Graph 16 – Data controllers registered with the Central Register in 2011 by types of data controllers

Graph 17 – Data files registered with the Central Register in 2011 by types of data controllers



The Commissioner continues to make efforts to ensure compliance with this legal duty. The Commissioner frequently calls for compliance with this duty under LPDP through the media, his web page, warnings sent to large data controllers, presentation of legislative provisions, education of large data controllers' staff and filing of requests for institution of infringement proceedings. However, for these efforts of the Commissioner to produce real and visible results, it is necessary to involve all public authorities in the efforts to ensure better and more complete provision of information on LPDP and the duties it lays down, including in particular the duty to register records of data files with the Commissioner's Central Register. Such action would also encourage other data controllers – small legal entities, sole traders and individuals – to fully comply with LPDP.

4.4. Acting of magistrates' courts on requests for institution of infringement proceedings filed by the commissioner

In the course of 2011, the Commissioner, upon inspection of implementation of and compliance with LPDP, filed 26 requests for institution of infringement proceedings.

Of greatest interest to the public were 21 requests for institution of infringement proceedings and the preceding inspection of public authorities included in the public administration system. The inspection was carried out between January and August 2011 and did not cover compliance with all duties under the law, but only two specific duties under LPDP – the duty to create and update records of data files in compliance with the applicable Decree passed by the Government under Article 48 paragraphs 1 and 3 of LPDP and the duty to submit those records to the Commissioner for the purpose of registration with the Central Register of Personal Data Files referred to in Article 51 paragraph 1 of LPDP.

Upon inspection, the Commissioner filed 21 requests for institution of infringement proceedings against the following data controllers and/or responsible persons in those data controllers: Environment Protection Agency, Directorate for Measures and Precious Metals, Customs Administration, Games of Chance Administration, Public Debt Administration, Anti-money Laundering Authority, Prison Administration, Veterinary Directorate, Republic Institute for Social Protection, National Employment Service, Republic Agency for Postal Services, Compensation Fund of the Republic of Serbia, Serbia and Montenegro Air Traffic Services Agency, Institute for the Advancement of Education, Serbian Export Insurance and Financing Agency, Serbian Civil Aviation Directorate, Serbian Nature Protection Institute, Medicines and Medical Devices Agency of Serbia, Republic Institute for the Protection of Cultural Monuments – Belgrade, National Agency for Regional Development and Agency for Accreditation of Health Care Institutions of Serbia.

The Commissioner also issued warnings to all these data controllers. An overwhelming majority of these data controller (18 out of 21) immediately complied with the Commissioner's warnings, while the Compensation Fund of the Republic of Serbia and the Serbia and Montenegro Air Traffic Services Agency complied only partly, registering only a part of their personal data files. However, the Games of Chance Administration did not comply with the Commissioner's warnings even after repeated verbal and written interventions.

Apart from the above requests for institution of infringement proceedings against public authorities included in the public administration system (21), the Commissioner the remaining five requests for institution of infringement proceedings due to violations of LPDP against: the Museum of Ponisavlje in Pirot, public utility company "Infostan", the Faculty of Special Education and Rehabilitation, the International Academic Centre and the Advanced Secondary School of Railway Engineering.

Pursuant to the 26 requests for institution of infringement proceedings filed by the Commissioner in 2011, magistrates' courts passed judgements in four cases. In three of those four cases the infringements were the same – failure to create records of personal data files and failure to submit those records to the Commissioner, while the fourth involved processing without the consent of the data subject. **In the three cases relating to identical infringements - failure to create records of personal data files and failure to submit those records to the Commissioner, the same court – the Magistrate's Court of Belgrade – passed somewhat different judgements: 1. convictions for both infringements; 2. convictions for both infringements in the first instance, but the judgement in the second instance overturned the judgement in the first instance; and 3. conviction for failure to create records of personal data files and a warning for failure to submit those records to the Commissioner.**

The case in which judgements were passed both in the first instance and in the second instance is an exception and shows that the Magistrate's Court of Belgrade acted diligently. Namely, pursuant to a request filed by the Commissioner in 2011, the judgement in the first instance passed by the Magistrate's Court of Belgrade found the responsible person in the public authority concerned guilty on both counts and imposed a single fine in the amount of RSD 20,000.00. **The judgement in the second instance passed by the Higher Magistrate's Court of Belgrade overturned the judgement in the first instance passed by the Magistrate's Court of Belgrade and returned the case to the court of first instance for renewed proceedings and deliberation.**

Pursuant to the 20 requests for institution of infringement proceedings filed by the Commissioner in 2010, judgements were passed in four cases in the course of 2011. In summary, judgements pursuant to the Commissioner's requests were passed in a total of eight cases in 2011.

Of the 20 requests for institution of infringement proceedings filed by the Commissioner in 2010, special mention should be made of 14 requests filed against Ministers for failure to create records of personal data files and failure to submit those records to the Commissioner. The Commissioner filed requests against the Ministers as responsible persons who head or headed the then existing Ministries, including: the Ministry of Finance, the Ministry of Health, the Ministry of Trade and Services, the Ministry of Environment and Spatial Planning, the Ministry of Agriculture, Forestry and Water Management, the Ministry of Mining and Energy, the Ministry of Infrastructure, the Ministry of Science and Technological Development, the Ministry of Education, the Ministry of Youth and Sport, the Ministry of Telecommunications and Information Society, the Ministry of Defence, the Ministry of Labour and Social Policy and the Ministry of Culture.

At the time when this Report was written, only two judgements had been passed pursuant to 14 identical requests relating to two infringements (failure to create records of personal data files and failure to submit those records to the Commissioner) filed in 2010. In one case the Minister concerned received a warning for both infringements, while in the

other case a fine of RSD 15,000 was imposed on the Minister concerned for failure to create records of personal data files, but he was acquitted on the count of failure to submit those records to the Commissioner. The rationale for the latter judgement contained a reference to Article 218 of the Misdemeanour Law, the court's reasoning being that the existence of the first infringement (failure to create records of data files) excludes the existence of the second infringement (failure to submit those records to the Commissioner). **In connection with this case, the Commissioner is of the opinion that failure to submit those records to the Commissioner also constitutes an infringement, as has been indeed been established in all other judgements passed to date, and that in this specific case the Magistrate's Court was lenient to the defendant.**

An analysis of judgements reveals that the same court – the Magistrate's Court of Belgrade – passed different judgements in 2011 pursuant to the Commissioner's requests which were essentially identical in terms of content and which related to the same two infringements (failure to create records of personal data files and failure to submit to the Commissioner those records). Thus, the Magistrate's Court of Belgrade passed: 1. an acquitting judgement on both counts; 1.a) an acquitting judgement in the first instance, which was overturned by the judgement in the second instance and returned to the court of first instance for renewed proceedings and deliberation; 2. a conviction for failure to create records of data files and a warning for failure to submit to the Commissioner those records; 3. a conviction fir failure to create records of data files and an acquitting judgement for failure to submit to the Commissioner those records, and finally, 4. warnings were issued in both cases.

Minor differences are also observed between convicting judgements pursuant to the Commissioner's requests relating to the same two infringements (failure to create records of personal data files and failure to submit to the Commissioner those records). In cases where the respondents were legal entities, they received fines of RSD 50,000 for each of the infringements and the responsible person had to a fine ranging from RSD 5,000 to RSD 10,000 per infringement. However, the one conviction relating to a Minister (public authorities are exempted from infringement liability) imposed a fine of RSD 15,000 only for failure to create records of data files.

It is also interesting that the Commissioner filed a total of 46 requests for institution of infringement proceedings in 2010 and 2011, while magistrates' courts passed one judgement in 2010 and eight judgements in 2011. While the Commissioner fully appreciates the fact that magistrates' courts are burdened with a huge caseload, he is nevertheless of the opinion that those courts to not treat requests filed by the Commissioner – and by analogy also the protection of personal data enshrined in the Constitution – with due attention.

4.5. Acting of prosecutors' offices on criminal reports filed by the Commissioner

Upon inspection of compliance with and implementation of LPDP, on the basis of knowledge obtained during such inspection and in compliance with the Code of Criminal Procedure, in 2011 the Commissioner filed 3 criminal reports for the commission of five criminal offences. Two of those criminal reports were filed with the First Primary Public Prosecutor's Office in Belgrade and one with the Primary Public Prosecutor's Office in Pirot. **A particular reason for concern is the fact that the Commissioner had filed 18 criminal reports to the addresses of six Primary Public Prosecutors' Offices in Serbia in 2010. However, as at**

31 December 2011, those Prosecutors' Offices had not informed the Commissioner whether any criminal proceedings were instituted pursuant to those criminal reports.

The Commissioner therefore concludes that Public Prosecutors' Offices have a practice of disregarding the criminal reports he files. This was true both in 2010 and in 2011 and the Commissioner cannot but conclude that the competent authorities treat this issue with utter negligence.

4.6. Acting of the Administrative Court pursuant to the Commissioner's motions

In compliance with the applicable constitutional provision (Article 168 paragraph 1 of the Constitution of Serbia), the Commissioner, as a government authority, has the power to file motions to review the constitutionality of laws and other regulations.

In 2010, the Commissioner, together with the Ombudsman, had filed two motions with the Constitutional Court to review the constitutionality of three laws – the Law on Personal Data Protection, the Law on Electronic Communications and the Law on Military Security Agency and Military Intelligence Agency, but the Constitutional Court has not responded to either of these motions in 2010 and in 2011.

4.6.1. Motion to review the constitutionality of the Law on Personal Data Protection

The first motion to review the constitutionality of Articles 12, 13 and 14 of LPDP was filed on 31 January 2010. The reasons for initiation of this procedure were as follows:

- Article 12 paragraph 1 item 3) of LPDP provides that processing of personal data without the consent of data subjects by processors other than public authorities is *inter alia* allowed "[i]n other cases envisaged by this Law or **another regulation adopted pursuant to this Law**, for the purpose of achieving a prevailing justifiable interest of the person concerned, the controller or a user."
- Article 13 of LPDP allows personal data processing without the consent of data subjects by public authorities *inter alia* "if such processing is necessary for them to perform duties within their spheres of competence as defined by a law **or another regulation** with a view to achieving the interests of national or public safety, national defence, crime prevention, detection, investigation and prosecution, economic or financial interests of the state, protection of health and ethical norms, protection of rights and freedoms and other public interests."
- Article 14 paragraph 2 item 2) of LPDP contains a provision which states that, apart from data subjects and from public authorities authorised under the law to collect such data, personal data may also be collected from third parties if "envisaged by a law **or another regulation passed pursuant to a law**."

The provisions of **Article 42 paragraphs 2 and 3 of the Constitution of the Republic of Serbia** read as follows:

"Collecting, keeping, processing and using of personal data shall be regulated by the law.

Use of personal data for any the purpose other the one were collected for shall be prohibited and punishable in accordance with the law, unless this is necessary to conduct criminal proceedings or protect safety of the Republic of Serbia, in a manner stipulated by the law."

Furthermore, **Article 8 paragraph 1 item 1) of LPDP** provides that processing of personal data is not allowed if a natural person did not give his/her consent to processing, i.e. if processing is carried out without legal authority.

In view of the above constitutional provision, elaborated in detail in the quoted provision of LPDP, the Commissioner is of the opinion that the provisions of Articles 12, 13 and 14 of LPDP extend the legal basis for personal data processing in that they stipulate that processing can be carried out not only pursuant to a law, but also pursuant to secondary legislation.

In view of the foregoing, **the Commissioner believes that the provisions of Articles 12, 13 and 14 of LPDP contravene Article 42 paragraphs 2 and 3 of the Constitution of the Republic of Serbia and therefore contends that the Constitutional Court should declare the respective provisions of LPDP non-compliant with the Constitution of the Republic of Serbia.**

4.6.2. Motions to review the constitutionality of the Law on Electronic Communications and the Law on Military Security Agency and Military Intelligence Agency

The second motion to review the constitutionality of Article 128 paragraphs 1 and 5 of the Law on Electronic Communications and Article 13 paragraph 1 and Article 16 paragraph 2 of the Law on Military Security Agency and Military Intelligence Agency was filed on 30 September 2010 for the following reasons:

- **The provisions of Article 128 paragraphs 1 and 5 of the Law on Electronic Communications contravene the provision of Article 41 paragraph 2 of the Constitution of Serbia**, because they allow for special measures that dispense with the confidentiality of mail and other communications not only under a court decision, but also without any court order, in cases where such possibility is provided for under the law or where a competent government authority so requests. (The unconstitutionality of such an arrangement has already been shown in the Constitutional Court Decision IUz -149/2008 of 28 May 2009 passed on the initiative of the Provincial Ombudsman for review of constitutionality of Article 55 paragraph 1 of the Law on Telecommunications).

- **The provision of Article 13 paragraph 1, in conjunction with Article 12 paragraph 1 item 6), of the Law on Military Security Agency and Military Intelligence Agency contravenes the provision of Article 41 paragraph 2 of the Constitution of Serbia** because it provides that MSA "on the basis of an order given by the Head of MSA or a person authorised by the Head of MSA" applies special procedures and measures, including *inter alia* "secret electronic surveillance of telecommunications and information systems for the purpose of collecting data of telecommunications traffic and locations of users, without accessing the content of such exchange." This is a measure that encroaches on the privacy of letters and other means of communication and should be applied only on the basis of a court order.

- **The provision of Article 16 paragraph 2 of the Law on Military Security Agency and Military Intelligence Agency contravenes the provision of Article 41 paragraph 2 of the Constitution of Serbia** because it provides that MSA "has the right to obtain information from telecommunications operators about the users of their services, their communications, dialling locations and other data of relevance for the outcome of special procedures and measures." This information encroaches on the privacy of letters and other means of communication and MSA cannot have a "right" to them without a court order.

The motion highlights the undisputable fact that all of these measures used for obtaining data on citizens' communication are obtained as explained above, without court orders. This is done both by MSA, invoking the contested Articles of the Law on MSA and MIA, and by the police (as part of the Ministry of Internal Affairs) and the Security Information Agency (SIA), and quite possibly some other authorities as well. However, in the laws that govern the operations of the police and SIA the backers of the motion could not identify any provision contrary to the Constitution that might be contested; instead, the practice of the police and SIA is based on an interpretation according to which call listings, user locations and other elements of communication are not covered by the term "communication" and are therefore not protected by the provision of Article 41 paragraph 2 of the Constitution.

For the purposes of review of constitutionality it should be pointed out that collection and use of information that shows with whom and at what time a citizen communicates and what type of connection and device he/she uses (e.g. type of mobile phone or computer), as well as information on the location from which communication is made, especially where all these pieces of information are taken together, undoubtedly departs from the principle of inviolability of letters and other means of communication, a view that has been upheld by the European Court of Human Rights in a number of judgements.

In view of the foregoing, **the Commissioner believes that the said provisions** of the Law on Electronic Communications and the Law on Military Security Agency and Military Intelligence Agency **contravene Article 41 paragraph 2 of the Constitution of the Republic of Serbia and therefore contends that the Constitutional Court should declare those provisions non-compliant with the Constitution of the Republic of Serbia.**

The Constitutional Court has not responded to either of these motions in 2010 and in 2011.

5. ABOUT THE COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PERSONAL DATA PROTECTION

5.1. Key Facts

The Commissioner's independence and autonomy is a core principle of this institution's functioning; it implies organisational and functional separation from government bodies and other public authorities whose operations it supervises.

This is ensured by the mechanism of appointment and by an explicit legislative provision under which the Commissioner can neither request nor accept orders or instructions of other public authorities or other persons and may not be held responsible for opinions or suggestions given while performing his/her duties. The Commissioner is appointed by the National Assembly of the Republic of Serbia. The incumbent must be an eminent expert in the field of human rights, with a graduate degree in law and at least 10 years of relevant work experience. A person who has competences or is employed in another public authority or a political party cannot perform the function of the Commissioner. The Commissioner has two Deputies, appointed by the National Assembly on Commissioner's proposal.

In December 2011, the National Assembly reappointed the current incumbent, Rodoljub Sabic, for a second seven-year term.

5.2. Commissioner's Powers and Responsibilities

5.2.1. Commissioner's Powers:

- To handle complaints against decisions passed by public authorities relating to violations of the rights provided for under the Law on Free Access to Information of Public Importance;
- To monitor compliance of public authorities with the obligations set out in this Law and report to the public and National Assembly thereof;
- To initiate the drafting or amendment of regulations implementing and promoting the freedom of information;
- To propose measures public authorities should take to improve their compliance with this Law;
- To undertake necessary measures to train the staff of public authorities and to familiarize the staff with their responsibilities in connection with the right to access information of public importance for the purpose of ensuring effective implementation of this Law;
- To inform the public of the content of the Law and the rights regulated by the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection,
- Has the right of access to and examination of any data medium covered by the Law on Free Access to Information[5], as well as data, data files, complete documentation, general instruments, premises and equipment of personal data controllers;
- To decide on complaints in cases set out in LPDP;
- To supervise and allow transborder transfer of data out of the Republic of Serbia;
- To point out identified cases of abuse in data collection;
- To produce a list of countries and international organizations with adequate provisions on data protection;
- To give his/her opinion on the formation of new data files or introduction of new information technologies in data processing;
- To give his/her opinion in case of doubt whether a data set constitutes a data file within the meaning of this Law;
- To monitor the implementation of data safeguards and to propose improvement of those measures;
- To give proposals and recommendations for improving data protection;
- To give prior opinion on whether a certain processing method constitutes specific risk for a citizen's rights and freedoms;
- To keep up to date with the data protection arrangements in other countries;
- To file motions for review of constitutionality and legality of laws and other general enactments.

[5] The Commissioner's powers to examine any data medium are partially limited by the Law on Data Confidentiality (2009) in that, for certain information labeled as top secret, the Commissioner needs to obtain a security clearance certificate, issued by the Office of the National Security and Confidential Data Protection Council.

5.2.2. Commissioner's Responsibilities*:*

- Within three months of the end of every fiscal year, to present the National Assembly with an annual report on the activities undertaken by public authorities to implement these two Laws and is/her own activities and expenses. The Commissioner also presents other reports to the National Assembly if he/she deems it necessary. The Commissioner forwards the report submitted to the National Assembly also to the President of the Republic, the Government and the Ombudsman and makes it available to the public by appropriate means.
- To publish and update a manual with practical instructions for the effective exercise of rights regulated by the Law on Free Access to Information of Public Importance in the Serbian language and in languages identified as official under the law,
- To inform the public of the content of the manual for implementation of the Law on Free Access to Information of Public Importance via the press, electronic media, the Internet, public panel discussions and in other ways,
- To issue instructions for the publication of directories of public authorities.
- To file petitions for institution of infringement proceedings,
- To maintain a Central Register of Data File Records and publicise it on the Internet.

5.3. Commissioner's Office

An expert service – the Commissioner's Office – has been set up to perform technical and administrative duties within the Commissioner's sphere of competence. Under the Bylaw on Internal Organisation and Job Classification, the Commissioner's Office has a total of 69 employees.

At present, the Commissioner's Office has 39 employees - 30 less than the required number according to the relevant job classification instrument. This number does not include Commissioner Rodoljub Sabic and his two deputies, Ms. Stanojla Mandic and Mr. Aleksandar Resanovic. **Most of the staff was hired between 2009 and 2011, because hiring had not been possible before that.**

From the formation of this institution in 2005 until as late as April 2009, the Commissioner had operated with only 5 civil servants, including 3 members of staff with university-level education in charge of handling freedom of information complaints and one employee. As from April/May 2009, 6 new civil servants have been hired for duties pertaining to freedom of information, as per the endorsed Commissioner's Human Resources Plan. Some of these members of staff have also been deployed to duties of personal data protection, in addition to their regular work. Given that the Commissioner insists on quality of decisions, this of necessity affected the observance of deadlines in both fields.

The Human Resources Plan for 2011 envisaged hiring of up to 55 employees and was even endorsed by the Ministry of Finance with regard to the availability of budget funds, but, very much like the Human Resources Plan for 2010, it could not be implemented due to the lack of office space.

The situation being as it is, amendments made to the Law on Free Access to Information **in late May 2010 have given the Commissioner additional powers** regarding administrative enforcement of his decisions. Staffing of new jobs was delayed pending the approval by the Administrative Committee of the National Assembly of amendments to the job classification instrument, which, by the way, did not envisage any changes in the number of employees.

Furthermore, according to the endorsed Law Amending the Law on Access to Information, which is dealt with in more detail above**, the Commissioner will, upon its enactment, have additional competences** in connection with the initiation of infringement proceedings for violations of the freedom of information.

In 2011, three employees left the Office for much better paid employment in national public companies or other bodies, while one employee was terminated *ex lege*.

As the volume of work has seen a multiple increase and as this growth trend continues, the current number of employees is not sufficient to ensure timely and proper functioning of this institution. This is discussed in more detail in the section dealing with obstacles faced by the Commissioner in the pursuit of his activities (тач. 6.4.5.).

5.4. Assets

The operations of the Commissioner and his Office are funded from the budget of the Republic of Serbia.

The premises made available to the Commissioner on the ground floor in Svetozara Markovica 42 (since July 2005) and on the first floor of the same building (since February 2009), as well as on the fourth floor in Deligradska 16 (since May 2010), is sufficient for the current number of employees – 39 at the time when this Report was written. However, this number of employees is far from sufficient for the requirements of the Commissioner's work and the attainment of his objectives. **Thus, due to the lack of appropriate offices, the Commissioner is unable to hire new staff, other than to replace the positions left vacant by those who resigned, even though the workload requires new hiring and the job classification, the Human Resources Plan and the available funds allow it**.

The available equipment is sufficient for the existing capacity of the Office. Some of it is owned by the Administration for Joint Services of the Republic Bodies, while most of it has been purchased from the Commissioner's budget in previous years.

For 2011, **funds allocated to the 126,086,000.00** - 2% higher than the amount stated in the Commissioner’s Draft Financial Plan. However, the subsequent **Budget revision** carried out in October **reduced** the Commissioner’s allocation **by about 20 million, or 16%. Thus, the Commissioner’s approved budget ultimately amounted to RSD 106,192,000.00.**

The Commissioner’s budget execution in 2011 was RSD 84,125,058.76 – 66.7% of the originally approved amount and 79.22% of the amount approved after budget revision. The main reason for this was the objective inability to hire the necessary number of officers, combined with very rational spending behaviour. The situation was similar in earlier years, when budget realisation ranged from 45% to 74 % of the approved funds.

Lower spending of budget allocations for 2011 was also attributable to the fact that the Commissioner secured funding for some of his activities through international cooperation and projects, as explained in detail below. Organisations which assisted in capacity building of the Commissioner's Office, improving transparency in the functioning of public authorities and ensuring compliance with other requirements of the EU stabilisation and association process have directly contracted and made all related payments (e.g. travel expenses, royalties, printing costs, conference hall rental etc.), so that no funds have been paid to the Commissioner's account for this purpose. No equipment operated by the Commissioner has been purchased from assistance and cooperation funds.

The Commissioner would like to once again point to certain salary-related issues merit special attention.

In inspection activities within the framework of enforcement of laws, other regulations and general enactments in the field of personal data protection, the Commissioner is increasingly facing the need to control software and other data protection measures put in place by data controller and processors. For the Commissioner to be able to perform these duties – which are increasingly shifting from the field of law to the field of IT and electronics – to a satisfactory standard of quality and expertise, he needs to hire persons who are specialised in and keep abreast of state-of-the-art technological developments in this field. The cost of recruitment of such specialists in the labour market exceeds by far the amount offered as the current salary rates in public administration. The Commissioner therefore emphasises that, unless a special mechanism is put in place to remunerate these specialists at least double or indeed several times more than the current amounts, the Commissioner – and other public authorities as well – will soon not be able to hire properly qualified specialists for such posts. The Commissioner believes this growing concern should be timely anticipated and an appropriate response should be prepared through relevant legislative arrangements.

Similarly, under Article 34 of the Law on Free Access to Information, legislation governing employment in public administration bodies applies *mutatis mutandis* to the staff of the Commissioner's Office, which means it applies also to staff salaries. As a result, the Commissioner's authorised officials responsible for inspection of personal data protection receive salaries which are lower than those of other civil servants who also perform enforcement duties and whose salaries are subject to a pay regime different from that imposed by the Law on Remuneration of Civil Servants and Appointees, allowing them to receive salaries that are 20-50% higher than those of civil servants.

The special pay regimes are based on: the Law on Data Confidentiality, the Law on Tax Procedure and Tax Administration, the Law on Defence, the Law on the Military, the Law on Military Security Agency and Military Intelligence Agency, the Law on Police, the Bylaw on Salaries and other Emoluments of Employees at the Ministry of Finance – Tax Administration, the Decree on Coefficients for Calculation and Disbursement of Salaries to the Director and Staff of the Administration for Custodial Sentences and the Decree on Coefficients for Calculation and Disbursement of Salaries at the Administration for Custodial Sentences.

Thus, salaries of authorised officers responsible for enforcement of the Law on Data Confidentiality ("Official Gazette of the Republic of Serbia" No. 104/09), due to specific work conditions and complexity and nature of their work, are increased by 20% (under Article 97, paragraph 7 of that Law), while the Law on State Audit Institution ("Official Gazette of the Republic of Serbia" Nos. 101/05, 54/07 and 36/10), envisages a so-called "institutional increment" of 30% compared with the salaries of other civil servants. The authorised officers employed at the Commissioner's Office, although they perform largely similar, sometimes even

more sensitive duties, cannot exercise this option. In view of this, it would be vital to adopt the proposed amendments to the Law on Free Access to Information, which would provide for such an option.

Apart from his salary, the Commissioner also used his official car. He received no other emoluments based on employment, he claimed no per diems for travel in the country and he claimed no travel allowances for travel abroad.

Execution of the Commissioner's budget in 2011

Economic classification	DESCRIPTION	Commissioner's proposal according to the Fin. Plan	Approved	Executed	% of execution
411	**Salaries and fringe benefits**	72,066,000.00	63,584,000.00	53,723,753.73	84.49
412	**Social contributions payable by employer**	12,954,000.00	11,436,000.00	9,477,468.52	82.87
413	**Compensations in kind**	200,000.00	200,000.00	141,600.00	70.80
414	**Social benefits to employees**	1,500,000.00	1,500,000.00	128,125.33	8.54
415	**Compensation for employees**	2,500,000.00	2,500,000.00	1,174,406.69	46.98
416	**Rewards and bonuses**	102,000.00	153,000.00	151,835.00	99.24
421	**Recurrent expenses**	6,200,000.00	4,505,000.00	3,525,276.28	78.25
422	**Travel expenses**	4,000,000.00	2,200,000.00	1,238,791.56	56.31
423	**Contract services**	11,899,000.00	8,949,000.00	6,878,866.92	76.87
425	**Current repairs and maintenance**	1,000,000.00	1,000,000.00	284,719.56	28.47
426	**Material**	8,000,000.00	4,500,000.00	3,778,856.28	83.97
482	**Taxes, statutory charges and penalties**	200,000.00	200,000.00	62,470.51	31.24
483	**Fines and penalties imposed by courts**	0.00	0.00	0.00	0.00
512	**Machines and equipment**	5,465,000.00	5,465,000.00	3,558,888.38	65.12
	TOTAL	126,086,000.00	106,192,000.00	84,125,058.76	79.22

The Commissioner is of the opinion that the procedure according to which a budget is allocated for his operations does not guarantee full financial independence of this institution, on a level comparable with other independent public authorities. The difficulties faced by the Commissioner regarding budget allocation in the initial years of his operation provide ample evidence of this.

6. COMMISSIONER'S ACTIVITIES

Introductory Remarks

Activities taken by the Commissioner are based on his legal powers and responsibilities, primarily under the two core laws (Law on Free Access to Information and Law on Personal Data Protection), as well as other regulations.

Some of the best indicators of the Commissioner's activities and the results achieved in the exercise and protection of freedom of information and personal data protection are **the official opinions of relevant institutions**. Thus, the European Commission expressed positive opinions on the Commissioner in its annual reports on Serbia's progress in the Stabilisation and Association Process in the past five years, while **OSCE, the EU Delegation to Serbia and the Council of Europe** both gave positive opinions and commended the Commissioner. Equally important are the words of praise by **journalists' associations and letters of support sent by numerous citizens and the public in general**.

In 2011 the Commissioner received three **awards:** Charter for Contribution to the Fight Against Corruption, awarded by the EU Delegation in Serbia and the Anti-corruption Council; award "Personality of the Year" presented by the OSCE Mission to Serbia, in recognition of his many years of contribution to the transparency of public institutions; and Charter of Gratitude for contribution to the development of the Librarian Society of Serbia. In previous years, the Commissioner received the following recognitions: "The Best European" for the best European project and for his performance in office as the Commissioner in 2008, the award "Knight of Vocation" in 2009 for his advocacy of universal values, while in 2010 he received a reward from the National Alliance for Local Economic Development as reformer of the year. Although these awards are conferred personally, they certainly confirm the merit of the words of praise concerning the functioning of this institution.

In the course of 2011, the Commissioner received a total of 4,741 cases, of which 4,022 in the field of freedom of information and 719 in the field of personal data protection. Caseload carried forward from the previous period includes a total of 1,387 cases, of which 1,350 relate to freedom of information and 37 concern personal data protection. In practice this means that the Commissioner worked on a total of 6,128 cases during 2011 – 5,372 in the field of freedom of information and 756 in the field of personal data protection.

6.1. Activities in Individual Cases in the Field of Freedom of Information

6.1.1. Procedure followed by the Commissioner

A requester can lodge a complaint with the Commissioner if a public authority body refuses to inform him whether it holds or has access to certain information of public importance, if it refuses to provide access to a document containing the requested information, if it fails to issue or send a copy of the document in question (depending on the content of the request), or fails to do so within the statutory time limit. Citizens may also raise complaints with the Commissioner when public authorities make the issuing of a copy of a document containing the requested information conditional upon payment of a fee in excess of the amount of necessary costs of copying or when public authorities otherwise hamper or impede the exercise of a requester's right.

The Commissioner acts on complaints as the authority of second instance, allowing the public authority, and if necessary also the applicant, to reply by means of statements. the Commissioner must pass a decision not later than 30 day of lodging of a complaint and he may decide to:

- Reject a complaint on formal grounds if it is inadmissible, lodged by an unauthorized person or untimely/premature,
- Dismiss a complaint as unjustified if the public authority proves it acted in accordance with the Law,
- Sustain a complaint as justified and order the public authority to comply with the request and to provide the information to the applicant within a short period of time, with an obligation to notify the Commissioner when it carries out his orders as instructed,
- Sustain a complaint, rescind the challenged first-instance decision and decide as suggested by the requester, or otherwise return the case to the authority of first instance to pass a new decision in renewed proceedings,
- Terminate the proceedings, if the complainant withdraws the complaint, usually because the public authority has in the meantime provided the requested information to the complainant after Commissioner's intervention or for other reasons.

Under the mandate given to him by the Law on Free Access to Information of Public Importance and the Law on Data Confidentiality, the Commissioner is authorised to pass a ruling in a procedure upon complaint lodged by an information requester ordering a public authority to revoke the confidentiality of data or a document containing such data and to enable the requester to exercise his/her freedom of information.

As already explained above, the Commissioner's powers to examine any data medium are partially limited by the Law on Data Confidentiality in that, for certain information labelled as top secret, the Commissioner needs to obtain a security clearance certificate. [6]

The Commissioner believes that the existing arrangements regarding his certification for accessing certain information should be reviewed, indeed changed as soon as the next wave of legislative amendments is due, because they are largely incompatible with international standards that provide for an independent status of identical or similar independent regulatory bodies.

When a requester files an application for enforcement of a decision, the Commissioner acts if a public authority fails voluntarily to comply with a final and enforceable decision of the Commissioner; however, enforcement may also be performed *ex officio* if justified public interest pertains.

The Commissioner acts on such applications in accordance with the provisions of the Law on General Administrative Procedure and issues conclusions allowing the execution of decisions. Such conclusions call on the public authority concerned, in the capacity of the respondent, to comply with the order contained in the relevant decision under threat of a fine and to notify the Commissioner thereof.

[6] Under Decision of the Government's Office of the National Security and Secret Data Protection Council No. 88-00-5/2012-01 of 21 February 2012, Commissioner Rodoljub Sabic is allowed to access classified information marked as "state secret" and he has been vetted for a certificate entitling him to access this type of information, which is valid until 20 February 2015.

If a respondent fails to comply with the decision even in such extended period, the Commissioner passes a conclusion imposing a fine stated in the conclusion allowing the execution of the decision. Where necessary, collection of the fine is enforced in court proceedings. The procedure continues with the notification and imposition of further fines, until such time as the respondent complies with the original decision, subject to an understanding that the sum of all such fines cannot exceed the cumulative amount of RSD 200,000.

If a decision passed by the Commissioner cannot be executed by any of the aforementioned means, the only remaining option is that the Commissioner asks the Government to enforce the decision by appropriate measures in accordance with Article 28, paragraph 4 of the Law, including direct enforcement.

As regards infringement liability, the Commissioner is not vested with statutory powers to file a request for institution of infringement proceedings. Hence, when the Commissioner finds, while acting on complaints or otherwise, that an action or inaction of a public authority involves elements of an infringement, the Commissioner shall notify the Administrative Inspectorate of the Ministry of Public Administration and Local Self-government as the body responsible for instituting infringement proceedings and shall forward to it all case documents for that purpose.

The Draft Law on Amendments to the Law on Access to Information endorsed by the Government on 26 January 2012 vests the Commissioner with the power to file petitions with competent courts for violations of the freedom of information. if this Draft Law is enacted, those powers will become effective six months of the date when the Law comes into force.

The Commissioner acts on requests for information of public importance available to him/her, if created in his/her work or in connection with it, like any other public authority in accordance with the provisions of Article 16 of the Law on Free Access to Information of Public Importance: he/she submits requested information to the applicant within the statutory time limit if such information is available to him/her and makes a note to that effect; if this is not the case, he notifies the requester and, with his/her consent, forwards the request to the authority that, according to his knowledge, holds a document with the requested information. If he finds that reasons for dismissing or restricting access to requested information under the Law pertain, the Commissioner shall pass a substantiated decision rejecting the request, providing rationale for such decision.

When acting on requests forwarded or referred by other public authorities, the Commissioner shall first establish whether the document is held by the authority that referred the request; if this is not the case, he/she shall forward the request to the authority that, according to his knowledge, holds the requested document (unless the requester decided otherwise) and notify the requester accordingly, or alternatively he/she shall refer the requester to the authority that holds the information.

Claims in connection with the operations of public authorities which are not deemed to be information of public importance by their content are forwarded by the Commissioner to the competent authority for acting and the Commissioner shall notify the requester within his/her sphere of competence.

In the procedure of enactment or amendment of other laws, the Commissioner may, where necessary, warn the competent authority or respond in other way if such legislation is incompatible with the provisions of the Law on Free Access to Information of Public Importance in that it hampers free access to information; furthermore, the Commissioner may also file a motion to establish constitutionality and legality of regulations. the **Commissioner is not vested**

with power to propose laws or legislative amendments; he usually initiates legislative amendments through the Ombudsman.

The Commissioner draws the attention of a public authority if, outside the complaints handling procedure in connection with alleged violations of the freedom of information, he/she finds that other provisions of the Law on Free Access to Information of Public Importance have been breached to the detriment of this freedom, e.g. if inadmissible amounts are charged as fees for issuing copies of documents etc.

6.1.2. Statistical Facts about Resolved Cases

In 2011, the Commissioner's Office received 4,022 cases in the field of freedom of information, with further 1,350 cases carried forward from the previous period, giving a total of 5,372 pending cases. In 2011 proceedings were terminated in 2,967 cases.

Case inflow in 2011 was approximately 40 % higher than in 2010 or some nine times higher than in 2005.

Resolved cases include:

- **1,614 complaints**, of which only 90 (5.6 %) related to actual decisions rejecting a request for information, while the remaining ones concerned failure of public authorities to act on requests for access to information of public importance or unsubstantiated rejection of request without a relevant decision,
- **98** responses to **claims in administrative proceedings against Commissioner's decisions,** pursuant to which 67 conclusions were issued allowing the execution of decision and 51 conclusions on fining of authorities, 17 requests for the Government to enforce the Commissioner's decisions and 3 petitions to courts for enforced collection of outstanding fines, as well as 70 conclusions on termination of enforcement in cases where authorities complied with an order,
- **40 Commissioner's opinions** concerning the implementation of the Law on Access to Information,
- **73 responses to requests for access to information on the Commissioner's work,**
- **29 responses to the Administrative Court to claims** in administrative proceedings against Commissioner's decisions,
- **156 requests for information of public importance in connection with the operations of another authority**, which the Office forwarded to the public authority that holds the information for further action and notified the requesters thereof or instructed them which authority to address,
- **347 cases concern communication with public authorities for the purpose of establishing their competences for handling specific cases**, in connection with other issues regarding implementation of the law,
- **255 cases relating to other advisory and instructional communication** with public authorities in connection with the implementation of the Law **in order to achieve greater transparency of operations,** in which **14 decisions and 241 warnings** were issued in connection with the publication of information booklets on the work of public authorities or in connection with bringing the content of such information booklets in compliance with the law, and

- **355 claims relating to operations of public authorities that are not deemed to be information of public importance**; these have been forwarded to the relevant authorities and requesters have been notified accordingly or instructed which authority to address.

6.1.3. Handling of Complaints by the Commissioner

In 2011, the Commissioner rules 1,614 complaints, of which **1,458 complaints (90.3%)** were found to be **justified, while a mere 156 complaints (9.7%) were found to be unjustified or formally deficient**, for which the Commissioner passed the following decisions:

- **72 orders (4.5 %) rejecting complaints as unjustified**
- **84 conclusions (5.2%) rejecting complaints on formal grounds** - untimely or premature submission, inadmissibility or declined jurisdiction by the Commissioner.

The complaints which were found to be justified (1,458 complaints) were resolved by the Commissioner as follows:

- **In 555 cases (38%) the Commissioner ordered the public authority concerned to comply with the request and enable access to requested information**. The Commissioner passed a total of 438 decisions, because 117 cases were joined and a single decision was used to resolve two or more complaints against the same authority,
- **In 870 cases (60%) proceedings were terminated because public authorities in the meantime complied with the requests, following interventions by the Commissioner**, so these cases were closed by passing of conclusions on termination of proceedings,
- **In 33 cases (2%) the Commissioner rescinded the first-instance decision and returned the case to the authority of first instance to pass a new decision in renewed proceedings.**

More details about the authorities against which complaints were most frequently made and the most frequent subject matters of complaints lodged with the Commissioner, as well as about subsequent actions of the authorities concerned, are given in section 2 of this Report, which deals with the overall situation in the field of freedom of information.

In 2011, the highest share of complaints lodged with the Commissioner were complaints against national authorities, organisations and institutions (46.4%), local self-government authorities (26.3%), judicial authorities (13.34%) public enterprises (11.3%) and 1.3% against the authorities of the Autonomous Province of Vojvodina, while all other authorities accounted for the remaining share.

From the information on outcomes of complaint proceedings presented above it follows that **in some 60% of all cases the authorities of first instance comply with the request of a requester as soon as they learn a complaint was lodged, i.e. before the Commissioner passes his decision, while further 30% of them comply with the request after the Commissioner passes a decision acting on a complaint**.

Thus, the Commissioner's interventions following complaints in 2011 ensured access to information for requesters in about 91.5% of all cases. Due to the large number of those cases, this document highlights only those that, for various reasons, gained special publicity.

Examples:

1. Pursuant to a complaint lodged by a journalist of Radio Television B92 against a decision of ***the Tax Administration of the Serbian Ministry of Finance (TA)*** which rejected his freedom of information request by invoking official secrecy, the Commissioner upheld the complaint, overturned the TA's decision and ordered the TA to provide to complainant the requested information about **the fifty largest tax and pension and social insurance debtors** from 2008 to the date of the request (9 November 2011), with a breakdown of debt amounts by years.

In spite of the fact that the Commissioner's decision was binding and became enforceable, TA officials refused to comply with it, choosing instead to continue insisting through the media that the information concerned constituted an official secret and that an amendment of the Law on Tax Procedure and Tax Administration would have to be amended in order to provide for an obligation or a possibility to disclose a list of largest tax debtors. Such attitude of the TA contravened the Law on Access to Information of Public Importance, a fact which the Commissioner substantiated in the decision he passed pursuant to the complaint.

Pursuant to the complainant's contention, the Commissioner passed a conclusion allowing the execution of his decision and called on the TA to comply with the said decision by an extended deadline, under threat of a fine of RSD 20,000.00. Since the TA failed to comply with this conclusion as well, the Commissioner imposed the fine of RSD 20,000.00, which the TA paid, and threatened it with the imposition of a new fine of RSD 180,000.00 unless it complies with the decision.

After the enactment of amendments to the Law on Tax Procedure, in early 2012 the TA published a list of 100 largest debtors as at 31 December 2011. In late January 2012, the TA informed the Commissioner it had complied with the request and provided the requested information to the requester.

2. Acting pursuant to a complaint lodged by the Government's Anti-corruption Council for denial of access to requested information, the Commissioner passed a decision by which the ordered the ***Ministry of Economy and Regional Development*** to provide to the Council within a specified period a copy of Appendices to the **Joint Venture Agreement between the Republic of Serbia and Fiat Group Automobiles** entered into on 29 August 2008 (Appendix 1 – Property Restructuring Plan, Appendix 3 – Incentives Plan, Appendix 4 – Action Plan for Infrastructure and Appendix 7 – Initial Business Plan), as well as copies of all Annexes and Appendices to the Agreement, insofar as any of those were entered into or amended from the date of signature of the main agreement until 17 March 2011.

Instead of copies of the requested documents, the Ministry provided to the Council several hundred virtually blank pages, where most of the content was "blackened", purporting this was done by its foreign partner, who claimed it constituted a trade secret, in order to protect its interests.

Pursuant to the Council's contention, the Commissioner first passed a conclusion allowing the execution of his decision and called on the Ministry to comply with the said decision by an extended deadline, under threat of a fine of RSD 20,000.00. Since the Ministry failed to comply with this conclusion as well, the Commissioner imposed the fine of RSD 20,000.00, and threatened it with the imposition of a new fine of RSD 180,000.00 unless it complies with the decision. The Ministry then informed the Commissioner it was unable to pay the fine within the specified period because it had to follow the correct procedure for payment. The Ministry at tie

same time informed the Commissioner it had invited the requester to access those parts of the Agreement for which the foreign partner gives its consent.

In connection with this case, the Commissioner wrote to the Minister of Economy on two occasions to remind him of the binding nature of the decision concerned and to point out it was unacceptable to let a foreign partner to censor details of an agreement in violation of the law, putting its interests above the Serbian law, which is, by the way, accepted by the parties as the governing law for the Agreement. The procedure will continue in accordance with the law.

3. The Commissioner received a complaint from a Belgrade-based attorney (in late 2010) against ***the Higher Court of Belgrade*** for failure of the Court to honour his freedom of information requests by which he requested **copies of audio and video recordings in a specific criminal case** of main hearings and the entire sentencing process before that court, as well as a copy of the transcript of the entire sentencing process. In these proceedings, the requester acted as counsel to the defendant.

After lodging of the complaint, but before the Commissioner passed a decision, the Court submitted to the complainant transcripts of main hearings, but not the requested copies of audio and video recordings. It informed the requester he could only view and listen to the audio and video recordings on the Court's premises, which was unacceptable to the requester and he insisted on obtaining copies of those recordings because he intended to use them to present a case for the defence, i.e. to build on them an appeal against the sentence in criminal proceedings.

The Commissioner passed a decision pursuant to the complaint (early January 2011) and ordered the Court to provide to the complainant copies of the requested audio and video recordings which the complainant would be required to accept personally on the Court's premises. The Commissioner instructed the Court to make inaccessible all personal data before delivering the copies, including names of witnesses, residing addresses of parties in the proceedings, their personal identification numbers, dates of birth and other personal data contained in the audio and video recordings and to obscure and make unrecognisable the faces of parties in the proceedings and all attending persons except court officials.

The Court filed legal action to annul the Commissioner's decision. The Administrative Court of Belgrade dismissed the legal action by Decision 23.U.1614/11 of 24 February 2011.

After that, the Republic Public Prosecutor, acting on initiative of the Court, also filed legal action with the Administrative Court seeking the annulment of the Commissioner's decision. The Court upheld this legal action in its Judgement 2 U.2765/11 of 6 July 2011 and returned the case to the Commissioner for renewed procedure, reasoning that the complainant's right to receive the requested copies of audio and video recordings was beyond doubt, but questioned the basis on which the Commissioner decided it was not necessary to protect court officials who took part in the proceedings, including judges, by making their faces unrecognisable just like all other parties in the proceedings.

In the renewed procedure, taking heed of the Court's legal opinion, the Commissioner made an identical decision, with additional reasoning to rectify the issues to which the Court objected, and ordered the respondent to make the requested information accessible to the requester.

The Higher Court of Belgrade did not comply with the Commissioner's decision and the Commissioner, acting pursuant to the requester's contentions (September 2011), passed a conclusion allowing the execution and called on the Court to comply with the decision. As the

Court failed to comply with this conclusion, the Commissioner imposed on it a fine in the amount of RSD 20,000.00 and another fine of RSD 180,000.00, at which point he exhausted all available measures (fines) to force the Court to comply with the said decision. The Commissioner therefore addressed the Government in mid November, asking it to execute the decision through direct enforcement, in accordance with Article 28 paragraph 4 of the Law on Access to Information of Public Importance.

The Court did not pay the fines and in November 2011 the Commissioner submitted to the Enforcement Unit of the First Primary Court of Belgrade a petition for enforcement for the purpose of collection of fines. However, on this occasion the First Primary Court did not pass a decision on enforcement; instead, it declined jurisdiction, although other courts, in two earlier identical cases, upheld the petitions and passed decisions on enforced collection. It should be noted, however, that the respondents in those two earlier cases where higher education institutions.

4. Pursuant to a complaint lodged by a journalist of the "Blic" daily against the ***State-owned Property Leasing Company "DIPOS"*** for failure to act on his freedom of information request, the Commissioner passed a decision ordering DIPOS to give the complainant access to the requested information – **a list of (state-owned) property managed by DIPOS, a list of individuals and legal entities that use properties managed by DIPOS and which properties they use, in which periods and how much they pay for using them,** with necessary protection of personal data. Not only did DIPOS fail to honour the request, but it also failed to respond when the Commissioner forwarded the complaint to it for response.

As DIPOS failed to comply with the Commissioner decision, the Commissioner upheld the requester's contention and passed a conclusion allowing the execution of his decision and called on the respondent to comply with the said decision by an extended deadline, under threat of a fine of RSD 20,000.00. Since DIPOS failed to comply with this conclusion as well, the Commissioner imposed the fine of RSD 20,000.00 payable within a specified period and threatened it with the imposition of a new fine of RSD 180,000.00.

Instead of the requested information, DIPOS provided to the requester cumulative data on all properties it manages. After imposition of the fine, it informed the Commissioner that it had complied with the decision, although the requester could not confirm that by the time when this Report was written; indeed, the requester responded he had not received the requested information.

5. Pursuant to a complaint lodged by the Anti-corruption Council of the Government of Serbia against the ***Securities Commission*****,** following the Commissioner's order, **information in connection with the privatisation and acquisition of shares of the press company "Novosti"** was partly made accessible to the public. However, in spite of the Commissioner's order, the Commission refused to provide all information in connection with the trading of shares of the company NIP "Novosti" (as per a request made in 2006 by a Lichtenstein-based company),as well as information created in the process of control and supervision of trading in shares of NIP "Novosti" and measures taken by the Commission in connection with the public confirmation made by Milan Beko that he owns a 60% equity holding in the company NIP "Novosti". Enforcement procedure is pending.

6. **Information in connection with court proceedings** which were of interest to the public, and investigative journalists in particular, which was made accessible following the Commissioner's interventions, related to proceedings before the ***Higher Court of Belgrade*** in the **trial of an organised criminal group from Krusevac, including Zoran Jotic and other**

defendants, the "briefcase" scandal, the cigarette smuggling scandal (involving the defendant Anton Stanaj), drugs trafficking (defendant Arsa Saric and others) etc.

7. **Information on donations to non-governmental organisations (budget line 481)** pursuant to requests by the Belgrade Centre for Non-profit Sector Development and other, addressed to almost all ***municipalities and other public authorities***, was made accessible only pursuant to complaints lodged with the Commissioner and/or pursuant to his orders. However, some cities and municipalities refused to do so even after being ordered by the Commissioner, e.g. **Novi Pazar, Smederevska Palanka, Bela Palanka, Varvarin.**

8. Numerous pieces of **information about privatisations and (non)compliance with the assumed obligations, about the (in)actions of competent authorities in this regard,** pursuant to requests made by the Anti-corruption Council and other requesters to government authorities, competent ministries, ***the Privatisation Agency, the Securities Commission, the Central Securities Registry, the National Bank of Serbia, public enterprises*** *etc.* were made accessible only after intervention by the Commissioner. These include the cases of C Market, the main agreement with FIAT, Mobi 63, Port of Belgrade, KMG Trudbenik, investor agreement for the laying of an optical cable signed with Nuba Invest, the construction of an oil refinery in Smederebo – agreement with "Comico Oil" etc. However, information contained in the agreement between public enterprise "Srbijagas" and "Jugorosgas" has remained inaccessible.

9. **Information contained in agreements** entered into by *ministries, public enterprises, local authorities and other bodies* on **media advertising and certain campaigns and subsidies to the media,** pursuant to requests of the Anti-corruption Council and other requesters, were made available only after the Commissioner's intervention, although in some cases this has not been done, including e.g. **Telekom Srbija and the city of Leskovac.**

10. **Numerous pieces of information in connection with the deliberation of objections made by judges and prosecutors who were not elected in the competition for general election of judges and prosecutors,** i.e. information in connection with the review of decisions made by the first convocation of the ***High Judicial Council*** **(HJC) and the** ***State Prosecutors Council*** **(SPC)** by courts where the unelected judges and prosecutors had worked or unsuccessfully applied, e.g. information about their work performance, evaluations, the opinions of staff boards of courts or public prosecutors' offices, as the case may be, and other information and documents of relevance for those the deliberation of objections, were made accessible pursuant to orders of the Commissioner, as explained in detail in section 3.2 above, which deals with information in which the public took a keen interest.

However, **HJC did not provide all information even after being ordered to do so by the Commissioner. For example, it did not allow access to all minutes from sessions in which objections were examined, information about reasons for the removal of Council member Prof. Dr. Predrag Dimitrijevic from office and reasoned decisions adopted in the process of review of original decisions. Accordingly, enforcement action was initiated in connection with these orders.**

SPC complied with the orders in all four cases in which requesters lodged complaints with the Commissioner, although in one case a requester expressed his doubt that he was not given access to all available information. That requester was advised of the possibility to demand inspection by an administrative inspector.

11. Various pieces of **information relevant for the issue of restitution**, i.e. denationalisation, pursuant to requests of Restitution Associations. In most cases, such

information was made available only after the Commissioner intervened pursuant to complaints. In this regard, the Commissioner sent a letter to the Prime Minister to warn him about the non-transparency of public authorities in connection with such requests relating to activities and measures taken by competent authorities prior to the enactment of the Law on Restitution and Indemnification, as well as funds earmarked on government accounts for these purposes etc. Some of these pieces of information have remained inaccessible and will require enforcement of the Commissioner's decisions;

6.1.3.1. Most Frequent Reasons for Denial of Access to Information

Some of the reasons for which public authorities dismissed access to information have been discussed in the section of this Report that deals with responses of public authorities to requests for information (section 3.3.).

As already explained, in 2010, similarly as in earlier years, the most frequent reason for denial of access to information was alleged confidentiality of information or document. The decision to make available those pieces of information that an authority considers to be secret is as a rule left to the Commissioner. Authorities rarely bothered to prove the substantive reason and tended to *a priori* reject a request without applying the so-called public interest test, which is necessary for determining the overriding interest – whether it is the public's right to know or the interest to protect another right or public interest that could be jeopardised through disclosure (e.g. national security, national economic interest, ongoing investigation, criminal or other proceedings, privacy) – as required by the Law on Free Access to Information..

One of the reasons for such actions, apart from an apparent intent to conceal information from the public, is very often lack of knowledge, uncertainty of fear of persons authorised to respond to requests in public authorities. This fear of persons authorised for handling information request is exacerbated by a lack of adequate protection from liability in cases where, in an attempt to comply with a request lodged by a requester, they disclose information identified as confidential, in the belief that it was declared confidential in order to conceal an illegal action, malfeasance in office, corruption or mismanagement.

Another cause of further confusion on behalf of authorised officers is **the existence of numerous provisions in other legislation which *ex lege* declare certain information secret** and *a priori* preclude public access to it, contrary to the requirements set out in the Law on Free Access to Information and recognized EU standards. the most striking example of this is the Law on Tax Procedure and Tax Administration (Article 7) and actions of the Tax Administration within the Ministry of Finance, which denies requesters access to information almost by default, invoking provisions of the said Law which allegedly stipulate that such information constitutes "official secret", although this form of secret does not exist as such according to the statutory classification of confidential information. The situation is the same with laws that govern anti-money laundering activities and the securities market and almost regular acting by the Securities Commission.

Furthermore, **a frequently cited reason for denial of access to information is the allegation put forth by public authorities that requesters do not have what is known as "justified interest",** i.e. that they are not a party to proceedings in connection with which information is requested, which, as already explained above, is not acceptable as justification for denial of access to information under the Law on Free Access to Information, because that Law guarantees freedom of information to everyone under equal conditions and does not allow public authorities to demand of requesters to furnish proof and reasons for requesting information. Quite

the opposite: the onus is on public authorities to demonstrate that the public, and by analogy a requester as a representative of the public, does not have a justified interest in accessing information, in cases where an overriding public interest or the right to privacy prevails. This reason has often been invoked even by judicial authorities.

In many cases, public authorities tend to **dismiss access to a whole document claiming that it would constitute a violation of the right to privacy**, even in cases which concerned salaries and other compensation received by public office holders or in cases when only certain information should have been withheld, e.g. personal information contained in a document – bank account, address etc. – while all other information should have been made available.

The fact that a single person filed multiple requests for information was more often than not qualified as an abuse of freedom of information, **even where such requests were absolutely legitimate.** Authorities have also tended to reach for this justification in cases where requests related to voluminous documents, which has also been seen as an abuse of freedom of information, even when information was available electronically and the authority concerned could have made it available to the requester without much effort.

Some public authorities have denied they were subject to the Law on Free Access to Information at all, claiming they did not have the status of public authorities within the meaning of that Law. Among them were *Telekom Srbija and Belgrade Airport.* Also, the *Higher Court* of Belgrade denied in 2011 that the Law on Access to Information applied to information on court activities, maintaining that it applied only to information on court administration. The Court substantiated this view by referring to the European Convention on Access to Official Documents (2009). The Commissioner exchanged letters with the Higher Court in connection with this issue, in an attempt to prove the erroneousness of such view. He supported his reasoning with the following facts: the National Assembly of the Republic of Serbia had not ratified the said Convention and it had not yet taken effect, because, under Article 16 of the Convention, it needs to be ratified by 10 Member States of the Council of Europe in order to become effective, and it had been actually ratified by only three of them. Furthermore, even if the Convention had been in effect, it could not have provided rationale for such view of the Higher Court, as the Constitution of the Republic of Serbia and the Law on Access to Information clearly showed that the country had opted for a broader approach, providing that the Law applied to all public authorities – legislative, judicial and executive – with no exceptions in terms of scope of application. In this context, the Commissioner pointed out it was necessary for the Republic of Serbia to inform the Council of Europe at the time of notification of ratification documents that the obligations provided for in the Convention fully apply to all three arms of the government, similarly as some other member states of the Convention with similar or identical arrangements in internal legislation have already done.

Of the total number of resolved justified complaints (1,458 complaints), in 8.5 % or 124 cases public authorities failed to comply with orders given in the Commissioner's decisions. Of that number, 62 were orders issued to local public authorities, 16 to judicial authorities, including HJC, while 45 orders were issued to other national authoritiers, ministries and national-level organisations, institutions and public enterprises.

Some of the striking examples are listed above.

Blatant examples of inadmissible actions of public authorities include the already mentioned case of the Higher Court of Belgrade in connection with the violation of an attorney's right to access requested information, which was tantamount to curtailing the right to a defence, as well as the case of the Tax Administration, which originally denied

access to information on the largest tax debtors and some other information in connection with its work that the Tax Administration considers to constitute the so-called official secret.

Thus, the Tax Administration of the Ministry of Finance Тако се Пореска управа failed to comply with the Commissioner's orders in two more cases. Other ministries that failed to comply with the Commissioner's decisions in 2011 ioncluded: *the Ministry of Economy and Regional Development (2), the Ministry of Internal Affairs (3), the Ministry of Justice (1) and the Prison Administration – District Prison in Novi Pazar within that Ministry (1), the Ministry of Labour and Social Policy (1), the Ministry of Defence (1) and the Ministry of Human and Minority Rights and Public Administration and Local Self-government (1).*

At the local level, public authorities with the highest rates of non-compliance with the Commissioner's decisions in 2011 included *the bodies and organisations of the following municipalities: Smederevska Palanka (7), Zvecan (7), Srbobran (3), the city of Leskovac (3) and Belgrade (4).*

As regards national-level public enterprises and institutions and companies with state-owned equity, *Telekom Srbija* stands out in terms of non-compliance with the Commissioner's orders in 2011 *(4 cases).*

6.1.3.2. Enforcement of Commissioner's decisions

Pursuant to an amendment of the Law on Free Access to Information of 26 May 2010, the Commissioner is responsible for administrative enforcement of his decisions in accordance with the provisions of the law governing general administrative proceedings which pertain to enforcement of non-financial obligations. This means the Commissioner has the power to impose and charge fines in an amount up to RSD 200,000 to force public authorities to comply with his orders. Where even those measures fail to produce effects, the Commissioner, according to the law, seeks assistance from the Government to ensure compliance with the orders, which includes direct enforcement.

Enforcement of the Commissioner's decisions by imposing fines has already produced tangible results. In 2011, the Commissioner received 125 petitions of for enforcement of the Commissioner's decisions in order to obtained access to information, pursuant to which the Commissioner passed 67 conclusions allowing the execution of decisions and 51 conclusions on imposition of fines, pursuant to which he **imposed 51 fines, including 28 fines of RSD 20,000.00 and 23 fines of RSD 180,000.00. In 70 cases enforcement was terminated because the public authorities concerned in the meantime complied with the Commissioner's orders and/or concxlusions allowing their execution.**

In 2011, eight public authorities did not pay the fines imposed on them to the budget. Some of these received multiple fines and yet failed to comply with the Commissioner's decisions, including *the Higher Court of Belgrade, the Securities Commission, the Anti-money Laundering Administration within the Ministry of Finance, the Municipality of Srbobran and the Faculty of Law of the University of Belgrade.*

In 17 cases where the Commissioner had used up all available options, the Commissioner, in accordance with the Law, **sought assistance from the Government to ensure compliance with his orders**, including through direct enforcement. The Government's Annual Report on Implementation of the Law on Access to Information states that in such situations the Government's Secretariat General "sent communications to the ministry in charge of supervision

of the authority concerned with a view to taking necessary enforcement measures." No other concrete information is provided and there are no indications of the outcomes of implemented measures.

6.1.3.3. Outcome of the Commissioner decisions pursuant to complaints in administrative disputes

The Administrative Court received 45 complaints against the Commissioner's decisions in 2011. Of that number, 31 were lodged by information requesters and 10 were lodged directly by authorities of first-instance, whose complaints are inadmissible, 3 were lodged through the Republic Public Prosecutor and one through the Republic Public Attorney.

The Commissioner responded to 30 complaints on request from the Administrative Court. **The Administrative Court ruled on 30 of those complaints. Of that number, it rejected 10 complaints by information requesters as unjustified, thereby confirming the Commissioner's decisions, dismissed 15 as inadmissible, including those lodged by public authorities, and terminated the procedure in four cases. In the case of one complaint, lodged by the Republic Public Prosecutor's Office on special grounds against a decision of the Commissioner, the Administrative Court overturned the decision and returned the case for renewed deliberation, reasoning that sufficient justification was not provided for one part of the decision. The Commissioner obeyed the judgement and once again passed the same decision, this time unchallenged by the Public Prosecutor.**

Barring this one case, **there were no overturned decisions of the Commissioner in 2011, just as in 2010. From the aspect of judicial control of the legality of the Commissioner's work, this result is indeed praiseworthy.**

From the aspect of implementation of the Law on Access to Information, **of particular interest for the Commissioner was the decision of the Administrative Court No. 9U 12001/11 of 7 November 2011 by which the Court stayed the execution of the Commissioner's decision ordering Telekom Srbija to give a requester information on the amounts it had paid to printed and electronic media in the period 2005-2010 and the cooperation agreements in signed with the media in the same period.** The Administrative Court reasoned that execution of the Commissioner's decision would cause irreparable damage to Telekom and stated that the stay of execution was not contrary to public interest or prejudicial to the other party in the procedure. The Court also concluded that the complainant's legal status was a matter of dispute in this legal matter and could only be determined once the complaint has been resolved, which was not done by the Court as at the date of submission of this Report. Such decision of the Court is difficult to understand, not least because the same court, i.e. the Administrative Court, dismissed two complaints by Telekom Srbija as inadmissible, thereby acknowledging the company had the status of a public authority, an opinion which had also been upheld by the formed Supreme Court of Serbia, which also dismissed a complaint filed by the same entity in one case.

For more information on complaints lodged by first-instance authorities against the Commissioner's decisions and on judicial enforcement of freedom of information with regard to information held by the highest national authorities, see the third chapter of this document, which deals with activities taken by public authorities in the implementation of the Law on Access to Information (section 3.6).

6.1.4. Handling of freedom of information requests by the Commissioner

Upon receiving a request for information referred or forwarded by another public authority, the Commissioner first checked whether the requested document was held by the authority which forwarded the request, i.e. whether it ought to have been held by that authority taking into account its sphere of competence. If he found that an authority indeed did not hold the requested document, the Commissioner forwarded such requests to an authority which, to the best of his knowledge, should hold such document (except where the requester does not want that), notifying the requester of such forwarding or instructing him/her to address the relevant authority personally, in which case the Commissioner provided an explanation and assistance with the submission of a request. **The Commissioner acted in this way pursuant to 156 forwarded cases in 2011. In further 347 cases he exchanged correspondence with public authorities in connection with the determination of competence for acting in specific cases and other issues associated with the implementation of the law.**

In 2011 the Commissioner also received 73 freedom of information requests relating to information created in his work, to which he responded on time. Requests were upheld and requesters received copies of requested documents in all cases but one, where the request was rejected because it would have been necessary to access more than 14,000 cases handled by the Commissioner since the commencement of his operations in order to determine whether the requested information was contained in the case files at all.

6.1.5. Handling of citizens' petitions by Commissioner

In 2011 the Commissioner received and acted on 355 citizens' complaints relating to the activities or failure to act by public authorities in various fields, insofar as these did not relate to the Commissioner's sphere of competence, i.e. the exercise of freedom of information. These petitions were forwarded to competent authorities for further proceeding, in which case the petitioners were notified accordingly, or alternatively the petitioners were instructed which authority to address. **The 33% increase in the number of petitions compared with 2010 is worrying because it is indicative of a lack of trust among the petitioners in certain institutions** to which those petitions related or which were competent in those cases.

6.2. Activities in cases in the field of personal data protection

6.2.1. Statistics of resolved cases

In 2011 the Commissioner received 719 cases in the field of personal data protection. As there were 37 cases carried forward from 2010, the total number of cases handled in this field in the course of 2011 was 756.

As at 31 December 2011, the Commissioner acted on and resolved those cases as follows:

- **He carried out 159 inspections of compliance with and implementation of LPDP. Of that number, in 144 cases inspection procedures were closed, while in the remaining 15 cases they were carried forward to 2012. As regards the closed cases (144), in 111 cases the Commissioner found violations of LPDP, while in 33 cases no violations**

were identified. In the cases where violations of LPDP were found (111), the Commissioner identified a total of 175 violations of LPDP, which means that in some cases he found not just one, but two or more violations of LPDP;

- **He acted on 88 complaints, 78 of which were received in 2011 (10 complaints were carried forward from 2010). Of those 88 complaints on which he acted, the Commissioner had closed the procedures pursuant to 68 complaints (58 received in 2011 and all 10 from 2010), while 20 complaints were carried forward to 2012. (Procedures pursuant to those 20 complaints were closed by the time of submission of this Report to the National Assembly;**
- **He registered in the Central Register 394 data controllers and 2,083 records of personal data files they keep;**
- **He filed 26 requests for institution of infringement proceedings;**
- **He filed 3 criminal reports;**
- **He passed five decisions on received requests for transborder transfer of personal data from Serbia, including two decisions and three conclusions. One decision allowed the applicant to carry out transborder transfer of data, while the other denied the respective request. He also passed three conclusions on termination of the procedure due to withdrawal of requests by the applicants;**
- **He issued his opinion on 15 regulations;**
- **He gave 270 responses and opinions on specific technical issues.**

6.2.2. Procedure followed by Commissioner in the field of data protection

LPDP vests the Commissioner with a general right to supervise the implementation and enforcement of that Law. The Commissioner performs those duties through authorised officers – inspectors, who have a duty to carry out their supervision duties in a professional and timely fashion and to produce records of their enforcement activities.

In supervising the enforcement of the Law, authorised officers shall use knowledge acquired on their own initiative or learned from appellants or third parties. In supervising the enforcement of the Law, authorised officers shall furnish their official identification documents, the format of which is prescribed by the Commissioner.

In carrying out supervision, the Commissioner has considerable powers – the right to access and examine data and data files; complete set of documents relating to data collection and other processing activities, as well as to the exercise of data subjects' rights under the Law; general enactments of controller; and premises and equipment used by controller.

If it is found during supervision that the provisions of LPDP pertaining to data processing have been violated, the Commissioner shall warn the data controller that irregularities have been identified in data processing. Furthermore, the Commissioner may order rectification of irregularities within a specified time limit, suspend any data processing which is carried out contrary to the provisions of the Law and order the deletion of any data collected without proper legal basis.

The Commissioner's decisions are not subject to appeal, but they may be challenged in administrative proceedings. The Commissioner files petitions for institution of infringement proceedings in cases where violation of the provisions of LPDP has been identified.

In addition to his sweeping supervision powers, the Commissioner is also mandated to act on complaints as the authority of second instance. Persons filing requests for exercising a right related to processing may lodge complaints with the Commissioner in the following cases:

against a controller's decision rejecting or denying a request; if a controller fails to decide on a request within the specified time limit; if a controller fails to grant access to data or issue a copy thereof or fails to do so within the time limit and in the manner provided for in LPDP; if a controller makes the issuing of a copy of data subject to the payment of a fee the amount of which exceeds the necessary costs of producing a copy; if a controller, in violation of the Law, hampers or prevents the exercise of rights.

The Commissioner may dismiss a complaint, reject a complaint, override the first-instance decision of a data controller and order corrective action or pass a decision on justifiability of a request.

6.2.3. Actions taken by Commissioner in supervisory capacity

Examples:

1. A case involving prior checks of personal data processing operations that certainly created the greatest stir in the public was the introduction of the new "Bus Plus" system in the Belgrade public transportation system. This procedure was initiated by the Commissioner pursuant to the Notice of Intent to Create a Personal Data File submitted by Marketing and Services Company "Apex Solution Technology" d.o.o. Belgrade as a data controller. Inspection was carried out in the data controller's premises and the Commissioner pointed out the following irregularities to the data controller: there was a possibility of pairing data from the data centre situated at the head office of the company "Lanus" with those stored in the data centre of the Institute of Information Technologies and Statistics of the City of Belgrade, which could result in breaches of citizens' privacy; data subjects/citizens were not fully aware of all elements of processing of their personal data, and given that in this case personal data were processed on the basis of the consent of data subjects, it was necessary to obtain such consent; and, lastly, the data controller did not allow the Commissioner to access the agreements it had entered into with data processors.

The data controller also failed to inform the Commissioner of measures taken to rectify the identified irregularities, so the Commissioner issued an urging pursuant to a warning in which he ordered the data controller to rectify the identified irregularities. As the data controller failed to rectify the irregularities pointed out in the Commissioner's warning and instead chose to commence with data processing, the Commissioner passed a decision imposing a temporary ban on data processing pending the rectification of irregularities in processing; as the data controller failed to inform the Commissioner whether and how it complied with the decision, the Commissioner also issued an urging. The case is pending.

2. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Tax Administration of the Ministry of Finance on the basis of knowledge he gained *ex* officio, having been asked by a number of citizens whether it was legal to publicly state the unique personal identification number (JMBG) in the address of a taxpayer, as it was common practice for branches of the Tax Administration to serve their decisions without envelopes and the decisions contained, in addition to a taxpayer's name, also his/her unique personal identification number, clearly visible. The Commissioner's authorised officers carried out an inspection on the data controller's premises and on the basis of the facts found the Commissioner warned the data controller about the following irregularities in processing: when serving tax decisions and instruments to individuals by mail, the Tax Administration performed illegal processing of individual taxpayers' personal data, because those decisions and instruments were sent folded in three parts, affixed on both sides, and contained the recipient's name, surname, address and also unique personal identification number, the latter being printed and clearly visible; alternatively,

those decisions and instruments were sent in envelopes with a see-through window, which again revealed the taxpayer's name, surname, address and unique personal identification number. The Commissioner explained the inclusion of taxpayers' unique personal identification numbers was unnecessary and both inappropriate and disproportionate taking into account the specific purpose of processing.

The data controller rectified the irregularities stated in the warning by passing new instructions on the manner of serving tax and administrative instruments on taxpayers.

3. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Belgrade-based Legal Partnership "Karanovic-Nikolic" pursuant to a report by a citizen who alleged that the data controller's website showed his curriculum vitae with all his personal data and passport number, which he contended was a threat to his privacy.

The Commissioner's authorised officers carried out an inspection on the data controller's premises and on the basis of the facts found the Commissioner warned the data controller about the following irregularities in processing: the data controller posted on its web page, and thereby made accessible, personal data of the complainant contained in his curriculum vitae, which he submitted when he applied for a job. Under Article 8 paragraph 1 item 2 of LPDP, this constituted illegal processing for a purpose other than that originally specified. The data controller was ordered to put in place necessary measures to protect the data concerned on its web page within 15 days and to notify the Commissioner of those measures in writing within the same period, which the data controller did within the specified period, thereby complying with the Commissioner's warning.

4. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Advanced Vocational School of Railway Engineering, pursuant to a citizen's report of illegal personal data processing by video recording at a session of the school's Council. The Commissioner's authorised officers carried out an inspection on the data controller's premises and on the basis of the facts found the Commissioner ordered the data controller to rectify within 7 days the identified irregularities in personal data processing by means of video recording at the said session of the school's Council, as the processing was in this case carried out without the consent of the data subject, contrary to the requirements of Article 12 of LPDP. The Commissioner ordered the deletion of those data, i.e. destruction by a committee of the 2 (two) copies of optical discs where this recording is stored, one of which is held by the headmaster and the other by the chairperson of the school's Council, and to submit to the Commissioner, within a further period of 3 (three) days, evidence in the form of minutes of a committee of compliance with this order, with which the data controller fully complied.

For the reasons stated above, the Commissioner filed a request for institution of infringement proceedings with the Magistrate's Court of Belgrade against the data controller and its headmaster as the responsible person. The proceedings are pending.

5. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Ministry of Internal Affairs in connection with video footage shot from a camera location of the Ministry of Internal Affairs included in the traffic video surveillance system in Belgrade, near the "Arena" sports hall in Novi Beograd. Contrary to its original purpose, the video footage, about three minutes long, shows sexual intercourse between two unnamed young adults whose faces are clearly visible. The footage ended up on the Internet and was accessible on a number of web addresses.

The Commissioner's authorised officers carried out an inspection on the premises of the data controller (the Ministry of Internal Affairs) and on the basis of the facts found the Commissioner demanded an additional, clearer response from the data controller with regard to the legal basis for this specific data processing. The Ministry of Internal Affairs sent a communication to the Commissioner advising him it had not issued a public announcement that could have alerted the public to the fact that the video surveillance system was commissioned and the locations of the cameras and that spaces where the surveillance cameras are mounted have no textual or graphic notices or other signs that would indicate that the Ministry of Internal Affairs carries out surveillance on certain roads.

The Commissioner found that the data controller had no procedures in place that would govern the actions of persons who use or maintain the traffic video surveillance system in Belgrade; it had no procedures in place that would regulate the actions, rights and responsibilities of data processors and potential data users; on the premises of organisational units of the Ministry of Internal Affairs with operator and supervisor accounts for accessing the said video surveillance system there are not technical safeguards in place that would supervise and record the actions of persons who use those accounts (lack of separate video surveillance, recording of workstation access by means of an electronic identification card etc.); there are no adequate safeguards in place to identify the person who accessed data in case of abuse of the video surveillance system; persons with operator accounts can use optical recording devices (e.g. a mobile phone with a built-in camera etc.) take snapshots of their workstation monitors or video-walls where footage is streamed in real time or of any recording retrieved from the archiving system; the circle of persons who may watch the surveyed roads in real time is to wide; the data controller was not familiar with the content of the workstation concerned, which was sent for servicing upon its instructions; the data controller failed to adopt written procedures for servicing of technical equipment included in the video surveillance system.

On the basis of the facts found, the Commissioner cautioned the Ministry of Internal Affairs of the identified irregularities and the duty to rectify them within 15 days of receipt of the warning and notify the Commissioner of all measures put in place within the same period.

The data controller complied with the warning and submitted to the Commissioner, together with relevant supporting documents, its Binding Instruction on the Conditions of Use and Maintenance of Road and Junction Video Surveillance System in the City of Belgrade, effective as of the same day, which laid down a procedure that fully regulated the competences, responsibilities, powers and obligations of organisational units of the Ministry of Internal Affairs in connection with the scope, manner, conditions, rules and procedures of use and maintenance of the video surveillance system, which contained a definition stating that the purpose of the system is permanent remote surveillance of the traffic situation in Belgrade, with a possibility of use in security-related matters.
Furthermore, the Commissioner filed with the Special Unit for the Fight against High-technology Crime of the Higher Public Prosecutor's Office in Belgrade a criminal report against an unknown person for reasonable suspicion that he/she committed the criminal offence of Unauthorised Collection of Personal Data provided for in Article 146 paragraph 3 in conjunction with paragraph 1 of the Criminal Code, i.e. that he/she, on an unspecified date, acting in the capacity of an official of the Serbian Ministry of Internal Affairs, obtained without due authorisation and used for a purpose other than that originally intended the personal data of the persons shown in the footage, whose identity is known to the Ministry of Internal Affairs, by burning the video footage without due authorisation from the local disk at the workstation with a supervisor or operator account where it was stored to an optical medium or a data transfer and storage device, from which the footage was then uploaded on the Internet by the same or another person, resulting in its

availability on a number of web addresses to an unlimited number of persons. The proceedings are pending.

6. In connection with allegations put forth by the media that the State Prosecutors Council (SPC) used information held by the Security Information Agency (SIA) in the process of appointment and reappointment of public prosecutors in the Republic of Serbia, the Commissioner carried out an inspection of compliance with and implementation of LPDP by the SPC on his own initiative between25 March 2011 and 30 March 2011. Upon examination of: correspondence held at the Administrative Office of the Administration for Joint Affairs of Republic Authorities – a body that carries out mail reception, registration and sending duties and other duties for the SPC; minutes from SPC sessions; individual files of applications to job announcements for prosecutors; decisions on applicants who were not appointed deputy public prosecutors; and opinions on expertise, qualifications and suitability of unelected applicants for deputy public prosecutors obtained from other authorities and organisations where those applicants work as lawyers, the Commissioner made a note to confirm that none of those cases contained any opinions given by the SIA.

7. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Pension and Disability Insurance Fund (and a person identified by initials), pursuant to a report by a citizen who alleged that the Pension and Disability Insurance Fund sent his listing to his ex wife without due authorisation. The Commissioner's authorised officers carried out an inspection on the data controller's premises, where they found that the listings and data concerned originated from the registry of insured persons kept by the Pension and Disability Insurance Fund, that they were undoubtedly printed on the type of printer used by this data controller, but that it was not possible to determine which employee printed the listings and when and where he printed them, because the bottom of the first page, which carried an identification mark of the person concerned, was cut off. Officials of the Pension and Disability Insurance Fund explained that, under the Law on Pension and Disability Insurance, such information was given solely on request from insured persons.

On the basis of the facts found, the Commissioner identified irregularities in personal data processing which he pointed to the attention of the data controller in a warning. The Commissioner also reminded the data controller of its duty to put in place all technical, HR and organisational data protection measures in accordance with established standards and procedures that are necessary to protect the data against loss, destruction, unauthorised access, unauthorised modification, disclosure and any abuse and bind the persons in charge of processing to observe data confidentiality. The Pension and Disability Insurance Fund complied with the Commissioner's warning and put in place necessary data protection measures.

8. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Public Utility Company for Garages and Parking Areas "Parking servis" from Belgrade. The inspection procedure was initiated pursuant to a report by a citizen who stated he believed this data controller was in breach of LPDP because with every application for issuing or renewal of his resident parking permit it demanded, obtained and kept a photocopy of his identity card and registration certificate.
The Commissioner's authorised officers carried out an inspection on the data controller's premises, where they found that the procedure of issuing resident parking permits was regulated by the Decision on the Procedure for Issuing Subscription Permits for Using General Parking Areas managed by Public Utility Company "Parking servis". Under that Decision, in order to obtain a resident parking permit, an applicant must submit a request, a photocopy of his/her identity card (with presentation of the original document for examination), a photocopy of a registration certificate (with presentation of the original document for examination) and payment

or certified payment slip for an amount specified in the fee rate list. According to the data controller, the sole purpose of data collection is to determine whether a person is eligible for a resident parking permit, to enable control of the use of public parking areas in accordance with applicable regulations and internal control of employees in charge of issuing those permits.

In the procedure further to inspection, the Commissioner warned the data controller about irregularities in personal data processing, in that it obtained photocopies of identity cards and registration certificates as mandatory evidence when identifying users in the process of reception, processing, storage and acting on their applications for resident parking permits, which was not permitted, because the data thus processed are unnecessary and disproportionate to the purpose of processing both in term of quantity and in terms of type.

The Commissioner also ordered the data controller to: a) rectify within 8 days all identified irregularities in personal data processing by bringing its Decision on the Procedure for Issuing Subscription Permits for Using General Parking Areas in compliance with LPDP, including deletion of the wordings "photocopy of identity card" and "photocopy of registration certificate" from the relevant provisions, after which it should terminate the practice of obtaining photocopies of those documents from applicants when assessing their eligibility for resident parking permits and introduce a provision to replace the deleted wording which would stipulate that, in the future, compliance with those requirements would be assessed on the basis of data stated in registration certificates; b) to destroy by a committee within 30 days all photocopies of identity cards and registration certificates of resident parking permit holders obtained in the process of issuing those permits since 2003 and to submit to the Commissioner, within a further period of 3 days, evidence in the form of minutes of a committee of compliance with this order.

The data controller filed legal action with the Administrative Court of Belgrade against the Commissioner's decision. Proceedings are pending.

9. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Military Medical Academy, pursuant to a report by the non-governmental organisation Committee of Lawyers for Human Rights – YUCOM in connection with the sending of donor cards in envelopes with a see-through window in a way that makes it clearly visible that the envelope contains an organ donor card and exposes the recipient's name and surname, personal identification number and residing address in plain sight. In connection with the allegations stated in the petition, the Commissioner carried out an inspection and found that the allegations were true for about 100 donor cards. The Commissioner found this was an honest mistake which resulted from the fact the Nephrology Clinic of the MMA had no other envelopes at its disposal at the time, in an attempt to avoid additional expenses, because MMA carried out all activities in connection with organ donation on a volunteer basis. During the inspection, the Commissioner also found that appropriate technical, HR and organisational data protection measures were not in place. Furthermore, data processing lacked an appropriate legal basis, because the Minister of Health had not passed secondary legislation he was required to pass under the Transplantation Law in connection with the manner of and procedure for giving informed consent and the recording of written consent or prohibition of organ donation in the health insurance card, protection of organ donor information, the form of organ donor cards and the conditions that have to be met by institutions, authorities and organisations that issue donor cards. Also, the Biomedicine Directorate had not yet formed and was not maintaining a single national-level register of persons who gave written consent during their lives to organ procurement in case of their death for the purpose of grafting to the body of another person for treatment purposes, in accordance with the Transplantation Law. Furthermore, the Minister of Health had not yet regulated the registration of organ donors with the Single National Register of Donors, as well as

data to be stored, data storage and protection arrangements, procedure of accessing stored data, manner and procedure of issuing and keeping of passwords for retrieval of stored data, deletion of data, manner and procedure of storing details of all data retrievals and other issues of relevance for the maintenance of the Single National Register of Donors.

The Commissioner issued MMA with a warning in which he identified the following shortcomings: 1) donor cards were delivered by regular, instead of registered, mail to persons who gave their consent to organ donation; 2) there were no backup copies of electronic records of donor card holders, and 3) access to the electronic records of donor card holders, which are kept on a USB stick, is not secured by unique username and password combinations.

Apart from MMA, the Commissioner also inspected through his authorised officers the Nephrology Clinic of the Clinical Centre of Nis and the Clinical Centre of Vojvodina, where he also found irregularities in the notification of voluntary organ donor data processing and failure to put in place appropriate technical, HR and organisational data protection measures. The Commissioner therefore issued warnings to these institutions as well and pointed out the identified irregularities in data processing.

However, as the key issue with regard to personal data processing is the lack of relevant secondary legislation, the Commissioner also wrote to the Minister of Health on two occasions, urging him to adopt as soon as possible relevant secondary legislation in accordance with the provisions of the Transplantation Law. The Commissioner also explained to the Minister of Health that one of the consequences of the lack of relevant secondary legislation identified during the inspection was the fact that the procedure for processing organ donors' data was not uniform across Serbia and that donor information was not adequately protected. The Commissioner therefore reasoned it was necessary to adopt relevant legislation that would not only harmonise the operations of all institutions authorised for organ transplantation, but also provide managers and employees legal certainty in their work, while at the same time ensuring the protection of organ donors' rights and fully enabling the transplantation process. Although the deadline for adoption of the said secondary legislation expired in January 2012, by the time when this Report was written the Commissioner received no information concerning its adoption.

10. The Commissioner carried out an inspection of compliance with and implementation of LPDP by HYPO-ALPE-ADRIA BANK a.d. pursuant to a report by a citizen, who works as an officer of the data controller in one of its branches. In her report she alleged that the bank demanded of her to enter her unique personal identification number (JMBG) on the payment order when paying an instalment of her university tuition fee, which she did, after being told this was required under an internal order of the bank because its payment processing software would not work without the personal identification number.

In the process of written inspection, the Commissioner obtained a written response from the data controller, which stated that the bank does not enter the payer's unique personal identification number in payment orders when performing payment services, i.e. when individuals pay moneys to third party accounts. The fact that this personal detail of the complainant was entered in a payment order was the result of an operational error made by an officer of the bank, because none of their officers had ever been ordered either verbally or in writing to enter payer's unique personal identification number in a payment order.

On the basis of evidence thus obtained, the Commissioner found that the facts correspond to the allegations stated in the report in all particulars. The Commissioner warned the data controller about the said irregularities in data processing and ordered it to inform the Commissioner of all

measures taken and activities planned in this regard, which the data controller did, thereby complying with the warning.

11. The Commissioner carried out an inspection of compliance with and implementation of LPDP by Public Utility Company "Infostan" Beograd pursuant to a report by a citizen, which alleged that Public Utility Company "Infostan" used the address details contained in its database to send to the users of its utility products and services, together with their bills for May 2011, a payment order for the first instalment of combined insurance of occupied apartments, garages and possessions in them by the insurance company "Dunav Osiguranje".

The Commissioner carried out an inspection and warned Public Utility Company "Infostan" of the following: 1) the data controller acted illegally because it processed personal data without consent, in contravention of LPDP; it should be noted that service users had not given their personal data to the data controller for any purpose other than its core business activity – integrated charging of utility services; 2) as regards the notice sent by Public Utility Company "Infostan" to the users of utility products and services, which states that users who do not wish to continue receiving advertisements with their bills should sign a special statement and send it to the branch of Public Utility Company "Infostan" in the municipality of their residence, the Commissioner found that the said notice was based on an inaccurate interpretation of LPDP, and 3) obtaining of citizens' personal identification numbers and identity card numbers in a special statement constitute excessive and disproportionate processing of personal data, as these data were not necessary for the expression of users' will and for their identification.

12. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Municipal Police of Belgrade. The procedure was initiated *ex officio*, upon obtaining knowledge of the manner in which personal data of vehicle owners are obtained for the purpose of enforced collection of outstanding parking charges, which the Commissioner obtained during an inspection carried out at the Public Utility Company for Garages and Parking Areas "Parking servis".

Direct supervision was carried out at the head office of this data controller and on that occasion it was found that the Municipal Police of Belgrade had been obtaining information on vehicle owners who had outstanding public charges since 8 June 2011, on request from Public Utility Company "Parking servis" Belgrade. Until the date of inspection by the Commissioner's authorised officers, data processing had been carried out in this way on two occasions. Namely, Public Utility Company "Parking servis" sent to the Municipal Police of Belgrade a "Request for Information on Vehicle Owners", with a specification of registration numbers of vehicles the owners of which acted in violation of the Decision on Public Parking Areas of the City of Belgrade, enclosed to the request in the electronic form on a USB drive. After that, the Municipal Police of Belgrade would address the Information Technologies Directorate of the Ministry of Internal Affairs with a written request for information on vehicle owners. In both cases the Ministry of Internal Affairs received 17,581 inquiries. The Ministry of Internal Affairs provided the requested information to the Municipal Police of Belgrade and the latter forwarded it to Public Utility Company "Parking servis".

While this inspection was in progress, the Law on Public Utilities (Official Gazette of the Republic of Serbia No. 88/11) was enacted. In one of its provisions (Article 23 – Cooperation with Police and Municipal Police), this law authorises the Municipal Police of Belgrade to process personal data in such cases, which is why the inspection procedure was terminated. Namely, according to the said provision, where necessary for the performance of duties within the scope of utility service providers, for the collection of charges for utility services provided after the expiration of a deadline for payment or for the purpose of initiation of proceedings before

competent magistrates' courts, courts or administrative bodies in case of failure of service users to perform their obligations under the law, on a substantiated request from a public utility company, the police shall provide personal data for citizens, vehicle registration details and other data contained in the records it maintains in accordance with the law. Furthermore, public utility companies are required to cooperate with the police, the municipal police and the communal inspectorate in the performance of their duties, in accordance with the law. Such cooperation includes in particular: mutual notification, exchange of information, exchange of data, provision of direct assistance and taking of joint measures and activities of importance for utility activities.

13. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Health Centre "Dr. Dragisa Misovic", Cacak pursuant to a report by three citizens, because fingerprint identification devices were to be installed on the premises of this data controller in order to control the use of working hours and employees could be suspended or might not receive their salaries if they refused to give their fingerprints. To verify the allegations put forth in the petition, the Commissioner carried out an inspection and found out that the Health Centre "Dr. Dragisa Misovic", Cacak bought, installed and configured the application of a working hours logging system. This system is intended to be used for scanning of the index finger and middle finger of the left hand for the purpose of logging of working hours using biometric data.

Because of the observed irregularities, the Commissioner issued a warning to the Health Centre "Dr. Dragisa Misovic", Cacak, in which he pointed out the following: 1) While scanning fingers for control of the use of working hours, the data controller illegally processed its employees' personal data, since data controllers have no legal authority to collect biometric data and 830 persons employed by the data controller (whose fingers were scanned), did not give their consent for such collecting and processing of biometric data for these purposes; 2. While scanning fingers, the data controller illegally processed its employees' personal data, since finger images and algorithms for finger images used to control of the use of working hours are the type of data which are not proportionate to the purpose of processing; 3. The Data controller did not notify the Commissioner about its intent to establish a data file within the meaning of LPDP before data processing, i.e. before establishing of a data file, although it was its duty to do so; 4. The data controller did not form and does not maintain records of personal data processing pursuant to the provisions of LPDP, although it is its duty according to the principle "one file-one record", nor did he submit records of data files to the Commissioner.

In response to the Commissioner's warning, the data controller stated it would fully comply with this warning. The data controller also requested the instructions on what to do with the data file which was already established by scanning employees' fingers, and the Commissioner replied that the data file must be deleted, i.e. destroyed. The data controller notified the Commissioner that an appropriate committee was formed which destroyed the data file of employees formed by scanning fingers, enclosing evidence on destruction of this data file – minutes of the committee and photographs taken.

14. The Commissioner carried out an inspection of compliance with and implementation of LPDP by "Findomestic banka" a.d. Beograd. The procedure was initiated on the basis of thing the Commissioner found out *ex officio* about personal data processing in the procedure of opening of foreign currency current accounts for natural persons-residents. A direct cause for inspection was an article titled "Morning in the Bank" on the internet portal "E-novine". The Commissioner inspected the data controller's head office and found out that the data controller required the data mentioned in the said article for client profiling, including: name and surname, residing address, number and floor of the apartment, legal basis for occupancy, the duration of residence in the apartment, the cause of opening of a foreign currency account, qualifications, civil status, the number of persons living in that apartment, whether a client had children, phone and mobile

phone numbers, phone number at work, profession, the name of the post, type of a company, the type of ownership. The data controller's representatives explained that those were the data the bank officers entered electronically in the questionnaire titled "Client's Profile", which had contained the same set of questions and had been used in this bank since 27 July 2011. The data controller's representatives explained that if a client refused to provide any data contained in the questionnaire which is marked as mandatory, the bank rejected such client and did not provide him/her the requested services. They also said that by insisting on the profiling procedure, the Bank did not discriminate against clients who chose not to provide the mandatory data; it only consistently implemented the provisions of the Law on Prevention of Money Laundering and the Financing of Terrorism, with which they had to comply, as well as any other enactments passed on the basis of that Law.

The Commissioner concluded that in the procedure of opening of foreign currency current accounts for natural persons – residents, the data controller inadmissibly processed personal data disproportionate to the purpose of processing without proper legal grounds – without written consent of a person to whom the data relates. In view of the foregoing, the Commissioner warned the data controller to notify him 15 days about measures taken and activities planned to rectify the said irregularities in personal data processing.

In his warning, the Commissioner also concluded that if "negligible or low risk" existed, the Law provided a possibility to use "simplified actions and measures for knowledge and monitoring of clients", which the data controller did not use in its practice.

In this specific case, the Commissioner believed that, at the time of establishment of business relations at the opening of foreign currency accounts for natural persons – residents, the volume of collected data was not proportionate to the purpose of those business relations, i.e. it is disproportionate to the data necessary to provide that bank service, and this volume of data also exceeded the legislator' intention regarding the type and the volume of collected data in simplified actions and measures for knowledge and monitoring of clients. The Commissioner thinks that the bank must adjust the content of the questionnaire for each type of clients, business relations or services it provides.

The data controller notified the Commissioner in writing about the measures it took which were ordered in this warning and said it changed the content of the questionnaire and significantly reduced the number of questions.

16. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Provincial Secretariat for Education – later renamed the Provincial Secretariat for Education, Administration and National Communities, having its head office in Novi Sad. The inspection procedure was initiated pursuant to a report by a citizen. The purpose of inspection was to establish whether personal data processing within the "Centralised School Database and the System for Notification of Parents about Pupils' Success" was admissible. A legal person with which the Provincial Secretariat for Education concluded the Contract on Cooperation on Implementation of the Project "Centralised Database on Primary and Secondary Schools in the Autonomous Province of Vojvodina and Establishment of the System for Notification of Parents" is the limited liability company "*WDV Soft*" d.o.o, a company in which a majority stake is owned by the company *Spencer International LLC* from USA, and minority stake is owned by four foreign nationals.

Upon inspection, the Commissioner found out that the database in question collects personal data about the total of 200,271 persons, of which: a) 21,745 teachers, b) 7,000 members of non-teaching staff, c) 75,721 pupils, d) 91,320 parents, e) 4,003 members of school boards, and f) 482

headmasters. In addition, the Commissioner found out that the processing in question is performed without legal grounds, contrary to provisions of LPDP and other laws regulating the field of primary and secondary education, as well as competences of the Autonomous Province of Vojvodina.

The Commissioner examined with great care the Conclusion of the Government of the Autonomous Province of Vojvodina passed on 23 June 201, as well as the Conclusion of the Board for Education, Science, Culture, Youth and Sport of the Assembly of the Autonomous province of Vojvodina, which was binding according to the data controller and as such provides a proper legal ground for implementation of the project in question. In addition, according to the data controller, the Autonomous Province of Vojvodina carries out inspection and supervision in education institutions in its territory through its authorities in the field of pre-school, primary, secondary and higher education and this database is only "a way to automate business processes in the work of provincial inspectors which already exist". Further, the Provincial Secretariat for Education moved the database of national importance outside the building of the Government of the Autonomous Province of Vojvodina, in which "Telekom" switchboard and proper IT infrastructure is placed, and left it completely to "*WDV Soft*".

Since during the inspection the Commissioner undoubtedly concluded that the data controller carried out data processing without legal authorization or consent of a person to whom the data relate, he passed a order suspending further processing and ordered deletion of personal data of the total of 200,271 persons from this database within 10 days. The Commissioner ordered that the deletion of personal data in question must be carried out in the following manner: the Provincial Secretariat and "*WDV Soft*" must at their own expense entrust the deletion of data from all data storage media to a specialised firm in the territory of the Republic of Serbia which performed such activities. In addition, the Commissioner ordered to the Provincial Secretariat and "*WDV Soft*" to notify him within 15 days about implementation of the ordered measures and to submit him a copy of records on their implementation, which they did.

17. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Ponisavlje Museum Pirot, pursuant to a report by two citizens employed by this data controller. In the inspection, the Commissioner identified and warned the data controller of the following irregularities in personal data processing: cameras were installed in the Ponisavlje Museum Pirot on 22 September 2011, at first there were five cameras, one of which, installed in the curator's office, was removed on 29 September 20011; cameras were installed to record the interior and the exterior of the building without the support of a valid legal instrument; cameras did not cover some important rooms, such as the so-called vault room, where the most valuable items are placed, conservation workshop, photo laboratory and the Archaeological Centre, which is physically separated from the museum and is placed at other location, and which has valuable items; a decision on the introduction of video surveillance on locations where cameras were installed was passed independently by the Director of the Museum; the video system was financed from various donations; cameras were bought from the Elvet company in Pirot, which also installed the video system in the rooms of the Museum; computer, i.e. surveillance monitor is placed in the Director's office; cameras record 24 hours, including Saturdays and Sundays, and recordings are kept for seven days, after which period they are deleted in cycles; the curator's office was recorded without consent of persons subject to video surveillance.

Due to observed irregularities, the Commissioner issued a warning against the Ponisavlje Museum Pirot and its Director, he filed a request for institution of infringement proceedings to the Magistrate's Court in Pirot and Primary Public Prosecutor's Office in Pirot against the Director of the Museum for reasonable suspicion that he committed the criminal offence of malfeasance in

office, the criminal offence of unauthorised wiretapping and recording and the criminal offence of unauthorised taking of photographs.

18. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Limundo d.o.o. in Belgrade pursuant to a report of a citizen, who alleged in the report that during registration of future mebers, the data controller processes personal data by collecting, using and keeping scanned copies and photocopies of personal identity cards, passports or driving licences of those persons.

In the inspection, the Commissioner identified and warned the data controller of the following irregularities in personal data processing: in the registration of users on its internet pages www.limundo.com and www.kupindo.com, the data controller collects personal data by requiring of each person who wants to become a member to sent a photocopy of their identity card or other valid personal document, which is then kept in the manner envisaged by the law the Terms and Conditions of Use of Limundo, which are published on these Internet pages.

Due to observed irregularities, the Commissioner ordered the following by a order to the data controller: to rectify irregularities in personal data processing in registration of members on its internet pages www.limundo.com and www.kupindo.com by discontinuing the mandatory submission of photocopies of members' valid personal documents (personal identity card, passport or driving licence) within 8 days; the commission must delete the entire database of scanned valid personal documents (personal identity cards, passports or driving licences) of its members and destroy all their photocopies which the data controller has collected and kept from 22 May 2006, when the database was established, to the date when the Commissioner's order was complied with, and after that the data controller must provide evidence of deletion to the Commissioner, in the form of records of the commission, and evidence that all ordered measures have been taken, within 30 days. Data controller fully respected the Commissioner's order.

19. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the primary school "Vlada Aksentijevic" pursuant to a report of a citizen, who stated that this school, as a data controller, publishes at its internet presentation lists with names and surnames of pupils by classes and time when pupils are at school and these data can be accessed without previous log in and access codes, which is why anyone can learn the said personal data.

Upon inspection, the Commissioner found out that irregularities stated in the report were true, and he also identified other irregularities pertaining to publishing of personal data of pupils and employees on the internet, including pupils' photos, individual and group by classes, time of their stay at school and other locations, video recordings and individual photos and CVs of the part of employees and their photos with pupils. In addition, by examining the Central Register, the Commissioner found out that this data controller submitted no record to the Central Register maintained by the Commissioner.

A reply from the responsible person of this data controller stated that the school is a public and open institution and that information about it is not considered to be secret, that it fosters children's rights, openness, democracy and free movement of persons and information and that its web page had so far garnered only words of praise for its visual identity, modern conception and well-organised data. It also stated that names and surnames of pupils attending the school were not confidential, that lists were published so that parents would know at the beginning of a school year in which classes their children were and who their teachers were, that parents were informed at the beginning of school year that lists would be published on the internet page and they had no objections; instead, they were pleased because it is easier for them to look at the site than to come

to school, that the information that children were at school at a specific time is a well-known fact and that the information about who taught which class was also public.

As regards information on employees, the site only contains information about employees who gave their consent and who wrote texts about themselves, each teacher underwent training, has his/her access password and can delete information about himself/herself and others if he/she considers it is necessary and the purpose of publishing is to give parents insight in school, its activities and employees.

As regards the content of a video recording posted at *You Tube*, the responsible person explained that it was performance in which boys – pupils of this school – are dressed as Indians and it was posted on request of parents ad photos on activities of the school promote school activities, which is a legal duty of the school.

Notices about school shifts, when the classes start and when they end and when parent days were scheduled were published to inform parents because shifts rotated every week and the dates of school trips were published for the same purpose, so that pupils would not be late; in addition, it also served the purpose of presenting the school's activities. It was also stated that the Ministry of Education and Science encouraged improvement of provision of information to parents about school events important for children.

In the inspection, the Commissioner identified and warned the data controller of the following irregularities in personal data processing: processing of the said pupils' personal data by publishing them on the Internet is inadmissible because it contravenes LPDP, since there is no written consent for their processing nor legal authorization for such processing; the data controller has not established and does not maintain records in accordance with LPDP, nor did it submit them to the Commissioner for the purpose of registration with the Central Register.

The data controller received the warning in late 2011 and contacted the Commissioner within the statutory deadline, stating that they accept all statements in the warning. At the time of preparation of this Report, the Commissioner was arranging a meeting with this data controller to clarify certain issues in connection with the internet presentation.

20. The Commissioner carried out an inspection of compliance with and implementation of LPDP by the Faculty of Special Education and Rehabilitation (former Faculty of Special Education) in Belgrade pursuant to a report of a citizen from Australia alleging that the faculty carried out inadmissible processing by transmitting personal data of students who graduated from undergraduate and graduate courses at this Faculty to Melbourne, Australia. A person who filed the report subsequently sent to the Commissioner by mail a CD containing a scanned document of 195 pages titled "Database of Graduate Students of the Faculty since 1975", which contained personal data of 6,615 students.

In the course of inspection the Commissioner found the irregularities stated in the report and passed a warning by which he ordered the data controller to rectify these irregularities in personal data processing within 15 days. In addition, the Commissioner filed a criminal report with the Higher Public Prosecutor's Office in Belgrade against an unknown perpetrator for the extended criminal offence of unauthorised collection of personal data and he filed a request to the Magistrate's Court of Belgrade for institution of infringement proceedings against this Faculty as a legal entity and against the responsible person of the Faculty.

6.2.4. Commissioner's acting on complaints in the field of data protection

Examples:

1. A complainant submitted to a data controller – the Ministry of Internal Affairs – a request to exercise the rights regarding personal data processing, by which he requested access to a record of operational reports made by officers of a specific Police Authority in connection with the procedure of issuing weapons.
The data controller rejected the request by a decision, invoking the provision of Article 23 paragraph 1 items 5 and 8 of LPDP, reasoning that the complainant could not be given access to the requested data because that would be highly prejudicial to the interests of public security and that the right of that authority as the holder of information prevails over the requester's right of access to the document.

The complainant lodged a complaint with to the Commissioner, who overrode the data controller's decision by his decision and returned the case for renewed procedure. In the rationale for his decision, the Commissioner stated that the data controller had not found all deciding facts, because it did not state exactly what harmful consequences would arise if the data were made accessible to the complainant, whether the data contained in operational records were confidential and could only be accessed by police officers and whether the requested information could be made available to the complainant if they were rendered anonymous, i.e. provided in a form which does not allow identification of other person's personal data.

In view of the foregoing, the Commissioner overrode the disputed decision within the meaning of Article 232 paragraph 2 of the Law on General Administrative Procedure and returned the case for renewed procedure, ordering the data controller to comply with the Commissioner's objections stated in the rationale.

2. A complainant submitted to a data controller – the General Hospital of Sabac – a request to exercise the rights regarding personal data processing in which he requested a copy of medical records, i.e. his medical history with disease history and all other information from the time of his admission to the hospital until the time of his discharge.

The data controller rejected the request by a decision, invoking the provision of Article 37 of the Law on Health Care, with an explanation that data contained in medical documentation, which are patients' persona, constitute official secret and can only be made available on the basis of a court order.

The complainant lodged a complaint with the Commissioner, who overrode the disputed decision and ordered the data controller to provide the complainant with a copy of the requested medical documentation without delay, and in any case not later than three days of receipt of the decision.

In the rationale for his decision, the Commissioner stated that the data controller has misrepresented facts and wrongly applied substantive law. This because the issue of personal data protection is regulated in detail by the provisions of LPDP, as a general law enacted after the Law on Health Care, which only partially applied to personal data protection in terms of notification of patients and next of kin and of public authorities about patients' health. This means that LPDP governs the protection of rights in connection with personal data protection and lays down the procedure for the exercise of those rights. This applies to all personal data, including the particularly sensitive ones, i.e. data concerning health status, within the meaning of Articles 16 to 18 of LPDP. The Commissioner therefore concluded there were no obstacles for making the requested data available to the complainant in this specific case, as the nature of those was not

such that it could warrant limitations of the right to a copy of personal data within the meaning of Article 23 of LPDP.

In view of the foregoing, the Commissioner, acting pursuant to the complaint, on the basis of Article 233 paragraph 1 of the Law on General Administrative Procedure, overturned the decision of the authority of first instance and ordered the data controller to issue a copy of medical documentation.

3. The complainant, as a temporary guardian of a child, filed with the First Primary Court of Belgrade a request for exercise of rights in connection with personal data processing whereby he requested the issuing of a copy of Minutes of Hearing of the child as the defendant in criminal proceedings before that court.

As the data controller failed to honour the request within the period set by the law, the complainant lodged a complaint with the Commissioner, who passed a decision ordering the data controller to comply with the request for the exercise of rights in connection with personal data processing immediately and in any case not later than 7 days of the date of receipt of the decision.

In the rationale of his decision, the Commissioner stated that the complainant's right to request a copy of personal data from the data controller within the meaning of Article 21 of LPDP was unquestionable. As the data controller failed to honour the request, because it did not inform the applicant whether it held the requested data and did not issue a copy thereof within the statutory time limit of 30 days, nor did it pass a decision rejecting the request within the meaning of Article 25 paragraphs 2 and 7 of LPDP, without providing justification for its failure to honour the request, the Commissioner ordered the data controller to honour the request in accordance with the provisions of Article 39 paragraph 3 of LPDP.

4. The complainant submitted to a data controller – the Clinical Centre of Vojvodina in Novi Sad – a request for the exercise of rights in connection with personal data processing in which he sought a copy of medical documentation created during his treatment in 2005 and 2006 at the Department of Neuropsychiatry.

As the data controller failed to honour the request within the period set by the law, the complainant lodged a complaint with the Commissioner. In response to the allegations put forth in the complaint, the data controller informed the Commissioner it had honoured the request and provided the requested data to the complainant, with enclosed evidence of delivery.

As the data controller allowed the exercise of the right to a copy after the lodging of a complaint for failure to honour a request, but before a decision was made pursuant to the complaint, the Commissioner passed a conclusion and terminated the procedure pursuant to the complaint within the meaning of Article 39 paragraph 4 of LPDP.

5. The complainant submitted to a data controller – the Administrative Court – a request for the exercise of rights in connection with personal data processing in which he requested a copy of a case file relating to him in a case heard before that court.

As the data controller did not honour the request in accordance with the provisions of LPDP, because it did not inform the complainant about the issuing of a copy within the statutory time limit of 30 days, without justifying its failure to honour the request and without passing a decision rejecting the request, the Commissioner concluded the situation warranted the application of Article 39 paragraph 3 of LPDP, which stipulates that the Commissioner, when he finds that a

complaint lodged for failure of a data controller to decide on a request is justified, passes a decision ordering the data controller to comply with the request within a specified time limit.

The Administrative Court sent a communication informing the Commissioner it had complied with the Commissioner's decision within the seven-day period and provided a copy of the case file to the complainant.

6.2.5. Transborder Transfer of Data out of Serbia

Transborder transfer of data out of the Republic of Serbia is regulated by only one provision of the Law on Personal data Protection, which is not enough. This provision stipulates that data may be transferred from the Republic of Serbia to a state that is a party to the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and to a state or an international organization that is not a party to the Convention if such state or international organization has a regulation or a data transfer agreement in force which provides a level of data protection equivalent to that envisaged by the Convention. The Commissioner determines whether the requirements are met and safeguards put in place for the transfer of data from the Republic of Serbia and authorizes such transfer.

The application of this provisions is indicative of the insufficient level of regulation of this issue, since it does not provide for a procedure of deciding on the permissibility of transborder transfer of personal data out of Serbia, nor did it provide for an obligation to pass a secondary legislation instrument that would govern in more detail this procedure and the manner of assessment of compliance with the requirements and the adequacy of personal data protection in accordance with the Convention. Furthermore, certain basic terms are either undefined or inappropriately defined (including data controller, processor, data user etc.) and there are no provisions regarding the scope of application, delegation of personal data protection duties, i.e. contractual processing and subprocessing, allowing the use of data, vesting the Commissioner with powers to prohibit the transborder transfer of personal data out of Serbia in the course of inspection etc., all of which speaks of the need to regulate this subject matter more thoroughly and to make it compliant with relevant international documents.

Since this issue is not properly regulated by the Law on Personal Data Protection, and particularly because the procedure is not regulated, the Commissioner prepared appropriate guidelines for the procedure in this case, which should primarily help parties to prepare precise and properly substantiated requests and supporting documentation and they should also provide assistance to the Commissioner's Office in processing of these requests.

In 2011, the Commissioner acted on 10 requests in which applicants requested permission from the Commissioner for transborder transfer of data out of the Republic of Serbia. Of that, five requests were filed in 2011 (three in the second half of December 2011) and five were carried forward from 2010 and resolved in the course of 2011.

Requests for transborder transfer of personal data submitted in 2011 covered data relating to: employees, health professionals, trade partners – customers and suppliers, candidates in testing programs (biometric data) and persons who applied for visas to customer centres. Countries to which transborder transfer was requested included USA, India, Malaysia and the Philippines. In most cases, applicants were large business corporations which sought to transfer personal data from Serbia to their contractual processors and/or users in foreign countries for the purpose of creating centralised databases (e.g. of employees) and corporate management of those data on

group level. For some categories of persons (e.g. customers, suppliers, tested candidates etc.), the purpose of transborder transfer was further processing, use and storage of data.

Judging by the requests received so far, most of them tend to be incomplete, i.e. not sufficiently substantiated, and supporting documents tend to lack sufficient evidence for fact-finding for the purpose of deciding in these cases. These include relevant facts in connection with personal data processing and transborder transfer out of Serbia, such as: legal basis for processing and transfer, identity of data controllers, contractual processors, data users and other persons to whom the data controller intends to make personal data available, the manner in which rights, duties and responsibilities in connection with the intended transfer and further processing are regulated (agreements providing for transfer and further processing), types of processed data, the purpose of personal data processing and transfer (who will receive the data, what data, for what purposes and on what legal basis) and further use of data (who will receive the data, what data, for what purposes and on what basis), the duration of intended processing etc.

Furthermore, applicants generally do not provide adequate documentation; they tend to provide translations of standardised agreements which broadly regulate issues in connection with the processing and intended transfer of data, from which it is impossible to glean facts relevant for an assessment of the level of protection accorded to the personal data for which transfer is sought; meanings of specific terms used in those agreements often do not comply with the provisions of LPDP from the aspect of terminology and substance (e.g. LPDP does not recognise the categories of "data exporter" and "data importer" which tend to be used in the standard agreements provided by applicants). Due to these shortcomings, parties in procedures are often ordered (sometimes repeatedly) to make their requests compliant and to provide complete and proper documentation, which ultimately delays the procedure and extends the process of deciding on the requests.

As this issue is not properly regulated, the Commissioner's Office is available to parties for any and all preliminary clarifications before submission of requests for transborder transfer of data out of the Republic of Serbia and for all clarifications of the procedure needed because of the shortcomings of LPDP in this regard. In this context, the Commissioner also passed ten opinions on transborder transfer of personal data out of Serbia, both in Serbian and in English. The aim is to assist the parties in the preparation of proper and duly substantiated requests and supporting documentation, as well as to assist the Commissioner's office when acting on those requests.

In the course of 2011, the Commissioner passed five decisions on requests, including two decisions and three conclusions. One decision allowed the applicant to transfer personal data out of Serbia, while the other rejected the request. The three conclusions on termination of procedures were passed where applicants withdrew their requests.

Examples:

1. The Commissioner received a request from the company *Lexmark*, with registered offices in Belgrade, founded by an international provider of global technologies (printer manufacture/sales). The company requested from the Commissioner to allow transborder transfer of personal data from Serbia to the company's head office in the USA for further processing with the aim to establish a single database for all companies of the Lexmark group.

Upon receipt of the request (more specifically two requests, one of which related to transborder transfer of data on employees and the other to transborder transfer of data on trade partners – customers and suppliers), it was found that it contains both formal and substantial shortcomings. The Commissioner ordered the applicant on several occasions to make the request compliant and to provide proper documentation from which it would be possible to find facts relevant for

deciding on the request. In this specific case, the requests did not contain all necessary information and the data processing and transfer agreement entered into between the applicant and the processor in the USA did not contain clear and precise definitions of rights, duties and responsibilities of the parties with regard to personal data protection and in particular with regard to further forwarding of those data to companies outside the USA. The applicant was therefore ordered to make the requirements more specific and to provide additional explanations of certain vaguely formulated provisions of the agreement and the documentation enclosed with the requests. Complying with the order, the applicant subsequently specified in more detail the requirement relating to employees, with regard to content, and supplemented the documentation; it also withdrew the request for transborder transfer of data on trade partners – customers and suppliers.

Upon completion of the procedure, the Commissioner passed a decision allowing the applicant to transfer from Serbia to the USA data on the data controller's employees, including name and surname, vocation, e-mail address, contact phone and bank account number and to provide those data to a US-based processor for the purpose of establishing a centralised database that would contain this type of information for all companies belonging to this international group. However, the applicant was instructed to decide before the transfer of personal data in which way the data will be handled after the expiration of their contractual processing. Furthermore, the decision did not allow further transfer or other disclosure of those data to legal entities outside the contractual processor in the USA. At the same time, a conclusion on termination of procedure was passed pursuant to the request for transborder transfer of data relating to trade partners – customers and suppliers – from Serbia and their submission to the contractual processor in the USA because the applicant withdrew the request.

2. The Commissioner received a request from the Belgrade-based citizens' association *MAC* for transborder transfer from Serbia to the USA of personal data processed by this company within a candidate testing program in Serbia. In this specific case, in addition to such data as name and surname, address, phone number, sex, date of birth, nationality and mother tongue, data obtained from candidates during testing included fingerprints, photographs and audio and video recordings, all covered by the request for transborder transfer of data.

Taking into account the statements made in the request, it was demanded of the applicant to make the request compliant in terms of content, to provide proper evidence of legal basis for data processing and transborder transfer and the arrangements governing mutual rights, duties and, above all, responsibilities with regard to personal data processing between the applicant and other persons who would have access to the personal data, to provide information on the procedures and measures put in place to protect and safeguard personal data, the manner of exercise and protection of rights of data subjects in case of potential abuse of such data etc.

Upon examination of the supplemented request and the documentation provided, including in particular the text of the form included in the statements made by the candidates who take the examination, it was found that data subjects were not clearly informed about data processing within the meaning of LPDP and that, consequently, from the aspect of protection of data subjects' rights, such statement cannot constitute proper legal basis for data processing, or indeed for transborder transfer of data.

Taking into account the manner in which personal data were collected and processed in this specific case and the type of personal data involved (biometric data) for which transborder transfer is sought, apart from weighing the legality and proportionality of data processing, the Commissioner also made an assessment of the potential risk posed by such processing of data and their further transfer in terms of protection of fundamental rights and freedoms of the data

subjects. The Commissioner took the view that the purpose of personal data processing in this particular case, and by analogy the purpose of transborder transfer of data, could be achieved by less invasive means.

Upon completion of assessment of legality of data processing, the Commissioner passed a decision rejecting the applicant's request for transborder transfer of data out of Serbia, because the taking of fingerprints (papillary lines) by the applicant as a data controller constituted illegal processing within the meaning of LPDP, as this particular detail was not necessary to achieve the purpose of processing and processing of this type of information was disproportionate to the purpose of such processing. This specific case was found to be a case of excessive processing, because the data controller had already obtained signatures in hand, recorded electronically, and photographs taken on the spot; together with video and audio recording of the examination event, this constituted sufficient data for reliable identification of persons who took the test. When passing this decision, the Commissioner also took into consideration the fact that the applicant had failed to rectify shortcomings in data collection because it had not obtained the required consent from the data subjects.

3. The Commissioner received a request from *Societe Generale Bank* with registered office in Belgrade for an opinion on the collection and processing of data of clients who use a new service offered by the bank and on the procedure for possible transborder transfer of those data from Serbia to a country which is not a member of Convention 108 and their subsequent use and processing.

In his opinion, the Commissioner highlighted all obligations of data controllers in terms of data collection and processing, including in particular the obligation to enter into an agreement on transborder transfer of personal data out of Serbia to regulate mutual rights and responsibilities, in particular responsibilities between a data controller and a contractual processor or other persons who were given access to personal data by a data controller.

The procedure of transborder transfer of data out of Serbia is initiated by a request in writing submitted to the Commissioner by data controller, which request should include all elements on the basis of which it is possible to clearly and fully establish compliance with relevant requirements for data processing in accordance with the general principles of personal data protection, including in particular the existence of relevant legal basis for processing (legal powers or consent of the data subject), a clear indication of identity of the data controller/contractual processor/foreign user, the categories of data subjects, the country to which data are to be transferred, the type of personal data involved, the purpose of processing and the purpose of transborder transfer, the manner of data processing, the duration of processing, the period in which data will be kept, the manner in which data subjects can exercise their rights, applicable safeguards and other information of relevance for personal data processing and their possible transborder transfer out of Serbia. Together with a request for the Commissioner's permission, the following documentation must be provided: evidence of legal basis for the processing of personal data the transfer of which is requested; an agreement governing mutual rights, duties and responsibilities in connection with the intended transfer and further processing of personal data between the data controller and the contractual processor and/or foreign user; relevant legal instruments of the data controller that contain rules in connection with personal data processing, organisational, HR and technical measures put in place to protect personal data, the manner in which persons can exercise their rights, arrangements for the protection of rights of persons with regard to processing and other evidence supporting the statements made in the request and demonstrating appropriate levels of personal data protection.

On the basis of a request and its supporting documentation, the Commissioner acts in an administrative procedure whether relevant requirements are met and whether appropriate personal data protection measures are put in place when such data are transferred out of Serbia and he decides on the request accordingly.

6.3. Commissioner's Other Activities

In 2011, the Commissioner took numerous activities to promote the freedom of information and the right to personal data protection. In the first place, the Commissioner raised public awareness of the exercise of the freedom of information and the right to personal data protection by various means (meetings, the media, direct contacts, communications by citizens and NGOs). The Commissioner also provided assistance and gave advice to public authorities, both formally and informally, about more efficient implementation of the Law on Access to Information and LPDP.

The Commissioner performed these activities in several ways, e.g. through decisions he passes upon submitted complaints. Depending on the reason of a complaint, the Commissioner also explained in decisions passed upon complaints the nature of the violation of the law, which can help public authorities to avoid such mistakes in the future. The Commissioner also indicated in his warnings or letters in different situations certain omissions in the operations of public authorities and gave suggestions as to how those could be rectified. Also, the Commissioner provided advice via telephone, e-mail or at direct meetings with representatives of public authorities.

One of the ways in which the Commissioner provides assistance to citizens is through the information contained in the Catalogue of Public Authorities which the Commissioner's office made and posted on its website and which it updates regularly during the year. The Catalogue lists some 11 thousand public authorities subject to the Law on Access to Information and helps citizens when they address public authorities and seek to exercise their rights. At the same time, the Catalogue is also useful to public authorities themselves, including the ministry in charge of supervision, although it is not constitutive by its nature.

6.3.2. Initiatives regarding Regulations

In order to promote the right of access to information and the right to personal data protection in the Serbian legal system, **the Commissioner launched initiatives to pass new or amend the existing regulations on several occasions and supported initiatives of other entities.** The Commissioner also launched initiatives against the enactment of certain instruments in their draft forms. In such cases, the Commissioner pointed to the attention of public authorities and/or publicly announced that the provisions of certain regulations are incompatible or directly contrary to the Constitution of Serbia, the Law on Access to Information or LPDP.

Among such initiatives launched in 2011, the following merit special attention:

- An initiative for amendment of the Law on Access to Information, on the basis of which the ministry in charger of human and minority rights and public administration proposed a Draft Law and the Government endorsed a Bill on 26 January 2012 (a summary of these amendments is given in the introductory passages in chapter 3 of this Report),

- An initiative to amend the Law on Public Administration in connection with the provision of information to the public about the operations of public authorities; it was proposed that public authorities should be required under the law to create web presentations and publish important information about their work and that these provisions should apply *mutatis mutandis* to local self-governments and other entities with the status of public authorities under the Law on Access to Information. The Commissioner received no feedback in connection with this initiative,
- An initiative to bring the provisions pertaining to the exercise of the right to examine case files in the drafting of the new Law on General Administrative Procedure and the Law on Civil Servants in Local Self-governments in compliance with applicable standards in the field of freedom of information. The former initiative, in connection with the Law on General Administrative Procedure, was endorsed, while the latter was only partly endorsed and is still pending,
- An initiative to bring the provisions pertaining to the exercise of the right to examine case files in the drafting of the new Law on Civil Lawsuits in compliance with applicable standards in the field of freedom of information, which was unfortunately rejected,
- An initiative to bring specific provisions in the drafting of the new Law on Trade Secrets in compliance with relevant arrangements in the field of freedom of information, which was endorsed,
- Support to the initiative submitted by Transparency Serbia to the Ministry of Justice to amend the Misdemeanours Law – essentially an initiative to extend the general statute of limitation for infringements provided for in anti-corruption legislation. The outcome of this initiative is still unknown,
- An initiative/opinion sent to the Anti-corruption Agency in connection with the adoption of the Bylaw on the Protection of Persons who report Suspected Corruption, concerning the need for comprehensive regulation of the issue of whistleblower protection in both private and public sectors. This initiative garnered support, but has not yet been put into effect.
- The Commissioner supported the activities of the Ministry of Telecommunications and Information Society in connection with the Draft Conclusion on the Report on Compliance of Websites of Public Authorities with the Guidelines for Creation of Websites of Public Authorities, as well as activities which resulted in the publication of information booklets on work of national authorities, organisations and agencies on the E-government portal.
- The Commissioner took part in normative activities in connection with the defining of specific arrangements incorporated in the Law on Contracts and Torts and the Law on Banks, because certain provisions of those two laws were not compliant with the constitutional guarantee of personal data protection. The purpose of these activities was to introduce appropriate legislative arrangements for the collection and processing of these data.
- The Commissioner proposed to the Ministry of Justice to initiate an amendment of LPDP with provisions on video surveillance, which the Commissioner drafted and presented to the Ministry.
- The Commissioner proposed to the Ministry of Justice to initiate an amendment of LPDP with provisions that would introduce the possibility of processing personal data not only for the original purpose of their collection, but also for the purpose of fundraising exclusively for charities.
- In the field of personal data protection, the Commissioner took part in normative activities aimed at defining specific legislative arrangements in the Draft Law on Social Welfare.
- In connection with the Draft Law on Private Investigation Activities and the Draft Law on Private Security Services, the Commissioner gave his opinion, took part in discussions in connection with both laws and, finally, appealed to the Government to withdraw the Draft

Law on Private Investigation Activities from the procedure because it contained unconstitutional and inappropriate arrangements for personal data protection.

- The Commissioner took part in normative activities involved in the definition of provisions pertaining to personal data processing in a number of draft laws in the field of education (the Law on Basic Elements of Education has been enacted).
- In the field of personal data protection, the Commissioner took part in normative activities involved in the development of the Draft Law on Citizens' Permanent and Temporary Residence.
- The Commissioner took part in normative activities aimed at defining specific provisions of the Draft Law on Restitution and Indemnification.
- The Commissioner suggested redefining of certain provisions of the Draft Law on Unique Personal Identification Number with the aim of introducing more precise provisions on personal data collection and processing.
- In the field of personal data protection, the Commissioner took part in normative activities aimed at defining specific legislative arrangements in a number of secondary legislation instruments.

Example:

A number of citizens and consumer association complained to the Commissioner that shop assistants asked them for certain personal data – name and surname and unique personal identification number (JMBG) – when they returned purchased goods or raised a complaint. The basis for processing of these data is the Bylaw on the Content and Manner of Registering Sales by Issuing Fiscal Payment Slips, the Manner of Correcting Errors in Recording Sales using Fiscal Cash Register and the Content and Maintenance of the Book of Daily Reports (Official Gazette of the Republic of Serbia No. 140/2004), Article 8 of which provides that, if the individual or total value of purchased goods that are returned or complained against by a customer exceeds RSD 500, the NI Form must include, in block letters, the customer's name and surname and his/her unique personal identification number and the customer must sign the Form in hand. Article 2 of the same Article stipulates that an NI Form that does not comply with the requirements of paragraph 1 of that Article shall be considered invalid, while paragraph 3 states that for returned goods or goods otherwise complained about the individual value of which is below RSD 500, customer details and his/her signature in hand are not necessary.

As the said Bylaw provides the legal basis for the processing of these data, the Commissioner sent a Communication to the Minister of Finance in which he pointed to established legal standards in connection with personal data protection and explained that sales figures and tax compliance can also be controlled by other means that are less invasive for consumers and that do not pose a threat to their privacy and their right to data protection. Furthermore, the unique personal identification number is in itself a complex piece of information because it incorporates a number of personal details (the exact date of birth, the place of birth or registered residence of a person as of the effective date of the Law on Unique Personal Identification Number and the sex of a person). A unique personal identification number is unique to each individual and its illegal processing may result in various cases of abuse which may cause financial damage to the person concerned (e.g. in case of identity theft), but it may also prejudice his/her right to privacy. For this reason, unique personal identification numbers should be processed only where necessary for the purpose of processing. Processing of such data solely for the purpose of compliance with an administrative duty is absolutely disproportionate to the purpose of processing, which is why the Commissioner called on the Minister of Finance to review the justifiability of the arrangement provided for in Article 8 of the said Bylaw as soon as possible and to amend it in accordance with his legal powers.

Finally, the Commissioner made public announcements on several occasions highlighting the poor practice of passing regulations without public debates.

It should be pointed out that the Commissioner is not authorized to submit draft laws or to directly influence the amending of regulations by submission of amendments to draft laws. If he wished to submit a draft law or an amendment, the only way for the Commissioner to do so would be by indirect means, through other public authorities and bodies vested with the right to submit legislative initiatives. This was the case for example when the Commissioner penned the text of legislative provisions on video surveillance and submitted it to the Ministry of Justice with a proposal to initiate an amendment of LPDP.

The Commissioner believes that, for the purpose of harmonising the provisions on personal data contained in special laws with international standards, the Constitution of the Republic of Serbia and LPDP, as well as for the purpose of ensuring efficient operations, relevant regulations should be amended in that the backers of each piece of legislation, be it a new one or an amendment of an existing one, submit to the Government with their draft law also the Commissioner's opinion to those provisions that pertain to personal data protection.

6.3.3. Conferences

In 2011, the Commissioner organized and took part in a number of conferences and other meetings held in Serbia or abroad. (participation in important international conferences and other important events will be described under international cooperation - item 7.2. or this report.)

On this occasion we would like to point out in particular **the major international conferences organized by the Commissioner**:

- Conferences dedicated to the 28th September – the International Right to Know Day – which have been organized every year since 2006 in cooperation with and with support from the OSCE Mission to Serbia, the Independent Journalists' Association of Serbia, the Journalists' Association of Serbia, the Coalition for Free Access to Information and other international organizations (American Bar Association - Central Europe and Eurasia Legal Initiative, USAID, UNDP) and on which awards are traditionally presented to public authorities for achieved results and contribution to exercise of the right to know. The main award has been presented for the overall contribution to exercise of the right to know and a special award has been presented for the best information booklet on operations of authorities, following a public competition;

- Conference dedicated to 28 January – the European Data Protection Day – organized by the Commissioner in cooperation with the Partners for Democratic Change Serbia and with financial support from Open Society Fund Serbia. This year also marked 30 years since the opening of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data for signing. The Data Protection Day has been commended for the first time in Serbia with the aim to raise awareness of the rights of every person and of duties of persons who manage personal data.

6.3.4. Training

The Commissioner is fully aware of the huge importance of training, both for persons responsible for implementation of the Law on Access to Information and LPDP and for citizens who should know how to use the right of access to information of public importance and the right to personal data protection.

For that purpose, the Commissioner has invested significant capacities and time in education, but it is not nearly enough to achieve the full implementation of both these laws, particularly LPDP. This law has been enacted only recently and not only citizens, but also the persons responsible for its implementation are not fully aware of its provisions. For that reason, the competent authorities and also territorial autonomy authorities, local self governments and other authorities and organizations vested with public powers should participate in this process and contribute to improved implementation of the law within their own spheres of competence.

The importance of training for efficient exercise of rights and from the aspect of the fight against corruption is also evident for the GRECO recommendations (Group of States against Corruption within Council of Europe). Although training of human resources, as one of the main conditions for implementation of the Law on Access to Information, is an explicit duty of every public authority, in order to present the duties set out under this Law to employees, the Law also envisages the Commissioner's task to take necessary measures for training to help authorities and he has been performing it continually.

These activities have been performed in seminars and conferences organized by the Commissioner or by international organizations, Serbian NGOs, other public authorities or services, territorial autonomy authorities and local self-governments.

In 2011, the Commissioner organized **22 seminars and most of them were intended for employees in public authorities,** for proper implementation of the Law on Access to Information and LPDP.

A set of 6 of these **seminars was dedicated to preparation of information booklets according to the new Commissioner's Manual.** These seminars were intended for public authority at the national, provincial and local levels.

Two seminars were organized for employees in public authorities and organizations, in cooperation with the Human Resource Management Service, and were dedicated to implementation of LPDP and the Law on Access to Information, **one seminar** was organized in cooperation with the Library Association for members of the Association, **one two-day seminar** was organized in cooperation with the Association of Centres for Social Work for social workers and **one six-day** seminar intended for NGOs in the field of personal data protection, in cooperation with the citizens' association Partners for Democratic Change Serbia.

A separate presentation was organized in the field of **personal data protection for members of the banking sector in cooperation with the Association of Serbian Banks and for employees in the Electric Power Industry of Serbia.**

The Commissioner also organized three workshops for journalists and representatives of the media in cooperation with the UNDP Office in Belgrade and journalists' associations.

In addition, **the Commissioner, deputy commissioners and associates were lecturers on a number of seminars and meetings dedicated to affirmation of the right to free access to**

information and personal data protection. These events were organized by a number of authorities and organizations, such as the National Assembly, the European Integration Office, the University of Belgrade, the Faculty of Philosophy in Belgrade, the Faculty of Political Sciences, the Faculty of Organizational Sciences, the Diplomatic Academy of the Ministry of Foreign Affairs, "Nikola Tesla" secondary school in Belgrade, OSCE Mission to Serbia, UNDP Office in Belgrade and NGOs such as Transparency Serbia, Centre for Research, Transparency and Accountability, Coalition for Public Finance Supervision, Belgrade Centre for Human Rights, "Juzne vesti", REX Cultural Centre, Whistle, Belgrade Fund for Political Excellence, journalists' associations, Autonomous Women Centre, JUKOM etc.

The Commissioner, deputy commissioners and associates also took active part in debates, round tables and similar meetings organized by other public authorities, media and the civil sector and dedicated to civil control of the government and the fight against corruption, freedom of the media, providing information to citizens, availability of information of public importance and classification of information, personal data protection, Internet and web presentations and archival materials in order to affirm this right.

These rights were also affirmed through numerous editorials written by the Commissioner and his associates and published during the year.

6.3.5. Commissioner's Opinions

In 2011, the Commissioner received 310 requests to give his opinion on certain technical issues, 40 of which pertained to issues in the field of freedom of information, while 270 requests pertained to personal data protection. The requests were submitted by citizens, representatives of the media, public authorities etc. The Commissioner replied to all those requests.

During the year, the Commissioner's Office has updated on a regular basis the information contained in the Catalogue of Public Authorities it produced to facilitate the exercise of the freedom of information. The Catalogue includes some 11 thousand public authorities that are subject to the Law on Access to Information and it is published on the Commissioner's web presentation. The Catalogue is a useful tool for citizens and other potential users of this freedom, but at the same time it is also useful to public authorities themselves, including the ministry in charge of supervision, although it is not constitutive by its nature

With regard to issues in the field of personal data protection, in addition to issuing his opinions on numerous and various issues (270), the Commissioner also issued opinions on 15 regulations and was even involved on several occasions in normative activities in the drafting of specific provisions contained in new legislation or amendments of existing legislation within his sphere of competence. These were: Law on Contracts and Torts, Law on Banks, Draft Action Plan on Implementation of Personal Data Protection Security, Draft Law on Private Security Services, Draft Law on Private Investigation Activities, Draft Law on Mandatory Copies of Publications, Draft Law on Amendments to the Law on Basic Elements of Education, Draft Bylaw on Whistleblower Protection, Draft Law on Citizens' Permanent and Temporary Residence, Draft Bylaw on Obligations of Value Added Service Operators, Draft Law on Restitution and Indemnification, Draft Decree on Detailed Content, Time Limit and Manner of Obtaining Data necessary for the Establishment of a Single Database of the Central Register of Compulsory Social Insurance, Decree on Detailed Content, Time Limit and Manner of Obtaining

Data necessary for the Establishment of a Single Database of the Central Register of Compulsory Social Insurance, Bylaw on the Content and Manner of Registering Sales by Issuing Fiscal Payment Slips, the Manner of Correcting Errors in Recording Sales using Fiscal Cash Register and the Content and Maintenance of the Book of Daily Reports, and Draft Law on Unique Personal Identification Number.

6.4. Obstacles to Implementation of Commissioner's Activities

The effects of implementation of the Law on Free Access to Information would undoubtedly have been far better if only the competent authorities had been more willing to eliminate certain administrative and other obstacles impeding the implementation of the Law, which unfortunately have persisted for a number of years. In order to convey a more realistic sense of the actual achievements, this Report reiterates facts about the remaining obstacles that have not been fully or at least mainly eliminated and, as such, have significantly affected the Commissioner's work and consequently also the implementation of this Law and LPDP.

6.4.1. Lack of Comprehensive Supervision and Full Infringement Liability

In 2010 normative arrangements were put in place to ensure more efficient supervision of compliance with the Law on Free Access to Information.

According to the information obtained by the Commissioner from the Ministry of Human and Minority Rights, Public Administration and Local Self-government for the purposes of this Report, **in 2011 administrative inspectors of that Ministry performed 146 inspections** of compliance with the Law on Access to Information with regard to preparation and publication of Information Booklets on the work of public authorities and submission of Annual Reports to the Commissioner on activities taken by public authorities to implement this law. All of these inspections were carried out in **courts and public prosecutors' offices**. **No requests for institution of infringement proceedings were filed** pursuant to these inspections, in spite of the fact that some of these authorities failed to comply with these legal duties, as can be seen from the statistics available to the Commissioner in connection with reports submitted by public authorities.

Administrative inspectors also inspected public authorities for compliance with the Commissioner's decisions in 202 cases. The report states that in 121 cases it was found that public authorities complied with the decisions, while the remaining cases were pending. **Once again, not a single request for institution of infringement proceedings was filed,** although the very fact that the Commissioner ordered an authority to make information available to a requester pursuant to a complaint is a confirmation of justifiability of such complaint and of violation of the requester's right, which is also punishable as an infringement.

These facts seem to indicate that the function of supervision of implementation of this Law in 2011, similarly as in the six preceding years, was not fully in place, meaning that public authorities were not liable for violation of freedom of information or for breaches of other duties under the Law on Free Access to Information with regard to measures aimed at increasing transparency. If this practice continues, it might encourage public authorities to violate this Law.

Taking into account the number of justified complaints (1458) resolved by the Commissioner in 2011, which serves only as a measure of violations of rights in the process of

handling of requests, and the rate of compliance with other statutory obligations with regard to reporting, training and preparation and publication of information booklets, the fact that in 2011 administrative inspectors did not file a single request for institution of infringement proceedings against responsible persons in public authorities and that no one was held to account for a violation of this human right is reason for concern. It should be noted that the Commissioner's Office submitted relevant files for some two thousand cases to competent Ministries, including 1,751 notifications submitted to the Ministry of Culture, most of which became statute-barred, while in 2010 and 2011 it submitted 408 such notifications submitted to the Administrative Inspectorate, together with all available information on compliance with statutory obligations by public authorities.

6.4.2. Lack of Appropriate Protection for "Whistleblowers"

In spite of the fact that the Council of Europe adopted the Resolution on the Protection of Whistleblowers as early as in April 2010, calling on all Member States to review their respective regulations providing for whistleblower protection, Serbia still has no law that would comprehensively regulate the protection of whistleblowers, i.e. persons who report suspicion of corruption in the public sector or in the private sector.

Amendments of the Law on Free Access to Information adopted in December 2009 introduced provisions the purpose of which should have been to protect the so-called "whistleblowers" – employees of public authorities who, in the interest of the fight against abuse and corruption, disclose information marked as confidential which can uncover such practices. Instead, the adopted version of those provisions offers protection only to those who disclose information that the public would be allowed to access in any case in accordance with the Law, thereby making them *de facto* pointless.

Such legislative arrangement does not guarantee any protection from liability for employees who, in the genuine belief that confidentiality is used as a screen for some illegal action, disclose such documents or information.

The Commissioner supported the adoption of the Bylaw on Protection of Persons who Report Suspicion of Corruption in 2011 by the Anti-corruption Agency, but he qualified his support with an observation that this subject matter should be regulated by a law, in a comprehensive manner, and not just in those areas for which the Agency is competent.

6.4.3. Issues related to Enforced Execution of Commissioner's Decisions

Mechanisms established under Article 28 of the Law on Access to Information (in May 2010), according to which the Government should enforce the Commissioner's decisions on his request, are not fully functional in practice.

Under the amendments to the Law on Access to Information of 26 May 2010, the Commissioner is responsible for administrative execution of his decisions in accordance with the provisions of the law governing the general administrative procedure that pertain to non-financial obligations. However, when none of the measures at his disposal (enforcement through the imposition of fines) produce effects, the Commissioner is required under the Law to demand of the Government to enforce his decisions by its measures, including direct enforcement. On this

basis, **in 17 cases** in 2011 where the Commissioner had used up all available options, the Commissioner, in accordance with the Law, **sought assistance from the Government to ensure compliance with his orders**, including through direct enforcement. The Commissioner received no feedback on these cases from the Government, but he was informed on request for the purposes of this Report that the Government's Secretariat General sent communications to the ministry in charge of supervision of the authority concerned with a view to taking necessary enforcement measures.

The inspection data provided by administrative inspectors seem to indicate that direct enforcement was not applied against any public authority as a means of bringing it to comply with its duty to make the requested information or document available to a requester. Similarly, there have been no requests for institution of infringement proceedings against responsible persons in public authorities.

6.4.4. Inadequate Normative Environment and Lack of Implementation of Complementary Regulations

6.4.4.1. In the field of freedom of information

Serbian legal system lacks consistency in matters of freedom of information. The issue of incompatibility of the freedom of information provisions in many procedural and other laws with the provisions of the Law on Free Access to Information of Public Importance was also discussed in earlier annual reports and not much has changed in 2011.

The Commissioner believes the main reason for this problem is the lack of willingness of those in power to ensure the necessary unity of the legal system when new legislation is enacted. Another reason is the fact that the Government's rules of procedure contain no specific obligations for backers of draft laws to obtain the Commissioner's opinion in the process of drafting of legislation.

As a result of this, **many procedural laws** from the period of so-called "procedural transparency", e.g, the Law on General Administrative Procedure, and even some laws enacted more recently, e.g. those on litigation, criminal and misdemeanour proceedings, contain provisions that effectively **restrict access to information to certain persons (e.g. parties in the proceedings) or impose a requirement under which a person has to demonstrate "justified" or "reasonable" interest** to access information, or documents are provided for examination only, while copies are not allowed, which is contrary to the Law on Free Access to Information, under which this right is granted to everyone under equal conditions. This means that it is always assumed that the public has "justified" and "reasonable" interest to know and the onus is on public authorities to demonstrate the opposite.

Another group of laws contain restrictive provisions on access to information in that they refer to **data confidentiality** e.g. The Law on Securities and Other Financial Instruments Market, The Law on Police, the Law on Taxation Procedure and Tax Administration etc., and these provisions are invoked to deny access to requested information by default even in cases when this is not justified under the Law on Free Access to Information, i.e. when there is no evidence that such action is necessary to safeguard a legitimate overriding interest and that disclosure of requested information could result in severe legal or other consequences for an overriding interest safeguarded by the Law. Instead of applying the prevailing interest test to determine whether access to a piece of information should be allowed even though a document is marked as

confidential, public authorities almost never do so, leaving it to the Commissioner instead to make a decision when acting pursuant to a complaint.

There have even been cases where new legislation was enacted or existing amended after the enactment of Law on Access to Information (e.g. Law on Health Care) without taking due care of the need to harmonise relevant provisions on transparency of operations and freedom of information with European standards and/or applicable standards contained in relevant international documents on which the Law on Access to Information is based, as a *lex specialis* in the subject matter of freedom of information. This obligation stems from the Declaration on Accessibility of Information, jointly adopted in December 2004 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE representative for media freedom and the Special Rapporteur on Freedom of Information of the Organization of American States, which explicitly states, that, in case of divergence, the freedom of information law shall prevail over other laws.

For proper implementation of the Law on Free Access to Information it is vital to implement the Law on Data Confidentiality. Unfortunately, even though it was enacted in 2009, it is still not implemented; indeed, even the regulations necessary for its implementation have not been adopted yet, including those laying down detailed criteria for determination of confidentiality levels "state secret", "top secret", "classified" and "internal".

The Recommendation of the CoE Committee of Ministers No. 2002 specifies that "situations in which confidentiality of a document would, by automatism, preclude access to that document in the future, should be avoided", and that public authorities handling requests for information must satisfy themselves that all requirements for granting the confidential status are indeed met by applying the "interests weighing" test in each specific case; in this context, reasons for which a document is marked as confidential would be the deciding factors for decisions made pursuant to freedom of information requests.

The lack of supervision of implementation of the Law on Data Confidentiality and adoption of secondary legislation for its implementation results in delays in the process of overview of data and documents marked as confidential. Thus, a large volume of data and documents still bear confidentiality marks assigned at a certain point in time when it was considered necessary, but their confidentiality has never been reviewed or revoked once the pertinent reasons no longer applied. This significantly hampers the implementation of the Law on Free Access to Information and confuses person authorised to act under that Law. Furthermore, The Commissioner's experience shows and the public is well aware that in many cases where denial of access to requested information was justified by invoking confidentiality the actual aim of the public authority was to create a convenient screen illegal actions, notably corruption.

The Commissioner has warned the competent authorities of possible dire consequences of non-implementation of the Law on Data Confidentiality, most recently in a letter addressed to the Government in January this year, when he highlighted serious risks from such behaviour, not only from the aspect of exercise of rights of the public, but also, and perhaps even more so, from the aspect of security interests of the country and overall legal certainty.

Enactment of a law to govern the issue of opening of secret files would also be a not insignificant step towards full implementation of the Law on Free Access to Information of Public Importance and LPDP.

6.4.4.2. In the Field of Personal Data Protection

In the field of personal data protection, the situation is similar as in the field of freedom of information, in that it is characterised by an inadequate normative environment and a lack of implementation of complementary regulations. Regulations that have to be adopted, both due to formal obligations under relevant obligations and due to an essential need for normative regulation of certain issues, have not been adopted yet. Thus, for example, the Government has not yet adopted an Action Plan on Implementation of Personal Data Protection Strategy, with defined activities, expected outcomes, implementers of specific tasks and time limits for the performance of those tasks, although the deadline for its adoption expired on 20 November 2010. Also, the Government has not yet regulated the manner of archiving and protection particularly sensitive data, although it should have done so by 4 May 2009.

In addition to adoption of new regulations, some of the existing ones need to be amended because they are not compliant with relevant international documents. This is particularly true of LPDP itself. Namely, a number of provisions of LPDP are not fully harmonised with Council Directive 95/46 and Convention No. 108 of the Council of Europe for the protection of persons with regard to automated processing of personal data. Furthermore, certain provisions of LPDP are not even harmonised with the Serbian Constitution, in particular with Article 42, paragraph 2, which stipulates that personal data collection, storage, processing and use must be regulated exclusively by a law, while several provisions of LPDP (Articles 12, 13 and 14) stipulate that data processing (a collective term covering all actions taken in relation to data) can also be regulated by secondary legislation, other regulations or agreements.

Apart from the fact that they are not harmonised with relevant international documents, many provisions of LPDP are inadequate or incomplete. Moreover, certain issues are not even provided for in LPDP. For example, the Law does not contain even general provisions on direct marketing, biometry, video surveillance, medical data etc. Also, the Law contains inadequate or incomplete definitions of some basic terms (public authority, data user), provisions pertaining to transborder transfer of data are incomplete, there is no definition of "historical, statistical or research and development purposes", there is no clear distinction between absolute and conditional exemptions from LPDP, provisions pertaining to territorial application of LPDP are unclear, arrangements for the Commissioner's supervision powers are inadequate, no distinction is made between small data controllers (those that employ two or three persons and operate small databases) and large data controllers (those that employ hundreds or thousands of employees and operate huge databases), no distinction is made between public sector and private sector data controllers in terms of their obligations etc.

The Commissioner is of the opinion that one of the key shortcomings of LPDP is the lack of provisions on video surveillance, all the more so because there are no legislative provisions pertaining to this subject matter in Serbia's legal system at all. With this in mind, although he is not vested with the right of legislative initiative, the Commissioner prepared a comprehensive text of amendments to LPDP in connection with video surveillance and submitted it to the Ministry of Justice. However, he has not yet received any feedback from the Ministry in that regard.

All these and many other issues have been highlighted in a lengthy Report by the EC Delegation's Expert Team for the project "Support to the Commissioner for Information of Public Importance and Personal Data Protection". This report should serve as the basis for drafting any amendments to LPDP.

The Commissioner would like to point out in particular that it is necessary to amend numerous special sector-level laws, which either do not elaborate on the principles of LPDP or fail to do so fully and appropriately. Under the said Article 42 of the Serbian Constitution and Article 8 of LPDP, legal basis for data processing can be either the law or freely given consent of a person. The majority of Serbian laws, in particular those adopted prior to the enactment of LPDP, do not contain provisions which govern in more detail the issues of personal data collection, storage, processing and use, i.e. those laws do not specify which data can be processed, what the purpose of processing is, how and for how long data are stored, who can use those data etc.

6.4.5. Issue of Premises

The institution of the Commissioner, although formed in 2004 as one of the first independent institutions, still has no definitive and appropriate arrangement in terms of office space, which is essential for proper functioning to the best of its capacities. This issue even acquired a political dimension when it was included among the Political Criteria in the List of Short-term Priorities in the EU Integration Process following the Opinion of the European Commission.

Since the beginning of his activities, having first waited for six months to be given any offices at all, the Commissioner has twice been allocated additional offices in two different locations.

In April 2010, the competent committee of the Government passed a Conclusion allocated to the Commissioner the offices in Karadjordjeva 48 in Belgrade. However, those premises cannot be used until they are fully renovated, because the building is in an extremely poor condition and is protected by the State as cultural heritage, which means the required investment would exceed by far the budget allocations available to the Commissioner and other joint users of the building.

Under such circumstances, the majority of the existing staff was hired only in the last three years. Namely, the Commissioner operated until as late as April 2009 with a staff of only 6 (including administrative and technical jobs). As explained above, this was far below the actual needs and the caseload of the Office.

A direct consequence of the unresolved issue of premises is the backlog in the Commissioner's operations. Almost 2,500 cases (as much as one thousand more than in 2010) filed by complainants whose right to access information was violated are pending resolution through no fault of the Commissioner, even though they are well past the 30-day deadline set by the Law within which the Commissioner was required to pass a decision. This creates an excessive burden on employees, and an even greater burden is created by the fear that citizens might lose trust in the institution of the Commissioner. It should be noted that a piece of information becomes irrelevant if it is not timely provided. Due to the large inflow of cases and understaffing, the Commissioner has been forced to focus on tasks and duties the delay of which would cause greatest damage.

7. COOPERATION

7.1. Cooperation with Public Authorities and Organisations

Relations between the **National Assembly** of the Republic of Serbia and independent authorities are governed by the Rules of Procedure of the National Assembly adopted in mid 2010. During the drafting of the Rules of Procedure, suggestions made both by the Commissioner and by the Ombudsman in connection with the procedure pursuant to reports submitted by independent authorities were accepted, mostly due to international pressure.

These issues notwithstanding, cooperation between the National Assembly and the Commissioner has been good on a functional level. At its session held on 7 July 2011, the National Assembly reviewed and endorsed recommendations of the Judiciary and Administration Committee and the Culture and Information Committee in connection with the Report on Implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection. The Assembly's Conclusion on the Report and the Conclusion on its review were published in the Official Gazette of the Republic of Serbia No. 52/11 of 15 July 2011. However, recommendations given by the Commissioner in connection with the elimination of obstacles and improvement of the overall situation in the spheres of his activities have not been implemented in full.

In 2011, the Commissioner maintained good cooperation with **other autonomous and independent public authorities and control bodies** on issues of improvement of their operations. Cooperation was particularly good and intensive with the Ombudsman, while the State Audit Institution and the Public Procurement Administration acted as partners in a joint UNDP project to improve transparency in public finance.

The Commissioner also met with the President of the Republic, the Prime Ministers, the Presidents of the Constitutional Court and the Supreme Court of Cassation, the Republic Public Prosecutor and representatives of the Administrative Court to discuss various outstanding issues in connection with his spheres of work.

The **Government's** attitude towards the institution of the Commissioner has not changed much in 2011 compared with earlier years. Other than verbal support, there have been no major breakthroughs. Facts seem to indicate that the Government still does not recognize in this institution a useful partner in the attainment of their (presumably) shared objectives, including promotion of democracy and rule of law, and in particular the establishment of democratic control of authorities by the public as a key assumption for fighting corruption, abuse, wastefulness etc. This observation is supported by the apparent lack of willingness of the Government and its services to provide this institution with sufficient staff and premises for proper functioning and to ensure other conditions for the implementation of the laws protected by the Commissioner.

The Commissioner has drawn the attention of the Prime Minister and other members of the Government to specific issues of relevance for his scope of work. Some of those issues have already been discussed in this Report.

The Commissioner's relations with **Ministries, other public authorities and local authorities** were based on relations of the authority of the second instance to the authority of the first instance, provision of assistance through education seminars and other expert meetings and consultations on a daily basis between the representatives of these authorities and the

Commissioner's Office. Individual contacts and conversations with certain ministries produced results in some cases, as, for example, conversations with the Deputy Prime Minister and Minister of Internal Affairs, ministers of public administration, judiciary, telecommunications, culture and information.

The Commissioner had good cooperation with the EU Integrations Office in relation to meeting priorities set by the Government National Program, submission of a report on Serbia's progress in European integration and submission of answers to the EC Questionnaire.

Cooperation was also good with the Administration for Joint Services of the Republic Bodies in provision of corresponding technical services.

The Commissioner also cooperated with the Serbian Chamber of Commerce and the Chamber of Commerce of Belgrade, the Association of Serbian Banks and other business associations, with regard to provision of support to organization of expert meetings.

7.2. International Cooperation

The Commissioner's international cooperation in 2011 was successful, just like in previous years. In addition to the already established cooperation with offices of international and supranational organizations in Serbia (OSCE, United Nations Development Program – UNDP, the Delegation of the European Union to the Republic of Serbia, the Council of Europe), the Commissioner also established cooperation with other organizations and public authorities.

Through participation in several important conferences the Commissioner established cooperation with authorities of other states responsible for both or one of his spheres of competence. In addition, in 2011 the Commissioner was admitted to full membership in the Central and Eastern Europe Regional Forum of Personal Data Protection Authorities.

Commissioner's representatives also participated in the following major international meetings:

- 7th International Conference of Information Commissioners in Ottawa, Canada (2-6 October 2011), dedicated to the role of the Commissioner and other authorities in ensuring the right of access to information, the relation between open data and free access, new technologies and the future of transparency, as well as privacy and the impact of IT on privacy of persons;
- 33rd International Conference of Data Protection and Privacy commissioners, in Mexico City, Mexico (1-3 November 2011) titled "Global Age", at which plenary and separate sessions were more closely focused on the impact of information and communication technologies on privacy of individuals and the duties of various stakeholders in that regard
- 13th Conference of Central and East Europe Personal Data Protection Authorities, in Budapest, Hungary (28-29 April 2011), when the Commissioner was admitted to full membership in this association;
- High level meeting – Personal Data Protection, dedicated to commendation of 30 years of the adoption of the CoE Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, in Brussels, Belgium (27 – 29 January 2011), organized by the European Commission and the Council of Europe;
- International Conference on Opening of Secret Police Files o in Former Communist Countries, in Berlin, Germany (14-15 September 2011), organized by the European

Commission Office in Germany, the Southeast Europe Association and the Federal Commissioner for the Stasi Archives.

As regards international cooperation, it is important to emphasize that the Commissioner's representative was elected as a member of the Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Thus, the Commissioner has become for the first time a member of a working body within an authority or an organization which passes international regulations and personal data protection standards.

The Commissioner cooperated with the European Police Office – EUROPOL -and European Union's Judicial Cooperation Unit – EUROJUST - in December 2011. The Commissioner admitted representatives of EUROPOL within a study visit and evaluation of respect of the right to personal data protection in the police sector. In addition, in December the Commissioner was also a host to representatives of EUROJUST and talked to them about personal data protection in the Republic of Serbia in the field of judiciary and cooperation of judiciary authorities.

In addition to cooperation with competent institutions from the region responsible for data protection in Slovenia, Croatia, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia and Montenegro, the commissioner also established cooperation with colleagues in Bulgaria and Hungary. This cooperation was also established in the field of freedom of information. Apart from these countries, except Bosnia and Herzegovina and Montenegro (which do not have separate authorities ensuring the exercise of rights, but only judicial protection), cooperation was also established with commissioners in Canada and Germany, both federal and provincial.

In 2011, the Commissioner continued cooperation with the OSCE Mission to Serbia on activities from previous years in the field of exercise of the right information held by public authorities, particularly on organization of commendation of the Right to Know Day, 28 September.

In 2011, the Commissioner also met on several occasions and had several talks with other representatives of European and international institutions and of neighbouring countries about the improvement of human rights and the fight against corruption, personal data protection and secret files. The Commissioner was a host and talked to ambassadors and representatives of international organizations and states, such as H.E. Vincent Degert, Head of the Delegation of the European Union to the Republic of Serbia, H.E. Dimitrios Kypreos, Head of the OSCE Mission to Serbia, Ms. Antje Rothemund, Head of the Council of Europe Office in Belgrade etc.

7.3. Cooperation with Civil Society Organizations

In 2011, the Commissioner continued developing well-established cooperation with the civil sector. Cooperation with the civil sector took place primarily through organisation of various expert meetings for the purpose of training and affirmation of the right to know and the right to personal data protection.

In this context, it is also important to mention cooperation with the organization Partners for Democratic Change Serbia and training of the members of civil society organizations in the field of personal data protection with the aim to empower the non-government sector, since these organizations have much more activities in the field of freedom if information than in the field of personal data protection. The Commissioner continued cooperation with associations such as

Civil Initiative, Transparency Serbia, Belgrade Centre for Human rights, Fund for Political Excellence, European Movement in Serbia, Open Society Fund, Lawyers Committee For Human Rights, Association of Serbian Banks, Centre for Security Studies, Standing Conference of Towns and Municipalities, Belgrade Centre for Security Policy, Autonomous Women Centre etc.

7.4. Media Relations and Media Reporting on Commissioner's Activities

In the course of 2011, the Commissioner continued building on the already good cooperation with the media. Reporting on the Commissioner's activities has overall been highly positive.

Cooperation was particularly good with the Independent Association of Journalists of Serbia, the Association of journalists of Serbia, the Association of Electronic Media and a number of exclusively online media, including Istinomer, Pistaljka and Juzne vesti, as well as with numerous printed and electronic media.

7.5. Cooperation on Projects

In the reporting period, the Commissioner cooperated on projects and implemented the agreed project activities. Thus, the Commissioner continued with the implementation of the project "Strengthening Accountability Mechanisms in Public Finance", in association with the United Nations Development (UNDP) Office in Belgrade. The objective of this project, funded by the Norwegian Government, was to provide support to capacity building of the Commissioner's Office.

In the course of 2011, the project "Improvement of Personal Data Protection" („Twinning Light" SR/2009/IB/JH/01TWL) was approved. This project is funded from the Instrument of Pre-accession Assistance to the Republic of Serbia, "IPA 2009", and its purpose is to improve knowledge and strengthen mechanisms for the implementation of regulations and standards and supervision of their enforcement. The project will be implemented in 2012.

8. PUBLICITY OF COMMISSIONER'S WORK

All information concerning the Commissioner's work is available at Commissioner's Internet presentation, at: www.poverenik.rs . This includes both information concerning the implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection and information on the Commissioner's Office itself. The publicity of information in connection with the implementation of laws is ensured through public announcements, opinions and advice given on request from public authorities, or opinions and advice formulated by the Commissioner on a case-by-case basis in response to complaints. The Commissioner's Internet presentation includes also relevant documents (international, Serbian, laws, secondary legislation), information in connection with the function of the Commissioner's Office, statistical information on case resolution and decisions made, information on approved budget and its execution, information on salaries, available work equipment, organisation, employees, forms etc.

In 2011, the Commissioner issued 50 public announcements in response to current issues and problems the implications of which reach far beyond the scope of an individual case, i.e. which have become or might become a negative phenomenon. All announcements are posted on the Commissioner's web page and almost all of them were also published by the media.

The Commissioner's Internet presentation also includes the Commissioner's Information Booklet, which also comprises much of the above information, as well as other details. The directory is updated on a monthly basis.

The Commissioner's Internet presentation is written in Serbian (Cyrillic and Latin script) and in English.

Publicity of work is ensured through reports which the Commissioner submits to the National Assembly and the competent committee of the National Assembly, as well as through reporting to the President of the Republic of Serbia, the Government and the Ombudsman and submission of other relevant information to the competent authorities.

Since the beginning of his work, the Commissioner has submitted to the National Assembly six regular Annual Reports (2005 to 2010). He also filed an extraordinary report on implementation of the Law on Free Access to Information to the Culture and Information Committee of the National Assembly in November 2005. The Commissioner's reports for 2005 and 2006 were reviewed and adopted by the Culture and Information Committee, but the National Assembly did not discuss them in plenary sessions; however, the 2006 Report was debated by MPs in the context of reappointment of the Commissioner in June 2007. On the other hand, the Reports for 2007, 2008 and 2009 were not reviewed at all.

At its session held on 7 July 2011, the National Assembly reviewed the Commissioner's Report for 2010 and reviewed and endorsed recommendations of the Judiciary and Administration Committee and the Culture and Information Committee in connection with the Report on Implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection. The Assembly's Conclusion on the Report and the Conclusion on its review were published in the Official Gazette of the Republic of Serbia No. 52/11 of 15 July 2011.

The reports are available at the Commissioner's official website.

9. COMMISSIONER'S SUGGESTIONS AND RECOMMENDATIONS

The Commissioner expects the National Assembly to review this Report in accordance with Article 58 of the Law on National Assembly and to support the Commissioner's activities and efforts aimed at further improvement of the freedom of information and of personal data protection.

Proper implementation of the Law on National Assembly and the Rules of Procedure of the National Assembly should contribute to improved and more unbiased examination of reports submitted by independent national authorities and compliance with their recommendations as a precondition for better exercise of rights.

In 2011, the institute of freedom of information has been used much more than in previous years, which is encouraging from the aspect of human rights. However, as regards the implementation of the Law on Free Access to Information, most of the problems highlighted by the Commissioner in previous annual reports as impediments to the implementation of the Law and as effective curtailment of the actual exercise of this freedom remain unresolved. The Commissioner's Report on Implementation of the Law in 2010, just like all other Reports before it, contained almost identical recommendations, but those recommendations have apparently failed to materialize.

Due to inertness or absolute passivity of competent authorities in the rectification of identified weaknesses that affect the implementation of the Law on Access to Information, we are not seeing the much needed improvements in the field of democratic control of the government by the public, in particular in the context of the fight against corruption and various forms of abuse, all of which are issues this Law has the potential to address properly.

The situation is not much different when it comes to personal data protection. The subject matter of personal data protection in Serbia's legal system should be regulated by LPDP and a number of special, sector-level laws, as provided for in the Constitution of Serbia. However, the principles of LPDP as an umbrella law in the field of personal data protection are usually not developed any further in special laws, and where this is attempted, the results are often incomplete or inadequate.

Apart from the fact that sector-level laws lack certain provisions, there are provisions in the text of the LPDP itself that are not harmonized with relevant international standards or are not suited to actual needs. There are also issues that are not regulated by LPDP at all.

The Commissioner believes that public authorities have not taken all necessary measures to create appropriate assumptions for the exercise of the freedom of information and the right to personal data protection.

With a view to improving the exercise of freedom of information and personal data protection**, the Commissioner proposes in particular that the National Assembly**, when enacting new regulations and amending the existing ones, with due observance of relevant European standards, **should take the following measures**:

1) Ensure unity and consistency of the legal system in the field of freedom of information and personal data protection,

2) Insist on the use of mechanisms and guarantees for practical implementation of regulations in the fields of freedom of information and personal data protection, as well as on effective supervision of compliance with and implementation of those regulations,

3) Insist on accountability for omissions in the work of public authorities and public office holders in the fields of freedom of information and personal data protection,

4) Provide appropriate support in an effort to enable full independence of the Commissioner in his work.

To the same end, the Commissioner in particular proposes that the Government of the Republic of Serbia should put in place measures to ensure:

1) Adequate office space for normal work of the Commissioner, to be provided as soon as possible,
2) Implementation of the Law on Data Confidentiality through urgent adoption of secondary legislation, without which the Law remains unenforceable, with simultaneous amendments to the Law to ensure its realistic implementation or, ultimately, the enactment of a new Law,
3) More intensive and wider supervision of implementation of the Law on Free Access to Information and consistent pursuance of specific measures against those who disobey the law,
4) A higher level of compliance with the Commissioner's binding and enforceable decisions,
5) Appropriate protection of the so-called "whistleblowers" by preparing a bill of amendments to the Law on Free Access to Information of Public Importance, in accordance with the relevant Council of Europe Resolution 1729 (2010),
6) A higher level of transparency in the functioning of public authorities and proactive publication of information concerning their work
7) Enactment of a new Law on Personal Data Protection or thorough and major amendments and modifications of the existing Law, in line with the actual needs and in compliance with relevant international standards,
8) Adoption of an instrument which would govern the method of archiving and measures put in place to protect particularly sensitive data,
9) Adoption of an Action Plan to implement the Personal Data Protection Strategy, with defined activities, expected outcomes, implementers of specific tasks and time limits for the performance of those tasks,
10) Amendment of relevant regulations to ensure that backers of each piece of legislation submit to the Government with their draft law also the Commissioner's opinion to those provisions that pertain to personal data protection.
11) Continual training of staff at public authorities to ensure consistent and timely compliance with the obligations based on the Law on Free Access to Information and LPDP, with full cooperation from the Commissioner,

The measures proposed above, if implemented and enforced, would eliminate the major obstacles and facilitate enhanced implementation of laws within the Commissioner's sphere of competence.

COMMISSIONER

Rodoljub Sabic (signed)

Done in Belgrade, on 27 March 2012
No: 011-00-560/2011-01