

S U M M A R Y
OF THE REPORT ON IMPLEMENTATION OF THE LAW ON FREE
ACCESS TO INFORMATION OF PUBLIC IMPORTANCE
AND THE LAW ON PERSONAL DATA PROTECTION IN 2012

In connection with this, the eighth Annual Report, 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 (enacted in 1998 by then Federal Republic of Yugoslavia), but in practice there was virtually no data protection. As a result, 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 these two fields.

The structure and the number of cases processed by the Commissioner in 2012 clearly show that in 2012, similarly as in the past years, the Commissioner had a much greater workload in the field of freedom of information than in the field of personal data protection. However, a comparison with the figures from earlier years shows that the balance is increasingly shifting. In the course of 2012 there were 7570 cases pending before the Commissioner (2526 cases were carried forward from 2011). Of the total number of new cases received by the Commissioner in 2012 (5044), those in the field of freedom of information accounted for a significant majority (3639), while some 28% (1405) related to personal data protection. However, a more than apparent upward trend noted in this field has been rather telling (83 cases in 2009, 250 cases in 2010 and 727 cases in 2011). These figures and other relevant facts discussed below point to the conclusion that the Commissioner is likely to see a shift towards personal data protection as the predominant sphere of his work in the following years.

A. Freedom of Information

Serbian citizens have increasingly been exercising the freedom of information year after year. 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 increasing number of freedom of information requests, combined with the prevalent negligence of public authorities when it comes to replying to those requests, has inevitably resulted in an increased workload for the Commissioner in his efforts to protect the freedom of information.

In 2012, the Commissioner received 3,639 cases, including 2,350 complaints to violations of freedom of information. The number of informal, verbal inquiries by

citizens and various entities for advice, opinion, explanations etc. was many times higher. In 2012 the Commissioner closed 3,553 cases, including 2,269 complaints. At the end of the year there were 2,484 cases pending, as 2,398 cases had been carried forward from the previous year. 90.5% of all complaints were found to be justified. In more than 90% cases complaints were lodged because of absolute “silence” of public authorities pursuant to requests or because the authorities gave negative replies instead of issuing reasoned decisions.

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 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, while in the remaining cases he overturned the decisions of relevant public authorities and returned the cases for renewed procedure. The Commissioner’s interventions had a success rate of 90.6% relative to the number of justified complaints.

The Commissioner also acted on 147 motions for administrative enforcement of decisions, pursuant to which he passed 288 conclusions allowing the execution of orders and conclusions on imposition of fines on public authorities and filed 8 motions with courts for judicial collection of outstanding fines he imposed. He submitted 49 responses to complaints to the Administrative Court, responded to 43 requests for the Commissioner’s opinion concerning implementation of the Law, provided information requested from him in 69 cases, sent 62 advisory and instructional communications in connection with the publication of information booklets on the work of public authorities and communicated with public authorities and requesters in 520 cases pursuant to freedom of information requests forwarded to him.

The Commissioner proposed 10 initiatives for legislative amendments to competent authorities. He prepared and published a publication summarizing the Commissioner’s practice and prepared and started a youth website titled “You Have the Right to Know”, accessible at www.pravodaznas.rs and www.pravodaznam.rs, which addresses freedom of information issues.

Apart from the activities within his sphere of competence, the Commissioner also received and responding to 394 petitions outside his jurisdiction, which mostly related to the work of public authorities. These petitions accounted for 11% of the total number of resolved cases and put an additional strain on the already overstretched Commissioner’s Office.

Although the share of unsuccessful interventions by the Commissioner is low – fewer than 10% of all cases on which he acted – it is still a concern.

The fact remains that in those cases the Commissioner’s existing powers to fine public authorities to force them to comply with his orders were of little use; nor did his pleadings to the Government for assistance have any effect, although the latter is required under the law to enforce the Commissioner’s orders. One of the reasons for such situation

is certainly the virtual absence of any liability for violations of the law. There have been no instances of offenders being held to account for infringements, or for any other offences for that matter. In 2012, similarly as in 2011, administrative inspectors did not file a single request for initiation of infringement proceedings for violations of the Law on Free Access to Information, including cases of non-compliance with the Commissioner's orders. Given the vast number of infringements, such "penal" policy is practically an invitation to break the law. In view of this fact, as well as the fact that in 2012 a new problem arose in connection with court jurisdiction for enforcement procedures to collect the fines imposed by the Commissioner, which will be discussed in detail later, the results achieved in the implementation of the law are all the more remarkable.

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 freedom of information legislation, the Law on Free Access to Information, which has seen three amendments since its enactment, provides a solid basis for proper exercise of the freedom of information. A fourth amendment was due for enactment by the National Assembly in January 2012, but unfortunately it has been withdrawn from the procedure together with other bills submitted by the Government and should be brought up again as soon as possible.

Amendments to the Law on Free Access to Information should ensure the following: increased proactive publication and updating of information; expansion of the circle of authorities and entities subject to the Law; 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, the so-called whistleblowers; longer statutes of limitation for infringement; establishment of a protective mechanism for the attained level of protection of the freedom of 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; proper regulation of the procedure of nominating and appointing an incumbent Commissioner and his/her removal from office; amendment of the provisions relating to enforcement of the Commissioner's decisions etc.

From the aspect of exercise of the freedom of information it is of paramount importance to adopt amendments to the Law on General Administrative Procedure or enact anew law as soon as possible, as well as to harmonise numerous procedural and other laws with the Commissioner's initiatives and eliminate any provisions that hamper the exercise of the freedom of information, such as the Code of Criminal Procedure, the Law on Civil Procedure, the Misdemeanours Law, the Law on Tax Procedure and Tax Administration, the Law on Health Care, the Competition Law etc. To ensure unity and consistency in the legal system, an amendment will be necessary to the Government's Rules of Procedure that would provide for an obligation to obtain the Commissioner's

opinion in the process of legislation enactment. 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. Enactment of a law that would provide for “whistleblower” protection as soon as possible is also paramount for the exercise of the freedom of information.

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 diverging practices of courts in judicial enforcement of the Commissioner’s conclusions on imposition of fines.

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 rightly recognized by Serbian citizens and always highly praised by relevant international actors.

B. Personal Data Protection

Since the enactment of the Law on Personal Data Protection in late 2008, Serbian citizens have increasingly exercised the right to personal data protection with each year. This is best seen from the number of cases received by the Commissioner (83 cases in 2009, 250 cases in 2010 and 727 cases in 2011).

A similar tendency of increasing caseload is also apparent in other types of cases, except for registration with the Central Registry. One example for this is the number of complaints lodged with the Commissioner (154 in 2012, as opposed to 78 in 2011, 45 in 2010 and 3 in 2009). The Commissioner has closed the procedures pursuant to 129 complaints. Complaints lodged with the Commissioner related to data contained in police records, medical documentation, case files of social welfare centres etc. 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, which is inadmissible both from the aspect of human rights violations and from the aspect of exercise of powers by data controllers. The second most frequent cause of complaints raised with the Commissioner is rejection of data subjects’ requests by data controllers. The Commissioner’s acting on complaints usually entailed the following: ordering the data controller to honour the data subject’s request; termination of the complaint procedure because the controller has in the meantime honoured the data subject’s request; dismissal of complaints that were incomplete; overturning of the data controller’s decision and returning the case for renewed procedure etc.

Furthermore, the Commissioner received 569 questions and requests for opinion on various issues (in 2011 he received 310 such requests). The Commissioner replied to

all these requests, including 432 opinions and responses given to individuals, 65 to legal entities and 72 to national and local authorities.

In 2012 the Commissioner carried out 365 inspections (compared with 159 inspections in 2011 and 71 inspections in 2010). As regards inspections of data controllers carried out by the Commissioner following reports by the citizens (203), the following were cited as reasons: personal data processing without legal basis, i.e. without data subject's consent; excessive processing of personal data; processing of Unique Personal Identification Number as an unnecessary piece of information; illegal installation of video surveillance and illegal taking of video footage etc. Processing of Unique Personal Identification Numbers, together with some other issues, was the most frequently cited reason for complaints of excessive personal data processing. The fact that video surveillance was one of the most frequent reasons for inspection by the Commissioner is, among other things, a direct consequence of the lack of an appropriate normative framework.

Of the 164 completed inspections, in 103 cases the Commissioner found violations of LPDP, while in 61 cases 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: he issued 67 warnings against irregularities in data processing; 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; he Filed 35 petitions for initiation of infringement proceedings due to violations of LPDP; he filed 1 criminal report etc..

The only area where developments have not followed the general trend of increasing caseload for the Commissioner is the number of registrations of data controllers and their personal data files with the Commissioner's Central Registry. This can be seen as an indicator of non-compliance of data controllers with their obligations under the law. Namely, in 2012, 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.

The main issues and obstacles faced by the Commissioner in the field of personal data protection are the lack of an appropriate legal framework and the insufficient knowledge of personal data protection issues and low awareness of the need for such protection among data controllers and their authorised representatives.

Regarding the lack of an appropriate normative framework, 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, keeping of the Central Registry 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. In this Context, the Commissioner is of the opinion that either a new LPDP should be adopted or the existing LPDP should undergo a thorough overhaul in terms of amendments.

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 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.

The lack of an appropriate legal framework is also reflected in the absence of relevant implementing regulations. Thus, for example, an instrument on the manner of filing and the measures for the protection of particularly sensitive data should have been adopted by the Government by May 2009, but Government had not done so by the time of submission of this Report to the National Assembly. As another example, the Government should have adopted an Action Plan on Implementation of the Personal Data Protection Strategy by November 2010, but again had not done so by the time of submission of this Report to the National Assembly. Furthermore, in order to give effect to the Law on Data Confidentiality as soon as possible and achieve an appropriate level of personal data protection, it is necessary to adopt a number of implementing regulations, without which the Law remains unenforceable.

Furthermore, the Commissioner is of the opinion that several laws need to be amended and made compliant with the constitutional guarantee of inviolability of letters and other means of communication. These include the Law on Electronic Communications, the Law on the Security Information Agency and the Code of Criminal Procedure. This is supported by the fact that the Constitutional Court, acting on a motion filed by the Commissioner and the Ombudsman, had already ruled that relevant provisions of the Law on Military Security Agency and Military Intelligence Agency were not compliant with the Constitution of Serbia.

Significant improvements of normative arrangements are needed in the security sector, e.g. through the enactment of a Law on Security Checks, a Law on Private Investigation Services and a Law on Private Security.

In the context of insufficient knowledge of personal data protection issues and the lack of awareness of the need for such protection, throughout the year the Commissioner assisted public authorities in ensuring compliance with applicable regulations, trained the officials of various data controllers and participated in a number of meetings. The need

for staff training is a particularly pressing issue for public authorities and this comprehensive and continual process should involve competent public authorities, with the Commissioner's support.

C. Premises

On top of all the other problems and obstacles faced by the Commissioner in his work, one of the largest problems is the chronic lack of appropriate office space, which has persisted for many years and continues to prevent the Office from hiring the required number of staff. This issue has held back 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, all of which compromises the citizens' right to fully and timely exercise their rights.