S U M M A R Y O F T H E R E P O R T

ON IMPLEMENTATION OF THE LAW ON FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE AND
THE LAW ON PERSONAL DATA PROTECTION
FOR 2016

1. About the Commissioner's Role and Activities

This Summary of the Report on Implementation of the Law on Free Access to Information of Public Importance (hereinafter referred to as the "Law on Access to Information") and the Law on Personal Data Protection (hereinafter referred to as "LPDP") for 2016 outlines the situation in the respective fields governed by these two laws, obstacles to exercising the freedom of information and the right to personal data protection and the activities and measures undertaken by the Commissioner for Information of Information of Public Importance and Personal Data Protection (hereinafter referred to as "the Commissioner") in 2016 within his mandate.

The Commissioner's mandate is to protect and promote the freedom of information and the right to personal data protection and to oversee the legality of personal data processing by public authorities and all other entities that process personal data. Accordingly, **in 2016 the Commissioner mostly ruled as the authority of second instance on individual complaints relating to violations of the freedom of information and the right to personal data protection and oversaw personal data processing, both *ex officio* and pursuant to citizens' reports.**

In addition, the Commissioner also provided expert assistance to public authorities in connection with the drafting of regulations, as they pertain to data processing and freedom of information; he submitted legislative initiatives to state authorities and gave opinions on implementation of laws; he organised or participated in numerous seminars and lectures, primarily for employees of public authorities and personal data controllers; he published positions from his professional practice; he maintained the Central Register of Data Files; he replied to citizens' submissions relating to the exercise of these two rights; he decided on requests for cross-border transfer of personal data out of Serbia; he took part in events of interest for the Commissioner's work at international and regional levels and in the state's activities relating to the European Union association process etc.

The constant increase in the number of cases within the Commissioner's purview since the beginning of his work has continued in 2016. **In 2016, the Commissioner received 8,237 new cases**, including 5,291 cases relating to freedom of information, 2,464 cases relating to personal data protection and 482 cases relating to both areas of the Commissioner's work. Together with the pending cases carried forward from the previous period (3,864), **in 2016 the Commissioner worked on 12,101 cases in total. During 2016, the Commissioner closed 8,061 cases**, including 5,135 cases in the field of freedom of information, 2,454 cases in the field of personal data protection and 472 cases relating to both fields. **There were 4,040 pending cases carried forward to 2017.** The reason for such high number of pending cases is the fact

that, for many years, the Commissioner worked with insufficient resources, while facing a huge influx of new cases.

In 2016, the Commissioner also worked towards improving the functioning of his office, primarily within the framework of the two-year project launched in 2015 under an agreement between the Government of the Republic of Serbia and the Ministry of Foreign Affairs of the Kingdom of Norway. Of particular importance for this institution and other bodies are staff trainings and the obtaining of the highest certification level for the implementation of data safety standards – SRPS ISO/IEC 27001, as well as other preparations for the implementation of this standard in the Commissioner's work, which is scheduled to be completed by the end of 2017.

Also, 21 employees at the Commissioner's Office underwent security clearance checks in 2016 and were issued with the requisite certificates by the Office of the National Security Council which allow them to access classified data in accordance with the Law on Data Classification; three of them have received security clearance to access data with the highest classification level, "state secret", while 18 have received security clearance to access data classified as "top secret", which they need for the normal exercise of their respective duties.

The role and work of the Commissioner as the authority in charge of protecting the freedom of information and the right to personal data protection were made even more visible in 2016 through the Open Data Portal presenting the Commissioner's work, social networks, the media etc. The institution of the Commissioner and the incumbent personally received three awards for their achievements from civil society organisations in 2016.

A. Freedom of Information

1.1. Commissioner's Activities and Current Situation regarding Exercise and Protection of Freedom of Information

In the field of freedom of information, Serbia has seen an upward trend in the number of freedom of information requests[1] submitted by citizens to public authorities, coupled with a large number of complaints with the Commissioner due to difficulties in obtaining information. The average of three to four thousand formally lodged complaints a year (in the past four years) is proof that **information is still difficult to obtain from public authorities in many cases without the Commissioner's intervention** and shows that citizens trust this independent state body when seeking protection of their rights.

In 2016, the Commissioner resolved 5,135 cases in the field of freedom of information. Given the high number of complaints, most of the activities involved resolving individual complaints due to refusal of public authorities to grant access to information, procedures relating to enforcement of the Commissioner's decisions and activities relating to administrative disputes. Thus, in 2016 the Commissioner resolved 3,252 complaints (of which 2,852 were founded),

[1] In 2005 there had been approximately two thousand requests, while in 2016 there were about thirty thousand. This figure is based on the 811 reports by those public authorities (about 28%) that submitted their annual reports to the Commissioner out of the total of 2,906 public authorities which are subject to mandatory reporting.

pursuant to which he passed 1,180 decisions and 1,160 resolutions. At the proposal of the complainants, he conducted 245 enforcement procedures, in which he passed 154 enforcement and fining orders, while in 188 cases where the decisions had subsequently been implemented, the Commissioner terminated the procedures by passing resolutions. In 61 cases the Commissioner demanded of the Government to enforce his decisions. Based on the Commissioner's resolutions on fining in the enforcement procedure, the budget received RSD 9,700,000 out of the total amount of RSD 13,200,000 in imposed fines. The Commissioner submitted 87 replies to claims against his decisions filed with the Administrative Court. He submitted 318 case files to the Administrative Inspectorate for the purpose of initiating infringement proceedings.

Other activities of the Commissioner included: provision of assistance to citizens in the exercise of rights by giving opinions (160), clarifications for acting in the implementation of laws and compliance with statutory duties / written communication of an advisory and instructional nature (639); provision of opinions in connection with the passing of regulations and other legislative initiatives (65); communication relating to requests by information requesters lodged with or forwarded to the Commissioner (257), acting pursuant to requests for access to information by which citizens and representatives of the media requested information of public importance generated in the Commissioner' work (223), provision of training to employees of public authorities; preparation of publications and other ways of disseminating positions from the Commissioner's practice; participation in conferences and other professional events etc. The Commissioner also replied to petitions relating to actions taken by other authorities and issues mostly outside the Commissioner's sphere of competence (488).

Exercise of the freedom of information had been improving constantly from the enactment of the Law on Access to Information (2004) to 2015. In parallel with this, efficiency of the Commissioner's interventions to protect this freedom also improved, as measured by the number of cases in which the requesters succeeded in exercising their right, i.e. received the requested information, relative to the number of justified complaints: in 2015, it was 95.8%.

Unfortunately, **this positive trend in the exercise of the freedom of information was reversed in 2016.** For the first time since the beginning of the Commissioner's work, the **efficiency of his work measured by the number of cases in which the requesters received the requested information**, which had been increasing year after year, **was reduced in 2016 by 3.8%, while the number of justified complaints was increased by 2%.** Of particular concern is the fact that **the rate of compliance with the Commissioner's decisions by which he ordered public authorities to make information available was reduced by 10.1% in 2016 to 73.6% of the passed decisions.** The highest rates of non-compliance with the decisions were seen among local self-government authorities and organisations, public enterprises (national and local) and Ministries.

Notwithstanding these figures, in 2016 **the Commissioner's interventions pursuant to complaints once again resulted in information requesters receiving the requested information in a high percentage of cases (92%).** After the Commissioner's intervention pursuant to a complaint, **in most cases where the complaints were found to be justified (60.8%), the procedures were terminated** because the public authorities subsequently provided

the requested information to the complainants. In many situations, the information was made available to the requesters only after the Commissioner has used all available mechanisms of coercion, i.e. enforcement procedures and fining of public authorities. Adding to this, **the mechanism for enforcing the Commissioner's decisions, which is the Government's responsibility, did not function in 2016, similarly as in earlier years, while oversight by the Administrative Inspectorate failed to yield the expected results in terms of inevitable liability for violations of this right.**

Below is a selection of illustrative figures that best show the situation in the field of freedom of information in Serbia in 2016:

There were many cases in which public authorities failed to act on received freedom of information request or replied they were unable to provide the requested information, without passing decisions with proper reasoning, as requested by the law; **thus, the Commissioner received a high percentage of complaints against the so-called administrative silence (84.4%) which was only 3.3% lower than in 2015.**

The number of complained lodged with the Commissioner due to citizens' inability to exercise their freedom of information in 2016 was slightly lower than in the previous year, but nevertheless remained very high at almost 3,500. Nearly half of all complaints were lodged against Republic-level national and other authorities and organisations and some 46% of those were complaints against Ministries and their subordinated bodies. **The share of justified complaints lodged with the Commissioner remains high at 87.7%.**

Compared with the previous year, public authorities denied freedom of information requests more frequently by citing abuse of the right (about 5%) or by invoking confidentiality of information (3.7%), even when the requested information related to public spending, investments, official actions etc.

At the initiative of public activities, in 2016 alone the Republic Public Prosecutor's Office filed 15 legal actions against the Commissioner's decisions citing protection of public interest and in some cases demanding a stay of execution of the Commissioner's decisions. This was more than the total number of legal actions filed during all 11 previous years, when the same Prosecutor's Office filed 11 legal actions against the Commissioner's decisions.

None of the Commissioner's decisions passed in 2016 were annulled by the Administrative Court[2], although **111 legal actions were filed against the Commissioner's decisions in 2016, of which 90 were resolved**. In parallel with this, **126 legal actions were filed with the Administrative Court against the six authorities against which complaints cannot be lodged with the Commissioner**, including 123 legal actions against the Government and one legal action against the National Assembly, the President of the Republic of Serbia and the Constitutional Court respectively. **Out of the 40 resolved legal actions, 31 were upheld, all of which had been lodged against the Serbian Government.**

Progress regarding compliance with the statutory duty of public authorities to improve the transparency of their work, as required by the Law on Access to Information,

[2] The Administrative Court annulled on formal grounds and returned for repeated deliberation one resolution passed by the Commissioner in 2015.

has been symbolic at best. The measures undertaken by the Commissioner in 2016 to ensure consistent implementation of the Guide on Preparation and Publishing of Information Booklets about the Work of Public Authorities have resulted in certain improvements regarding the so-called proactive disclosure of information; however, these improvements as a rule came only after the Commissioner intervened. Many public authorities which have a statutory duty to publish information booklets about their work, provide staff trainings, maintain data storage media and submit reports on implementation of this Law to the Commissioner have brazenly refused to do so for years without any liability or repercussions, although failure to comply with each of these duties is penalised as an infringement.

Liability for violations of the law is lacking or is merely symbolic in great many cases given the number of such violations; furthermore, most of the infringement proceedings were instituted pursuant to petitions filed by information requesters as harmed parties and the number of such cases was many times higher than the number of cases initiated by the Administrative Inspectorate. This absence of liability is a direct consequence of the scope and quality of oversight of compliance with the Law by the Administrative Inspectorate and the divergent practice of magistrates' courts.

1.2. About Obstacles to the Exercise of Freedom of Information

The described situation in the field of freedom of information was largely due to the following obstacles:

1.2.1. Non-functioning of the Mechanism for Enforcement of the Commissioner's Decisions

The Government has a duty, when asked to do so by the Commissioner, to undertake direct enforcement measures in accordance with the rules of general administrative procedure which apply to administrative enforcement in order to ensure the enforcement of the Commissioner's decisions in cases where public authorities fail to do so voluntarily, even after the Commissioner has applied direct enforcement measures (fines/penalties). The Commissioner's decisions are final, binding and enforceable under the law and failure to comply with those decisions is punishable under the law as an infringement.

In 2016, the Commissioner was forced to demand of the Government to enforce his decisions in much more cases (61) than in earlier years[3]; however, the Government failed to do so in a single case. For reasons of full disclosure, it should be noted that public authorities complied with the Commissioner's decisions after the Commissioner sent requests to the Government in only three cases, which can be attributed more to public pressure and media reports than to any intervention by the Government. Notwithstanding the statutory duty, the Commissioner's requests for enforcement have been ignored since 2010, when this duty was first introduced; to date, the Government has failed to act on 135 such requests in total.

Although the share of unsuccessful interventions by the Commissioner is law (8%), it is worrying that access has been denied to information in relation to which public access would be more than justified, e.g. large investment projects by the government and

[3] In 2015, the Commissioner submitted 24 requests for enforcement of his decisions to the Government.

spending of public money, failure of competent authorities to undertake statutory measures etc.

As an example, notwithstanding all measures and formal decisions undertaken by the Commissioner pursuant to citizens' grievances and complaints, the public has not been informed which measures, if any, the competent state authorities undertook and other circumstances surrounding the events of 25 April 2016 when buildings were demolished in Hercegovacka street in Belgrade, the so-called "Savamala" case. Access has also been denied to information contained in the official notes and the explanation of the decision made by the competent prosecutor's office not to investigate the crash of a military helicopter in March 2015, when seven persons were killed. Public authorities have refused to allow public access to information about management of the Smederevo Steel Mill, purchase of raw materials and termination of the Agreement, on the pretext that those were "classified data". This case relates to the Management and Consulting Services Agreement for the operations of the company "Zelezara Smederevo" of 25 March 2015, entered into between the Government of the Republic of Serbia, the company "Zelezara Smederevo" d.o.o., HPK MANAGAMENT d.o.o. of Belgrade and HPK ENGINEERING B.V. of Amsterdam, the Netherlands.

In 2016, the Government refused to enforce the decision to grant the Anti-Corruption Council and journalists access to information about the agreements entered into by Public Enterprise Srbijagas, the company Telekom Serbia and the company Air Serbia in 2015 in connection with marketing, advertising and public relations services, sponsorships/donations, promotional and media campaigns etc.; information about the loans granted by the Development Fund of the Republic of Serbia to the steel mill "Zelezara Smederevo" from 2012 to 2015; agreements entered into by the Serbian Export Credit and Insurance Agency with "Pink international company" and evidence of execution of those agreements; transaction documents of Air Serbia and Etihad (Shareholders' Agreement, Support Services Agreement, long-term commercial agreements with the Belgrade Airport, the oil company NIS and "Tehnika", the agreement on funding of the company Air Serbia by the Government, travel services and training agreements etc.) and other information.

Another issue in addition to the non-functioning mechanism of enforcing the Commissioner's decisions is the divergent jurisprudence of different courts in Serbia in connection with the enforcement of the Commissioner's resolutions on the imposition of fines/penalties in the enforcement procedure, which exacerbates the problems with enforcement of the Commissioner's decisions. The Basic Courts in the territory covered by the Court of Appeals of Belgrade, unlike other Serbian courts, have declined jurisdiction for enforcing the said resolutions. One of the consequences of this was the inability to forcibly collect the outstanding fines of two and a half million dinars in 2016 alone for the national budget.

1.2.2. Lack of Accountability for Violations of the Law

For many years, the Commissioner's reports have expressed his **concern about the lack of proper accountability for violations of the freedom of information and has been warning that such attitude of the competent bodies encourages public authorities to continue doing so, safe in the belief that they would never suffer any consequences.**

A direct consequence of this lack of accountability for violations of the freedom of information is the unacceptably large number of complaints lodged with the Commissioner and the Commissioner's inability to resolve all complaints within the statutory timeframe, which often leads to legal action and causes expenses and unnecessary budget expenses. Quite understandably, this causes dissatisfaction among citizens and additionally strains the Commissioner's Office.

Any form of violation of the freedom of information is punishable as infringement under the Law on Access to Information, including failure to act on a freedom of information request, provision of incomplete or inaccurate information, failure to comply with the Commissioner's decisions to grant access to information and non-compliance of public authorities with their duties regarding publication of information booklets about their work, submission of reports to the Commissioner and provision of trainings. Oversight of compliance with the Law is the responsibility of the Ministry of Public Administration and Local Self-Government. According to the report submitted to the Commissioner, in 2016 the Administrative Inspectorate conducted inspections only in cases of non-compliance with the Commissioner's orders and, to a lesser extent, in cases of failure to publish the information booklets. **Taking into account that, on the one hand, the fact that almost three thousand complaints were found to be justified provides proof of violations of the freedom of information pursuant to submitted requests and the level of compliance of public authorities with their duty to improve the transparency of their work, and taking into account on the other hand the number of infringement proceedings initiated pursuant to petitions by the Administrative Inspectorate in 2016 (46) and especially their outcomes, the glaringly apparent conclusion is that, in most cases, accountability is either completely lacking or symbolic at best.** Because of this inspection policy, which had not seen a single infringement proceeding initiated for violation of the freedom of information in several years (2011-2015), certain state-owned companies, like Srbijagas, have paid dozens of fines in the executory procedures conducted by the Commissioner, but still refuse to provide information to requesters.

Appallingly, given this state of affairs, the number of infringement proceedings were instituted pursuant to petitions filed by citizens whose rights had been violated as harmed parties was many times higher than the number of cases initiated by the Administrative Inspectorate.

Even when fines were imposed, they were close to the statutory minimum amount and appellate proceedings were often terminated because the statute of limitation had expired. In this context it should be noted that, in the process of amending the Law on Misdemeanours, the Ministry of Justice rejected the Commissioner's initiative to extend the statute of limitations on infringements under the Law on Access to Information, taking into account their anti-corruption potential.

1.2.3. Postponed Amendments to the Law on Access to Information

Since 2011, when the process of amending the Law on Access to Information was initiated and then suspended in 2012, its amendments have not been passed and the timeframe for doing so has been extended year after year without proper reason. As a result, the obstacles that should be eliminated by amendments to the Law hamper the exercise of the freedom of information and impede the Commissioner's work.

The competent authorities (initially the Ministry of Public Administration and Local Self-Government and now the Ministry of Justice) have set a new timeframe for passing amendments to the Law on Access to Information with every amendment or new version of strategic documents, notwithstanding the fact that all authorities without exception have identified a need for increasing transparency in all processes conducted by public authorities, expanding the powers and the resources available to the Commissioner and ensuring mandatory compliance with the Commissioner's decisions and instructions, as well as a need for upgrading this Law. The most recent timeframe for adoption of amendments to the Law on Access to Information is the fourth quarter of 2017.[4]

This delay in amending the Law on Access to Information has stopped the sorely needed improvement of standards of proactive disclosure of information and of the anti-corruption potential of this law; the efforts to make the work of all public authorities more visible; to extend the application of the provisions of this Law to all entities with delegated public powers, including public notaries and bailiffs, as well as entities that are majority-owned by the state; the efforts to increase accountability for violations of the Law by vesting the Commissioner with the power to file petitions for initiation of infringement proceedings; the efforts to ensure that the mechanism for enforcing the Commissioner's decisions is fully functional; the efforts to improve the legal environment for the exercise of the freedom of information by stipulating that the Commissioner's opinion must be sought in the legislative process and by putting in place safeguards to ensure that the level of rights guaranteed by the Law on Access to Information and the achieved level of rights are not lowered by amendments to other regulations; and the efforts to enable public authorities to charge the costs of accessing information as own-source revenue instead of paying this revenue to the joint budget account as required by the currently applicable regulations, in a situation where the costs set out in the Government's Regulation of 2006 have not been adjusted for inflation.

The delay in amending the Law on Access to Information also delays the EU integration process in the field of freedom of information, the Directive on Re-use of Public Sector Information and the Directive on Public Access to Environmental Information.

B. Personal Data Protection

1.1. Legal Framework

The inadequate legal framework is the main problem for and obstacle to personal data protection, which makes the situation in this field alarming. Due to the deficient legal framework, many issues are either not regulated at all or are improperly regulated, which in practice leads to numerous violations of the right to personal data protection, some of which are major in scope or significance.

In view of this, it is imperative to fundamentally change the attitude of the state and the society towards personal data protection and towards privacy in general.

[4] National Programme for Adoption of the *Acquis* – Second Revision, November 2016.

The key reason for this is the fact that the competent state authorities, in particular the Serbian Government, have inexplicably, but persistently, refused for eight years now to take the necessary steps to regulate the legal framework for personal data protection, thus creating the associated adverse consequences.

The legal framework in the field of personal data protection is inadequate both with regard to international law and international relations and with regard to national law.

With regard to international law and international relations, harmonisation of national legislation with *acquis communautaire* is an international law obligation of the Republic of Serbia under the Stabilisation and Association Agreement[5] and the status of a candidate for EU membership is indicative of the fact that European integration is key for the country's foreign and domestic policy. The fact is that the LPDP is not fully harmonised with earlier international documents and is even less so on even more counts with the recently adopted Regulation[6] (EU) 2016/679 of the European Parliament and of the Council of 27. April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. This Regulation came into force on 24 May 2016 and will apply from 25 May 2018,[7] i.e. Member States have a two-year period to harmonise their national legislation with the Regulation.

The vigorous legislative activity in the EU in 2016 in the field of personal data protection, the decisions of other authorities and bodies, including judicial decisions, as well as the positions and opinions of the Article 29 Working Party, place a serious and demanding task before EU Member States to adapt to the new standards in this field. For Serbia, as a country on the path of EU accession, this requires large and very serious changes in the national legal order, including not only the enactment of a new LPDP, but also harmonisation of numerous other laws and implementing regulations with the European standards.

The Commissioner, in accordance with his powers and his status of an independent state authority, has provided assistance and support in all situations to the competent authorities and bodies in the process of Serbia's EU stabilisation and association by providing the requested opinions and answers to questions.

Serbia's national legal framework in the field of personal data protection is inadequate and thus utterly dysfunctional. There are multiple reasons for this. Firstly, many provisions of the LPDP are inappropriate or incomplete and certain issues are not regulated by the LPDP, just as they are not systemically regulated by other, separate laws. There is a number of issues that will have to be regulated properly, including e.g. video surveillance, processing of biometrics, the procedure for exercising the right to personal data protection, the procedure of transborder transfer of personal data, the oversight procedure, the Commissioner's powers, data safety, analysis of risk for data subjects in cases of specific processing that may pose a significant threat to their rights and the duty of data controllers to report to the Commissioner any breach of data safety; in this context, new concepts should be implemented in the data protection regime,

[5] http://www.seio.gov.rs/src/srbija-i-eu/sporazum-o-stabilizaciji-i-pridruzivanju/
[6] http://www.poverenik.rs/sr/pravni-okvir-zp/medjunarodni-dokumenti/2502-uredba-2016679.html
[7] http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG&toc=OJ:L:2016:119:TOC

including in particular the appointment of data protection officers by certain data controllers (of specific types or those that perform mass processing of data or process specific categories of data) etc.

Furthermore, the inadequate national legal framework for personal data protection is also reflected in deficient sector-level laws. Namely, it is necessary to amend numerous sector-level laws which as a rule incompletely regulate personal data processing in specific sectors, while certain sector-level laws do not regulate this subject matter at all. It is well known that pursuant to Article 8, item 1 of LPDP, the legal basis for data processing can be either the law or an individual's freely given consent. Many laws, especially those enacted before LPDP, do not contain provisions that govern in an appropriate manner the subject matter of personal data collecting, keeping, processing and use, although this is a constitutional duty (Article 42 paragraph 2 of the Constitution of Serbia); instead, the subject matter is often regulated by secondary legislation. Furthermore, secondary legislation often contains insufficient or incomplete arrangements governing technical and similar issues concerning data processing operations, although this is in fact the point of its existence. Another huge issue is the lack of certain implementing regulations the Serbian Government should have passed a long time ago, but still has not done so. So far, the only implementing regulations passed on time were those which were under the responsibility of the Commissioner.

As an example, the Commissioner has pointed time and again to the need to adopt an instrument on the manner of filing and the measures for the protection of particularly sensitive data, which is a statutory duty, but the Serbian Government has still not done so (almost eight years after the statutory time limit). In addition, the Serbian Government should have adopted an Action Plan on Implementation of the Personal Data Protection Strategy, with would set out activities, expected effects, implementers of specific tasks and periods for their completion, but has still not done so (after more than six years). In this context, it is particularly important to emphasise that the Personal Data Protection Strategy of 2010 is obsolete and that a new strategy should be passed.

1.2. (Non-)Enactment of a New LPDP

Given that numerous provisions of the LPDP are inappropriate and/or incomplete, while certain issues are not even regulated by the LPDP nor regulated systemically by other, special laws, for several years the Commissioner has been pointing this fact to the attention of the Government, including in particular the Ministry of Justice, proposing specific solutions, including a Model for a new LPDP prepared independently by the Commissioner (in October 2014). He presented this Model to the Ministry of Justice; however, only about a year after this, the Ministry of Justice announced that it prepared a Draft Law on Personal Data Protection, which had nothing in common with the Commissioner's Model Law, although this was a duty provided for in the Action Plan for Negotiation of Chapter 23[8] (September 2015). Furthermore, the Action Plan also specifies that the new LPDP would be enacted in the fourth quarter of 2015, which did not happen, so the subsequent text of the Action Plan for Negotiation of Chapter 23[9],

[8] http://www.mpravde.gov.rs/files/Akcioni%20plan%20PG%2023%20Treci%20nacrt-%20Konacna%20verzija1.pdf

[9] http://www.mpravde.gov.rs/tekst/12647/akcioni-plan-za-pregovaranje-poglavlja-23-usvojen-na-sednici-vlade-srbije-27-aprila-2016.php

adopted in the session of the Serbian Government held on 27 April 2016, this time limit was moved forward to the fourth quarter of 2016. However, the new LPDP was not enacted in the fourth quarter of 2015 or in the fourth quarter of 2016; indeed, it has not been enacted as of the date when this Report was completed and no new deadline has been specified for its enactment.

Such (in)action of the Serbian Government, in particular the Ministry of Justice, clearly show that the Action Plan for Negotiations for Chapter 23, harmonised with the EU, was violated both before the opening of this Chapter and after its opening. The Commissioner has complied with all of his duties relating to implementation of the Action Plan for Negotiation of Chapter 23; indeed, he has even gone beyond strict compliance with his statutory duties by preparing the Model LPDP, although he lacks the power to propose laws or their amendments. Proof of this can be found in the Statistical Report on Efficiency of Implementation of the Action Plan for Chapter 23 by the Fourth Quarter of 2016[10], adopted in December 2016 (p. 55), which explicitly states that "the Commissioner has fully implemented all activities provided for in the Plan" (unlike certain other state authorities, including in particular the executive, as well as the legislature).

In the working draft of the Serbia Progress Report of 9 November 2016, the European Commission stated, among other things, that "a new law on personal data protection in line with EU standards needs to be adopted urgently. Processing and protection of sensitive personal data, biometrics and video surveillance, security of data on the internet and direct marketing remain inadequately regulated, leaving significant scope for abuse." However, this conclusion presented in the Report has not been implemented either, i.e. a new Personal Data Protection harmonised with EU standards has not been enacted. An additional aggravating circumstance is the fact that there is still no law that would systemically and comprehensively regulate numerous areas that are crucial in terms of personal data protection, including video surveillance, biometrics, security clearance checks etc.

Because of this situation, in 2016 the Commissioner prepared a new Model LPDP, fully harmonised with the relevant standards set out in the new European documents, including in particular the said Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (As of the time of completion of this Report, the Commissioner has posted the text of this Model on his website and has invited all stakeholders, the expert community and the general public to discuss it in a hearing. After the hearing, which will take more than a month, the Commissioner will host a roundtable to discuss the Model. After adapting the text of the Model to the results and conclusions of the hearing, the Commissioner will make the Model available to the Government and the Ministry of Justice, just like in 2014, of which the public will again be informed by appropriate means. The Commissioner believes that this Model, unlike the Model of 2014, will be subject to serious deliberation by the Government and the Ministry of Justice and will subsequently be adopted by the National Assembly. He also hopes its full and unreserved implementation would help improve and protect the human rights guaranteed by the Constitution).

The indolent attitude of the competent Serbian authorities, including in particular the Government, towards personal data protection is inexplicable and unconceivable, not least

[10] http://www.mpravde.gov.rs/files/Statisticki%20izvestaj%20o%20sprovodjenju%20Akcinog%20plana%20za%20PG%2023.pdf

because our country is still in an early stage of implementing European standards in its internal legal order and especially in real life. This process should be made far more efficient and sound, with full respect for the principle of accountability.

1.3. Commissioner's Activities relating to Personal Data Protection

In 2016, the Commissioner closed 2,454 cases, including: 835 inspections completed; 408 complaints resolved; 944 opinions on implementation of the LPDP given; 66 submissions resolved; 24 replies to legal action submitted to the Administrative Court; 11 forwarded requests resolved; 30 instructions for improving data protection and prevention issued; 8 requests for transborder transfer of data out of Serbia resolved; 125 requests for changed in the Central Register resolved; 2 motions to protect legality acted upon; 1 motion for repeated procedure resolved; and 130 data files maintained by 332 controllers entered in the Central Register.

1.3.1. Oversight

The Commissioner completed 835 inspections in total, as follows: in 534 cases it was found that the inspected entity complied after the inspection; 217 cases were closed with notifications pursuant to Article 50 because no irregularities were found; 74 cases were closed with official notes because it was found that no violations of the LPDP had been committed and no grounds existed for conducting inspections; 9 cases were closed by petitions for initiation of infringement proceedings; and 1 case was closed by filing criminal charges.

In cases where he found violations of the LPDP (356), the Commissioner issued 316 warnings and 30 decisions and filed 9 petitions for initiation of infringement proceedings and 1 criminal charge due to violations of the LPDP.

By the end of the reporting period, out of the 174 warnings passed by the Commissioner under Article 50 of the LPDP, 156 warnings were complied with, in one case there was partial compliance and one warning has not been complied with, while the remaining 16 are pending, which means that, as of 31 December 2016, the percentage of compliance was 89.6%. (*By the time of completion of this Report, on 1 March 2017, six more warnings were complied with, making a total of 162, which increased the percentage of compliance with the warnings under Article 50 of the LPDP to 93.7%*.).

Furthermore, by the end of the reporting period, of the 142 warnings passed by the Commissioner under Article 56 of the LPDP, 108 were complied with, in 9 cases the warnings were partially complied with, in 6 cases they were not complied with, while the remaining 19 warnings were pending, which means that, as of 31 December 2016, the percentage of compliance was 82.4%. (*By the time of completion of this Report, on 1 March 2017, four more warnings were complied with, making a total of 112, which increased the percentage of compliance with the warnings under Article 56 of the LPDP to 85.2%*.).

During the reporting period, the Commissioner passed 30 decisions and, **according to the information provided, the controllers have fully or partially complied with 8 decisions passed by the Commissioner, 1 decision was not complied with, while the**

remaining 21 decisions were pending, which means that, as of 31 December 2016, the percentage of compliance was an absolutely unsatisfactory 30%. (*By the time of completion of this Report, on 1 March 2017, the Commissioner was informed that one more controller had complied with a decision, which means a total of 9 controllers fully or partially complied with the Commissioner's decisions, thus marginally improving the percentage of compliance with the Commissioner's decisions to 33.3%*). Nearly all of the Commissioner's decisions that have not been complied with – 19 out of 20 – related to commercial banks, which have continued delaying their compliance with the Commissioner's orders and destroying copes of certain documents containing numerous personal data of their clients which they had unlawfully collected and continue processing them.

Below are some of the typical examples which are illustrative of the cases in which the Commissioner undertook measures within his sphere of competence. Thus, for example, **after conducting an inspection at the Ministry of Health, the Commissioner found that it had established without proper legal grounds the Integrated Health Information System (IHIS),** as a centralised electronic collection of personal data, in which it processed the personal data of employees and patients at 451 health care institutions in the Republic of Serbia, including information about patients' health. The Commissioner found that 69,359 natural persons had access to personal data within the IHIS, which constituted a very real threat of potential compromising of information about citizens' health. He therefore first issued a warning to the Ministry of Health and then, after finding that appropriate safeguards had still not been applied to this data, ordered the Ministry of Health to undertake all necessary measures to protect the personal data it processes under the IHIS.

Also, in an inspection of the Tax Administration of the Ministry of Finance, the Commissioner **found that a data "leak" had occurred, because the personal data contained in a natural person's tax return had been published by a media outlet as they appeared on the records of the Tax Administration.** The Commissioner warned that appropriate safeguards to protect taxpayers' personal data had not been undertaken and filed a criminal report with the Higher Public Prosecutor's Office against an unnamed individual at the Tax Administration for the criminal offence punishable under Article 146 paragraph 3 of the Criminal Code.

Furthermore, based on the amended Decision on Scheduled Public Transport adopted by the City Assembly, **the Commissioner found that ticket inspectors in public transport can determine the identity of citizens without legal grounds and without the presence of the police or the municipal police, while citizens are required to provide their information to them**. Without questioning the importance of regulating public transport fare collection, the Commissioner pointed to the attention of the Assembly of the City of Belgrade that grounds for personal data processing must be provided by a law, rather than a piece of secondary legislation (such as the decision in question). He also presented this fact to the Ministry of Construction, Transport and Infrastructure, which he advised to undertake the necessary measures to amend and supplement the Law on Road Transport.

The Commissioner was informed that certain employers subject their employees to **polygraph tests**, for example if they are suspected of having committed a criminal offence. Such was e.g. the case of "Perutnina Ptuj", which was advised by the Commissioner that it lacked proper legal grounds for the inadmissible processing of personal data of 17 of its employees who

had been subjected to polygraph tests and explained such processing was disproportionate to the intended purpose. He gave similar advice to other employers as well.

The lack of proper legal grounds for personal data processing is also evident in video surveillance, the use of which is still not systemically regulated by any law, so its use in practice is often disproportionate to the intended purpose. For example, in his inspections, the Commissioner came across a bizarre case involving video surveillance: namely, the Belgrade Bus Station had installed cameras inside toilet cubicles, allegedly for security reasons, while the sanitation department was in charge of monitoring(!). This processing was terminated pursuant to the Commissioner's Letter of Warning. Also, after conducting an inspection of the Republic Geodetic Authority (RGA) and subsequently also the Faculty of Law of the University of Belgrade, the Commissioner issued a letter of warning to these institutions because they processed personal data by video surveillance and streamed it online. Both institutions have complied with the Commissioner's warnings.

The Commissioner conducted an inspection of the Republic Health Insurance Fund (RHIF) after a member of the RHIF's Managing Board had posted personal data of an underage beneficiary online. The Commissioner issued a relevant Letter of Warning and initiated an infringement proceeding. During the inspection, he found irregularities in the actions undertaken by the RHIF when processing personal data of insurance beneficiaries, both because it had made personal data from the central records available to a member of its Managing Board without proper legal grounds and because it had failed to put in place the required measures to safeguard personal data.

The Commissioner found in an inspection that the Ministry of Interior was compiling **Daily Bulletins of Events, which it sent not only to authorised recipients within the Ministry of Interior, but also to a wide circle of external recipients, as had been customary at the Ministry of Interior for years.** Most of those external recipients were not authorised to request or receive such information and did not need it to perform their respective duties. After a Letter of Warning sent by the Commissioner, the Ministry of Interior abolished the practice of sending personal data to external recipients.

1.3.2. Complaints

In the course of 2016, the Commissioner received 422 complaints, which was 37,5% more than in 2015. The continuing upward trend in the number of complaints lodged with the Commissioner since the effective date of the LPDP seems to indicate that citizens' knowledge of the LPDP is improving and they are becoming more aware of the rights afforded to them under the law. However, the increase in the number of complaints lodged with the Commissioner was also due to the fact that two persons had lodged 115 complaints with the Commissioner in 2016 against decisions of data controllers (the Commissioner found most of those complaints to be unjustified).

In 2016, the Commissioner closed the procedures pursuant to 408 complaints, as follows: in 197 cases he found the complaints to be justified; he rejected the complaints as unjustified in 146 cases and he dismissed the complaints on formal grounds in 65 cases.

During the reporting period, the Commissioner issued a total of 108 binding and final decisions pursuant to the lodged complaints. As of 31 December 2016, 97 data controllers fully complied with the Commissioner's decisions, 3 data controllers partially complied with the decisions and notified the Commissioner accordingly, while 8 data controllers failed to notify the Commissioner within the specified timeframe whether they had complied with the decisions or not, **which means the percentage of compliance with the binding and final decisions passed by the Commissioner pursuant to complaints was 92.6%. (*By the time of writing of this Report, on 1 March 2017, the percentage of compliance with the binding and final decisions passed by the Commissioner pursuant to complaints increased to 96.3%.)***

1.3.3. Opinions

In 2016, the Commissioner issued 944 opinions relating to application of the LPDP (708 opinions issued to citizens and the media, 105 opinions issued to national and local self-government authorities, 93 opinions issued to legal entities and 38 opinions issued to associations and trade unions).

1.3.4. Central Register

In 2016, 332 data controllers submitted records of 1,300 data files they maintained to the Commissioner. Companies were both the most numerous data controllers and had the highest number of records of data files.

1.3.5. Transborder Transfer of Data

In 2016, the Commissioner acted on 18 requests for transborder transfer of personal data out of Serbia. Countries to which transborder transfer was requested included the USA, India, Canada and the United Kingdom. **The Commissioner passed eight decisions pursuant to the requests, including five allowing the transborder transfer of personal data and give resolutions to terminate the procedure, while ten cases have been carried forward to 2017.**

1.3.6. Acting of Judicial Authorities in the field of Personal Data Protection

In the course of 2016, the Administrative Court received 26 legal actions against the Commissioner's decisions. **The Administrative Court ruled on 25 legal actions by rejecting 19 and dismissing 6.**

In 2016, the Commissioner filed 1 criminal report for the criminal offence referred to in Article 146 of the Criminal Code. According to the information available to the Commissioner, **pursuant to the criminal reports filed by the Commissioner to date (30), one final and enforceable judgment of conviction was passed, 16 criminal reports were dismissed because the statute of limitations had expired or because the principle of opportunity of criminal prosecution had been applied, while one investigation was terminated. The remaining criminal reports are still pending** and the Commissioner believes that the criminal reports he filed build strong enough cases for further prosecution, to ensure the detection and appropriate punishment of the committers of those criminal offences.

In 2016, the Commissioner filed 9 petitions for initiation of infringement proceedings against violations of the LPDP. **Pursuant to the petitions for infringement proceedings filed to date, in 2016 the Commissioner received 22 decisions of Magistrates' Courts (including 20 first-instance decisions and 2 second-instance decisions), including: 10 judgments of conviction and 12 resolutions terminating the proceedings because the statute of limitations. Contrary to the hitherto common practice, in 2016 Magistrates' Courts did not pass a single exonerating judgment**.

2. Review and Implementation of Recommendations

The Commissioner hopes the Report on Implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection in 2016, with the Commissioner's recommendation, will be reviewed in a hearing by the National Assembly and the conclusions from such hearing will help improve the conditions and foster a more responsible attitude towards human rights among public authorities. Nevertheless, it should be noted that the last time the National Assembly passed conclusions pursuant to the Commissioner's annual reports was in 2014, when the 2013 Report was reviewed, while the Commissioner's 2014 and 2015 reports were reviewed only by the competent parliamentary Committees, with the exception of the Committee on Culture and Information, which, as the Committee in charge of overseeing implementation of the Law on Access to Information, failed for the first time to review the Commissioner's Report on implementation of that Law in 2015. As a result of this, the National Assembly is unable to exercise its oversight function in relation to the Government and the recommendations contained in the reports of the independent authorities are not implemented.