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 2012

B e l g r a d e

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

This Report is the eighth 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.

Nevertheless, 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.

What can undoubtedly be seen as a positive development is the fact 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. Of course, many problems are still evident and some of them have persisted for years, as explained later on in this report, this positive process is evidently 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 purpose 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.

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, Serbia is at the very beginning of a process which needs to be expedited and enhanced. As early as in the summer of 2010, after seemingly endless procrastination, 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, without any practical effects.

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, medical 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.

Precious little is done 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 IPA 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.

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 2012 we have continued witnessing the first significant results in this field. But the results need to be better. The field of personal data protection will inevitably become the focus of many public authorities. This necessity stems both from the reasoning behind the country's EU integration processes and, even more importantly, from the need to improve human rights. These facts certainly merit the attention of the National Assembly and that is why this Report focuses in detail on specific cases in this field.

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

2.1. KEY FACTS

The Commissioner for Information of Public Importance and Personal Data Protection (hereinafter referred to as "the Commissioner") is an independent and autonomous public authority, which in practice means he is organisationally and functionally separated from the government bodies and other public authorities the operations of which he supervises.

For the purpose of enforcing the right of access to information of public importance, in 2004 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 Free Access to Information") established the institution of the Commissioner. Four years later, the Commissioner was also entrusted with enforcing personal data protection pursuant to the Law on Personal Data Protection ("Official Gazette of the Republic of Serbia" Nos. 97/2008 and 104/2009 − new law, 68/12 – Decision of the Constitutional Court and 107/12, hereinafter referred to as "LPDP")

This position of the Commissioner 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.

Commissioner's Powers

The Commissioner: handles 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; monitors compliance of public authorities with the obligations set out in this Law and reports to the public and National Assembly thereof; initiates the drafting or amendment of regulations implementing and promoting the freedom of information; proposes measures public authorities should take to improve their compliance with this Law; undertakes necessary measures to train the staff of public authorities and familiarizes 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; informs 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[1], as well as data, data files, complete documentation, general instruments, premises and equipment of personal data controllers; supervises and enforces LPDP; decides on complaints in cases set out in LPDP; supervises and allows transborder transfer of data out of the Republic of Serbia; points out identified cases of abuse in data collection; produces a list of countries and international organisations with adequate provisions on data protection; gives his/her opinion on the formation of new data files or introduction of new information technologies in data processing; gives his/her opinion in case of doubt whether a data set constitutes a data file within the meaning of this Law; monitors the implementation of data safeguards and to propose improvement of those measures; gives proposals and recommendations for improving data protection; gives prior opinion on whether a certain processing method constitutes specific risk for a citizen's rights and freedoms; keeps up to date with the data protection arrangements in other countries; files motions for review of constitutionality and legality of laws and other general enactments.

Commissioner's Responsibilities

The Commissioner: within three months of the end of every fiscal year, submits to the National Assembly an annual report on the activities undertaken by public authorities to implement these two Laws and his/her own activities and expenses; submits other reports to the National Assembly if he/she deems it necessary; publishes and updates manual, guides etc. with practical instructions for the effective exercise of rights regulated by the Law on Free Access to Information of Public Importance and LPDP; informs the public of the content of and respect for the freedom of information and the right to personal data protection via the press, electronic media, the Internet, public panel discussions and in other appropriate ways; issues instructions for the publication of information booklets on the operations of public authorities; files petitions for initiation of infringement proceedings; and maintains a Central Register of Data File Records and publishes it on the Internet.

2.2. Issues and Obstacles faced by the Commissioner in His Work

2.2.1. Freedom of Information

Serbian citizens have increasingly been exercising the freedom of information since the enactment of the Law on Free Access to Information (2004). The public is becoming more and more aware of the possibilities opened by this Law, as evident not only from the large number of freedom of information requests, but also from the fact that requests are

[1] The Commissioner's powers to examine any data medium are governed by the Law on Data Confidentiality (2009): 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.

increasingly relating to ever more delicate information. The citizens' knowledge of the potentials and scope of this Law is improving. They are increasingly aware that the Law can help them obtain information relevant for preventing irresponsible actions of public authorities, controlling the spending of public funds and exercise of public powers or enable them to participate in debates and influence the development and implementation of policies on issues of common interest. It is evident that the citizens are often using the freedom of information to obtain information they need to better protect or exercise other rights or interests.

In 2012, the freedom of information was most frequently exercised by the citizens as individuals and by various citizens' associations, as well as by journalists and the media, trade unions, political parties, public authorities themselves, lawyers, businessmen and others.

The volume of the Commissioner's activities in 2012 was more than 40% higher than in the previous year. Just over 90% of those who addressed the Commissioner to protect their rights have succeeded in obtaining the requested information upon his intervention.

However, public authorities still occasionally ignore the Commissioner's orders and grossly violate the Law on Free Access to Information. These were cases where public authorities failed to make the requested information available even after the Commissioner's orders, sometimes even after the Commissioner's enforcement action, refusing at the same time to pay to the budget the (sometimes multiple) fines imposed as an enforcement measure. In this context it should be noted that the Commissioner is not adequately supported by the Government, which is required under the Law to ensure the enforcement of the Commissioner's decisions in cases where measures available to the Commissioner produce no effects. Furthermore, the mechanism of judicial enforcement of fines in Belgrade stopped functioning in 2012 when the First Primary Court initially declined jurisdiction for this enforcement action and then delayed the proceedings and sought the opinion of the Supreme Court of Cassation. *For more details on this issue, see* *3.1.3. Enforcement of Commissioner's Decisions and Conclusions.*

In this light it is worrying that even such public authorities and others that denied access to information to requesters or failed to comply with other obligations under the Law on Free Access to Information were virtually not held to account in any way, because the Ministry in charge of supervising compliance with the Law on Free Access to Information failed to file a single request for initiation of infringement proceedings both in 2012 and in 2011. Information requesters themselves – those among them who were the most persisent – filed requests for initiation of infringement proceedings to courts for violations of their rights, often facing certain obstacles in doing so.

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, information disclosure on the so-called proactive basis was generally improved in 2012, but it still fell short of the citizens' reasonable expectations.

As regards legislative provisions governing the freedom of information, Serbian Law on Access to Information, with its three amendments since its enactment, 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 Centre for Law and Democracy and the Spanish organisation "Access info Europa". 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 that had began earlier in 2012 has unfortunately been stopped. Following an earlier initiative by the Commissioner, the ministry responsible for human and minority rights and public administration had proposed amendments to the Law on Access to Information towards the end of the year and on 26 January 2012 the Government had endorsed the Draft Law and submitted it to the National Assembly for expedited enactment. After the elections were held and the new Government took office, this Draft Law was, together with other drafts, withdrawn from the parliamentary procedure and until the time when this Report was written, to the best of the Commissioner's knowledge, the Ministry of Justice and Public Administration has not taken any activities to amend the Law on Free Access to Information.

Achieving a higher level of freedom of information in real life will require relevant normative and other activities, including in particular:

Amendments to the Law on Free Access to Information, which should ensure the following:

- Increased proactive publication and updating of information through an improvement of the provisions pertaining to publication of information booklets on the operations of public authorities,
- A wider scope of application of the Law, by expanding the circle of public authorities subject to the obligation to publish an information booklet, which would be brought about by eliminating the existing difference between "government authorities" and "public authorities" within the meaning of the Law,
- Expansion of the circle of authorities and entities otherwise subject to the Law (by including also private entities entrusted with public functions – natural persons/sole traders vested with public powers, legal entities partly funded from the national budget, regardless of the percentage of such funding compared with funding from public sources),
- Additional powers that would enable the Commissioner to file infringement reports for violations of the right to access information and to propose measures to competent authorities for the protection of data sources,
- Amendment of the provisions relating to enforcement of the Commissioner's decisions,
- Longer statutes of limitation for initiation of proceedings to determine infringement liability for infringements subject to this Law,
- Establishment of a protective mechanism for the attained level of protection of the right to access information, so as to ensure that the level of the right guaranteed by the Law on Free Access to Information is not compromised by other laws,
- Reducing the institute of abuse of right to the barest necessary minimum, because this provision is increasingly abused by public authorities,

- More stringent penal provisions, in order to harmonize the level of fines with the Misdemeanours Law,
- Redesigned provisions relating to the institution of the Commissioner, in that they should regulate the procedure of nominating and appointing an incumbent and his/her removal from office.

In the context of exercise of the freedom of information, it is paramount to adopt amendments to the Law on General Administrative Procedure or enact a new law as soon as possible, to reflect the solutions endorsed by the Government in late February 2012, as those amendments also include improved freedom of information provisions. The enactment of this law is one of the priorities of Serbia's European integration process.

A higher degree of unity and consistency in the legal system could be achieved through an amendment of the Government's Rules of Procedure that would provide for an obligation to obtain the Commissioner's opinion in the process of legislation enactment, with simultaneous improvements in the provisions concerning transparency of operations, public debates in the drafting of legislation and public availability of materials and information.

As regards the legal framework relevant for the freedom of information, it is also essential to ensure to harmonise the provisions pertaining to access to information in certain procedural and other laws with the Law on Free Access to Information, which is a *lex specialis* in the subject matter of freedom of information, in line with the initiatives submitted by the Commissioner to competent ministries.

Enactment of a law on "whistleblower" protection, which would comprehensively regulate and provide adequate protection to persons willing to disclose information pointing to corruption, in accordance with the relevant Council of Europe Resolution 1729 (2010), is also paramount for the exercise of the freedom of information. For more information on the activities taken by the Commissioner in 2012 to ensure whistleblower protection, see section 2.4 of this Report which deals with assets, budget and projects.

Furthermore, to ensure a higher level of quality in the implementation of the Law on Free Access to Information and to eliminate any doubts the authorities may have with regard to compliance, it is necessary to give effect to the Law on Data Confidentiality as soon as possible by adopting relevant implementing regulations, without which the Law remains unenforceable, while at the same time amending the Law to enable its implementation in practice or, as appropriate, enacting a new Law. As a result of the lack of enforcement of the Law on Data Confidentiality and the major delay in the adoption of implementing regulations, the two-year period in which public authorities should have reviewed data and documents marked as confidential has expired in vain; consequently, we are still facing a huge number of documents that had been marked as confidential at a specific point in time because justified reasons pertained at the time, but have never since been reviewed or declassified once those reasons no longer applied. This is highly detrimental to the implementation of the Law on Free Access to Information and creates confusion for persons authorised to act under this Law. The risks implied by such situation are prejudicial not only to the public's right to know, but also – and perhaps to an even greater extent – to the country's security interests and overall legal certainty.

The laws regulating the operations of public authorities, local self-governments, public enterprises and other entities subject to the Law on Free Access to Information or a special regulation should provide for a statutory obligation of public authorities to create and regularly update their web presentations; the legislation should include a provision stipulating the required minimum content of such web presentation, in accordance with the initiative taken by the Commissioner, which would significantly contribute to higher transparency in the functioning of public authorities.

In addition to the development of the so-called "legal framework" in line with the recommendations given above, further promotion of the freedom of information in real life will require proper functioning of the mechanism of liability for violations, as well as the mechanism of enforcement of the Commissioner's decisions by the Government. Furthermore, it is necessary to urgently address the issue of competence of the authority in charge of enforcing the Commissioner's conclusions on the imposition of fines, either through amendments to the Law on Free Access to Information or through a review of the stand taken by the Supreme Court of Cassation in Spp 6/12 of 1 October 2012. With all due respect to the Supreme Court of Cassation, this legal interpretation is highly controversial, to say the least. Firstly, it is based on the understanding that the Commissioner is a "government authority", which he most emphatically is not. Secondly, it is absolutely unclear how the Commissioner could legally and *de facto* enforce his orders by "seizing the financial assets of government authorities". It is therefore no accident that this stand has resulted in a situation where it is not applied by all courts in Serbia; indeed, the majority of them do not apply it. The Commissioner believes this issue should be addressed appropriately not only from the aspect of implementation of the Law on Free Access to Information of Public Importance, but also from the aspect of normal functioning of the judicial system of the Republic of Serbia as a whole.

The results achieved by the Commissioner in the implementation of the Law on Free Access to Information in the face of all of the obstacles explained above have been achieved with much effort and persistence. They are recognized by Serbian citizens and always highly praised by relevant international actors. The recognitions awarded on the Commissioner in mid 2012 by professional associations of judges and public prosecutors, including in particular magistrates, as well as by the European Movement in Serbia, bear witness to this fact.

2.2.2. Personal Data Protection

Serbian citizens have exercised their right to personal data protection more frequently than in the past several years. This can be seen not only from the number of complaints lodged with the Commissioner, but also from the sheer volume of communications sent to the Commissioner and the requests for answers to diverse questions. However, the Commissioner has in practice observed certain issues and obstacles faced by the citizens in the exercise of

this right, as well as certain issues and obstacles most frequently encountered by data controllers the Commissioner himself in their work.

One of the main obstacles is the fact that LPDP is not fully harmonised with Directive of the European Parliament and of the Council 95/46/EC and with Convention No. 108 of the Council of Europe for the protection of persons with regard to automated processing of personal data. Furthermore, a number of provisions of LPDP are inadequate and/or incomplete, e.g. certain definitions, the Commissioner's powers, transborder transfer of personal data etc. Also, certain issues are not even provided for in LPDP, i.e. it does not contain even general provisions on biometry, video surveillance or direct marketing. This was one of the conclusions of the so-called Light Twinning project "Improvement of Personal Data Protection". The Commissioner has already submitted to the Serbian Government and the Ministry of Justice and Public Administration his Information with suggestions for amendments of a large number of provisions of LPDP listed by Article numbers. In this Information the Commissioner expressed his view that the importance and scope of the proposed amendments to LPDP warrant the drafting of a completely new text of LPDP.

Furthermore, it is necessary to amend numerous sector-level laws which, as a rule, tend to include incomplete or inadequate provisions on personal data protection in the given sector. Some sector-level laws contain no provisions on this subject matter at all. Under Article 8, item 1 of LPDP, the basis for personal data processing is either the law or freely given consent of the data subject. The majority of laws, especially those enacted before the enactment of LPDP, contain no provisions that would govern in detail the issue of personal data collection, retention, processing and use. In accordance with the Constitution of Serbia, these very issues (personal data collection, retention, processing and use) must be regulated by laws, while other issues, including technical issues relating to the collection, retention, processing and use of personal data, may be regulated by implementing regulations.

In addition to the obstacles listed above – the lack of relevant legislative provisions and the existence of inadequate and/or incomplete legal arrangements – it is also necessary to adopt specific implementing regulations. Thus, for example, an instrument on the manner of filing and the measures for the protection of particularly sensitive data provided for in Article 16, paragraph 5 of LPDP should have been adopted by the Government within six months of the effective date of this Law, i.e. by 4. May 2009. The Government has not done so by the time of submission of this Report to the National Assembly, after nearly four years of enactment of LPDP.

As another example, the Government should have adopted an Action Plan on Implementation of the Personal Data Protection Strategy, with defined activities, expected effects, implementers of specific tasks and periods for their completion, by 20 November 2010, but, as of the date of submission of this Report to the National Assembly, it has still not done so. *For more details on this issue, see* *4.1.7. - Activities taken by Commissioner to improve Legislative Solutions.*

Furthermore, the Commissioner is of the opinion that several laws need to be amended and made compliant with the Constitution of Serbia, i.e. the Law on Electronic Communications, the Law on the Security Information Agency and the Code of Criminal Procedure. Also, in order to enable the implementation of the Law on Data Confidentiality and to provide adequate protection for personal data, it is necessary to adopt a number of implementing regulations for that Law, without which it is virtually unenforceable.

Significant improvements of normative arrangements are needed in the security sector. Inspections of mobile and landline telephony operators carried out by the Commissioner have found cases of disregard for the constitutional guarantee for inviolability of communication and violations of the provision which stipulates that derogations are allowed only for a limited period based on a court order, for the purpose of conducting criminal proceedings or for reasons of national security. Based on the results of these inspection activities, the Commissioner and the Ombudsman have drawn up Draft Recommendations in 14 items for improvements in this field. They include the following:

1. The Government should draft and propose, and the National Assembly should enact, only such laws that respect the constitutional guarantees concerning the privacy of communications and other human rights. The National Assembly should not ignore the opinions of public authorities established to protect the citizens' rights.

2. Relevant laws should be amended as a matter of utmost urgency in order to determine which courts have the jurisdiction to decide on requests for access to citizens' communication data by the police and the Military Security Agency (the existing regulations only stipulate which courts have the jurisdiction in case of the Security Information Agency (SIA)).

3. Effective organisational measures and IT solutions should be put in place to expedite preliminary judicial review and deciding on requests for access to communications and communication data.

4. The existing, largely parallel, technical capacities of various agencies and the Police should be integrated into a single national agency that would act as a provider of technical services needed to intersect communications and other signals to all authorised users.

5. The procedures applicable to electronic communication service providers and their obligations should be integrated.

6. Indelible recording of access to telecommunications should be provided, with all information necessary for *post factum* review of legality and regularity of access.

7. Relevant legal arrangements should be introduced to regulate the operations of the private security sector and effective supervision of that sector should be ensured.

8. Strong legal and *de facto* protection should be accorded to whistleblowers (especially in the security sector, as well as generally) and the Ombudsman should be entrusted with such protection.

9. Obstruction of investigations carried out by independent supervisory public authorities (the Ombudsman, the Commissioner for information of public importance and personal data protection, the Anti-Corruption Agency, the State Audit Institution, the Equality Commissioner) should be criminalised. Any harassment, threat or other attempt to influence a complainant or a witness cooperating assisting the supervisory authorities should be made a criminal offence.

10. An obligation should be introduced for internal supervision mechanisms to report their findings relevant for the respect for human rights to the Ombudsman and the competent parliamentary committees, especially in cases where they are disregarded by the management of their respective authorities and in cases of alleged or confirmed serious human rights violations.

11. The results of implementation of the Law on Data Confidentiality (including the adoption of necessary implementing regulations, declassification of old documents, conduct of investigations, issuing of security certificates...) should be reviewed and comprehensive amendments or enactment of a new law should be initiated.

12. The capacities of supervisory institutions for handling and keeping confidential data should be strengthened.

13. A new Law on Security Information Agency should be enacted to ensure, among other things, predictability in the implementation of special measures.

14. The law enforcement powers of intelligence and security services and their involvement in criminal proceedings should be reviewed.

Although these recommendations were published nine months ago (in July 2012), there have been no visible responses by the time of submission of this Report to the National Assembly.

Further improvements in the security sector should be ensured through the enactment of a Law on Security Checks, a Law on Private Investigation Services and a Law on Private Security, with proper, modern provisions, especially in the light of the need to ensure appropriate personal data protection in accordance with the law.

2.2.3. Premises

The main challenge faced by the Commissioner in his operations for years has been the lack of appropriate office space. This issue has hindered further development and threatens to undermine the results achieved by the Commissioner so far. The Commissioner has been working in these conditions for eight whole years. If the current state continues, this authority will face serious backlogs and its ability to timely and efficiently protect rights will be at stake. Such situation, with a constantly high number of complainants and an ever-increasing caseload, combined with the introduction of new powers and the inability to hire a sufficient number of staff, directly and inevitably result in delays in resolving individual cases, sometimes for as long as one year or more.

It is difficult to provide justification for the fact that the Commissioner has not been given use of appropriate office space for eight years. This issue was even included by the European Commission in the political criteria on the list of short-term priorities in the EU integration process. These facts seriously call into question the willingness of the competent authorities to address the issue of the Commissioner’s office space and to provide equal treatment to all public authorities in terms of access to necessary assets.

For more details on the issue of office space, see chapter 2.4 - Commissioner's Assets.

2.3. Commissioner's Cooperation with Serbian and Foreign Entities

2.3.1. National Cooperation

Cooperation with Public Authorities and Organisations

Cooperation between the National Assembly of the Republic of Serbia and the Commissioner in 2012 took place within the framework of relations between the National Assembly and independent authorities, as provided for by the Rules of Procedure of the National Assembly.

The Commissioner's Annual Report on Implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection in 2011 was reviewed by competent parliamentary committees in late.

Thus, the Judiciary, Public Administration and Local Self-government Committee reviewed the Commissioner's Annual Report for 2011 at its session held on 31 October 2012. The Committee decided to prepare, in one of its future sessions, draft conclusions and recommendations for adoption by the National Assembly after the review of annual reports submitted by independent authorities.

The Culture and Information Committee also reviewed the Commissioner's Annual Report for 2011 at its session held on 27 December 2012. Committee members voiced their satisfaction with the quality and improvements in the Commissioner's work. Following a debate, the Committee endorsed the Report and drew up a Conclusion with proposed measures for the Government, which calls for the following:

- urgent provision of adequate office space to the Commissioner, as soon as practicable; the Committee undertook to follow up on this part of the Conclusion;
- more intensive and comprehensive supervision of implementation of the Law on Free Access to Information of Public Importance by the competent Ministry, with the imposition of specific measures against those who violate the Law;
- the need to insist on compliance with the Commissioner's binding and enforceable decisions and the need to insist on a higher level of transparency in the operations of all public authorities and proactive publication of information on their work.

By the time of submission of this Report, the National Assembly has not examined the Committee's recommendations and conclusions in connection with the Commissioner's report for 2011.

The Commissioner also attended the sessions of other parliamentary committees on their invitation and took part in public hearings and other events they organised in 2012.

Thus, the Commissioner attended the session of the Security Services Supervision Committee held on 27 December 2012, which dealt with mechanisms of cooperation between independent public authorities (the Ombudsman, the Commissioner's for Information of Public Importance and Personal Data Protection and the State Audit Institution) and the Committee in connection with the supervision of security services in 2013. Committee members supported the establishment of regular cooperation, backed the work of independent public authorities and pledged to strengthen their human resources and financial capacities.

The Commissioner's representatives took part in public hearings, workshops and similar events on invitation of competent parliamentary committees dealing with the following topics: the supervisory function of the parliament; the role of the parliament in the enactment of "improved" legislation; special measures and procedures taken by the police and the security services; reporting to independent bodies; fight against domestic violence; protection against child abuse on the Internet; and other topics related to the Commissioner's sphere of competence.

In 2012, the Commissioner also had talks with the President of the Republic and with individual Ministers in the Government. The Government's attitude towards the institution of the Commissioner has not changed much in 2012 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 Government to specific issues of relevance for his scope of work, such as the issue of implementation of the Law on Data Confidentiality, the issue of constitutionality of certain provisions of the Law on Electronic Communications, the need for significant amendments to the Law on Personal Data Protection etc.

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.

In 2012, the Commissioner maintained good cooperative relations with other independent and autonomous government authorities and supervisory bodies, notably the Ombudsman and the Anti-Corruption Agency, on issues concerning possible improvements in their operations. From April 2010 to mid 2012, the Commissioner, the State Audit Institution and the Public Procurement Agency were partners in a joint project implemented by the United Nations Development Programme (UNDP) aimed at improving the transparency of public finance.

Cooperation with Civil Society Organisations

In 2012, 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.

The Commissioner continued cooperation with associations such as Civil Initiative, Transparency Serbia, Belgrade Centre for Human rights, Fund for Political Excellence, Centre for Euro-Atlantic Studies, European Movement in Serbia, Open Society Fund, Lawyers Committee For Human Rights, Centre for Security Studies, Belgrade Centre for Security Policy, Autonomous Women Centre, Regional Centre for Minorities, Association of Serbian Banks, Standing Conference of Towns and Municipalities, League for the Protection of Private Property and Human Rights etc.

In this context, it is also important to mention cooperation with the organisation Partners for Democratic Change Serbia and training of the members of civil society organisations in the field of personal data protection with the aim to empower the non-government sector to better recognize problems concerning personal data protection and to contribute towards their elimination. Furthermore, in cooperation with the Youth Initiative for Human Rights, the Commissioner was host to more than thirty secondary school pupils from the municipalities of Presevo, Bujanovac and Medvedja. The Commissioner introduced the pupils to his work and explained to them the manner of exercising freedom of information and personal data protection.

Media Relations and Media Reporting on Commissioner's Activities

In the course of 2012, 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 and Juzne vesti, as well as with numerous printed and electronic media.

Cooperation on Projects

In 2012, the Commissioner 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; the project was ended in mid 2012. During 2012, this project also secured funding for a publication presenting the Commissioner's practice and for the starting of a youth website titled "You Have the Right to Know",

accessible at www.pravodaznas.rs and www.pravodaznam.rs**,** dedicated to the freedom of information.

For the purpose of implementing the project titled PEU SRE 000817 "Whistleblower Protection in Serbia", the Commissioner entered into the Accountable Grant Agreement with the UK Embassy in Belgrade for the amount of £49,085.00, as well as the Contribution Agreement No. BEL0115682 with the Kingdom of Holland for the amount of £26,010.00. The total amount of funding available from this source (UK Embassy and the Kingdom of Holland combined) is £75,095.00. The purpose of the project was to improve whistleblower protection in Serbia and to raise the awareness of all relevant stakeholders in this field, from competent ministries to regulatory bodies to business associations and civil society organisations of the need for a whistleblower protection mechanism in Serbia in order to facilitate Serbia's progress towards EU integration, especially in the field of fight against corruption.

In the course of 2012, the Commissioner executed and closed the Twinning Light project SR/2009/IB/JH/01TWL "Improvement of Personal Data Protection", funded from the Instrument of Pre-accession Assistance to the Republic of Serbia IPA 2009 with € 250,000, implemented by the Information Commissioner of the Republic of Slovenia. The purpose of this project was to improve knowledge and strengthen the implementing mechanisms and compliance supervision arrangements for regulations and standards. This project was implemented in cooperation with the Information Commissioner of the Republic of Slovenia. Numerous important activities were carried out during the term of the project, including assessment of compliance of Serbian legislation with personal data protection standards in the EU. Slovenian personal data protection experts analysed numerous provisions in the fields of internal affairs, the judiciary, social policy, health, labour relations and employment and electronic communications from the aspect of personal data processing and protection. They also prepared reports with specific proposals for amendments and/or modifications that are needed in order to harmonise Serbia's legal framework in the field of personal data protection with relevant European standards. All these reports have been presented to relevant public authorities. Seminars on personal data protection were also held for the staff of relevant public authorities, including the Ministry of Internal Affairs and security structures, the judiciary, the Constitutional Court, bodies in the fields of labour relations and social policy experts and in the field of health care.

This project also resulted in the preparation and presentation of a Manual for Data Controllers, which should take some of the burden of compliance off data controllers. The manual contains answers to the questions most frequently asked by data controllers and provides a starting point for understanding and respecting the rights of individuals under LPDP. The project included a special training course for the staff of the Commissioner's Office entrusted with personal data protection duties.

2.3.2. International Cooperation

The Commissioner's international cooperation in 2012 was successful, just like in previous years. In addition to the already established cooperation with offices of international and supranational organisations in Serbia (OSCE, United Nations Development Program – UNDP, the Delegation of the European Union to the Republic of Serbia, the Council of

Europe, United States Agency for International Development - USAID), the Commissioner also established cooperation with other organisations and public authorities. Thus, the Commissioner cooperated with competent institutions from the region responsible for data protection in Slovenia, Croatia, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia, Montenegro, Bulgaria and Hungary. This cooperation was also established in the field of freedom of information. Apart from regional cooperation, the Commissioner also cooperated with the information commissioners of Canada and Germany, both federal and provincial.

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.

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

- The conference "Assessment and Empowerment of Supervision of Intelligence Services in Western Balkan Countries" held on 5 and 6 December 2012 in Ljubljana, which addressed the issues of protection and promotion of human rights in the operations of intelligence services, the role of journalists in the supervision of intelligence services and other major issues identified by parliamentarians, the civil society and journalists,
- A conference organised to commend the International Freedom of Information Day under the title "Informed Citizens – Accountable Government", held on 27 September 2012 in Bosnia and Herzegovina under the auspices of Transparency International Bosnia and Herzegovina, in cooperation with the Ministry of Foreign Affairs of the Kingdom of Norway. The Commissioner was invited to speak at the panel discussion "Implementation of Freedom of Information Legislation in Bosnia and Herzegovina and the Region".
- A conference dedicated to the International Right to Know Day held in Zagreb on 28 September 2012, which the Commissioner attended on the invite of the event organiser, the NGO "Gong",
- The seminar "Ombudsman and Access to Public Information" held in Stockholm on 12-14 September 2012 for the representatives of relevant institutions of EU candidate countries, organised by the European Commission, which also covered travel costs,
- A regional training on access to information titled "LegalLeaks", organised for journalists from Bosnia and Herzegovina, Croatia and Serbia in Zagreb on 28-30 March by Access Info, N-OST, Transparency International, Transparency Serbia, the Balkan Network for Investigative Journalism and other organisations from Bosnia and Herzegovina and Croatia,
- The international conference "Systemic Preconditions for Eradicating Corruption" held on 29 June 2012 in Belgrade, which provided a framework for the exchange of experiences on systemic anti-corruption efforts and prevention mechanisms in Serbia and in other European countries - Germany, France, United Kingdom, Holland and Portugal, as well as best EU practices,
- The international conference of researchers "Balkan Peer Exchange", organised in Belgrade by the European Fund for the Balkans, Open Society Fund Serbia and

others. A representative of the Commissioner spoke at the panel discussion "Transparency and Accountability".

- 34th International Conference of Data Protection Authorities held in Punta del Este (Uruguay) from 22 to 26 October 2012. Until then, the Commissioner had observer status in this association of personal data protection authorities and at the Uruguay conference he was promoted to a full member.
- 14th CEEDPA (Central and East Europe Data Protection Authorities) Conference held in Kiev (Ukraine) on 21 and 22 May 2012. At the Conference, the Commissioner was voted host of 15th conference of this association by a unanimous vote of all CEEDPA members. The conference will be held in Belgrade from 10 to 12 April 2013.
- The Conference "Modernization of the Data Protection Legislation" held in Skopje (Macedonia) on 30-31 May 2012.
- A meeting of the European Commission's Working Party "Article 29" held in Brussels on 6 and 7 June 2012. This body was set up under Article 29 of Directive of the European Parliament and of the Council 95/46/EC. It is independent, has an advisory capacity and exerts significant influence on the development of EU data protection policy through the opinions it submits to the European Commission. The Commissioner, as the data protection authority of the Republic of Serbia, was granted observer status at this WP29 session, as a result of the fact that the Republic of Serbia became an EU candidate country in late March 2012.
- A representative of the Commissioner took part five times in the Consultative Committee of the CoE Convention for the Protection of Individual with Regard to Automatic Processing of Personal Data (Convention No. 108). At the 28th Plenary Session of that body, Assistant Secretary General Ms Nevena Ruzic was elected member of the Bureau of the Consultative Committee of the Convention (the Committee's working body). The Bureau includes representatives from eight states parties of the Convention (at present it has a total of 43 states parties), who are appointed for a two-year period. The Republic of Serbia thus became the first non-EU country and the first country outside the Schengen Convention to have a member in the Bureau.
- A consultative meeting of experts on the Internet, social media and human rights was held in Strasbourg on 23 November 2012. Apart from Commissioners and CoE representatives, the meeting was also attended by six experts and key topics included Internet access and access to content without unjustified restrictions, protection of privacy and personal data and rights of the child.
- A meeting with the Personal Data Protection Bureau of the Republic of Slovakia was held in Bratislava on 16-17 May 2012. Representatives of the two data protection authorities exchanged experiences from their work and agreed on future cooperation.

In 2012, 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 organisation of commendation of the Right to Know Day, 28 September.

In 2012, 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 organisations and states, such as Head of the Delegation of the European Union to the Republic of Serbia, Head of the OSCE Mission to Serbia, Head of the Council of Europe Office in Belgrade, a representative of the United States Agency for International Development (USAID) in Serbia etc. The Commissioner also received representatives of Google and talked with them about the possibilities of introducing the service "Google Street View" in Serbia.

In July 2012, the Commissioner was host to lawyer Lisa Sotto, a top US expert on personal data protection, as part of the Judiciary Reform and Accountable Government Project implemented by USAID. During her five-day visit, Ms Sotto talked about data safety and responsibilities of data controllers, with special emphasis on security services. Ms Sotto also prepared a proposal for improvements in Serbia's legal framework relating to data safety and data breaches.

2.4. Assets – Funds Received and Expenses Incurred by Commissioner

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

Premises

The issue of premises available to the Commissioner's Office is of paramount importance. Even after eight years of the Commissioner's work, this issue has not been fully resolved. In view of the negative consequences of such situation, the Commissioner would like to use this opportunity to warn the competent authorities that any further delay would pose an alarming threat to the continuing work of the Commissioner, threatening to undermine the reputation built by this institution and the achieved and recognised results of its work.

As a temporary solution, the Commissioner was at different times given use of offices at several different locations, first on the ground floor in Svetozara Markovica 42 (since July 2005) and then on the first floor of the same building (since February 2009), as well as on the fourth floor in Deligradska 16 (since May 2010). These are the premises *de facto* used by the Commissioner.

In 2010, the competent committee of the Government passed a Conclusion which 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. Adaptation of this building will require a significant investment, which would exceed by far the budget allocations available to the Commissioner and other joint users of the building. The Administration for Joint Affairs of Republic Authorities has conferment that no funding has been set aside for the reconstruction and adaptation of this building in 2013.

The premises that are currently at the Commissioner's disposal are sufficient for the current level of staffing of the Commissioner's Office, which is just over half of the number assigned to the Office under the 2008 classification. The lack of adequate office space is the main reason for the fact that staffing is far below the level that would be appropriate taking into account the actual circumstances, the scope of work and the goals pursued by the Commissioner. The Commissioner is therefore unable to further develop the Office and new hiring occurs only to replace the staff who left the Office, although the actual scope of work would require full staffing in line with the Human Resources Plan and according to the provided funding.

A direct consequence of the unresolved issue of premises is the backlog in the Commissioner's operations and the inability to timely protect those human rights the Commissioner is supposed to protect under the law. Thus, at the end of 2012, in the field of freedom of information alone there were some 2,500 cases pursuant to complaints 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. Furthermore, there were about 300 outstanding cases in the field of personal data protection at the end of the year. Apart from the fact that such situation is directly conductive to human rights violations, it 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, in 2012 the Commissioner has once again been forced to focus on tasks and duties the delay of which would cause greatest damage.

Apart from creating backlogs, the staffing constraints at the Commissioner's Office resulting from the lack of necessary office space also act as a hindrance to the institution's further development in the face of an ever-increasing and increasingly complex scope of work. Furthermore, from the aspect of international obligations, because of such situation the Commissioner lacks the capacity to respond properly to the needs and demands of personal data protection imposed by the European integration process and membership in EUROPOL and EUROJUST.

Given the existing scope of work, as well as the pending amendments to the Law on Free Access to Information which should vest the Commissioner with new powers in connection with the initiation of infringement proceedings for violations of the freedom of information, addressing the issue of the Commissioner's premises is a matter of utmost urgency.

Equipment

The available equipment for work is sufficient for the existing capacities of the Commissioner's Office. Some of the equipment is the property of the Administration for Joint Affairs of Republic Authorities, but the majority of it was purchased from the Commissioner's budget in past years.

Budget

The Law on Budget of the Republic of Serbia for 2012 approved an allocation of RSD 141,114,000.00 to the Commissioner, which was 0.06% higher than the amount proposed by he Commissioner in the Draft Financial Plan. The budget revision carried out in September did not change the amount of the Commissioner's allocation.

The Commissioner's budget execution in 2012 was RSD 101,457,251.87, or 71.90% of the approved budget funding. Once again, similarly as in the past years, the main reason for this was the objective inability to hire the necessary number of officers, combined with very rational spending behaviour.

Apart from staff salaries, the largest share of expenses in 2012 was attributable to communications and computing services, translations of documents for the purposes of European integration, for the Commissioner's Office and for the public in general, costs associated with participation in international conferences and membership in relevant bodies, costs of insurance of employees, vehicles and equipment, costs of purchase, maintenance and use of vehicles and costs of fees for external expert services.

Apart from his salary, the Commissioner personally incurred only costs associated with the use of 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.

Lower spending of budget allocations for 2012 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 in section 2.3 above. 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.

In 2012, for the purpose of implementing the project titled PEU SRE 000817 "Whistleblower Protection in Serbia", the Commissioner entered into the Accountable Grant Agreement with the UK Embassy in Belgrade for the amount of £49,085.00, as well as the Contribution Agreement No. BEL0115682 with the Kingdom of Holland for the amount of £26,010.00. The total amount of funding available from this source (UK Embassy and the Kingdom of Holland combined) is £75,095.00.

Funding under this project was not intended for the institution of the Commissioner. The purpose of the project was to improve whistleblower protection in Serbia and to raise the awareness of all relevant stakeholders in this field, from competent ministries to regulatory bodies to business associations and civil society organisations of the need for a whistleblower protection mechanism in Serbia in order to facilitate Serbia's progress towards EU integration, especially in the field of fight against corruption.

In 2012, the UK Embassy transferred a total of £32,923.00 (RSD 4,943,388.45) for the purpose of implementation of the said project, of which RSD 3,842,933.15 was spent during the year. Remuneration for expert services of persons hired for project activities (project manager, working party members, foreign and national consultants and speakers in

seminars and at round tables) accounted for the highest share of the total grant transfer – RSD 3,760,753.00. Thus, the funding earmarked for this project was only technically transferred to the Commissioner's budget account, which is why they are shown as part of his budget execution here, but those funds were *de facto* neither intended for nor used by the Commissioner's institution or the incumbent personally.

The Commissioner would like to once again point to certain salary-related issues merit special attention, since little has changed in this regard.

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 Law on Anti-Corruption Agency, the Law on State Audit Institution, 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.

Execution of the Commissioner's budget in 2012

Economic classification	Description	Funds approved before budget revision	Funds approved after budget revision	Executed	% of execution
411	Salaries and fringe benefits	86,400,000.00	86,400,000.00	63,602,612.92	73.61
412	Social contributions payable by employer	15,466,000.00	15,466,000.00	11,316,249.87	73.17
413	Compensations in kind	200,000.00	200,000.00	152,130.00	76.07
414	Social benefits to employees	1,500,000.00	1,500,000.00	64,668.54	4.31
415	Compensation for employees	2,800,000.00	2,800,000.00	1,230,071.85	43.93
416	Rewards and bonuses	90,000.00	90,000.00	39,956.00	44.40
421	Recurrent expenses	4,408,000.00	4,408,000.00	3,597,721.83	81.62
422	Travel expenses	3,300,000.00	3,300,000.00	1,411,846.14	42.78
423	Contract services	11,750,000.00	11,750,000.00	7,890,380.11	67.15
425	Current repairs and maintenance	2,150,000.00	2,150,000.00	356,131.00	16.56
426	Material	5,800,000.00	5,800,000.00	4,914,412.83	84.73
482	Taxes, statutory charges and penalties	450,000.00	450,000.00	255,117.50	56.69
512	Machines and equipment	6,800,000.00	6,800,000.00	6,625,953.28	97.44
01 budget revenues		141,114,000.00	141,114,000.00	101,457,251.87	71.90
421	Recurrent expenses	150,150.00	150,150.00	23,100.00	15.38
422	Travel expenses	30,030.00	30,030.00	614.40	2.05
423	Contracted services	4,763,208.45	4,763,208.45	3,819,218.75	80.18
05 Grants by foreign countries		4,943,388.45	4,943,388.45	3,842,933.15	77.74
Total for function 160:		146,057,388.45	146,057,388.45	105,300,185.02	72.10

In connection with the budget determination and operation methodology, 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, similarly as with most other independent public authorities, although the funding allocated at present would be *de facto* sufficient for the Commissioner's operations were it not for the need to provide an office building.

2.5. 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 40 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 2012, 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, until new hiring was possible in 2010. Such situation has influenced the timeliness of work in both fields for which the Commissioner is responsible, especially after the expansion of the Commissioner's powers to include duties of administrative enforcement of his decisions following the amendments made to the Law on Free Access to Information in late May 2010.

In 2012, three employees left the Office for much better paid employment in other public authorities and they were replaced with newly-hired officers. The Commissioner did not have the capacities to implement the Human Resources Plan for 2012, which envisages a total of 66 employees at the Office, even though the Plan was approved by the Ministry of Finance in terms of necessary budget funding, due to the lack of appropriate office space.

Technical support services for the information system of the Commissioner's Office in 2012 were provided by persons hired under service contracts as and when needed, for monthly remuneration of RSD 20,000 – 30,000.

Implementation of the Commissioner's Human Resources Plan for 2013, envisaging a total of 69 civil servants and employees, which would imply new hiring, which has been approved by the Ministry of Finance in terms of necessary budget funding, directly depends on whether the competent Government's services will provide the Commissioner with appropriate office space.

Publicity of Work carried out by Commissioner's Office

All information concerning the Commissioner's work is available at Commissioner's Internet presentation, at: www.poverenik.org.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 concerning the operations 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 2012, the Commissioner issued 35 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 were 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 booklet is updated on a monthly basis.

The Commissioner's Internet presentation is written in Serbian (Cyrillic and Latin script) and in English. In 2012, the site had 99,959 visits.

Publicity of work is ensured through reports which the Commissioner submits to the National Assembly and the competent committees 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 seven regular Annual Reports (2005 to 2011) and one extraordinary report on implementation of the Law on Free Access to Information 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.

The National Assembly reviewed the Commissioner's report for 2010 in July 2011 and endorsed recommendations of the Judiciary and Administration Committee and the Culture and Information. 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.

The Commissioner's Annual Report for 2011 was reviewed in late October 2012 at a session of the Judiciary, Public Administration and Local Self-government Committee. The Committee decided to prepare, in one of its future sessions, draft conclusions and recommendations for adoption by the National Assembly after the review of annual reports submitted by independent authorities.

The Commissioner's Annual Report for 2011 was also reviewed by the Culture and Information Committee in late 2012. Committee members voiced their satisfaction with the quality and improvements in the Commissioner's work. The Committee endorsed the Report and drew up a Conclusion with proposed measures for the Government, including urgent provision of adequate office space to the Commissioner, more intensive and comprehensive supervision of implementation of the Law on Free Access to Information of Public Importance by the competent Ministry, specific measures to be taken against those who violate the Law, the need to insist on compliance with the Commissioner's binding and enforceable decisions and the need to insist on a higher level of transparency in the operations of all public authorities and proactive publication of information on their work.

By the time of submission of this Report, the National Assembly has not examined the Committee's recommendations and conclusions in connection with the Commissioner's report for 2011.

The Commissioner's Annual Reports are available at the Commissioner's official website.

3. IMPLEMENTATION OF LAW ON FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE

3.1. Commissioner's Activities aimed at Protecting Freedom of Information

3.1.1. Summary of Commissioner's Activities in the Field of Freedom of Information

The number and volume of the Commissioner's activities have continued to increase in 2012. Thus, in the field of freedom of information alone the Commissioner resolved 3,553 cases in 2012 – up 20% from the previous year. The records show the Commissioner worked on 6,037 cases, which was 12.5 % more than in 2011. There were 2,398 pending cases carried forward from 2011 and in 2012 he received 3,639 new cases.

The majority of resolved cases relate to complaints lodged by information requesters, followed by execution procedures pursuant to the Commissioner's decisions or procedures related to judicial protection, requests for opinions on implementation of regulations, communication relating to requests of information requesters filed with or forwarded to the Commissioner or measures aimed at improving the transparency of public authorities, as well as other communication in connection with the Commissioner's powers.

Furthermore, the Commissioner's Office has processed about 400 petitions relating to actions taken by other authorities and issues outside the Commissioner's sphere of competence. Those petitions accounted for 11% of the total number of resolved cases.

As at 31 December 2012, the Commissioner closed 3,553 cases, as follows:

- He passed 2,269 second-instance decisions pursuant to complaints,
- He acted on 147 motions for administrative enforcement of decisions, pursuant to which he passed 79 conclusions allowing the execution of orders and 47 conclusions on imposition of fines on public authorities; he forwarded 10 requests to the Government to enforce the Commissioner's decisions and filed 8 motions with courts for judicial collection of outstanding fines he imposed; he also issued 122 conclusions on termination of execution procedures in cases where public authorities complied with his orders. Two motions were rejected,
- He responded to 43 requests for the Commissioner's opinion concerning implementation of the Law,
- He acted on 69 freedom of information requests relating to the Commissioner's work,
- He submitted 49 responses to complaints to the Administrative Court,

- He processed 184 requests for access to information of public importance relating to the operations of other public authorities, either by forwarding the requests to another public authority which held the relevant information for further action or by instructing the requesters which authorities to address,
- He processed 336 cases relating to communication with public authorities in connection with the determination of authorities competent to act in the specific case on other issues regarding implementation of the law,
- In 62 cases, the Commissioner took measures to improve the transparency of work of public authorities by sending advisory and instructional communications; in this context, he passed 23 decisions and issued 52 warnings and/or suggestions 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
- He responded to 394 petitions relating to the work of public authorities that do not constitute information of public importance by forwarding them to the public authorities that held the information and informing the requesters thereof or by instructing the requesters which authorities to address.

In 2012, 12 civil servants were directly engaged in performing these duties.

3.1.2. Commissioner's Acting on Complaints relating to Violations of Freedom of Information

3.1.2.1. Statistics on Complaints and Outcomes of Complaint Procedures

In 2012, the Commissioner resolved 2,269 complaints – 41 % more than in 2011. Of the total number of complaints received, only 199, or 8.7%, were lodged against decisions of public authorities rejecting freedom of information requests. This goes to show that, in 2012, the most frequent grievance of the complainants was once again the so-called "administrative silence" following freedom of information requests. These are situations 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 91.3% of all 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.

Of the total of 2,269 resolved complaints, 2,054 (90.5%) were found to be justified, while 215 (9.5%) were unjustified or had formal deficiencies.

The unjustified complaints (215) were resolved by passing:

- 140 decisions (6.2%) rejecting complaints as unjustified, and

- 75 conclusions (3.3%) dismissing complaints on formal grounds as untimely (lodged too late or prematurely) or inadmissibility or because the Commissioner did not have the jurisdiction to act on them.

The outcome of proceedings before the Commissioner pursuant to the justified complaints (2,054) was as follows:

- In 894 cases (43.5%) the Commissioner ordered the public authorities to comply with the requests and give the requesters access to the requested information; in doing so, he passed 749 decisions, because 145 cases were joined with other cases, so that a single decision was passed pursuant to two or more complaints against a single authority,
- In 1,104 cases (53.7%) he terminated the proceedings because the public authorities in the meantime complied with the freedom of information requests after the Commissioner intervened, so the proceedings in all these cases were closed by passing conclusions on termination of the proceedings,
- In 52 cases (2.5%) he overturned the decisions of the authorities of first instance and returned the cases for repeated proceeding and decision-making, and
- In 4 cases (0.19%) he overturned the decisions of the authorities of first instance passed without proper legal basis.

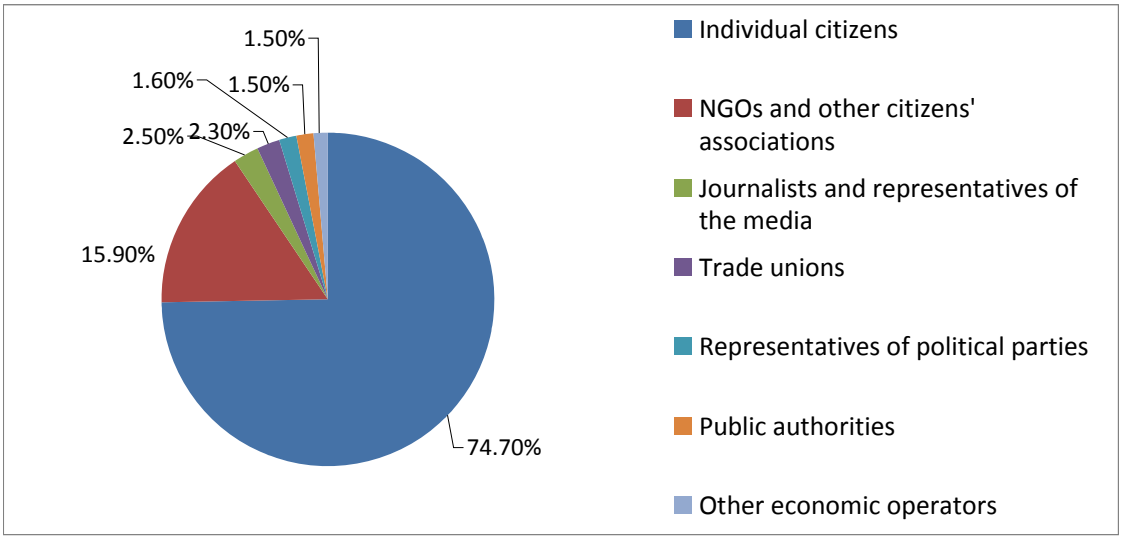
The figures quoted above show that justified complaints by information requesters in more than half of all cases (53.7%) end in termination of the proceedings because the public authorities honour the request made by the requester/complainant immediately upon learning of a complaint, before the Commissioner passes a decision. This shows that public authorities still act wastefully and irresponsibly in their dealings with the citizens and break the law, when all it takes to ensure compliance is just a little more willingness, knowledge and responsibility.

In 2012, the number of cases in which the Commissioner had to pass a decision pursuant to a complaint and order the respondent to honour the request and give access to the requested information was approximately 6% higher than in the previous year.

3.1.2.2. Who requested information and what information they requested

The Commissioner received 2,330 complaints relating to violations of the freedom of information in 2012.

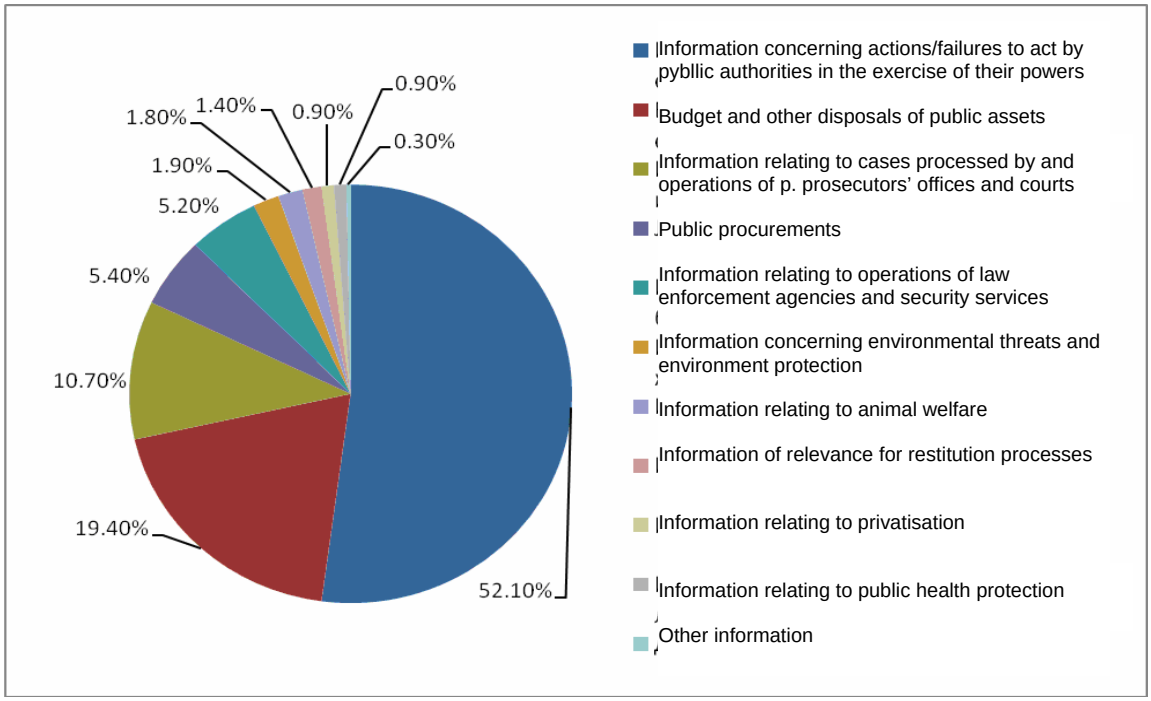
Graph 1. Complainants addressing the Commissioner



In 2012, the share of complaints lodged by the citizens, trade unions and political parties was increased compared with 2011, while the share of complaints lodged by journalists, by public authorities against other public authorities and by NGOs was lower.

The Commissioner once again points to the inadmissible situations in which public authorities deny each other access to requested information. *For example, one court in Belgrade requested from Public Enterprise "Elektrodistribucija Beograd" (Belgrade Electricity Distribution Company) information on debtors – public authorities, enterprises and institutions - in the territory of the city of Belgrade which received notice of disconnection from the grid from "Elektrodistribucija Beograd". The latter refused to do so and even went so far as to dispute the legitimacy of the request. "Elektrodistribucija Beograd" provided the court with the requested information only in the procedure of enforced execution of the Commissioner's decision passed pursuant to a complaint by the court.*

Graph 2. Types of requested information that were the subject of complaints



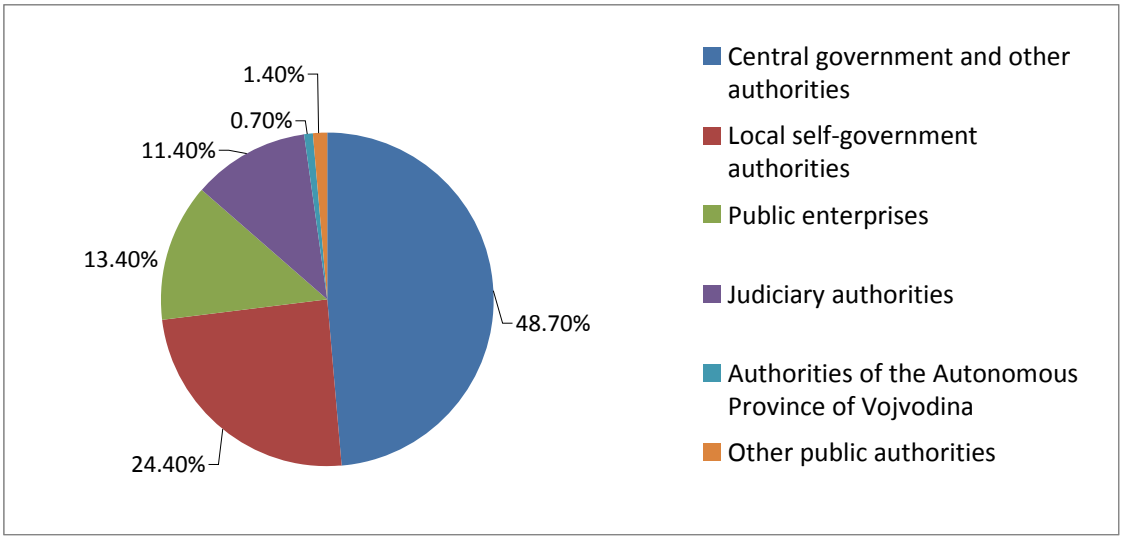
The figures given in Graph 2 show that *the majority of requests that were followed by complaints to the Commissioner related to information concerning the actions/failures to act by public authorities in the exercise of their powers, followed by information relating to the budget and other disposals of public funds and public procurements, as well as information concerning the cases processed by and operation of public prosecutors' offices, courts, law enforcement agencies and security services.*

In 2012, the share of complaints relating to withholding of information relating to procedures before public authorities and complaints relating to environmental information was higher than in 2011; the share of complaints against judicial authorities was significantly lower, while the share of complaints relating to other information saw a slight decline or stayed at the same level as in 2011.

3.1.2.3. Public authorities against which requesters lodged complaints with the Commissioner and reasons for complaints

The complaints lodged with the Commissioner in 2012 for violation of the freedom of information were mostly against central government and other authorities and organisations, as well as local self-government authorities, public enterprises and judicial authorities.

Graph 3. Public authorities against which requesters lodged complaints

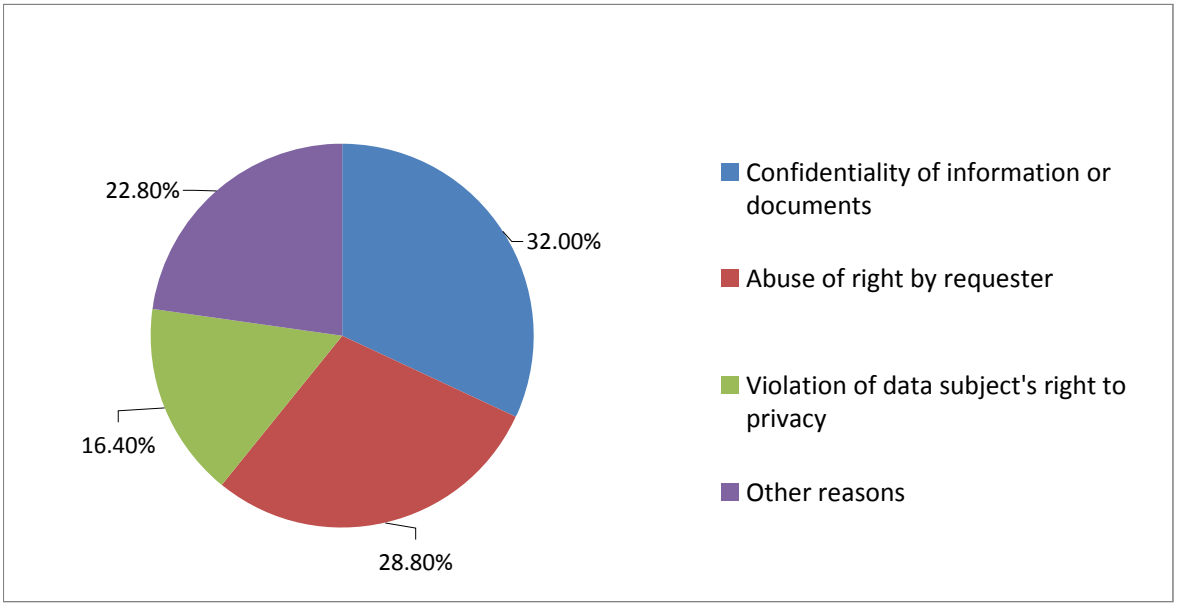


In 2012, the share of complaints lodged with the Commissioner against central-level public authorities was increased, while the share of complaints against other authorities was 0.5 - 2% lower than in 2011.

An analysis of complaints resolved in 2012 shows that public authorities invoked the following reasons when rejecting freedom of information requests:

- Confidentiality of information or documents (32%)
- Abuse of right by requester (28.8%)
- Violation of data subject's right to privacy (16.4%)
- Other reasons, e.g. the requested information was not deemed to be information of public importance, the authorities deemed the requester did not have justified interest to know, the information was already available, the addressed authority denied it had the status of a public authority etc. (22.8%).

Graph 4. Reasons for rejection of freedom of information requests



As can be seen from the foregoing, in 2012, 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.

The main reasons for such actions of public authorities include lack of supervision of implementation of the Law on Data Confidentiality and the huge delays in the adoption of its implementing regulations.

As an illustrative example, we will quote the example of a case in which a public authority invoked confidentiality of the requested documents:

A requester requested from the Ministry of Defence a copy of the Budget Inspection Report relating to the most recent (extraordinary) audit carried out at that Ministry on the initiative of the Minister of Defence, based on an approval of the Minister of Finance.

The Ministry passed a decision rejecting the request, with the explanation that the Report was marked as "Official Secret – Confidential" and that it contained documents with varying degrees of confidentiality; the Ministry further contended the Report constituted a single item, without enclosures, and it was therefore not possible to declassify only specific sections of the Report. Furthermore, it stated that the data contained in the said Report were deemed to be confidential and top secret data within the meaning of Articles 13 and 14 of the Bylaw on the Criteria for Determination of Data relating to the Yugoslav Army that constitute Military Secret, the Degree of Military Secret and Measures for their Protection,

so their disclosure could result in serious harm to the Army and its preparation for national defence, as well as serious harm to the interests protected by the Law.

Pursuant to the complaint, the Commissioner, in line with the powers vested in hum under Article 26, paragraph 2 of the Law, requested access and examined the content of the said Report, after which he passed a decision which overturned the decision passed by the authority of first instance and ordered the Ministry to provide the requester with a copy of the Report, having first protected and made inaccessible only those data that indicate the types, the quantities and the manufacturers of special-purpose items.

After the Commissioner filed a motion to enforced execution of his decision, the Ministry of Defence provided the information to the requester. (The case was originally initiated in 2009/10, while the complaint was resolved in 2012).

In 2012, the number of cases in which public authorities rejected requests invoking abuse of right by information requesters was alarmingly high (28.8%). Thus, cases *a priori* labelled as abuse of right included those in which the same requester repeatedly filed a request or cases of requests relating to voluminous bodies of documents or documents created over a long period of time, regardless of their volume.

As an illustrative example, we will quote the example of a case in which a public authority invoked the abuse of right:

The Privatisation Agency was asked to provide information in connection with the privatization of 14 individually named enterprises in the Autonomous Province of Vojvodina, including reports of compliance with the obligations assumed under equity sale agreements before the termination of the agreements, decisions on restructuring after the termination of the agreements, minutes of public auctions, information on total liabilities before privatisation for each entity individually, information on disposal of assets during the term of the agreements, information whether the Agency initiated the institution of criminal proceedings etc.

The Agency initially informed the requester it will need the additional statutory period of 40 days to reply to the request due to the volume of the information, only to pass a decision rejecting the request, quoting abuse of right as the reason for rejection and explaining that honouring the request would hamper the Agency's normal operations.

The requester informed the Commissioner he had been invited to the Agency's premises on an earlier occasion and had personally witnessed that all requested data for each privatised entity were stored electronically and could be burned to a CD or printed in a matter of minutes.

The Commissioner upheld the complaint and ordered the Agency to provide the requested information. The Agency complied with the Commissioner's order.

In 2012, the share of complaints lodged for denial of access to information because of alleged protection of the right to privacy increased. Public authorities very often unjustifiably quote privacy as the reason for denial of access to information even in cases where the requested information relates to the exercise of powers by holders of public or political functions and civil servants or public employees.

As an illustrative example, we will quote the example of a case in which a public authority invoked violation of privacy:

A journalist requested from Public Enterprise "Elektroprivreda Srbije" (Serbian power utility company, known by its local acronym EPS) information concerning the disbursement of compensation for work in difficult winter conditions during the energy crisis in early 2012, i.e. he asked for names of the directors who received payments, the names of relevant organisational parts of the public enterprise or companies formed by EPS and the amounts they received on this basis, to investigate suspected misappropriation of funds intended for the workers who carried out the work in the field.

In its reply, EPS stated among other things that the names of its directors could not be made available to the public because there was no legal basis for it under the Law on Personal Data Protection.

In connection with the complaint, EPS informed the Commissioner's that the requested information did not in fact exist, because no such payments were ever made to the directors. The Commissioner ordered EPS to inform the requester accordingly, which EPS did. As this issue attracted media coverage, the company backtracked on its intention to make these payments to its directors under pressure from the public.

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 is not acceptable freedom of information is guaranteed to everyone under equal conditions. Even certain judicial authorities often invoked the lack of justified interest of the public to know when acting on freedom of information requests, which is contrary to the core principles underlying the Law on Free Access to Information.

A frequent reason for lodging complaints with the Commissioner is incompleteness of provided information. The Commissioner has observed that public authorities often resort to selecting the pieces of information they provide to requesters, without formally adhering to the relevant request. As a rule, they tend to provide only information that shows the institution concerned in a positive light, or they provide only extracted information, without copies of the requested documents, which is contrary to the essence of the freedom of information, which implies the right to obtain a copy of the document containing the requested information.

In 2012, similarly as in previous years, some public authorities have denied they were subject to the Law on Free Access to Information at all. The most persistent of them was *Telekom Srbija a.d.*, which continued denying the Law applied to it even after the Administrative Court backed the Commissioner's opinion that *Telekom Srbija* had the status of a public authority within the meaning of the Law due to the fact that it was formed and managed by the Government of Serbia.

The fact that many of the cases in which public authorities denied access to information by invoking data confidentiality have in the meantime resulted in prosecution due to misappropriation of public funds, malfeasance in office or other forms of corruption points to the conclusion that such cases of denial of access to information, while not necessarily indicative of any of the above offences, should always be subject to careful scrutiny.

Charging of costs was quoted as the reason for only two complaints lodged with the Commissioner in 2012. In those two cases, the requesters complained against the fact that the exercise of their right was made conditional on payment of charges or against the amount of court fees, which are outside the Commissioner's sphere of competence.

Nevertheless, as regards the costs of exercising the freedom of information, the figures presented in the annual reports submitted by public authorities to the Commissioner show that in 2012 public authorities collected approximately RSD 500,000.00 on this basis and that, contrary to the law, they misappropriated most of these funds to their own accounts, instead of paying them to the designated account of the national budget. 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.

Thus, approximately 83% of the total amount of costs was charged by the Republic Geodetic Authority alone, which then failed to pay the collected amount to the designated Treasury account. Courts also charged the costs of exercising the freedom of information; the highest share was charged by magistrates' courts – 9.2% of the total amount charged, followed by local self-governments (3.3%), while Ministries, for example, collected only RSD 540.00 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 2012 was RSD 37,000.00, which was twice as much as in the previous year. However, this amount was considerably lower than the sum of amounts stated in the reports submitted by public authorities, which appears to confirm the above conclusion that some public authorities did not pay the amount collected on this basis to the designated account, but to their own accounts, as in the abovementioned case of the Republic Geodetic Authority.

The issue of costs of procedures could 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. The charge rates provided for in the Government's Decree of 2006 have not been indexed for inflation.

3.1.3. Enforcement of Commissioner's Decisions and Conclusions

In 2012, the Commissioner's proceedings pursuant to justified complaints (2,054) were closed in 894 cases (43.5%) by passing of decisions or issuing of the Commissioner's orders to make the information available to the requesters. In these cases, the Commissioner passed 749 decisions, because 145 cases were joined with other cases, so that a single decision was passed pursuant to multiple complaints against a single authority.

As regards cases where access to information was ordered by the Commissioner's decisions (749 decisions), from the feedback the Commissioner received it appears that in 2012 public authorities complied with the orders in 80.9% 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.

In more than half of all cases of justified complaints (53.7%), proceedings pursuant to complaints lodged with the Commissioner were terminated because the public authorities honoured the request made by the requester/complainant immediately upon learning of a complaint, before the Commissioner passed a decision.

Information on outcomes of proceedings pursuant to complaints lodged with the Commissioner show that, regarding justified complaints (2,054), the Commissioner's interventions had a success rate of 90.6%.

In 2012, the number of cases in which enforced execution of the Commissioner's decisions was necessary was 20% higher than in 2011. Thus, in 147 cases the Commissioner received petitions from the requesters for enforcement of the relevant decisions. Acting on those petitions, the Commissioner passed 79 conclusions allowing the execution of his orders and 47 conclusions on imposition of fines and imposed 47 fines in the total amount of RSD 3,180,000 (33 fines of RSD 20,000.00 and 14 fines of RSD 180,000.00), payable to the national budget of Serbia. In 122 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. Two petitions were dismissed due to formal deficiencies. The conclusions on imposition of fines resulted in the collection of RSD 1,635,000.

The remaining amount of RSD 1,545,000 in outstanding fines was not paid voluntarily by public authorities pursuant to the Commissioner's conclusions on imposition of fines. In such situations, the Commissioner filed petitions with competent courts for judicial enforcement of the imposed fines. However, the First Primary Court of Belgrade declined jurisdiction, contending the Commissioner himself was in charge of enforcing the fines he imposed on public authorities.

Courts in the territories of other courts of appeals have allowed enforced execution on the basis of the Commissioner's conclusions as enforceable titles. Indeed, that had also been the practice of the First Primary Court of Belgrade until a case in which a fine was imposed on the Higher Court of Belgrade, when it declined jurisdiction. It then continued with this practice in all subsequent cases, claiming that the Commissioner's conclusion on imposition of a fine was not an enforceable title. It later resorted to delaying the proceedings pending the resolution of this, in its opinion contentious, issue of jurisdiction concerning such enforcement before the Supreme Court of Cassation. The First Primary Court has also delayed the passing of decisions pursuant to objections filed by the Commissioner pending the announcement of an opinion by the Supreme Court of Cassation.

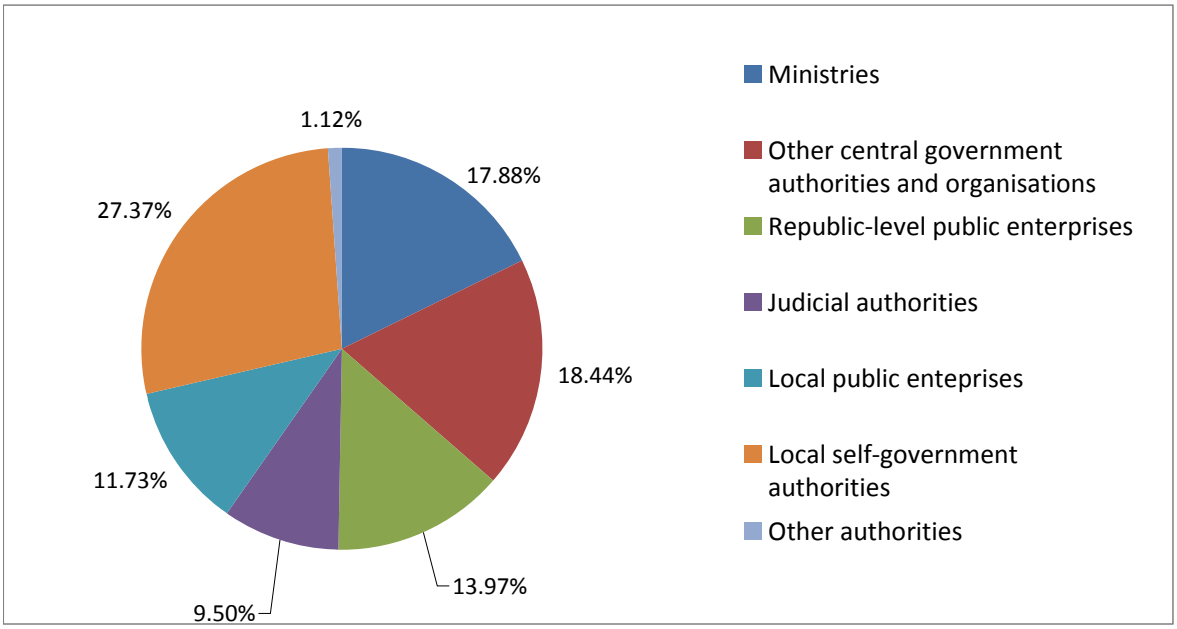
In connection with the abovementioned issue of enforced execution of the Commissioner's conclusions for the purpose of collection of fines imposed by him as a coercive measure to ensure compliance with his orders, which arose in early 2012, in addition to formally filing objections against every such decision, in March 2012 the Commissioner brought the matter to the attention of the competent institutions: the acting president of the First Primary Court of Belgrade, the acting president of the Court of Appeals of Belgrade, the High Judicial Council and the Ministry of Justice. The Commissioner pointed to the unsustainability of the current situation, in which different courts across Serbia pursue different practices; he stated that courts in the territories of other courts of appeals have accepted jurisdiction in such situations and reminded that even the First Primary Court of

Belgrade had done so right until a case in which the respondent was its superior court, the Higher Court of Belgrade. This correspondence continued until June, when the Supreme Court of Cassation and the Court of Appeals that the disputed matter had been brought before the Supreme Court of Cassation.

In September, the Commissioner once again addressed the Supreme Court of Cassation and brought to its attention another diametrically different decision in the same legal matter: namely, the Primary Court of Leskovac declined jurisdiction, but not because it believed the Commissioner himself had had the power to enforce the decisions, as the First Primary Court of Belgrade had ruled, but because it was of the opinion that the Commercial Court had jurisdiction over this issue. The Commissioner sent the same letter also to the Minister of Justice, who replied that the communication was forwarded to the Administrative Inspectorate for further action.

In 2012, the First Primary Court initially declined jurisdiction for this enforcement action and then delayed the proceedings and sought the opinion of the Supreme Court of Cassation First Primary Court on this, in its opinion contentious, issue of jurisdiction concerning such enforcement.[2]

Graph 5. Number of Commissioner's decisions passed in 2012 that have not resulted in compliance



[2] During the preparation of this Report, Legal Opinion Spp 6/12 of 1 October 2012 was posted on the website of the Supreme Court of Cassation, according to which the Commissioner's conclusion on imposition of a fine does not constitute an enforceable title within the meaning of Article 13, paragraph 1, item 2 of the Law on Execution and Security and the Primary Court did not have *in rem* jurisdiction for its enforced execution. The Court is of the opinion that the Commissioner, as the public authority imposing the fine, should enforce its decisions by seizing moneys from the accounts of the respondent public authorities.

Public authorities which refused to pay fines to the budget included: the Ministry of Internal Affairs, the Securities Commission, the Archives of Serbia, Public Enterprise "Zeleznice Srbije" (Serbian Railways), Telekom Srbija, Public Enterprise "Srbijagas" (Serbian gas company), Serbian Medical Chamber, the Commercial Court of Belgrade and the Town Council of the town of Leskovac.

Imposition of measures available to the Commissioner for enforced execution of his decisions through fines as a rule results in compliance with his orders and provision of information to requesters. However, in some cases even those measures produced no effect; the Commissioner was therefore forced, on initiative of the complainants, to ask the Government to enforce his decisions in 10 cases by imposing measures available to it, including direct enforcement action, as provided by the Law. In this context, the Government gave no feedback on enforced execution of his decisions in any of those cases. The Government's Annual Report on Implementation of the Law on Free Access to Information states that the Government's General Secretariat asked in 2011 what was then the Ministry of Human and Minority Rights, Public Administration and Local Self-Government to give a proposal for courses of action available to the Government pursuant to Article 28 of the Law, but the Ministry gave no response. The said Report of the Government further stated that in a number of cases the Government's General Secretariat ordered the Ministry in charge of supervising compliance with the Law to take necessary measures to enforce the Commissioner's decisions.

The current situation with regard to enforced execution of the Commissioner's decisions calls for immediate implementation of the mechanism provided for in Article 28 of the Law on Free Access to Information. Alternatively, if the Government's General Secretariat needs any clarifications concerning the application of that Article, the competent Ministry should provide such clarification by issuing an expert opinion or, ultimately, by amending the Law. If the situation remains as it is, the reputation of these institutions might suffer and the exercise of the freedom of information will most certainly be compromised.

3.1.4. Commissioner's Activities aimed at Promoting Proactive Publication of Information, Improvement of Legislation and Affirmation of Rights

Information booklets

The primary goal of publication of information booklets on the websites of public authorities is to make available to the citizens and the media the key facts about their operations, HR and other capacities, organisation, 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 information. Publication of this document gives public authorities a chance and sets a duty to review their organisations and procedures and to improve them, while at the same time affirming their operations.

Overall, 2012 saw certain progress in terms of publication of information on the so-called proactive basis, primarily in terms of quantity, but also to a certain extent in terms of quality. This was the result of new Instructions for Preparation and Publication of Information Booklets on the Work of Public Authorities which the Commissioner passed in 2010 and the activities taken to implement the Instructions and increase transparency in the work of public authorities.

Nevertheless, this statutory obligation does not apply to many public entities whose operations are undoubtedly of much interest to the public. Thus, for example, the now formalised obligation to prepare an information booklet on its work does not apply to a single local public enterprise, or to those Republic-level public enterprises that are not vested with public powers under the law, e.g. PTT Srbija (Serbian Post), Telekom Srbija, JAT (national airliner) etc., pr health case institutions, pre-school institutions etc. Unfortunately, amendments of the Law initiated by the Commissioner in 2012, which among other things addressed also this issue, have not been adopted, although they were in the parliamentary procedure as a bill of law.

The Commissioner monitored proactive publication of information on the websites of public authorities throughout the year, exerting influence on public authorities to enhance the transparency of work. This was done either *ex officio* or pursuant to reports made by the citizens, usually journalists who use this source of information. In this regard, the Commissioner's Office sent dozens of letters and suggestions to public authorities, as well as more than 50 formal warnings and more than 20 orders to prepare and publish information booklets in accordance with the law and the Instructions. The Commissioner also provided advice and assistance to public authorities in the preparation of these documents on their initiative, at seminars, through direct contact and on other appropriate occasions.

An analysis of information booklets published by public authorities, which was carried out as part of an effort to determine which authorities made the greatest contribution to affirmation of the freedom of information, showed that the majority of public authorities made omissions and did not comply with the Instructions in one or more chapters; this was even true of those authorities that had updated information booklets which contained all the required chapters. Generally, the least compliant were those chapters that should contain "sensitive" data – those relating to spending, i.e. revenues and expenses, public procurements and international grants, as well as, quite frequently, information on services provided by public authorities to the citizens.

Starting from the assumption that Ministries, as the most important executive bodies, should set an example of compliance with the law and openness to the public, the Commissioner monitored the information booklets published by Ministries with a keen interest. The elections and subsequent government changes in 2012 have unfortunately had adverse effects on compliance with this statutory obligation. Thus, the relatively good situation in terms of publication of information booklets after the Commissioner's warning in early 2012 gradually worsened over the year, in that the published information has not been updated, thus often becoming worthless.

The Commissioner displayed understanding for the period before the new Government took office, the personnel changes in the Ministries and reorganisations and changed powers of certain public authorities; two months after the new Government took office, in September 2012, he sent a communication to all Ministries and drew their attention to the obligation to prepare information booklets on their work in accordance with the Law and the Instructions. The reason for this reminder was the fact that websites of newly-formed

Ministries contained information booklets of previous, now defunct Ministries, the information booklets were mostly not updated and some Ministries had no information booklets at all at that time.

After the Government marked one hundred days in office, the Commissioner's Office repeated its analysis of the situation in terms of publication of information booklets on the work of Ministries. On the basis of that analysis, the Commissioner filed a motion with the Ministry of Justice and Public Administration to file petitions for initiation of infringement proceedings against those Ministries that did not fulfil this statutory obligation. These included two Ministries without information booklets and six Ministries whose information booklets were found to contain major shortcomings. The Ministry did not file a single petition for initiation of infringement proceedings.

As regards local self-governments, the situation in 2012 was better than in 2011, when as many as 45 municipalities had not published information booklets before the Commissioner's intervention. In 2011/2012, the Commissioner sent letters in connection with the preparation of information booklets on their work to all municipalities in Serbia. The majority of them complied with the Commissioner's orders, but after some time, the information contained in their booklets became obsolete again through lack of updating. Examples for this were the towns of Krusevac, Jagodina, Leskovac and Pancevo, as well as Kraljevo, where new town administrations failed to prepare new information booklets after they took office. As regards the information booklet on the work of authorities of the City of Belgrade, the analysis has shown it is not updated, i.e. it does not contain current figures on revenues and expenses, public procurements, salaries etc.

In 2012 the Commissioner also analysed the information booklets published by magistrates' courts. The analysis has shown that 23 information booklets of magistrates' courts were published on the website of the Higher Magistrates' Court, two magistrates' courts submitted their information booklets to the Commissioner, but did not post them online, while the remaining magistrates' courts - 21 of them – neither prepared nor published information booklets on their work. The majority of information booklets of these courts were not prepared in accordance with the Instructions. The results of the analysis were sent to the courts. After that, all those that had not previously done so published their information booklets on the website of the Higher Magistrates' Court. However, a random sample check has shown that the quality is still far below the required level and compliance is only formal.

At the end of the year, the Commissioner began analysing the information booklets of higher education institutions, universities, faculties and advanced secondary schools. This activity has continued into 2013.

One of the ways in which the Commissioner motivated public authorities to make better information booklets on their work was the award for the best information booklet, which was once again presented in 2012. The award was presented to the Serbian Chamber of Commerce on the 28th of September, as part of commendation of the Right to Know Day. Also, the jury presenting the award for the highest contribution to the promotion of freedom of information and transparency, which has been traditionally awarded on the same day, took into account as a crucial element proactive publication of information, i.e. publication and regular updating of information booklets on the work of public. this honour was awarded to the National Assembly of the Republic of Serbia for its overall contribution to the implementation of the Law, the transparency of its work and its highly informative and up-to-date information booklet and website, noted primarily for proactive publication of detailed figures on spending of its budget allocations, which attracts much attention from the public

and affirms this form of data publication in general, thus setting a standard for other public institutions to follow.

Measures taken so far in this field have focused primarily on getting as many public authorities as possible to publish their information booklets, in parallel with interventions aimed at improving the quality of the information booklets of those authorities that attract the most attention from the public. A certain improvement has been noted in this regard, although the response to these measures and the level of compliance with this statutory obligation has been very law compared with the effort invested by the Commissioner, due to the absence of infringement liability. Public authorities often tend to neglect their duty to update the information unless the Commissioner intervenes; many of them prepare information booklets only to satisfy the formal requirements, avoiding any "sensitive" information, i.e. information concerning their spending. Infringement liability for non-publication of information booklets – which was, unfortunately, again not enforced in 2012 – would have certainly made the outcome much better. It would also be beneficial if the Commissioner had higher capacities for this duty, because at present only one staff member is in charge of it, on top of his other work assignments.

Initiatives and opinions concerning legislation

In 2012 the Commissioner made initiative for the adoption of new regulations or the amendment of existing ones on multiple occasions and he supported similar initiatives coming from other entities, always with the aim to improve legislative provisions relating to the exercise of the freedom of information. Following requests from public authorities, as well as the citizens, the Commissioner also gave opinions aimed at improving compliance with the Law on Free Access to Information. In this context, it should be noted that the Commissioner has no authority to propose draft laws and the Government's Rules of Procedure do not provide for an obligation to consult the Commissioner in the drafting process in connection with the legislation he enforces. For these reasons, the Commissioner could give his opinions concerning the enactment or amendments of legislation only after learning of such activities through informal means or after relevant authorities published the draft versions of legislative provisions on their websites.

His initiatives and opinions concerning legislation in 2012 included in particular:

- An opinion sent to all deputy groups in the National Assembly pointing out that the Draft Law on Archive Material submitted by a deputy was not compliant with the relevant Council of Europe Recommendation No. R (200) 13 on a European policy on access to archives and that the proposed concept of access to archives guaranteed a lower level of rights than that provide by the Law on Free Access to Information,
- An opinion on the Draft Law on Local Self-Government Officials, drafted by the former Ministry of Public Administration and Local Self-Government, pointing to the non-compliance of certain provisions pertaining to freedom of information with the core principles provided for in the Law on Free Access to Information,
- An initiative sent to the ministry in charge of justice in connection with amendments of procedural laws in the field of the judiciary, in which he called for an amendment of the provisions pertaining to freedom of information in the Criminal Procedure Law, the Law on Civil Procedure and the Law on Misdemeanours, in a manner that would be compliant

with the core principles and standards applicable to the exercise of the freedom of access to information of public importance,

- Initiatives sent to the ministry in charge of health in connection with the Draft Law on Protection of Patients' Rights and the Draft Law on Special Measures to prevent Criminal Offences against Sexual Freedom of Minors, calling for amendments to the provisions pertaining to freedom of information in a manner that would be compliant with the core principles and standards applicable to the exercise of the freedom of access to information of public importance,

- An opinion relating to the Draft Decree on Detailed Criteria for Designation of Confidential Data with Confidentiality Levels "STATE SECRET" and "TOP SECRET", submitted to the Government's General Secretariat, in which he explained that the proposed concept of the Decree was, contrary to the Law on Data Confidentiality, built around a list of documents and confidential data, rather than detailed criteria for designation of confidentiality levels, indicating that such concept also had no legal basis in the Law on Free Access to Information of Public Importance,

- An opinion on the working draft of the Anti-Corruption Strategy for the period 2012-2013 submitted to the Ministry of Justice and Local Self-Government, calling for a higher level of transparency in the work of public authorities.

Furthermore, pursuant to individual requests by the citizens or public officials, the Commissioner prepared and issued 43 opinions on contentious issues relating to implementation of the Law on Free Access to Information.

Publication

In 2012, the Commissioner issued a publication titled "Freedom of Information: an Extracts from the Commissioner's Practice", funded from the project "Strengthening Accountability Mechanisms" which he implemented from April 2010 in cooperation with the United Nations Development Programme (UNDP), which was financed by the Government of the Kingdom of Norway. It contains dozens of extracts from the Commissioner's decisions will provide an important source of information for public authorities, for all those who implement the Law in practice or study it academically. The publication brings together all relevant opinions of the Commissioner on more or less all outstanding legal issues and situations that have arisen in the implementation of the Law. It was printed in 1,500 of which more than 1,000 were sent to public authorities.

The Commissioner also started a youth website titled "You Have the Right to Know", accessible at www.pravodaznas.rs and www.pravodaznam.rs. On the website he posted his publication "A Guide to Freedom of Information for Secondary School Pupils", which is written in plain language and instructs secondary school pupils how to use the Law, familiarizes them with the institution of the Commissioner and explains the freedom of information as a fundamental human right.

Seminars

In the course of 2012, the Commissioner organised a number of seminars dedicated to the exercise of freedom of information. These included a one-day seminar organised with the Government's Human Resources Management Service for the staff of Ministries and other public authorities, two seminars for the staff of magistrates' courts and trainings for representatives of civil society. Numerous lectures have been held, including a lecture for university students at a debate dedicated to corruption in higher education, organised by Belgrade Open School and the Students' Conference of Serbian Universities and a lecture dealing with the freedom of access to environmental information, in a debate organised by the European Integration Centre of Belgrade Open School. The Commissioner held several lectures for university students, e.g. at the Faculty of Law in Belgrade, the Faculty of Organisational Sciences, the Academy of Crime and Police Studies, the Diplomatic Academy etc., in connection with the exercise of the freedom of information. The Commissioner also took part in several lectures for Serbian journalists addressing the topics of local government transparency and the role of the media, in cooperation with the OSCE mission to Serbia.

In cooperation with the Youth Initiative for Human Rights, the Commissioner was host to more than thirty secondary school pupils from the municipalities of Presevo, Bujanovac and Medvedja. The Commissioner introduced the pupils to his work and explained to them the manner of exercising freedom of information and personal data protection.

The Commissioner and representatives of the institution of the Commissioner have spoken about the freedom of information at various debates, conferences, round tables and other public events organised by other public authorities or the civil sector. This is dealt with in more detail in chapter 2.3 of the Report, which deals with the Commissioner's cooperation.

Conferences

In 2012, the Commissioner organised and participated in a number of conferences and other events organised in Serbia and abroad. (Participation in major international conferences and other important events is discussed in section 2.3, which deals with cooperation.)

Of particular importance was a major international conference organised by the Commissioner to commend the 28th of September, the Right to Know Day. These conferences have been held every year since 2006, in cooperation with and with the support of the OSCE Mission to Serbia, the United Nations Development Programme (UNDP) Office in Serbia, the Independent Association of Journalists of Serbia, the Association of journalists of Serbia and the Freedom of Information Coalition. These conferences are traditionally an occasion to present awards to public authorities in recognition of the results they achieved and their contribution to the freedom of information, as well as a special award for the best information booklet on the work of public authorities, which is awarded in a competition. The conference was also used to present the publication "Freedom of Information: Extracts from the Commissioner's Practice", which was prepared by the Commissioner, as well as the Guide to Freedom of Information for Journalists, which was prepared by Access Info Europe and the Network for Reporting on Eastern Europe (n-ost), supported by OSCE and translated and adapted for Serbian journalists by Transparency Serbia and several other organisations.

The results of the project "Monitoring of Proactive Access to Information in Serbia" implemented by Transparency Serbia were also presented.

3.2. Judicial Protection of Freedom of Information before Administrative Court

Judicial protection of the freedom of information before the Administrative Court is a remedy for reviewing the legality of decisions passed by the Commissioner and the six authorities against which complaints with the Commissioner are not admissible and which are exempted from the Commissioner's authority (the National Assembly, the President of the Republic, the Government, the Supreme Court of Cassation, the Constitutional Court and the Republic Public Attorney). 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.

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

According to the figures of the Administrative Court, in 2012 that Court received only 2 lawsuits against the highest public authorities listed above (the authorities referred to in Article 22, paragraph 3 of the Law): one lawsuit against a decision of the President of the Republic and one against a decision of the Government. Both cases are pending.

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, as evidenced by only two lawsuits filed against those authorities. That there were reasons for filing lawsuits against those authorities for denial of access to information can best be seen from the fact that requesters in such situations lodged complaints with the Commissioner, which had to be dismissed as inadmissible. In 2012 there were 15 such cases.

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. However, this legislative provision has remained unchanged through several amendments of the Law.

The Administrative Court received 66 lawsuits against the Commissioner's decisions in 2012 – a 50% increase compared with 2011. It is rather alarming that, even though the Law has been in effect for nearly eight full years now, as many as 17 lawsuits were file directly by authorities of first instance, which do not even have the legal power to file lawsuits. 29 lawsuits were filed because the Commissioner failed to decide on complaints within the statutory 30-day period.

The Administrative Court ruled on 39 lawsuits as follows: it rejected 11 lawsuits filed by information requesters as unjustified, thus upholding the Commissioner's decisions; it dismissed 19 lawsuits as inadmissible, including those filed by public authorities; finally, in 9 cases proceedings were terminated. This means there were no overturned decisions of the Commissioner in 2012. From the aspect of judicial control of the legality of the Commissioner's work, this result is indeed praiseworthy.

Inadmissible lawsuits against the Commissioner's decisions in 2012 were filed by the following public authorities: *Telekom Srbija* (10 lawsuits), the First Primary Court of Belgrade, the City Public Attorney's Office in Belgrade, the Higher Public Prosecutor's Office in Cacak, the Municipal Administration of Zitiste, the Municipal Public Attorney's Office in Trstenik, the Serbian Medical Chamber (2) and the Institute for Technology of Nuclear and Other Mineral Raw Materials (2).

The persistency displayed by some government and other public authorities, in particular *Telekom Srbija a.d.*, in their efforts to avoid or delay the execution of the Commissioner's binding and enforceable decisions by filing inadmissible lawsuits, is highly detrimental to the reputation of those authorities. However, this aspect notwithstanding, there is no doubt that such actions should be met by an appropriate reaction in terms of liability, which, as a rule, is unfortunately lacking. 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.

3.3. Supervision of Compliance with the Law and Liability for Violations of Rights

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. The authority responsible for supervision also has the power to make requests for initiation of infringement proceedings before the competent magistrates' 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 Ministry of Justice and Public Administration, , in 2012 administrative inspectors carried out 267 controls of compliance with the Law on Free Access to Information in cases in which public authorities failed to comply with the decisions

passed by the Commissioner in procedures held pursuant to complaints lodged by information requesters. The report further states that the authorities concerned complied with the relevant decisions in 121 cases, while the remaining cases are pending.

The report further states that inspectors supervised compliance with the duty to submit reports and publish information booklets by Ministries and that the Administrative Inspectorate concluded the level of compliance with the Law on Free Access to Information was higher than in the past years.

In this context, it is worrying that in 2012, similarly as in 2011, administrative inspectors did not file a single request for initiation 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 2012 alone. Indeed, more than 2,000 complaints lodged with the Commissioner were found to be justified and the Commissioner himself forwarded the files to the Administrative Inspectorate for more than 260 cases of gross violation of the freedom of information by public authorities in 2012, including those in which public authorities refused to comply with the Commissioner's orders even after being fined.

The level of compliance with the above legal duties provided for in the Law on Free Access to Information would undoubtedly have been much higher if an accountability system had been in place, i.e. if administrative inspectors had filed requests for initiation of infringement proceedings and if those responsible for violations of the law had been held to account.

As an illustration, we will quote only some of the cases of denial of access to information even after the Commissioner's passed a binding and enforceable decision in which responsible persons bore no liability due to lack of supervision:

1. *"Telekom Srbija" refused to give a journalist information on the amount of money it paid to printed and electronic media in the period 2005-2010 and copies of business agreements with the media (case No. 07-00-00560/2011-03), as well as copies of agreements with companies Koefik, Roaming Electronics and others (case No. 07-00-02406/2012-03), information concerning the purchase of Ericsson equipment (case No. 07-00-0687/2011-03) etc.*
2. *Public Enteprise "Zeleznice Srbije" ("Serbian Railways") refused to provide a requester with information on its public procurement plan (case No. 07-00-00198/2012-03) and information on fees and compensation paid to associates and consultants it hider and their education etc. since 2009 (case No. 07-00-01431/2011-03)*
3. *Public Enterprise "Srbijagas" refused to provide a journalist with copies of its agreement on large-value public procurement entered into with the company Ces mecon (case No. 07-00-02845/2012-03)*
4. *The Serbian Broadcasting Corporation (RTS) refused to provide the Anti-Corruption Council with copies of instruments governing the competition procedures for the selection of independent production programmes and the selection of the most advantageous tenderers (case No. 07-00-170/2012-03) and refused to provide other requesters with information in connection with the action "Safe House" concerning the amount of*

insurance claimed (case No. 07-00-00964/2011-03), information on the costs of broadcasting certain documentaries and information on the supervision of legality of operations of RTS (case No. 07-00-02127/2010-03)

5. *The Faculty of Agriculture of the University of Belgrade refused to provide the Faculty's trade union with information concerning its financial operations, public procurements and staff remuneration (case No. 07-00-2643/2011-03)*
6. *The Town Council of the town of Leskovac refused to provide local communities with lists of flooded household (case No. 07-00-02920/2011-03)*
7. *The Ministry of Finance and Economy (formerly Ministry of Economy and Regional Development) refused to provide a requester with information concerning the purpose and repayment of an export promotion loan approved to the company HI "Zupa" (Chemical Industry "Zupa") (case No. 07-00-01640/2011-03)*
8. *The Ministry of Defence did not provide a journalist with information on the costs of overhauling MIG 29 airplanes (case No. 07-00-01541/2012-03)*
9. *The Ministry of Internal Affairs did not provide a journalist with information concerning the Rules on Special Compensation Payable to Employees of the Ministry of Internal Affairs in the Territory of Kosovo and Metohia (case No. 07-00-03027/2011-03).*

In the context of liability for non-compliance with the statutory obligations of public authorities concerning the preparation and publication of information booklets and the elementary obligation to submit annual reports on implementation of the Law on Free Access to Information, the following table contains statistical figures on (non)compliance by specific categories of authorities that are subject to those obligations:

Table showing compliance of public authorities with their obligations

Public authority	No. of public authorities	Report submitted – number and %	Information Booklet published -number and %	Information Booklet prepared, but not published - number and %	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%)	/	3 (50 %)	5 (83.3 %)
Ministries	17	17 (100 %)	17 (100 %)	/	9 (53 %)	14 82 %
Courts	128	122 (95.3 %)	106 (82.8 %)	11 (8.6 %)	68 (53 %)	101 (78.9 %)
Public Prosecutors' Offices	66	62 (93.9 %)	20 (30.3 %)	37 (56 %)	36 (54.5 %)	49 (74.2 %)
Authorities and organisations of the Autonomous Province of Vojvodina	36	22 (61.1 %)	21 (58.3 %)	/	19 (52.7 %)	20 (55.5 %)
Local self-governments (cities/towns and municipalities)	200	158 (79 %)	130 (65 %)	13 (6.5 %)	92 (46 %)	133 (66.5 %)
Public enterprises ((Republic and Provincial level) required to submit	29	27 (93.1 %)	24 (82.7 %)	/	18 (62 %)	20 (10 %)

reports						
Other public authorities	2358	297 (12.5 %)	199 (8.4 %)	56 (2.3 %)	211 (8.9 %)	253 (10.7%)
Total	2840	711 (25 %)	521 (18.3 %)	117 (4.1 %)	456 (16 %)	595 (20.9 %)

4. IMPLEMENTATION OF LAW ON PERSONAL DATA PROTECTION

4.1. Commissioner's Activities in the Field of Personal Data Protection

4.1.1. Summary of Commissioner's Activities in the Field of Personal Data Protection

In 2012, in the field of personal data protection the Commissioner:

- Received 1,405 cases (83 cases in 2009, 250 cases in 2010 and 727 cases in 2011). As 128 cases were carried forward from 2011, a total of 1,533 cases were processed in this field in 2012.
- Carried out 184 preliminary checks of personal data processing; in 66 cases no irregularities were found, while in 118 cases the Commissioner found irregularities and pointed them to data controllers;
- Carried out 365 inspection of compliance with and implementation of LPDP. Of that number, by 31 December 2012 procedures were fully completed, including 103 cases of identified violations of LPDP and 61 cases where no violations occurred. In the 103 cases the Commissioner found 223 violations of LPDP, which means that in practice the Commissioner found two or more violations of LPDP in some cases;
- Issued 67 warnings against irregularities in data processing;
- Ordered 14 measures. In 6 cases he ordered elimination of irregularities within a specified period; in 2 cases he imposed a temporary ban on data processing that was done contrary to LPDP; and in 6 cases he ordered deletion of data collected without proper legal basis;
- Together with the Ombudsman, filed with the Constitutional Court a motion to review constitutionality of Article 286, paragraph 3 of the Code of Criminal Procedure;
- Filed 35 petitions for initiation of infringement proceedings due to violations of LPDP;
- Filed 1 criminal report for the criminal offence referred to in Article 146, paragraph 3 of the Criminal Code;
- Acted on 174 complaints, including 154 complaints received in 2012 and 20 carried forward from 2011. Of those 174 complaints, by 31 December 2012 the Commissioner closed 129 cases (109 received in 2012 and all 20 cases carried forward from 2011), while the remaining 45 were carried forward to 2013;
- Registered 303 data controllers and 1,575 records of the data files they maintain with the Central Register;
- Acted on 12 requests for transborder transfer of personal data, seven of which were received in 2012, while the remaining five were carried forward from 2011. Two

decisions have been passed pursuant to these requests, while decisions in the remaining cases are still pending;

- Issued 569 reasoned opinions and answers, including 432 to individuals, 65 to legal entities and 72 to public authorities and local self-governments. Of those 72 opinions, 18 related to drafts or working versions of laws.

In 2012, 15 civil servants were directly engaged in performing these duties.

4.1.2. Supervision of Personal 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 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 files petitions for initiation of infringement proceedings in cases where violations of the provisions of LPDP have been identified. The Commissioner may also file criminal reports.

In 2012, the Commissioner carried out 184 preliminary checks of personal data processing, in accordance with Articles 49 and 50 of LPDP and the Bylaw on the Manner of Conducting Preliminary Checks of Personal data processing. In 66 cases (35.87%) no irregularities were found, while in 118 cases (64.13%) the Commissioner found irregularities and pointed them to data controllers.

The structure of data controllers that were subject to preliminary checks of personal data processing was as follows: public administration – 17 (9.19%); local self-government – 9 (4.86%); manufacture, trade and services – 69 (37.30%); health care -7 (3.78%); telecommunications – 4 (2.16%); judiciary – 5 (2,70 %); associations – 12 (6.49%); education – 1 (0.54%); banking sector – 50 (27.03%); insurance – 8 (4.32%); and others – 3 (1.62%).

In 2012 the Commissioner carried out 365 inspections (compared with 159 inspections in 2011 and 71 inspections in 2010). Of those 365 inspections, 46 (12.60%) were carried out on the data controllers' premises, while 319 (87.40%) were carried out through written communication.

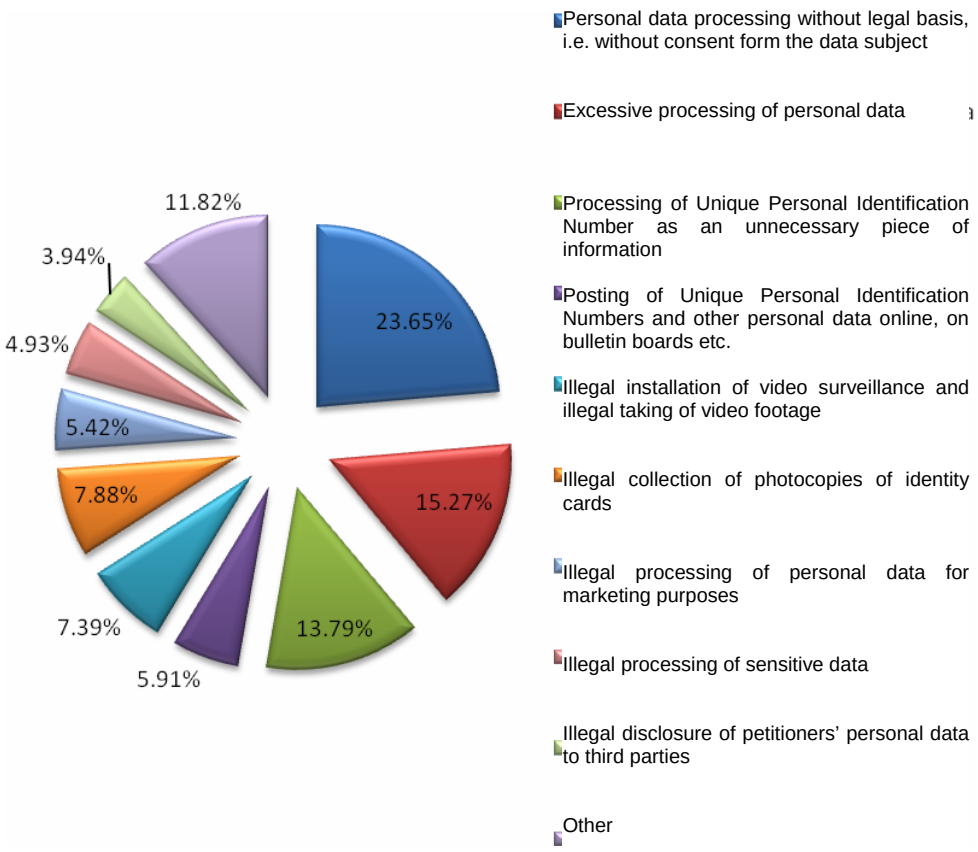
The Commissioner initiates inspection procedures either on his own initiative or pursuant to reports filed by the citizens. Of the 365 inspections carried out in 2012, in 162

(44.38%) cases the Commissioner initiated inspection on his own initiative, while in 203 (55.62%) cases inspections were carried out pursuant to reports filed by the citizens.

As regards inspections of data controllers carried out by the Commissioner following reports by the citizens (203), the following were cited as reasons:

- Illegal installation of video surveillance and illegal taking of video footage - 15 (7.39%);
- Illegal processing of citizens' personal data by political parties - 5 (2.46%);
- Processing of biometric data for the purpose of logging working hours - 1 (0.49%);
- Illegal processing of personal data for marketing purposes - 11 (5.42%);
- Violation of the right to privacy - 5 (2.46%);
- Illegal deletion of data - 2 (0.99%);
- Illegal collection of photocopies of identity cards – 16 (7.88%);
- Processing of Unique Personal Identification Number as an unnecessary piece of information - 28 (13.79%);
- Excessive processing of personal data - 31 (15.27%);
- Unauthorized disclosure of petitioners' personal data to third parties - 8 (3.94%);
- Access to citizens' personal data by unauthorised persons - 4 (1.97%);
- Illegal processing of sensitive personal data - 10 (4.93%);
- Personal data processing without legal basis, i.e. without consent form the data subject - 48 (23.65%);
- Posting of Unique Personal Identification Numbers and other personal data online, on bulletin boards etc. - 12 (5.91%);
- Processing of inaccurate and obsolete data - 4 (1.97%);
- Data safety - 1 (0.49%), and
- Illegal data collection - 2 (0.99%).

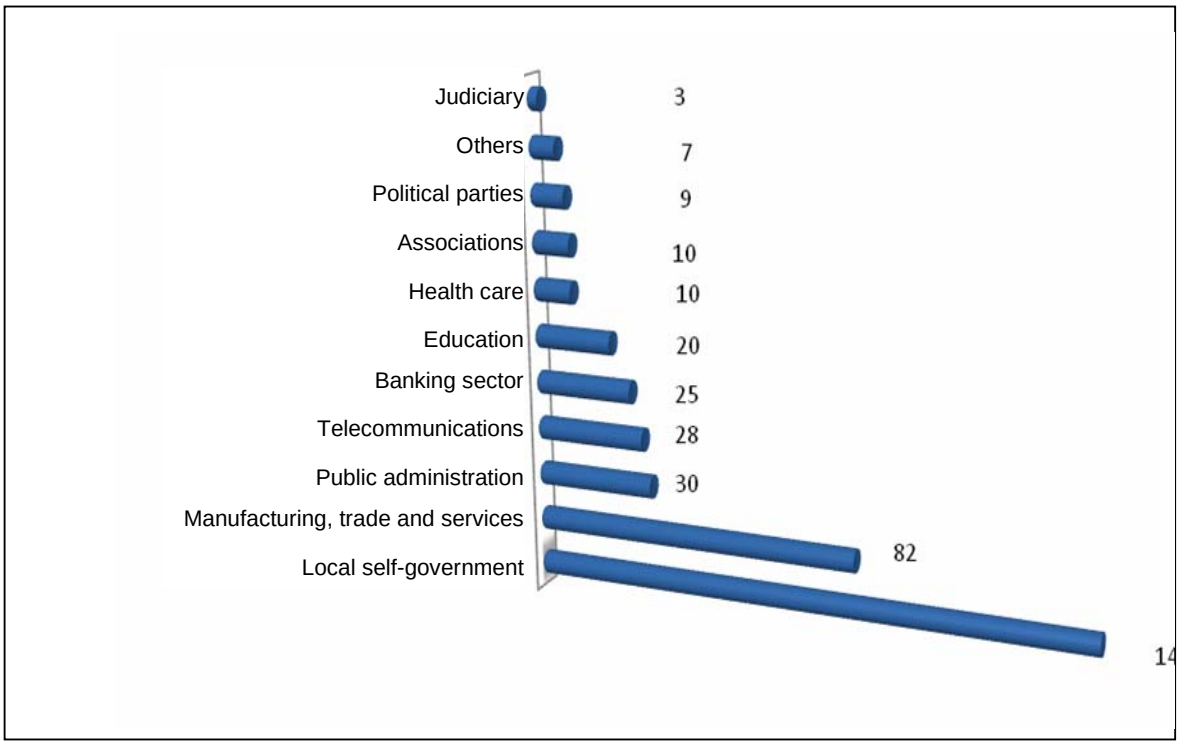
Graph 6. Reasons for initiation of inspection procedures following citizens' reports



Data controllers inspected by the Commissioner for compliance with LPDP, by fields of activity:

- Public administration - 30 (8.29%);
- Local self-government - 141 (38.63%);
- Manufacture, trade and services - 82 (22.45%);
- Health care - 10 (2.74%);
- Telecommunications - 28 (7.67%);
- Judiciary - 3 (0.82%);
- Political parties - 9 (2.47%);
- Associations - 10 (2.74%);
- Education - 20 (5.48%);
- Banking sector - 25 (6.85%),
- Other - 7 (1.92%)

Graph 7. Structure of all personal data controllers (365) inspected by the Commissioner for compliance with and implementation of LPDP



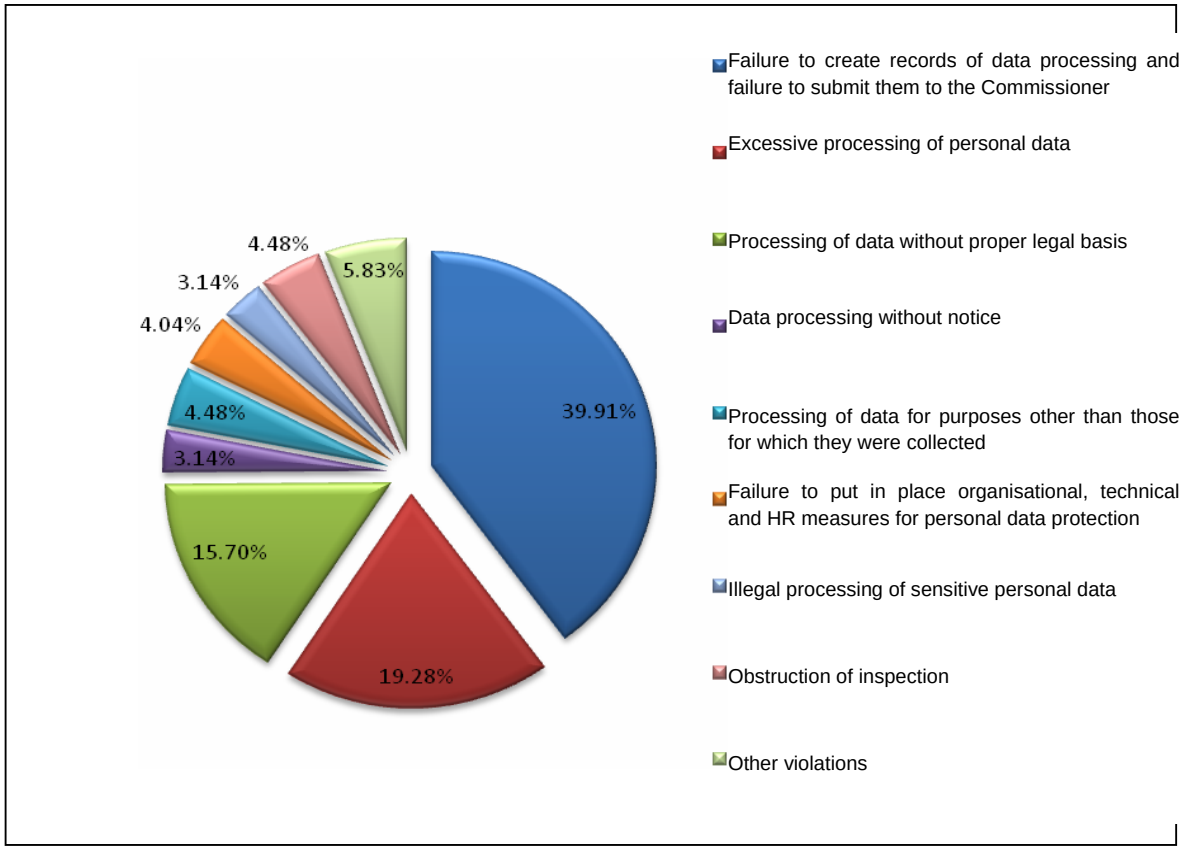
Of the total of 365 inspections carried out by 31 December 2012, the procedures were fully completed in 164 cases. Of the 164 completed inspections, in 103 cases (62.80%) the Commissioner found violations of LPDP, while in 61 cases (37.20%) no violations were found.

In the 103 cases the Commissioner found 223 violations of LPDP, which means that in practice the Commissioner found one, two or more violations of LPDP in some cases, including:

- Failure to create records of data processing and failure to submit them to the Commissioner – 89;
- Excessive processing of personal data – 43;
- Processing of data for purposes other than those for which they were collected – 10;
- Failure to put in place organisational, technical and HR measures for personal data protection – 9;
- Processing of data without proper legal basis – 35;
- Illegal processing of sensitive personal data – 7;
- Data processing without notice – 7;

- Failure to inform the Commissioner of intent to create a personal data file – 5;
- Purpose of processing no longer relevant – 2;
- Processing by inadmissible means – 5;
- Collection of data contrary to the requirements of Article 14 of LPDP – 1, and
- Obstruction of inspection – 10.

Graph 8. Identified violations of LPDP



In each individual case where violations of LPDP were found, the Commissioner took one or more measures, as follows:

a) Issued 67 warnings against irregularities in data processing (In 2011 he issued 108 warnings and in 2010 he issued29);

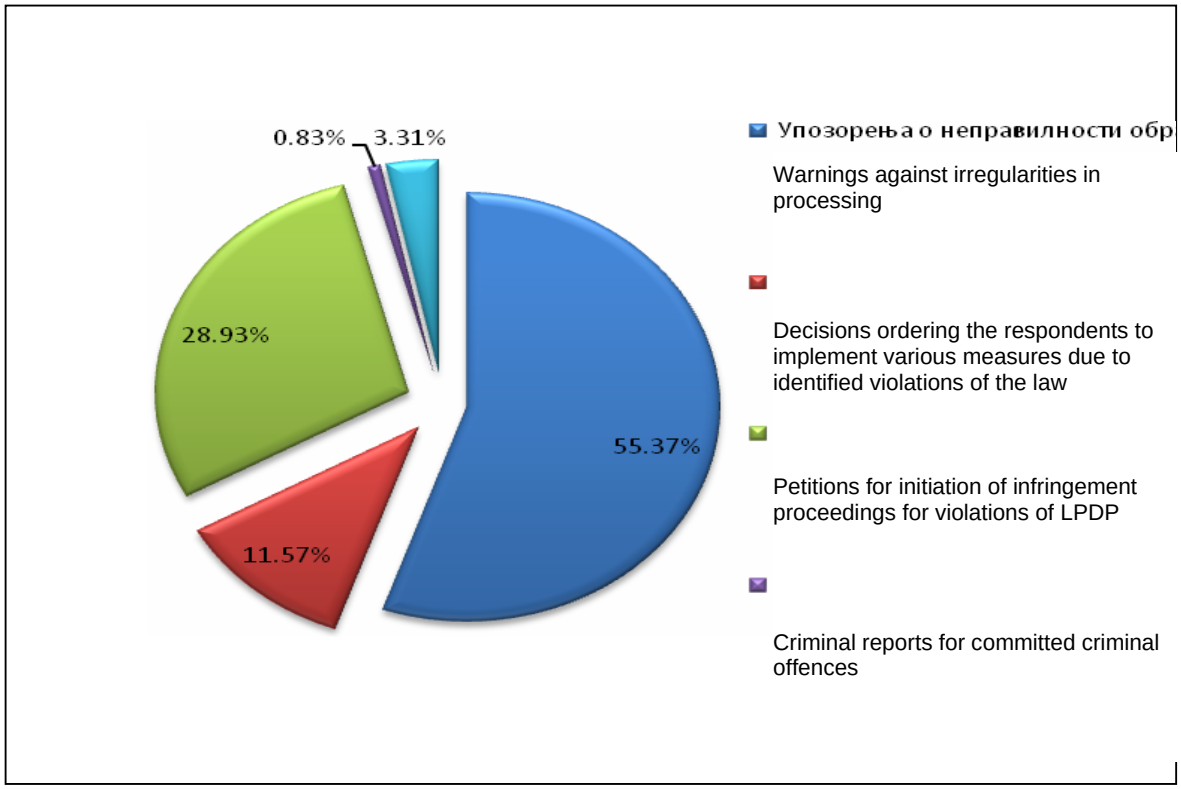
b) He ordered the implementation of 14 measures: in 6 cases he instructed the respondents to rectify the irregularities within a specified timeframe; in 2 cases he temporarily banned the respondents from processing carried out in violation of LPDP; and in 6 cases he instructed the respondents to delete data collected without proper legal basis. (In 2011 the Commissioner ordered the implementation of 7 measures, while in 2010 he ordered 5 measures);

c) He filed 35 petitions for initiation of infringement proceedings for violations of the provisions of LPDP (In 2011 he filed 26 such petitions and in 2010 he filed 20);

d) He filed 1 criminal report for the criminal offence referred to in Article 146, paragraph 3 of the Criminal Code (In 2011 he filed 3 criminal reports and in 2010 he filed 18), and

e) He terminated 4 cases by making an official note, because the data controllers concerned immediately informed the Commissioner they had rectified the irregularities.

Graph 9. Measures taken by the Commissioner



Example: *The largest-scale inspection carried out by the Commissioner is the inspection of compliance with and implementation of LPDP by the Ministry of Internal Affairs. The inspection was carried out in 2011 and 2012, in 61 organisational units of the Ministry of Internal Affairs. In many cases the inspection found irregularities that constituted breaches of LPDP, while some of them even violated the Constitution of Serbia. These irregularities included: large-scale and diverse personal data processing by the Ministry of Internal Affairs based mostly on implementing regulations; processing carried out without a clearly specified purpose; processing that is excessive and disproportionate for the intended purposes; absence of appropriate technical, HR and organisational data safeguards necessary to protect the data against loss, destruction, unauthorised access, modification, disclosure or any other abuse; and failure to submit records of personal data files to the Commissioner's Central Register within the specified period of time. During the inspection it was found that the majority of these irregularities tend to occur together, rather than individually.*

It should, however, be observed that relevant regulations that would govern the layout and content and the manner of keeping the records provided for in the Law on Police have not yet been adopted the content, although this should have been done within six months of the effective date of the Law on Police. Moreover, special laws and instruments that should have been adopted under Article 80 of the Law on Police to provide legal basis for handling of data contained in the records of received operational and technical means and methods have not yet been adopted. The Commissioner is of the opinion that the absence of these regulations has only further increased legal uncertainty and resulted in a lack of transparency in this segment of operations of the Ministry of Internal Affairs; while at the same time hampering the exercise of data subjects' rights in connection with processing, including the right to information and access to processed data, the right to correction, the right to deletion etc.

The effects of regular inspection of compliance with and implementation of LPDP by the Ministry of Internal Affairs are expected to be seen in the future, primarily through urgent adoption of relevant regulations, as well as through envisaging and implementing HR, organisational and technical measures to bring personal data protection to a higher level.

Certain positive effects of inspection were already visible during the inspection procedure, in that the Ministry immediately rectified some minor irregularities in data protection pointed out by the Commissioner's officials who carried out the inspection.

In late 2012, the Commissioner warned the data controller about the irregularities in data processing listed above and ordered it to report to the Commissioner on measures taken and activities planned to rectify those irregularities.

***Example:** The Commissioner carried out an inspection of compliance with and implementation of LPDP by data controllers – mobile and landline telephony operators in the Republic of Serbia, including: Orion Telekom, Telenor, VIP Mobile and Telekom Srbija. The inspection was carried out between March and July 2012. The subject of inspection was not access to the content of communication, i.e. standard wiretapping, but access to the so-called retained data on communications – information indicating who communicated with whom, when, for how long, from where, using what means etc., in the 12-month period preceding the time of inspection.*

In the inspection procedure, among other things the Commissioner determined:

- The structure of entities requesting retained data. These included: courts, public prosecutor's office, the Ministry of Internal Affairs (which submitted by far the largest number of requests), the Military Security Agency, the Security Information Agency, the Customs Administration, the Tax Administration, inspection authorities, the Provincial Fund for Pension and Disability Insurance, a pre-school facility, the City Emergency Headquarters, a Montenegrin detective agency, court experts, lawyers, an individual and others;

- The number of requests for access to retained data. All four operators combined received more than 4,000 requests and responded positively to approximately 90% of all requests. Public authorities accessed the data retained by only one operator more than 270,000 times on their own. The remaining three operators do not keep records of such cases where public authorities access retained data on their own, which they are not required to do under the law;

- The types of retained data requested. These included e.g. identification data and users' contractual details; communication data for individual users; data on base station traffic; data on signal coverage and presence of mobile devices in the service area of a specific base station; data on links between SIM cards and mobile devices used; data on links between a subscriber's

number in the mobile network and an IP address in the public Internet network; listing of incoming and outgoing traffic; caller identification; provision of user contracts; addresses of base stations; data on mobile telephony cards; data on the person in whose name a landline telephony number is register; listing for a prepaid public phone card etc.

On the basis of the facts listed above and all other facts found during the inspection, the Commissioner concluded that processing of all these data individually, and especially all of them together, in the preceding 12 months, constituted a serious invasion of the citizens' privacy. Starting from the facts found in this inspection and taking into account the constitutional guarantee of inviolability of means of communication, which allows for derogations only on the basis of a court order for the purposes of conducting criminal proceedings or protecting national safety, as well as the generally accepted rules of international law, the Commissioner and the Ombudsman made a Proposal of Recommendations in 14 points for improving the situation in this field.

For more details on this issue, see 2.2.2 – Personal data protection

Example: *The Commissioner carried out an inspection of compliance with and implementation of LPDP by the company Metromarketing jug D.O.O. Leskovac, a provider of parking services, to verify allegations of illegal processing of data on the citizens' employment status. The data controller, as a utility company providing parking services, processed personal data in a judicial proceeding for the enforced collection of an outstanding parking ticket by including in its petitions for enforcement on the basis of an original document the name of the employer as evidence of the debtor's employment status, thus carrying out inadmissible processing within the meaning of Article 8, item 2 of LPDP, as it processed the data for purposes other than those originally specified.*

In this specific case, the original purpose of employment data is the exercise of employment rights under applicable labour legislation and rights arising from pension and disability insurance. However, the data controller processed this information for another purpose, i.e. for the purpose of debt collection, thereby processing the data for purposes other than those originally specified, regardless whether it was carried out on the basis of the data subject's consent or on the basis of statutory powers for processing data without consent, which constitutes inadmissible processing under LPDP.

Example: *The Commissioner carried out an inspection of compliance with and implementation of LPDP by Eurobank EFG in connection with the alleged processing of false data on a citizens' borrowing at the Credit Bureau. Eurobank EFG, as data controller, entered and published, i.e. processed, on the given date in its allocated portion of the Credit Bureau database maintained by the Association of Serbian Banks and Other Financial Institutions an inaccurate piece of information about the borrowing of a citizen who had never been its client and owed it no debt, thereby carrying out inadmissible processing under LPDP.*

Facts found in the inspection procedure revealed that the complainant was not a client of the bank and owed no debt to it on any basis. He did, however, have the same Unique Personal Identification Number (JMBG) as one of the bank's clients. As the system which connected the data controller with the Credit Bureau retrieves debt information on the basis of the JMBG, it identified the complainant as the bank's loan debtor in the Credit Bureau.

The Commissioner found that the infrastructure of the protected memory space of the Credit Bureau was partitioned and allocated to individual members. The data controller

concerned had a contractual obligation to prepare, store and update the data in its allocated memory space. Hence, the data controller sent no data to the Credit Bureau, but rather used its own memory space which was, under specific conditions, available both to other members of the Credit Bureau and the data subject. Thus, the data controller was solely capable of and responsible for entering data and correcting inaccurate data in the Credit Bureau database using a special form developed for that purpose.

The Commissioner ordered the data controller to rectify this irregularity by deleting the complainant's borrowing information.

Example: *The Commissioner carried out an inspection of compliance with and implementation of LPDP by the data controller Oncology Institute of Vojvodina and an unnamed staff member of that Institute as the directly responsible person for illegal processing of a female patient's medical data.*

The facts found in the inspection procedure revealed that the person directly responsible for such processing, who was assigned access privileges through the authorisation system which allowed it to access the Therapy Planning System and patients' electronic records, personally created a document titled "Medicinska dokumentacija pacijenata.doc" (Patients' Medical Documentation), which included the following data: name, surname, year of birth, address, PrintScreen CT cut-off, as well as diagnosis, description of surgical interventions, description of PH findings, description of administered therapy, description of planned therapy and report from the oncological committee on post-operative radiation therapy. The person then sent that document, together with three other documents (Izveštaj kolegijuma klinike novembra 2011 doc, izveštaj stručne komisije.pdf, Imenovanje stručne Komisije.pdf) to the citizens'a ssociation Doctors against Corruption by e-mail to doctors.against.corruption@gmail.com.

On the basis of the facts thus found, the Commissioner issued a Warning to the Oncology Institute of Vojvodina, in which it advised the Institute it had forwarded medical data of the two patients without proper legal basis, i.e. without the data subjects' consent, for purposes other than those for which the medical documentation was originally formed. The data controller was also advised it had not put in place appropriate technical and/or organisational safeguards necessary to protect the data from abuse. The data controller informed the Commissioner about the measures taken to rectify the irregularities cited in the Warning. In addition, the Commissioner filed a petition for initiation of an infringement proceeding against the Oncology Institute of Vojvodina as the data controller and defendant legal entity and against the directly responsible person as the defendant individual employed at the legal entity for processing of sensitive personal data in violation of LPDP.

Example: *The Commissioner carried out an inspection of compliance with and implementation of LPDP by the data controller – company "Apex Solution Technology d.o.o.". ("Bus Plus"), which is in charge of collecting public transport fares in Belgrade, for excessive processing of personal data. The data controller had sent application forms to primary schools in the territory of Belgrade, which the headmasters and other persons then distributed to pupils, requiring them to provide personal data in order to be issued with transport cards. On that occasion, the data controller carried out excessive processing of personal data of the pupils and their parents. Furthermore, the data controller failed to inform the schools, as data processors, of relevant safeguards that would be applied to those data.*

The following irregularities were found upon inspection: the data controller carried out inadmissible, disproportionate and excessive processing of personal data of primary school

pupils in the territory of the city of Belgrade, contained in the application forms titled "Application for Personalised Contactless Smart Card", including: address, mobile phone number, fixed phone number and e-mail address. It collected those data through primary schools, which had administered the application forms to their pupils and sent them back to the data controller. Furthermore, in its notice of processing, which the data controller included in its form "Application for Access to Busplus Benefit Programme", failed to inform the data subjects of the fact that provision of the data required therein was not mandatory, i.e. it did not clearly state that pupils did not have to complete that application form ("Application for Access to Busplus Benefit Programme"). Also, the data controller did not inform the primary schools in the territory of the city of Belgrade, which were involved in the process of data collection from their pupils as data processors, of relevant safeguards that would be applied to those data.

On the basis of the facts thus fund, the Commissioner took the following measures: he passed a decision by which he temporarily banned Marketing and Services Company "Apex Solution Technology" d.o.o. Beograd, as the data controller, from processing the said personal data. Furthermore, Marketing and Services Company "Apex Solution Technology" d.o.o. Beograd, as the data controller, was ordered to delete in all paper-based forms "Application for Personalised Contactless Smart Card" it received any and all data that were unnecessary and excessive for the purpose of processing. Also, the Commissioner ordered the data controller to clearly state in its Notice of Processing, which was included in the form "Application for Access to Busplus Benefit Programme", that pupils do not have to provide the data required in that form, i.e. that completion of the said form was not necessary, and to inform the primary schools in the territory of the city of Belgrade, which collected their pupils' personal data in the capacity of data processors, about the applicable safeguards.

Example: *The Commissioner carried out an inspection of compliance with and implementation of LPDP by the data controller Raiffeisen Bank to investigate an allegation that the bank had been processing personal data for marketing purposes.*

A citizen contacted the Commissioner inquiring whether a bank was allowed to make the approval of a service to a client conditional upon his/her consent to the use of his/her personal data for marketing and other similar services (making data available to insurance companies for their advertising purposes); the citizen also inquired whether a bank was entitled to use the data thus obtained for marketing purposes even if it had refused to provide the service to the client and whether such bank had an obligation to clearly state which data would be used for which purpose.

In the inspection procedure, the Commissioner examined the bank's General Terms and Conditions and, after obtaining a written response from the bank, concluded that irregularities had occurred in the processing of personal data. The Commissioner therefore ordered the bank to ask its clients for two separate consents, so that in this specific case its clients would give one consent for the purpose of opening a current account, while consent to the use of their personal data for marketing and other similar services (making data available to insurance companies for their advertising purposes) would be given separately. The bank complied with the Commissioner's Warning.

Example: *The Commissioner carried out an inspection of compliance with and implementation of LPDP by the data controller Primary Court of Sremska Mitrovica for alleged illegal processing of data on a citizen's criminal record. The Court had illegally processed data on the citizen's criminal record because it sent to the address of his employer the court decision*

in a case in which he was issued a court reprimand for the criminal offence of defamation in a private lawsuit.

In the inspection procedure carried out following a report from the citizen concerned, the Commissioner found the criminal offence in question was not prosecuted ex officio and was not in any way related to the complainant's work. On request from the Commissioner, the Court responded in writing that the said decision on court reprimand was sent to the complainant's employer "for information purposes", on the basis of Article 350, paragraph 1 of the Court's Rules of Procedure, and that it was the Court's practice to apply the said provision in all criminal proceedings.

The Commissioner subsequently issued a Warning to the Primary Court of Sremska Mitrovica, advising it of the fact it had, in violation of LPDP, illegally processed sensitive personal data as the data controller with the status of a public authority without legal authorisation or the data subject's written consent by sending written notice of validity and enforceability of its judgement in a private lawsuit in which the complainant was issued a court reprimand. The rationale of the Warning state inter alia that the only law that provided for a duty to provide notice and the period in which such notice is to be served was the Code of Criminal Procedure, which contains no provisions that would require notification of sentencing in private criminal lawsuits, nor was there any requirement to provide notice of every valid and enforceable judgement by default. The Court is indeed under an obligation to apply its Rules of Procedure and the Court President is in charge of enforcing and properly implementing those Rules of Procedure and ensuring legality of actions taken by the Court; however, legality implies consistent observance of the law, whose norms cannot be derogated by the provisions of secondary legislation, nor can personal data, least of all sensitive personal data, be processed on the basis of "common practice" where such practice constitutes a violation of LPDP.

4.1.3. Commissioner's Acting on Complaints against Data Controllers

The Commissioner is vested with 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.

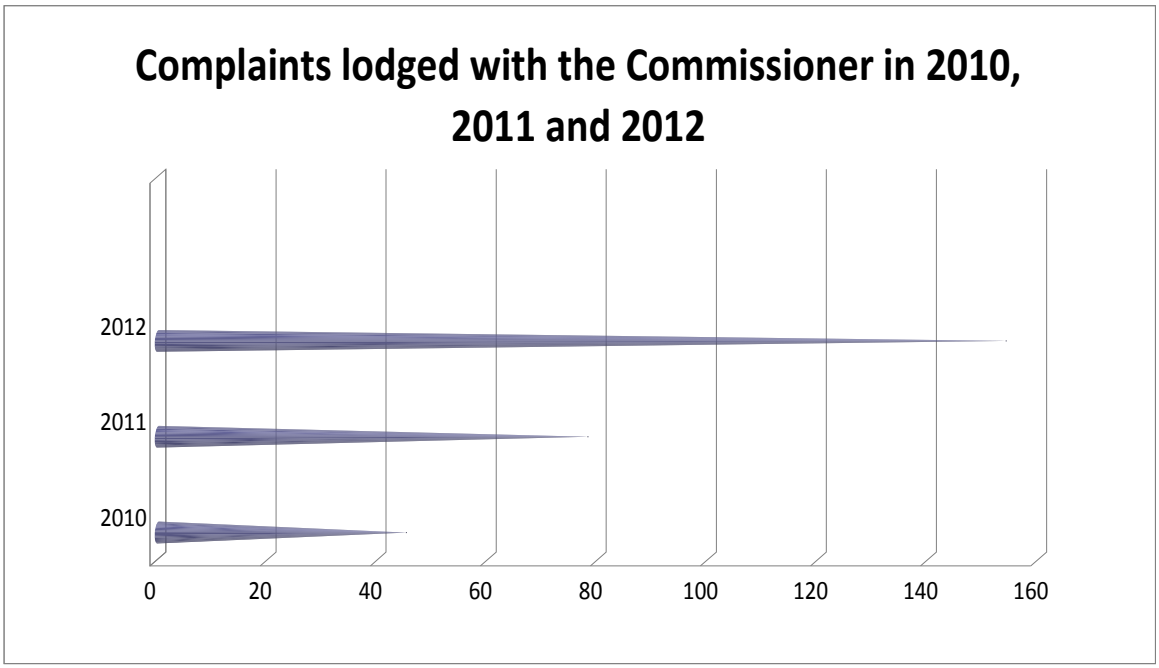
A person who previously addressed a data controller with a request for the exercise of rights in connection with data processing may lodge a complaint with the Commissioner in accordance with LPDP. The Commissioner rules on complaints within 30 days of lodging. Before passing a decision, the Commissioner 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 2012, the Commissioner received 154 complaints (compared to 78 in 2011 and 45 in 2010). In 2012 the Commissioner acted on 174 complaints (the 154 complaints received in 2012 and 20 complaints carried forward from 2011). Compared with 45 complaints received in the course 2010, the 78 complaints received in 2011 constituted a 73% increase. Compared with 78 complaints received in 2011, the 154 complaints received in 2012 constitute a 97% increase.

Graph 10. Complaints lodged with the Commissioner in 2010, 2011 and 2012

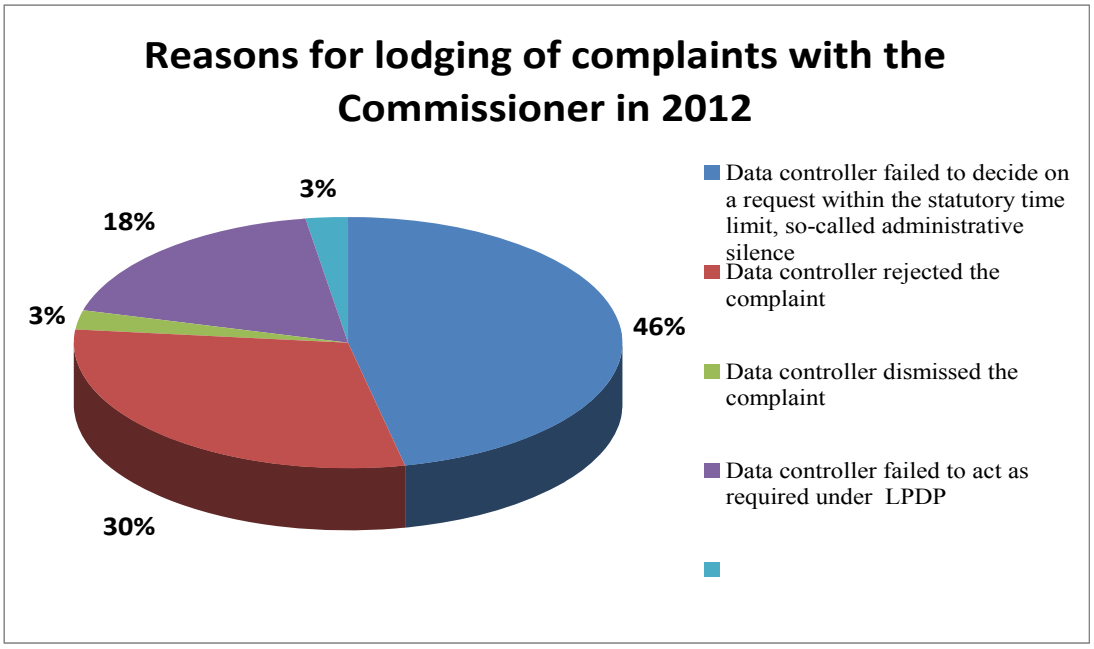


In the complaints lodged with the Commissioner in 2012 (154 of them), complainants stated the following reasons:

- Data controller failed to decide on a request within the statutory time limit – so-called administrative silence – 72 complaints,
- Data controller rejected the complainant's request – 46 complaints,
- Data controller failed to act as required under LPDP – 28 complaints,
- Data controller dismissed the complainant's request – 4 complaints, and

- Data controller obstructs or prevents the exercise of rights in violation of the law – 4 complaints.

Graph 11. Reasons for lodging of complaints with the Commissioner in 2012



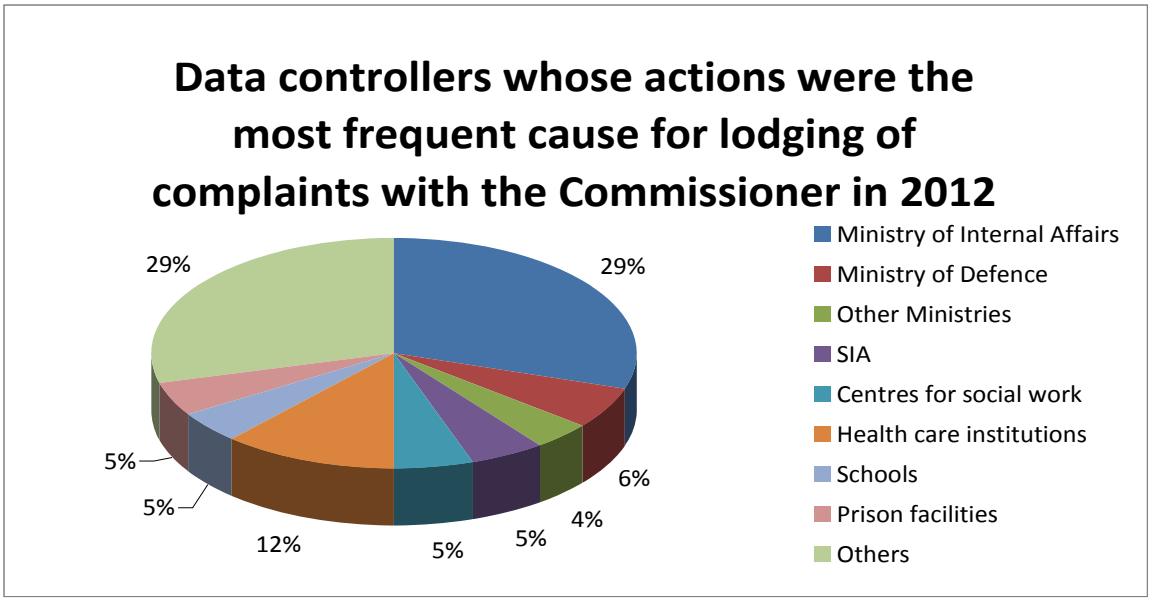
Traditionally, the most frequent reason for lodging of complaints with the Commissioner was failure of data controllers to decide on requests within the statutory time limit, the so-called administrative silence. Compared with 2011, when 36% of all complaints received by the Commissioner were lodged for this reason, in 2012 this form of non-compliance by data controllers has increased to 47%, which is a negative upward tendency. The share of complaints for rejection of requests has also changed: in 2011 they accounted for 23% of cases, while in 2012 data controllers rejected requests as unjustified in a total of 30%, which is also a negative upward trend**.**

However, compared with 2011, when data controllers failed to act as required under LPDP (preventing or obstructing the implementation of the Law) in 29% of cases, in 2012 this reason for complaints went down to 18%. Also, in 2012 the number of complaints lodged in cases where data controllers obstructed or prevented the exercise of rights was 9% lower than in 2011.

Complaints lodged with the Commissioner related to data contained in: police records − 46; medical documentations − 18; case files of social welfare centres − 8; records kept by the Ministry of Defence within its sphere of competence – 9; records kept by the Security Information Agency in its documentation archives and registries – 8; human resources records − 7; case files of courts and the High Judicial Council − 3; records in the fields of pension and disability insurance and health insurance − 7; phone listings – 5; video recordings − 2; banking system 4, psychological tests administered to job applicants – 3; questionnaires of the Census of the Population, Households and Flats of 2011 – 2; and other – 32.

Complaints lodged with the Commissioner in 2012 (154) related to the actions of the following data controllers: the Ministry of Internal Affairs 46; centres for social work 8; Security Information Agency (SIA) 8; prison facilities 7; judicial authorities of the Republic of Serbia 2; High Judicial Council 1; health care institutions of the Republic of Serbia 18; Ministry of Defence 9; Ministry of Justice and Public Administration 3; Ministry of Health 1; Ministry of Foreign Affairs 2; National Employment Service 3; Republic Pension and Disability Insurance Fund 6; Republic Health Insurance Fund 1; banks 4; schools 7; Telekom Srbija a.d. Beograd 4; Telenor 1; Serbian Statistical Office 2; Uniqa osiguranje a.d.o. Belgrade 1; Archive Centre Belgrade 1; Home for Secondary School Pupils 1; the Diocese of Pozarevac and Branicevo 1; public utilities 2; Public Enterprise "Zeleznice Srbije" 2; iron works company "Zelezara Smederevo 2; company Ni-Ba –Woods 2; NIS Gazprom Neft 1; Pirate Party of Serbia 1; Republic Institute for the Protection of Monuments 1; Toursim Inspectorate of the South Backa Administrative District 1; District Prison in Belgrade 1; Foreign Language Faculty Alfa Belgrade 1; Central Securities Registry, Depository and Clearing House 1; AD BAG 1; Publishing Company "Prosveta" in restructuring 1.

Data controllers whose actions were the most frequent cause for lodging of complaints with the Commissioner in 2012



It is noticeable that the largest number of complaints (30%) 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 three times higher than the number of complaints against all other ministries put together (10%). Complaints concerning (in)action of the Ministry of Internal Affairs usually related to data contained in various records kept by that Ministry. Facts show the Ministry of Internal Affairs 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 and it 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, albeit with delays, which was why the citizens had to raise complaints with the Commissioner.

Example: *A requester filed with the data controller Ministry of Internal Affairs of the Republic of Serbia a request for the exercise of rights in connection with personal data processing, asking for access to a copy of a report which contained reasons for his rejection by the Academy of Crime and Police Studies.*

The data controller rejected the request by a decision in which it explained that the competent Police Administration had carried out an operational check in which it found the following: that the complainant did not comply with the requirements set out in the Law on Police; that data had been collected in accordance with LPDP; and that the complainant had consented to collection and processing of personal data and accepted to undergo security checks for the purpose of identifying possible security issues that could preclude him from admission to the Academy of Crime and Police Studies. The decision further stated that provision of the required data could compromise the discharge of duties entrusted to the Ministry of Internal Affairs and that it would disclose data that are designated as secret under the law, other regulations or instruments based on the law and which could, if disclosed, seriously compromise an interest protected by the law.

The complainant lodged a complaint with the Commissioner, who overturned the data controller's decision and returned the case for renewed procedure.

In the rationale of his decision, the Commissioner stated the challenged decision did not contain clear reasoning as to how and in what way the Ministry would be prevented from performing its duties if the requested data had been provided to the requester and concluded it was therefore impossible to determine whether conditions are met to restrict the right of access and the right to obtain a copy of the requested data within the meaning of LPDP. Furthermore, the challenged decision provided no explanation as to what harmful consequences could arise if the requested were provided to the requester, so there was no way to determine with absolute certainty whether conditions are met to restrict the right of access and the right to obtain a copy of the requested data within the meaning of LPDP, because, although one of the conditions is indeed that processed personal data must be designated as secret under a regulation or official instrument based on the law, the other condition, which also has to be met, is that disclosure of the personal data in question could seriously compromise interests protected by the law.

For the reasons stated above, the Commissioner overturned the challenged decision and returned the case for renewed procedure, ordering the data controller to comply with the Commissioner's remarks listed in the rationale of his decision and to pass a new decision in a new administrative matter based on properly found facts, i.e. to decide on the complainant's request again in accordance with the provisions of LPDP, the Law on Police and other applicable regulations.

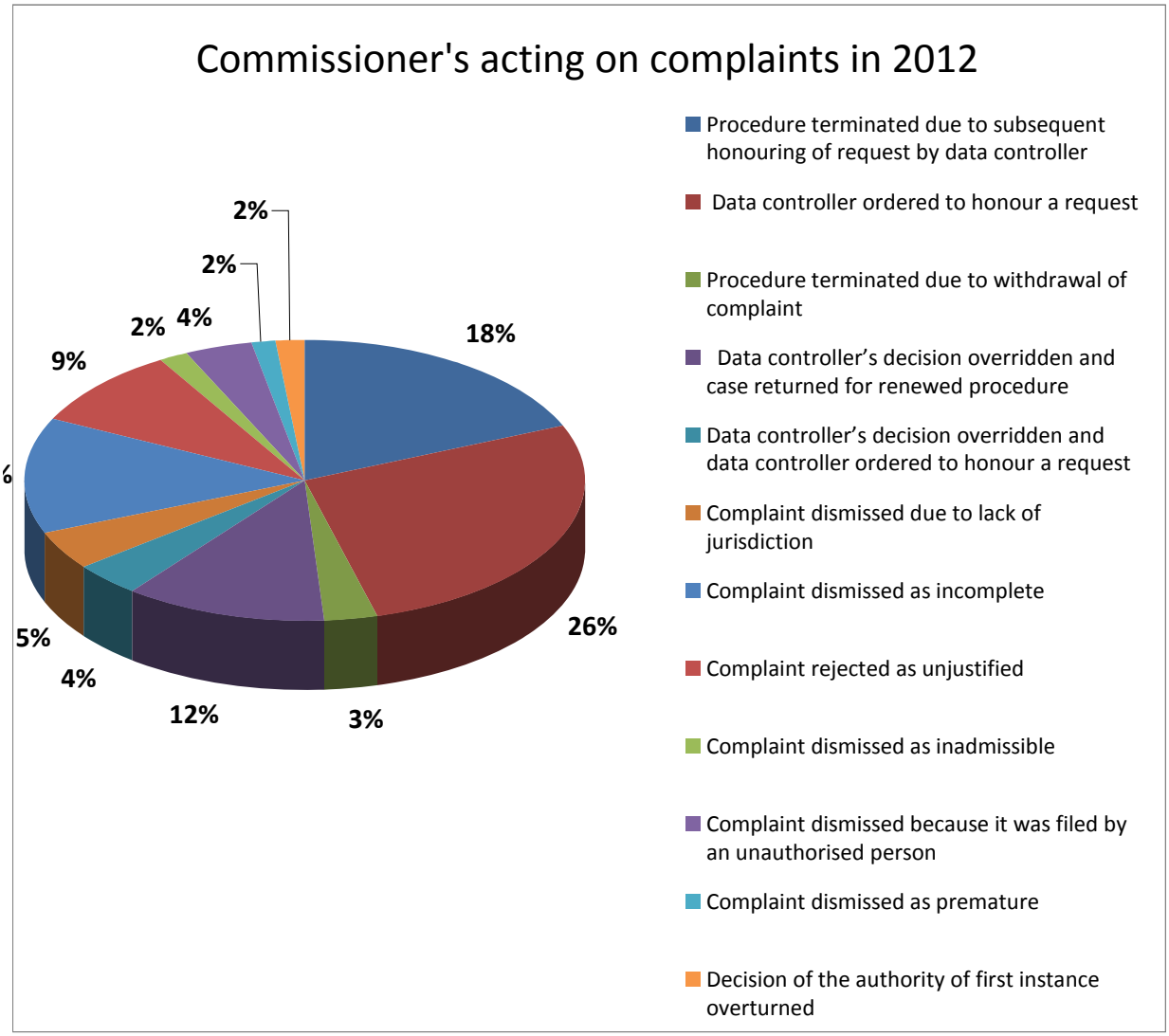
Of the 174 complaints pending before the Commissioner in 2012, by 31 December 2012 129 cases were closed (109 complaints lodged in 2012 and all 20 carried forward from 2011), while 45 cases have been carried forward to 2013.

In 2012, the Commissioner closed 129 cases of complaints as follows:

1) Data controller ordered to honour a request - 35,
2) Procedure terminated due to subsequent honouring of a request by data controller - 24 ,
3) Procedure terminated due to withdrawal of complaint - 4

4) Data controller's decision overridden and case returned for renewed procedure - 15,
5) Complaint rejected as unjustified - 12
6) Data controller's decision overridden and data controller ordered to honour a request - 5,
7) Complaint dismissed due to lack of jurisdiction - 6
8) Complaint dismissed as incomplete - 17
9) Complaint dismissed as inadmissible - 2
10) Complaint dismissed because it was filed by an unauthorised person - 5
11) Complaint dismissed as premature - 2
12) Decision of the authority of first instance overturned - 2.

Graph 13. Commissioner's acting on complaints in 2012



Example: *A requester submitted a request for the exercise of rights in connection with data protection to the data controller General Hospital "MC" in Novi Sad, requesting a copy of his medical documentation and history. The data controller answered it could not honour the request because, under 36 of the Law on Health Care, a patient has the right to access his/her medical documentation, while Article 37, paragraph 1 of the same Law stipulates that medical data, i.e. data included in medical documentation, constitute a patient's personal data and are treated as confidential.*

The requester lodged a complaint with the Commissioner, who passed a decision ordering the data controller to give the requester a copy of the requested medical documentation within five days of receipt of the decision.

In the rationale of the decision, the Commissioner explained that the complainant's right to obtain copies of data processed about him within the meaning of LPDP was undisputable and that the data controller's contention that this specific case was governed by the Law on Health Care rather than LPDP was unacceptable.

Example: *A requester submitted a request for the exercise of rights in connection with data protection to the data controller Foreign Languages Faculty ALFA University in Belgrade, asking for access to his file and a copy of data processed about him and the findings included in the file.*

As the data controller did not honour the request within the statutory period, the requester lodged a complaint with the Commissioner, who issued a decision ordering the data controller to honour the request without delay and not later than 5 days of receipt of the decision.

Example: *A requester submitted a request to the data controller Ministry of Internal Affairs of the Republic of Serbia asking for the Unique Personal Identification Number of another person, which he needed as the plaintiff in a lawsuit he filed against that person before the Higher Court of Belgrade.*

Acting on the request, the Ministry of Internal Affairs sent a communication to the requester informing him he had to demonstrate legitimate interest in obtaining the requested data relating to another person, on the basis of which the Ministry would then forward the requested data to the Court.

Unsatisfied with the data controller's reply, the requester lodged a complaint with the Commissioner, who found that this specific case did not involve a procedure of exercising rights in connection with data protection within the meaning of LPDP. As the requester did not ask for information about himself, but about another person, demonstrating legitimate interest in obtaining the requested data to the Ministry of Internal Affairs, this was a case of issuing a document containing a person's Unique Personal Identification Number; such numbers are kept in the records of the Ministry of Internal Affairs and the said Ministry decides on such requests pursuant to the Law on General Administrative Procedure and the Law on Unique Personal Identification Numbers.

In view of the fact that acting on this complaint was not the responsibility of the Commissioner, but of the Ministry of Internal Affairs, the Commissioner declined jurisdiction and passed a conclusion by which he dismissed the complaint.

Example: *A requester submitted a request for the exercise of rights in connection with data protection to the data controller District Prison of Belgrade, asking for a copy of data collected about him during his detention. As the data controller did not act on the request within the statutory period, the requester lodged a complaint with the Commissioner.*

In its response to the allegations stated in the complaint, the data controller informed the Commissioner it had provided the requested data to the requester after the complaint was lodged and enclosed evidence of delivery of the data with the response.

As the data controller had allowed the requester to exercise his right to obtain a copy of personal data after the lodging of the complaint, but before a decision was passed pursuant to the complaint, the Commissioner issued a conclusion and terminated the procedure.

Looking at the Commissioner's actions pursuant to complaints (ordering data controllers to honour requests – 27%; termination of procedure due to subsequent honouring of a request by data controllers – 19%; overriding of data controllers' decisions and returning of cases for renewed procedure – 12%, overriding of data controllers' decisions overridden and data controllers ordered to honour requests – 3%; 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 – 3%), it is clear that the complaints lodged with the Commissioner were justified in 64% of all cases.

On the other hand, the Commissioner rejected complaints as unjustified in 9% of cases; in 17% of cases he dismissed complaints because they were incomplete or lodged by unauthorised persons, while in 5% of cases he declined jurisdiction. Finally, in 5% of cases complaints were resolved in other ways (decisions of authorities of first instance were overturned or complaints were dismissed as premature or inadmissible).

As the Commissioner's decisions pursuant to complaints are binding, final and enforceable, in 2012 data controllers informed the Commissioner of their compliance with his decisions in 39 cases. The Commissioner knows of only one case in which a data controller did not comply with the Commissioner's orders, which is why the Commissioner carried out an inspection of compliance with and implementation of LPDP by that data controller, after which he initiated an infringement proceeding against the data controller and its general manager as the responsible individual within the legal entity.

The Administrative Court received four lawsuits against the Commissioner's decisions rejecting complaints against the decisions of data controllers (for more details see 4.2 – Acting of Judicial Authorities and Administrative Court in the Field of Personal Data Protection).

Keeping of 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.

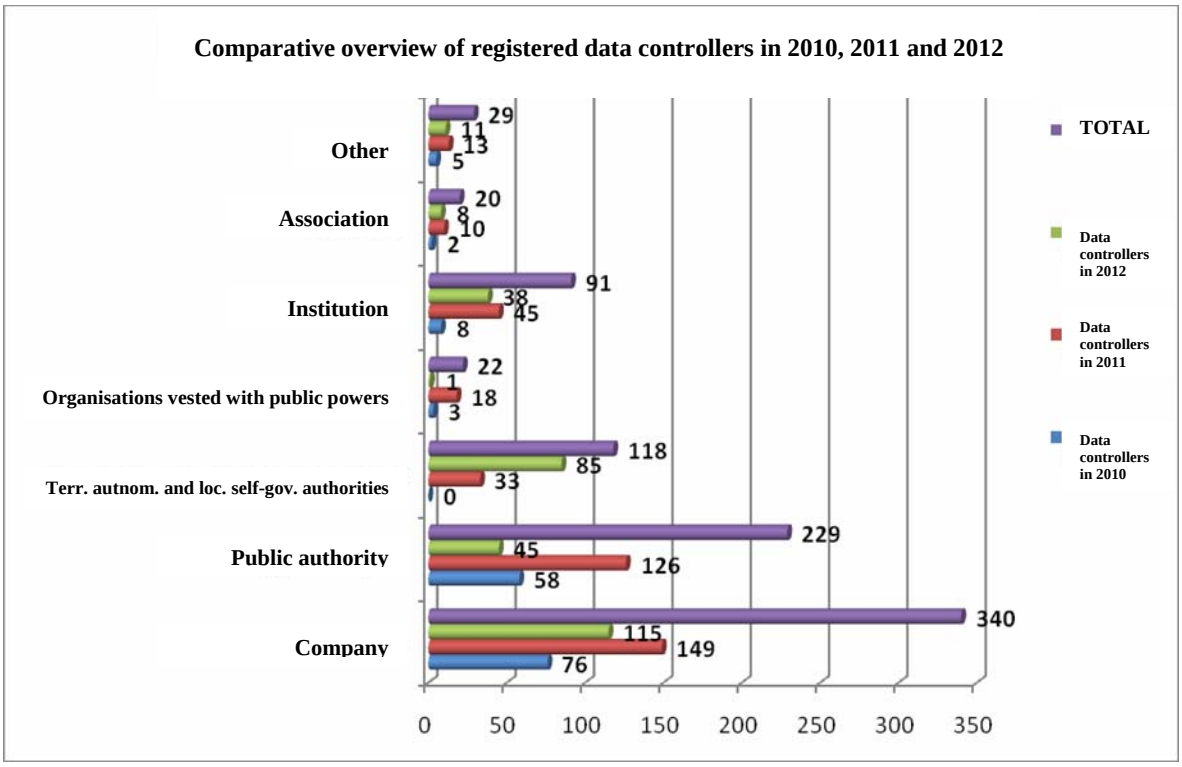
The Central Register is public, kept electronically and published online. Data controllers register their data files electronically and subsequently submit a data file report on the requisite form.

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 situation as regards registration with the Central Register as at 31 December 2012 shows that, of the estimated total of some 350,000 controllers of personal data, only 849 submitted to the Commissioner records of the 4,637 personal data files they keep. This practically means that, as at 31 December 2012, less than 0.3% of personal data controllers had submitted records of personal data files they keep to the Commissioner.

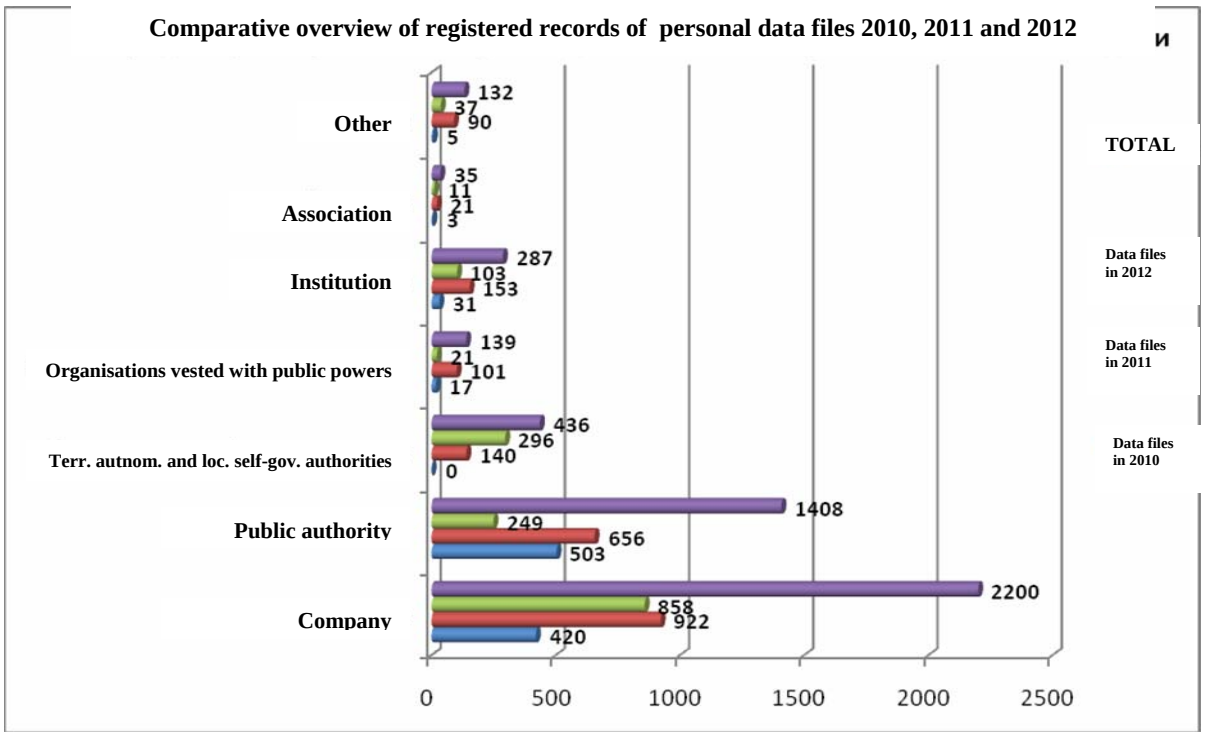
The fact that they are not aware of their obligation under LPDP to provide to the Commissioner records of their personal data files, now that the Law has been in force for more than four years, is certainly no justification for data controllers, least of all public authorities, territorial autonomy and local self-government authorities and other authorities and organisations vested with public powers, as well as various legal entities, to breach this statutory obligation.

Graph 14. Comparative analysis of registered data controllers in 2010, 2011 and 2012



In summary, 2012 saw a decline in the number of records registered by data controllers, as 303 data controllers submitted to the Commissioner 1,575 records of the data files they maintain, while in 2011 there 2,083 records submitted by 394 data controllers.

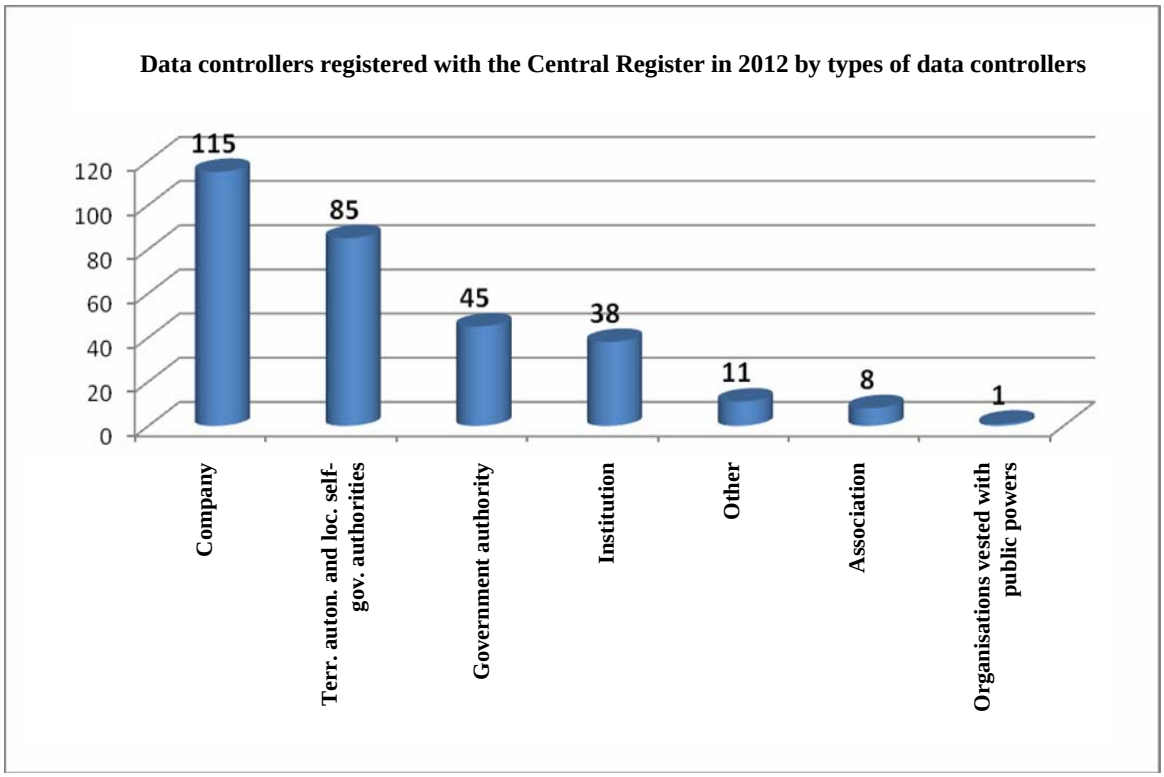
Graph 15. Comparative analysis of registered records of personal data files in 2010, 2011 and 2012



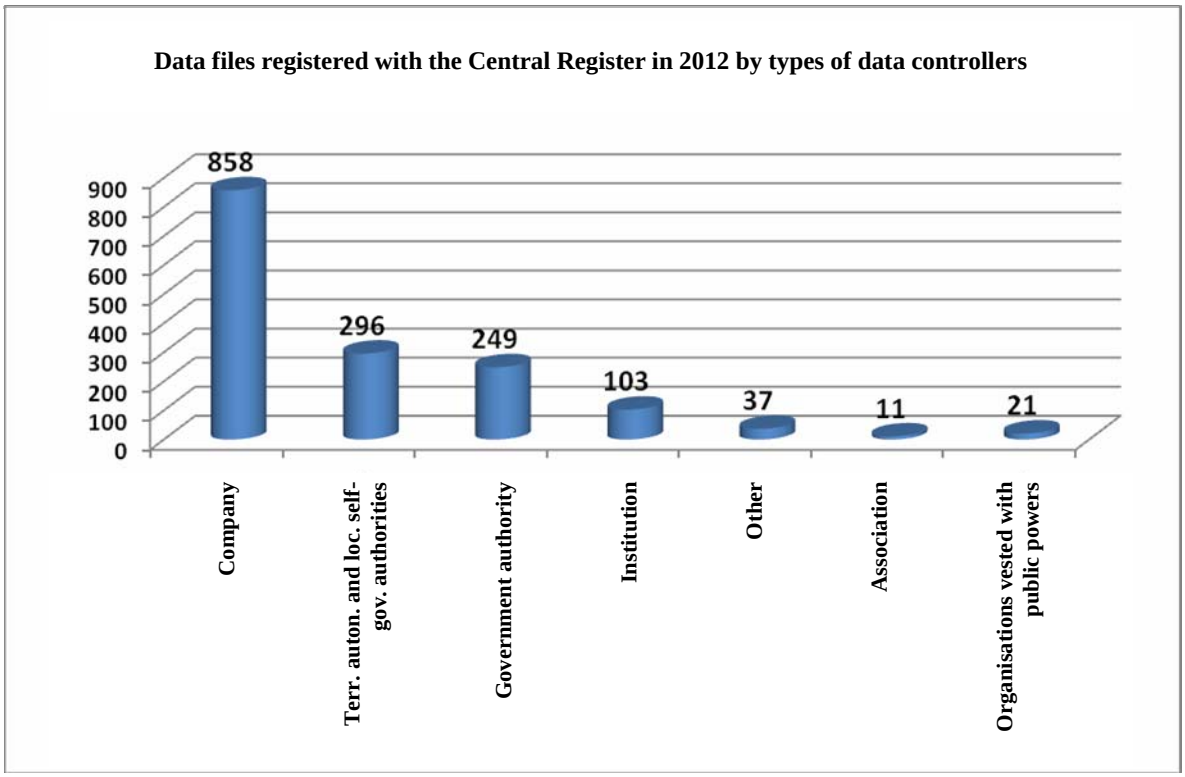
As regards submission of records of data files to the Commissioner for the purpose of registration with the Central Register in 2012, the highest response, although lower than in 2011, was among public authorities − 131 (including government authorities - 45, territorial autonomy and local self-government bodies - 85 and bodies vested with public powers − 1), which submitted a total of 566 records of data files (of which government authorities - 249, territorial autonomy and local self-government bodies - 296 and bodies vested with public powers − 21). Response rates were even lower among companies, with 115 of them submitting 858 records of data files. 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 – 858, an average of 7.46 records of data files per company, and public authorities – 566, an average of 4.32 records per public authority).

It should be noted that in 2012, similarly as in 2011, 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 filed multiple requests for initiation of infringement proceedings, which also gained media coverage. The outcome was similar when the Commissioner sent a letter to all government authorities and organisations vested with public powers that had failed to comply with the obligation to submit personal data file records to do so.

Graph 16. Data controllers registered with the Central Register in 2012 by types of data controllers



Graph 17. Data files registered with the Central Register in 2012 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 initiation of infringement proceedings. However, the Commissioner's also believes it will be difficult to enforce the provisions of LPDP which impose an obligation on all personal data controllers (some 350,000 of them) to provide the Commissioner with records of their personal data files and require the Commissioner to file petitions for initiation of infringement proceedings for any such (and many other) violations of LPDP. In view of this fact and taking into account the experiences of many European countries, the Commissioner is of the opinion that these provisions of LPDP should be amended and defined in a way that would be realistic and enforceable.

4.1.5. Issuing of Opinions

In 2012 the Commissioner issued a total of 569 reasoned opinions and responses, including 432 to individuals, 65 to legal entities and 72 to national and local authorities.

Of the 72 opinions issued to national and local authorities, 18 related to drafts or working versions of laws, including: Draft Law on Secondary Education (Ministry of Education and Science), Draft Law on Adult Education (Ministry of Education and Science), Draft Law on Private Security (Ministry of Internal Affairs), Draft Law on Amendments to the Law on Textbooks and Other Teaching Aids (Ministry of Education and Science), Draft Law on Primary Education (Ministry of Education and Science), Draft Law on Information Security (Ministry of Culture, Information and Information Society), Draft Law on Private Investigation Operations (Ministry of Internal Affairs), Draft Law on Amendments to the Law on Personal Data Protection (Ministry of Justice and Local Self-Government), Working Version of the Law on Misdemeanours (Ministry of Justice and Local Self-Government), Draft Law on Primary Education (Ministry of Education, Science and Technological Development) – repeated request for an opinion, Working Version of the Law on Enforcement and Security (Ministry of Justice and Local Self-Government), Working Version of the Law on Civil Procedure (Ministry of Justice and Local Self-Government), Working Version of the Law on Mediation (Ministry of Justice and Local Self-Government), Working Version of the Law on Amendments to the Law on Extra-Judicial Procedures (Ministry of Justice and Local Self-Government), Draft Law on Amendments to the Law on Seizure of Property obtained through Crime (Ministry of Justice and Local Self-Government), Draft Law on Special Measures to Prevent Criminal Offences against Sexual Freedom of Minors (Ministry of Justice and Local Self-Government), Draft Law on the Protection of Persons with Mental Health Problems (Ministry of Health) and Draft Law on the Protection of Patients' Rights (Ministry of Health).

The Commissioner believes that, by giving opinions within his sphere of competence on draft laws and regulations adopted by the Government, he could make a significant contribution towards enhanced quality of those regulations. The Commissioner considers that issuing of opinions on regulations proposed by public authorities and other entities in connection with the rights enforced by the Commissioner is an appropriate form of cooperation between the Commissioner as an independent and autonomous authority and public authorities. Indeed, the position of the Commissioner in itself implies he is often in a situation to be addressed by citizens who believe their rights are violated or jeopardised by measures, instruments or regulations of public authorities; in view of such position of the Commissioner, it would be inappropriate for him to be actively involved in the drafting of those measures and regulations.

4.1.6. Commissioner's Activities in Connection with 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 – Article 53. 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 organisation that is not a party to the Convention if such state or international organisation 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.

In the course of 2012, the Commissioner acted on twelve requests for transborder transfer of personal data out of Serbia. Seven of those requests were carried forward from 2012, while five were carried forward from 2011. Two decisions were passed pursuant to the requests, draft decisions were prepared for two requests, four requests will be decided after inspection by the Commissioner's, while procedures for the remaining four requests are pending.

Requests for transborder transfer of personal data submitted in 2012 covered data relating to: employees, health professionals and researches in clinical trials and trade partners – customers and suppliers. Countries to which transborder transfer was requested included the USA, India, Malaysia, the Philippines and Australia. 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.

The procedure in those cases is to find all facts that may be relevant in decision-making before transborder transfer of data out of Serbia is permitted. In decision-making, the Commissioner takes into account all circumstances of data processing by the data controller that intends to transfer those data from Serbia. The Commissioner takes into account in particular: the type of personal data, the purpose of processing and transferring the data, the manner of informing data subjects about processing, the duration processing, safeguards put in place before, during and after the transfer, data storage, the manner of exercise of data subjects' rights and other facts relevant for decision-making in such cases.

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. On the one hand, this further complicates decision-making in these cases, while on the other hand it shows that data controllers also find it difficult to understand their obligations in connection with transborder transfer of data due to insufficient regulation of the procedure. 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, data processors, data recipients 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), the manner in which the rights of individuals with regard to processing are protected etc. Due to these and other shortcomings,

parties in procedures are often ordered (sometimes repeatedly) to make their requests compliant and to provide complete and proper documentation. In some cases it was necessary to carry out inspections in order to determine whether the personal data for which transborder transfer is requested would be processed in accordance with the law, which ultimately delays the procedure and extends the process of deciding on the requests.

The Commissioner's Office is available to parties for any preliminary clarifications before submission of requests for transborder transfer of data out of the Republic of Serbia and for all clarifications of the procedure, in order to overcome the shortcomings of LPDP in this regard. In this context, the Commissioner also issued nine opinions on requests from the parties to enable them to prepare proper and duly reasoned requests and supporting documents for transborder transfer of data out of Serbia.

The practice so far has shown that the procedure of deciding on admissibility of transborder transfer of personal data out of Serbia is insufficiently regulated, as is the manner of determining the "adequate level of personal data protection" in accordance with the Convention. For the purpose of more efficient implementation of LPDP, it is necessary to regulate properly the issue of transborder transfer of data and to harmonise the applicable provisions with the solutions contained in relevant international documents in this field. This relates in particular to the determination of the level of adequacy of personal data protection and cases where transborder transfer of personal data to countries which do not provide such level of protection would be possible without prior approval from the Commissioner's, as well as the entire procedure of transborder transfer of data from the Republic of Serbia.

4.1.7. Activities taken by Commissioner to improve Legislative Solutions

The Commissioner has called on more that one occasion for through amendments to LPDP and adoption of implementing regulations for which the Government is in charge, as this has been long overdue without an apparent reason. The Commissioner believes the hitherto common practice of ignoring the problems in this field must stop immediately.

Law on Personal Data Protection

The Commissioner has pointed time and again to the need to make LPDP fully harmonized with relevant EU regulations and standards. His views have been confirmed after the implementation of the Light Twinning project "Improvement of Personal Data Protection": an analysis carried out by international experts who were involved in this project has shown that LPDP contains many provisions that have to be amended in order to be harmonised with the standards of CoE Convention No. 108 and EU Directive 95/46/EC and that LPDP needs to be supplemented with provisions pertaining to video surveillance, biometrics and direct marketing, because these delicate fields are not addressed in LPDP at all. To that end, the Commissioner submitted to the Serbian Government and the Ministry of Justice and Public Administration his Information with suggestions for amendments of a large number of provisions of LPDP listed by Article numbers. In this Information the Commissioner expressed his view that the importance and scope of the proposed amendments to LPDP warrant the drafting of a completely new text of LPDP.

The Commissioner received no response to this initiative from the Government of Serbia and the Ministry of Justice and Public Administration, just as he received no response to an earlier initiative to supplement LPDP with provisions on video surveillance, which he submitted to the former Ministry of Justice. This initiative was made in the form of some dozen specific Articles which should be inserted in LPDP in order to regulate the issue of video surveillance.

The Commissioner has also on many occasions pointed to the need to adopt implementing regulations based on LPDP. Indeed, the fact that the Government has not adopted those regulations even after several years defies reason. Undoubtedly, the largest share of responsibility for this delay rests squarely on the shoulders of the previous Government, but this should not be a convenient excuse for the present Government to continue with the same practice; quite the contrary, it should serve as an incentive to cut the delay and to alleviate as much as possible its undoubtedly harmful consequences.

Thus, for example, an instrument on the manner of filing and the measures for the protection of particularly sensitive data provided for in Article 16, paragraph 5 of LPDP should have been adopted by the Government within six months of the effective date of this Law, i.e. by 4. May 2009. The Government has not done so by the time of submission of this Report to the National Assembly, after nearly four years of enactment of LPDP, which means that the protection of those data proclaimed by the law remains a dead letter.

As another example, the Government should have adopted an Action Plan on Implementation of the Personal Data Protection Strategy, with defined activities, expected effects, implementers of specific tasks and periods for their completion, within 90 days of publication of that Strategy in the "Official Gazette of the Republic of Serbia". As the Strategy was published in the "Official Gazette of the Republic of Serbia" No. 58/2010 on 20 August 2010, the period of 90 days of its publication expired on 20 November 2010. And yet, at the end of 2012 the Government has not yet adopted the Action Plan.

A particular reason for concern is the fact that, judging by the recently adopted Action Plan for Compliance with the Recommendations of the European Commission in the European Integration Process, the Government does not plan to take any major activities in connection with personal data protection "before the third quarter of the following year (2013)."

The only regulations adopted so far are those which the Commissioner had the power to adopt.

Other laws

The Commissioner believes the Law on Electronic Communications, the Law on the Security Information Agency and the Code of Criminal Procedure should be amended as a matter of utmost urgency, instead of waiting for the Constitutional Court to rule on their (non-)compliance with the Constitution.

To ensure efficient operation of competent authorities, new legislative arrangements must be supported with appropriate organisational measures, such as 24-hour duty calls for judges, and IT solutions that would expedite preliminary judicial review and deciding on requests for access to communication data.

For the purpose ensuring more efficient implementation and better control of legality of surveillance measures, it is necessary to make both normative and factual assumptions for integration of the existing parallel and largely redundant technical capacities of various agencies and the police into a single national agency, which would act as a provider of services necessary to intercept communications and other signals to all authorised users. This would result in uniform procedures for all electronic communication service providers and ensure indelible recording of access to communications, with all data needed for proper *post facto* control of legality and regularity of access. It is also necessary to strengthen internal control mechanisms and impose an obligation on them to notify their findings relevant for the respect of human rights to the competent parliamentary committee and the Ombudsman, especially in cases where management of the public authority concerned ignores the findings of internal control and in cases dealing with particularly grave violations of human rights. Furthermore, it is necessary to build the capacities of independent supervisory authorities and to criminalise (identify as a criminal offence) any obstruction of investigations they carry out.

The Commissioner and the Ombudsman warned the competent authorities and the public in 2012 about the worrying situation in connection with the use of electronic communication surveillance. They warned such situation could result in possible violations of rights of many citizens and suggested a package of 14 measures to address the situation. Several months later, they find it is rather telling that the relatively strong verbal support voiced for the proposed measures was not reflected in actual actions. They therefore once again call on the competent authorities to treat this issue as a top priority and eliminate the huge gap between the actual state of things and the constitutional rights of the citizens.

Commissioner's initiative for enactment of a Law on Security Checks

In Serbia, the subject matter of security checks has been regulated by several laws and other regulations, but the provisions have been incomplete and imprecise. The majority of those regulations do not even include definitions or provisions on the subjects of checks, of the purpose and procedure of checks, the applicable timeframe etc. As implementation of these and other formerly applicable regulations with identical or similar arrangements over several decades has resulted and continues to result in violations of human rights and freedoms, in particular the right to privacy, i.e. the right to the Commissioner submitted to the Government of Serbia an initiative to enact a Law on Security Checks. The Commissioner received no response to this initiative.

Commissioner's support to the initiative for enactment of a Law on Opening of Security Service Files

The Commissioner supported the initiative to regulate the highly complex subject matter of opening of security service files by a single, special law. The Commissioner believes that such law, which would contain equitable, sound and enforceable solutions, could give a significant contribution to Serbia's further democratic development and strengthening of the rule of law. In support of this opinion, the Commissioner pointed out in particular it was necessary for the competent authorities in the drafting process to study comparative solutions and experiences of other countries which have already passed similar laws, with specific focus on former Communist countries, and former Yugoslav republics in particular, since Serbia's past is,

in from the political and legal aspects, largely similar to theirs. The Commissioner also explained such a serious task would also require considerable resources for proper implementation. It is therefore necessary to have already in the drafting and enactment procedure a clear and, if possible, precise idea of how much funds and human, logistical and other resources would have to be used and at what times, in order to provide the necessary assumptions for compliance with this Law.

4.1.8. Commissioner's Activities aimed at affirming the Right to Personal Data Protection

In 2012, the Commissioner carried out a number of activities on the promotion and affirmation of the right to personal data protection. Thus, the Commissioner informed in various manners (through meetings – organisation and/or participation in trainings, seminars, debates, round tables, conferences etc., as well as through the media, Internet presentation, social networks and other manners of communication with citizens) the public or only the expert community on the exercise and obstacles in the exercise of the right to personal data protection. In addition, the Commissioner was providing formal, and often also informal, assistance and advice for efficient implementation of LPDP.

Trainings/seminars

The Commissioner organised and took part in a number of trainings and seminars for employees in government authorities, territorial autonomy authorities and local self government authorities, institutions etc. For example, training for representatives of the City Administration of Nis, training for representatives of public authorities, which was organised by the Human Resource Management Service in Belgrade, training for representatives of the media in Uzice, for students at the Faculty of Organisational Sciences in Belgrade, training for students of the Diplomatic Academy in Belgrade, training for students at the Faculty of Political Sciences, training for representatives of 20 civil society organisations in cities and towns across Serbia, training for representatives of the Standing Conference of Towns and Municipalities, training for professors and secretaries of the University of Belgrade, for representatives of commercial bank, which was organised by the Association of Serbian Banks, training for representatives of the Alliance of Vojvodina Hungarians etc.

In addition, eight representatives of the Commissioner took the course for information security system managers according to the ISO27001 and ISO27002 standards organised by Quality Austria Centre and successfully completed final examination.

Debates/conferences/round tables

The Commissioner organised a conference to commend the 28th of January, the European Data Protection Day, in cooperation with the organisation "Partners for Democratic Change" and with financial assistance from the Open Society Fund Serbia. This year also marked 30 years of opening of the CoE Convention for the Protection of Individuals with regard

to Automatic Processing of Personal Data for signing. The Data Protection Day was commended for the first time in Serbia with the aim to raise awareness of the rights of each individual and duties of those who control personal data.

To mark the completion of the EU Twinning Light Project "Improvement of Personal Data Protection in Serbia", the Commissioner, together with the Information Commissioner of the Republic of Slovenia and the Delegation of the European Union to the Republic of Serbia, organised on 7 December 2012 a conference titled "Personal Data Protection in Serbia". The conference addressed the issues of personal data protection in Serbia in the sectors of electronic communications, internal affairs and health care.

Together with the Ombudsman, the Commissioner organised on 6 July 2012 a conference for the media titled "Supervision of Compliance with of the Law on Personal Data Protection in Telecommunications Service Providers in Serbia – Constitutional Guarantees of Secrecy of Means of Communication". After presentation of the results of an inspection of compliance and implementation of LPDP by data controllers – telecommunications service providers in Serbia – carried out by the Commissioner, the Commissioner and the Ombudsman concluded that the situation in practice in terms of the protection of privacy significantly derogates from the standards established by the Constitution of the Republic of Serbia and relevant international documents and they presented 14 recommendations for improvement of the situation in this field. These recommendations were then submitted to the National Assembly and the Government. *More information in Examples under 4.1.2. Supervision of Personal Data Protection*

In addition to organisation of the said conferences, the Commissioner, his deputies and associates at the Office participated in a number of seminars, conferences, round tables and other meetings dedicated to personal data protection.

The Commissioner participated in a number of meetings, such as: the conference "Internet Dialogue of Serbia" organised by the Directorate for Digital Agenda, the Register of National Domain Names of Serbia and the Diplo foundation; a round table dedicated to cooperation between magistrates' courts and the Commissioner, implementation of LPDP and text of the new Draft Law on Misdemeanours organised by the JRGA project; a meeting organised by the Humanitarian Law Centre on facing with the past and investigation of war crimes; an expert meeting with associations of journalists, judges and prosecutors on the protection of journalistic sources and documents held by government authorities; a meeting organised by the Civil Initiative on mapped services, data protection and social welfare programs; a round table "Information Security and ISO 27000" organised by the IT Society of Serbia and the Serbian Chamber of Commerce – Association for Information Technologies; the conference "Information Security 2012" organised by the Serbian Society for Information Security – Serbian Chamber of Commerce and Towers Net company, which addressed the situation, development strategies and legal regulations in the field of information security; a round table on privacy in the circumstances of large-scale posting of personal data on the Internet, social networks and in mobile communications organised by the Association for Information Technologies of the Serbian Chamber of Commerce and the Association of Serbian IT Specialists; the conference "Police Reform" organised by the Centre for Euro-Atlantic Studies, the Belgrade Centre for Human Rights and the Belgrade Centre for Security Policy; the expert forum SIZIT 11-12 titled "Regulated Information Security System", organised by the Faculty of Technical Sciences and the "IT Revizor" association, co-hosted by the National Assembly; the conference "Establishing an Equitable Balance between Free Access to Information of Public Importance and Personal Data Protection" organised by the Centre for

Improvement of Law Studies; the international fair of security of buildings, infrastructure, persons and operations iSEC dedicated to the topics in the field of personal data protection etc.

Publishing

"Manual for Data Controllers - Data Protection" was published within the EU Twinning Light Project "Improvement of Personal Data Protection in Serbia". This Manual provides answers to frequently asked questions by data controllers and provides the basis understanding and respect of the citizens' rights under LPDP.

4.2. Acting of Judicial Authorities and Constitutional Court in the Field of Personal Data Protection

4.2.1. 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 2012 the Commissioner filed 1 criminal report for the commission of the criminal offence referred to in Article 146, paragraph 3 of the Code of Criminal Procedure (in 2011 the Commissioner filed 3 criminal reports and in 2010 he filed 18). Following these criminal reports, which the Commissioner filed in 2010, 2011 and 2012 to several primary public prosecutors' offices in Serbia, not a single criminal proceeding has been instituted and apparently nothing has been done to identify the offenders and bring them to justice.

The Commissioner therefore considers that Public Prosecutors' Offices have a practice of disregarding the criminal reports he files. The Commissioner cannot but conclude that the competent authorities treat this issue with utter negligence.

4.2.2. Acting of Magistrates' Courts on Petitions for initiation of Infringement Proceedings filed by the Commissioner

In the course of 2012, the Commissioner, upon inspection of implementation of and compliance with LPDP, filed 35 petitions for initiation of infringement proceedings for violations of LPDP (in 2011 he filed 26 such petitions, while in 2010 he filed 20).

Of the total of 35 petitions for initiation of infringement proceedings filed in 2012, 17 were filed for non-compliance with the obligation to arrange and keep records of personal data files in accordance with Article 48 of LPDP, on the form prescribed in the Decree on the Form

and Manner of Keeping Records of Personal Data Processing ("Official Gazette of the Republic of Serbia" Nos. 50/2009), as well as for non-compliance with the obligation to submit those records to the Commissioner for registration with the Central Register of Personal Data Files in accordance with Article 51 of LPDP. Of that, 15 petitions were filed against heads of city and municipal administrations, one petition was filed against a health care institution and its director, while one petition was filed against one public enterprise (legal entity) and its director.

Further 11 petitions were filed for obstruction of the Commissioner's officials during inspection and for failure to give access to and make available the required documentation. Of that number, ten city and municipal administrations completely ignored the requests made by the Commissioner's official (even after repeated urging), which is why infringement reports were filed, while one petition was filed against a company (legal entity) which failed to give a written response to an official of the Commissioner in the procedure of inspection of compliance with and implementation of LPDP.

Two petitions were filed for processing of sensitive data contrary to the provisions of Articles 16 to 18 of LPDP. One petition was filed against a health care institution and the directly responsible individual for unauthorised disclosure of a patient's medical data to third parties, while the other petition was filed against an employee of the Ministry of Defence for unauthorised disclosure of an employee's medical data processed in his employment file.

One petition was filed for each of the following violations of the Law: collection of data from another person contrary to the requirements of Article 14, paragraph 2 of LPDP; data processing without consent, contrary to the requirements of Article 12 of LPDP; failure to notify the Commissioner's of intent to establish a data file within the specified period, contrary to Article 49, paragraph 1 of LPDP, and failure to put in place organisational and technical safeguards, contrary to Article 47, paragraph 2 of LPDP; failure to notify the Commissioner's of intent to establish a data file within the statutory period, contrary to Article 49, paragraph 1 of LPDP, and failure to submit records or changes in data files within the statutory period, contrary to Article 51, paragraph 1 of LPDP; and failure to comply with the Commissioner's decision passed pursuant to a complaint against a health institution and its director as the responsible individual.

No judgements were passed by 31 December 2012 pursuant to any of these 35 petitions for initiation of infringement proceedings filed in 2012.[3]

An analysis of the judgements and decisions passed by Magistrates' Courts pursuant to petitions for infringement proceedings filed by the Commissioner in 2010 and 2011 seems to indicate that Magistrates' Courts do not treat the issue of personal data protection with the attention it deserves as a right guaranteed by the Constitution of Serbia. Cases with identical factual and legal basis often resulted in different decisions. Many cases were terminated because the relative statute of limitations had expired. Sanctions imposed in some cases with identical factual and legal basis often differed, which means that some of them were not adequate for the gravity of the infringement committed.

[3] At the time of preparation of this report, the first judgement was passed pursuant to a petition for initiation of infringement proceedings filed by the Commissioner's поднетом 2012. The defendants were a health institution and its responsible person and the infringement was failure to comply with the Commissioner's decision passed pursuant to a complaint. The health institution received a RSD 100,000 fine and the responsible person received a RSD 30,000 fine.

Thus, in 2010 the Commissioner filed 20 petitions for initiation of infringement proceedings, including six petitions against individuals and legal entities for various violations of LPDP, while 14 petitions were filed against ministers in the then Government of Serbia as responsible persons for the infringements referred to in Article 57, paragraph 1, items 12 and 14, in conjunction with paragraph 3, of LPDP.

As regards the six petitions filed in 2010 against individuals and legal entities for various violations of LPDP, in four cases the courts passed valid and enforceable sentencing judgements and imposed fines, in one case the proceeding was terminated because the absolute statute of limitations had expired, while in one case the authority of first instance passed a sentencing judgement one and a half months before the expiration of the absolute statute of limitations, so it is likely this case will also be terminated because of expiration of the absolute statute of limitations if the defendants appealed the judgement.

As regards the 14 petitions filed against ministers in the then Government of Serbia as responsible persons for the infringement referred to in Article 57, paragraph 1, items 12 and 14, in conjunction with paragraph 3, of LPDP, in two cases no decisions of Magistrates' Courts were received by the time of preparation of this report, i.e. after two years and three months. In two cases the proceedings have been terminated because the addresses of the respondent ministers are unknown. Such decisions are quite strange, to put it euphemistically, as the respondents are former ministers and are still politically active and very much in the public eye. The question is how can they be unavailable to judicial authorities, when the media and the general public apparently have no trouble accessing them? In the remaining ten cases, although the factual basis was the same for all of them, courts passed different judgements. In all ten of those cases, courts found the respondents guilty of the infringement referred to in Article 57, paragraph 1, item 12, in conjunction with paragraph 3, of LPDP, but when it came to the infringement referred to in Article 57, paragraph 1, item 14, in conjunction with paragraph 3, of LPDP, the courts of first instance had differing views. In eight cases they took the stand that the infringement referred to in Article 57, paragraph 1, item 14, in conjunction with paragraph 3, of LPDP was already included in the offence referred to in Article 57, paragraph 1, item 12, in conjunction with paragraph 3, of LPDP. The courts of first instance sentenced the ministers for both infringements in only two cases.

The Commissioner emphasizes that only one judgement was passed against one minister in 2011, while nine of them were passed only in 2012, usually just before the absolute statute of limitations for infringement prosecution expired.

The Commissioner appealed against the judgements in all eight cases in which respondent ministers were found not guilty of the infringement referred to in Article 57, paragraph 1, item 14, in conjunction with paragraph 3, of LPDP. In five cases the Higher Magistrates' Court overturned the decisions of the courts of first instance regarding the pronouncement on the defendants' guilt for the infringement referred to in Article 57, paragraph 1, item 14, in conjunction with paragraph 3, of LPDP and returned the cases to the courts of first instance for renewed procedure. Only in one of those cases did the court of first instance pass a new judgement and pronounce the defendant guilty of the infringement referred to in Article 57, paragraph 1, item 14, in conjunction with paragraph 3, of LPDP. Two appeals are still pending, while one was dismissed for procedural reasons.

As regards the first-instance judgement that found the defendants guilty of both infringements, in one case the court imposed a fine, while in the other the defendant received a court reprimand, which is most emphatically not an adequate sanction for such infringements.

In 2011, the Commissioner filed 26 petitions for initiation of infringement proceedings, including 21 petitions against public authorities and responsible persons within public authorities for the infringements referred to in Article 57, paragraph 1, items 12 and 14 and five petitions against individuals and legal entities for various violations of LPDP.

As regards the five petitions filed against individuals and legal entities for various violations of LPDP, three cases are still pending, in one case the court passed a valid and enforceable sentencing judgement and in once case the proceeding was terminated because the absolute statute of limitations for infringement prosecution had expired (the infringement was committed on 11 May 2010). In the latter case, the court of first instance had passed a sentencing judgement. Acting on the defendant's appeal, the Higher Magistrates' Court overturned the judgement and returned the case for renewed procedure; however, in the meantime the absolute statute of limitations for infringement prosecution expired.

Regarding the 21 petitions filed against public authorities and responsible persons within public authorities for the infringements referred to in Article 57, paragraph 1, items 12 and 14 of LPDP, the courts acted as follows: in one case the proceeding was terminated due to the defendant's death; eight cases were still pending at the time of preparation of this Report (on average a year and a half); in seven cases the public authorities and the responsible persons were pronounced guilty for both infringements, but in as many as four cases the defendants received only court reprimands, which are undoubtedly to lenient taking into account the gravity of the infringements; in four cases the courts found the defendants guilty of the infringement referred to in Article 57, paragraph 1, item 12 of LPDP, but acquitted them for the infringement referred to in Article 57, paragraph 1, item 14 of LPDP, which is why the Commissioner lodged appeals in these four cases; in one case there were multiple different judgements (the original judgement of the court of first instance found the defendant guilty of the infringements referred to in Article 57, paragraph 1, items 12 and 14; the judgement of the court of second instance overturned that judgement and returned the case for renewed procedure; the second judgement of the court of first instance pronounced the defendant guilty only of the infringement referred to in Article 57, paragraph 1, item 12, but acquitted him on the count of the infringement referred to in Article 57, paragraph 1, item 14; the second judgement passed by the court of second instance then overturned the acquittal for the infringement referred to in Article 57, paragraph 1, item 14 in the first-instance judgement and returned the case for renewed procedure).

The practice of Magistrates' Courts analysed here points to the conclusion that the legislator should extend the statute of limitation for infringement prosecution and the absolute statute of limitation or set a special deadline, as was done in the Law on Misdemeanours in some other fields, because infringements against LPDP sanction the violations of some important human rights, such as the right to privacy (guaranteed by the European Convention on Human Rights and Fundamental Freedoms) and the right to personal data protection (guaranteed by the constitution of the Republic of Serbia).

4.2.3. Acting by Administrative Court

In 2012, the Administrative Court received eight lawsuits against the Commissioner's decisions rejecting complaints filed by complainants against the decisions of data controllers. As a comparison, in 2011 the Administrative Court received two lawsuits, one of which was

rejected. Of the eight lawsuits filed in 2012, the Administrative Court rejected one and dismissed two, while the remaining ones are still pending.

4.2.4. Acting by Constitutional Court

Under Article 168, paragraph 1 of the Constitution of Serbia, the Commissioner, as a government authority, has the power to file motions for the Constitutional Court to review the constitutionality of laws and other regulations.

Together with the Ombudsman, in 2012 the Commissioner filed a motion to the Constitutional Court to review the constitutionality of Article 286, paragraph 3 of the Code of Criminal Procedure ("Official Gazette of the Republic of Serbia" Nos. 72/2011 and 101/2011), which reads: "When so ordered by a public prosecutor, the police may, for the purpose of performing the duties provided for in paragraph 1 of this Article, obtain records of telephone communications and base stations used or locate the place from which communication was made." The Commissioner and the Ombudsman believe that this challenged provision is non-compliant with the provision of Article 41, paragraph 2 of the Constitution of Serbia, because it allows the use of special measures which derogate from the inviolability of letters and other communication even without a court order, i.e. it is sufficient for the police to obtain an order from a public prosecutor. The unconstitutional nature of such arrangements has already been confirmed in the Decision of the Constitutional Court of 28 May 2009, passed pursuant to the initiative of the Provincial Ombudsman to review the constitutionality of Article 55, paragraph 1 of the (then applicable) Law on Telecommunications, as well as the Decision of the Constitutional Court of 19 April 2012 passed pursuant to the motion filed by the Commissioner and the Ombudsman to review the constitutionality of Article 13, paragraph 1 and Article 16, paragraph 2 of the Law on Military Security Agency and Military Intelligence Agency.

In the past period (2010 and 2011), the Commissioner filed 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. In 2012, the Constitutional Court ruled on the constitutionality of two of those laws – the Law on Personal Data Protection and the Law on Military Security Agency and Military Intelligence Agency.

The Commissioner filed the motion to review the constitutionality of Articles 12, 13 and 14 of LPDP on 31 January 2010. In view of the provision of Article 42, paragraph 2 of the Constitution, 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. The Constitutional Court upheld the contentions stated in the Commissioner's motion and, after more than two years of the date when the motion was filed (30 May 2012), ruled that the said provisions of LPDP were not compliant with the Constitution and would be repealed on the date of publication of the Decision of the Constitutional Court in the "Official Gazette of the Republic of Serbia". The pertinent Decision of the Constitutional Court was published in the "Official Gazette of the Republic of Serbia" No. 68 of 18 July 2012.

The Commissioner and the Ombudsman jointly submitted a motion to review the constitutionality of Article 13, paragraph 1 and Article 16, paragraph 2 of the Law on Military Security Agency and Military Intelligence Agency[4] on 30 September 2010. 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, which means it is non-compliant with Article 41, paragraph 2 of the Constitution of Serbia and should be applied only on the basis of a court order. The provision of Article 16 paragraph 2 of the same Law 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 Constitutional Court once again upheld the contestations presented in the motion to review the constitutionality of the said provisions of the Law on Military Security Agency and Military Intelligence Agency filed by the Commissioner and the Ombudsman and on 19 April 2012 ruled that the said provisions of the Law on Military Security Agency and Military Intelligence Agency were not compliant with the Constitution and would be repealed on the date of publication of the Decision of the Constitutional Court in the "Official Gazette of the Republic of Serbia".

Although the motion filed jointly by the Commissioner and Ombudsman on 30 September 2010 also called for a review of constitutionality of Article 13, paragraph 1 and Article 16, paragraph 2 of the Law on Military Security Agency and Military Intelligence Agency and Article 128, paragraphs 1 and 5 of the Law on Electronic Communications, after 19 months of filing of the motion, the Constitutional Court ruled only in connection with the Law on Military Security Agency and Military Intelligence Agency. As regards the Law on Electronic Communications, no decision was passed until the date of submission of this Report to the National Assembly.

[4] At the time of writing of this Report, the National Assembly enacted the Law on Amendments to the Law on Military Security Agency and Military Intelligence Agency ("Official Gazette of the Republic of Serbia" No. 17/2013).

5. COMMISSIONER'S PROPOSALS AND RECOMMENDATIONS

In accordance with Article 58 of the Law on National Assembly and Articles 237-241 of the Rules of Procedure of the National Assembly, the Commissioner proposes that the competent Committees of the National Assembly review and endorse the Commissioner's Report for 2012 and agree on conclusions and recommendations with measures to improve the situation in the fields within the Commissioner's sphere of competence on the basis of the Commissioner's proposals set out in this Report; after that, the National Assembly should, in its first following session, review and adopt a conclusion with measures for implementation of the agreed proposals and recommendations for supporting the Commissioner's activities and efforts aimed at further improvement of the freedom of information and of personal data protection and elimination of the obstacles highlighted in this Report.

In the field of freedom of information, considerable results have been achieved in the protection and further affirmation of this freedom. However, the key issue of inadequate office space and insufficient capacities of the Commissioner, combined with other obstacles in the implementation of the Law on Free Access to Information which the Commissioner underscored also in the past seven annual reports, seriously threatens to compromise timely and effective protection of the rights which the Commissioner. A key precondition for continued work of the Commissioner and for the enforcement of those rights is a change in the practice of slow or absolutely passive response from the competent authorities to identified obstacles in his work. Elimination of these weaknesses would contribute to 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 the Law on Free Access to Information 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 in real life, 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.
5) Amend the Rules of Procedure of the National Assembly to provide for a standing mechanism for monitoring compliance with the proposals and recommendations of the Commissioner and other independent public authorities, as well as the conclusions adopted by the National Assembly in connection with annual reports submitted by those authorities.

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, and development of his human resources capacities to an adequate level, as a necessary precondition for timely protection of rights,
2) Preparation of Draft Amendments to the Law on Free Access to Information in accordance with the Commissioner's initiatives, with a view to ensuring effective implementation of the principles laid down by this Law,
3) Implementation of the Law on Data Confidentiality through urgent adoption of implementing regulations, 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,
4) 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,
5) A higher level of compliance with the Commissioner's binding, final and enforceable decisions,
6) enforcement of the Commissioner's conclusions on imposition of fines,
7) Appropriate protection of the so-called "whistleblowers", in accordance with the relevant Council of Europe Resolution 1729 (2010),
8) A higher level of transparency in the functioning of public authorities and proactive publication of information concerning their work,
9) Enactment of a new Law on Personal Data Protection or major amendments and modifications of the existing Law, in line with the actual needs and in compliance with relevant international standards, to enable more effective implementation of the principles provided for in this Law,

10) Enactment of a Law on Security Checks, a Law on Private Investigation Services and a Law on Private Security, to improve the situation in the security sector,

11) Adoption of an instrument which would govern the method of archiving and measures put in place to protect particularly sensitive data,

12) 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,

13) Amendment of the Government's Rules of Procedure 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,

14) 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 adopted and implemented, would facilitate enhanced implementation of laws within the Commissioner's sphere of competence.

COMMISSIONER

Rodoljub Sabic (signed)

Done in Belgrade, on 27 March 2013

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