

**SUMMARY OF THE REPORT**  
**ON IMPLEMENTATION OF THE LAW ON FREE**  
**ACCESS TO INFORMATION OF PUBLIC IMPORTANCE**  
**AND THE LAW ON PERSONAL DATA PROTECTION**  
**IN 2013**

The scope of work of the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter referred to as “the Commissioner”) is defined by the Law by the Law on Free Access to Information of Public Importance (Official Gazette of RS Nos. 120/04, 54/07, 104/09 and 36/10 (hereinafter referred to as “the Law on Access to Information”) and by the Law on Personal Data Protection (Official Gazette of RS Nos. 97/08, 104/09 – new law, 68/12 – decision of the Constitutional Court 7 107/12 (hereinafter referred to as “LPDP”).

The majority of the Commissioner’s activities in 2013 concerned the following: handling of cases pursuant to complaints against violations of the freedom of information and violations of the right to personal data protection; supervision of implementation of and compliance with the LPDP; Provision of assistance to individuals and to public authorities, i.e. personal data processors, in the exercise of rights and proper implementation of the Law on Free Access to Information of Public Importance and the LPDP; issuing of legislative initiatives and opinions to public authorities in connection with the enactment or amendment of laws and other regulations; organisation of and participation in seminars and lectures, primarily for employees of public authorities and personal data controllers; maintenance of a Central Register of Data Files; development of international and regional cooperation; activities in connection with the EU accession process etc.

The volume of the Commissioner’s activities, reflected in the number of cases handled (and also their complexity), has continued increasing throughout 2013. Thus, in 2013 години the Commissioner handled a total of 9,903 cases (7,377 cases in the field of freedom of information and 2,526 cases in the field of personal data protection), which was about 31% higher than in 2012. **In the course of 2013, the Commissioner closed the proceedings in 6,307 cases**, including 4,406 in the field of freedom of information and 1,901 cases in the field of data protection.

Particular emphasis should be placed on the fact that the years-long issue of insufficient office space for the Commissioner’s institution was finally resolved towards the end of 2013, which created assumptions for the Office which assists the Commissioner in his work to develop further in order to be able to tackle the ever-increasing number of complaints and the huge backlog of cases from the period when it was understaffed, as well as to be able to properly conduct supervision activities for the purpose of protecting personal data and improving the situation in both fields. Unfortunately, any potential benefits from this fact were largely offset by the Law on Amendments to the Law on Budget System (Official Gazette of RS No. 108/13), which imposed hiring restrictions on

the Commissioner as well (although this institution has been chronically understaffed for years). The institution of the Commissioner ended 2013 with less than 50% of the number envisaged by the organisation regulations approved by the National Assembly.

### **A. Freedom of Information**

In 2013, the citizens of Serbia exercised the freedom of information more than in the previous years. The citizens wanted to know how public authorities managed budget funds and other public money, whether government and other authorities operated in accordance with the law, including in particular cadastre offices, the police, public prosecutors' offices and courts, public enterprises etc., how the competent authorities treated the environment, human health and animal welfare etc.

The largest share of information requesters were individual citizens and journalists/media outlets, followed by non-governmental organisations, trade unions and other citizens' organisations, political parties, economic operators, lawyers, public authorities themselves etc.

The volume of the Commissioner's activities in the field of freedom of information in 2013 was 24% higher than in 2012, with a 34.5% increase in the number of received cases. The Commissioner terminated the procedure in 4,406 cases of a total of 7,377 cases handled in 2013 (4,893 received in 2013 and 2484 pending cases carried forward from 2012). 2,971 pending cases which could not be closed due to understaffing were carried forward to 2014.

Most of the Commissioner's activities involved handling of individual cases pursuant to complaints filed by information requesters. In 2013 the Commissioner received 3,300 complaints due to denial of access to information, which was 41.6% more than in 2012. The number of resolved complaints was 2,910, which was 28.3% higher than in 2012. Of that number, 2,651 complaints (91.1%) were found to be justified and the most frequent grievance of the complainants was once again the so-called "administrative silence". 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, in spite of the fact that failure to honour freedom of information requests is an infringement punishable under the law.

The majority of the complaints in 2013 – 1,479 complaints or 44.1% of the total number – were filed against national authorities, including 666 complaints (45%) against ministries. The number of cases in which public authorities invoked confidentiality of information without proper legal basis has increased. On the other hand, there were fewer cases in which public authorities qualified freedom of information requests as an abuse of the right, which can be seen as a positive trend.

The percentage of proceedings pursuant to citizens' complaints that were terminated because the public authorities allowed access to the information they had previously withheld immediately upon learning of a complaint, before the Commissioner passed a decision, remains high (more than 60%). Obviously, irresponsible treatment of citizens

could have easily been avoided, together with the unnecessary administrative actions and associated expenses.

As regards justified complaints, the Commissioner's interventions enabled the requesters to exercise their rights in 92.3% of the cases. However, out of the total number of cases in which the Commissioner ordered the respondents to make the information available to the complainant, the authorities failed to comply in 203 cases. State-owned enterprises are the most common transgressors in terms of non-compliance with the Commissioner's decisions.

Enforcement of the Commissioner's decisions and resolutions remains an issue. On requests from information requesters, the Commissioner carried out 92 enforcement procedures to ensure the implementation of his decisions, within the framework of which he issued 96 enforcement orders and decisions on fining, as well as 55 resolutions on termination of proceedings in cases where the respondents complied with the decisions. In, 2013, the number of cases in which enforced execution of the Commissioner's decisions was necessary was more than 37% lower than in the previous year. This can be seen as a positive trend.

As regards the enforcement of his decision, the Commissioner asked the Government to enforce his decisions in 7 cases in accordance with the law, but to no avail. The fines imposed by the Commissioner in enforcement procedures secured an inflow of RSD 1,308,000 to the budget, while the outstanding amount of RSD 2,438,692 owing in fines could not be collected forcibly because the competent court in Belgrade declines jurisdiction in these cases, while all other courts in Serbia accept jurisdiction. Such divergent practice of courts is highly detrimental to the exercise of the rights and calls for an urgent response by the competent authorities.

In 2013, the Administrative Court adjudicated 47 legal actions against the Commissioner and did not uphold a single claim. Thus, in 2013, just as in the previous year, there were no overturned decisions of the Commissioner. From the aspect of judicial control of the legality of the Commissioner's work, this result is indeed praiseworthy.

An earlier decision passed by the Commissioner in 2013 has even been upheld by the European Court of Human Rights and one judgment of the Constitutional Court of Serbia explicitly reaffirms the views concerning freedom of information which the Commissioner has been applying in practice for a number of years.

Other activities of the Commissioner included provisions of assistance to public authorities in the implementation of laws and to citizens in the exercise of their rights, through opinions and explanatory instructions (503 cases), issuing of a publication containing views and opinions from the Commissioner's practice, measures to improve proactive publication of information (218 cases), legislative initiatives and opinions in connection with the enactment of legislation (15), communication in connection with the requesters of information submitted or forwarded to the Commissioner (185), replies to freedom of information requests address to the Commissioner (87), acting on petitions that are largely outside the scope of the Commissioner's powers (336) etc.

The Ministry of Justice and Public Administration, or more specifically the Administrative Inspectorate within it, as the authority in charge of overseeing the implementation of the Law and initiating infringement proceedings against responsible public authorities, has not initiated a single infringement proceeding in 2013. Thus, virtually no one is held to account for violations of the Law on Access to Information for three years running. And all this despite the fact that the Commissioner alone submitted to the Inspectorate the files of 283 cases in which infringement proceedings should have been initiated and the fact that more than 2,650 justified complaints, which appears to indicate that in 2013, similarly as in the previous years, at least several thousand infringements occurred.

In spite of the fact that the applicable Law on Access to Information is based on high international standards from the aspect of the manner of protection of the freedom of information, its coverage of public authorities, the number and nature of exceptions from the principle of freedom of information and similar criteria, after nine years of practical application of this Law it is abundantly clear that some of its sections are in need of reworking, so as to eliminate obstacles in the implementation of the Law and eliminate the scope for interpreting certain provisions to the detriment of the protection of rights.

Amendments to the Law in accordance with the initiative launched by the Commissioner in 2012 would provide for improved transparency in the work of public authorities and better exercise and protection of the freedom of information in real life. Amendments to the Law would, among other things, achieve the following: accessibility of more up-to-date information to citizens on the websites of public authorities and in their information booklets; the Commissioner would be authorised to file petitions for infringement proceedings for violations of the freedom of information and obtaining of his opinions would be mandatory in the legislative process; the vague wording of the provisions pertaining to enforcement of the Commissioner's decisions would be made more clear and the statutory mechanisms of enforcement of the Commissioner's decisions and resolutions would be actually applicable in practice when necessary; the amounts of fines would be harmonised with the Law on Misdemeanours; a protective mechanism would be put in place to ensure that the achieved level of freedom of information guaranteed by the Law on Access to Information cannot be lowered by other regulations etc.

The said normative improvements would produce real effects only if introduced simultaneously with fully functional mechanisms of accountability for violations of rights and a mechanism of enforcement of the Commissioner's decisions by the Government, while at the same time addressing the diverging practices pursued by courts in the judicial enforcement of the Commissioner's resolutions on imposition of fines.

In the context of fight against corruption, the Law on Access to Information has been recognised as an excellent mechanism for making the operations of public authorities more transparent, which is a key assumption for all anti-corruption efforts. In a survey conducted in 2013 by the Bureau of Social Studies with the support of OSCE, the institution of the Commissioner's ranked highest of the ten anti-corruption authorities and bodies in the opinion of the civil sector, the media, institutions and political parties. As a result, the Commissioner was presented with the "Recognition for the Institution with the Highest Level of Anti-Corruption Integrity in Serbia".

The results of interventions by the Commissioner emerge as even more praiseworthy because of the fact that they were achieved without any means of enforcement.

The main challenge for the Commissioner in the field of freedom of information in the coming years will be to clear the backlog of about 3,000 cases. Had the Commissioner been able to hire sufficient staff in accordance with the job classification instrument, this issue would be much less of a challenge, but even with the currently available human resources the Commissioner will do absolutely everything to resolve the cases.

However, the single largest obstacle standing in the way of consistent implementation of the Law on Access to Information is the absence of functional mechanisms which are beyond the Commissioner's control and within the mandate of the executive branch.

The fact that the Government has not enforced the Commissioner's decisions in any of the cases where this was necessary, although it was clearly required under the law to do so, while the Ministry of Justice and Public Administration has not prosecuted a single one of the by now numerous offenders in the last three years, appears to simply beg for more violations of the law. An end must be put to this practice without any further delays.

Duties towards the public and the citizens, as provided and regulated by the law, must be respected and performed consistently. The National Assembly, too, when passing the National Anti-Corruption Strategy, singled out transparency as one of a handful of fundamental principles: the said Strategy provides explicit guarantees for transparency in the process of passing and implementing of decisions and allows the citizens to access information in accordance with the law.

Transparency matters not only from the aspect of anti-corruption efforts, but also from the aspect of actual achievement of a number of objectives of transitions, including good governance, democratic government oversight, rationality, accountability etc. In this context, at the end of last year the Commissioner submitted to the National Assembly a Special Report which addresses serious issues in the implementation of the Law on Access to Information of Public Importance in public enterprises. The Special Report was never reviewed, as the National Assembly was disbanded soon after, but it certainly merits the parliament's attention.

Underestimation of facts which point to a lack of understanding and unwillingness to comply with the duties owed to the public, especially when coupled with a chronic lack of liability for violations of the Law on Free Access to Information of Public Importance, unstopably and inevitably steers the country away from the desired results in the fight against corruption and many other objectives of transition.

## **B. Personal Data Protection**

In 2013, the citizens of Serbia exercised their right to personal data protection and the rights enshrined in the LPDP to a much larger extent than in the previous years.

This can best be seen in the Commissioner's caseload.

In the course of 2013, the Commissioner received 2,188 cases in the field of personal data protection. This was 55% more than in 2012. He initiated 1,140 inspection procedures – an increase of more than 100% compared with 2012 - and closed 831 of them – also more than 100% higher than the previous year. Also, in 2013 the Commissioner issued 395 warnings, which was nearly six times more than in 2012, and received 188 complaints – up 22% from 2012. Of that number, he closed the procedures pursuant to 174 complaints, which was 33% higher than the previous year.

The rate of compliance with the Commissioner's warnings is slightly above 90%.

Of the 188 complaints received in 2013, as many as 158 were lodged due to actions of public authorities or their failure to act, including 57 complaints against ministries, which usually related to the Ministry of Internal Affairs of the Republic of Serbia (47).

In 2013, the Commissioner closed the proceedings pursuant to 174 complaints, usually by ordering data controllers to honour the requests (54), by terminating the proceedings because the data controllers had in the meantime complied with the requests (46) etc. All of this seems to indicate that the complaints – just as the requests filed before them – were justified.

In 2013, the Commissioner issued a total of 511 reasoned opinions and responses, including 266 to individuals, 99 to legal entities and 146 to national authorities and local self-governments.

The data controllers most frequently subjected to inspections of compliance with and implementation of the LPDP by the Commissioner in 2013 were internet providers (who accounted for approximately 38% of the total number of inspections). The Commissioner acted in this way in response to the situation in the field of electronic communication, including both the inadequate legal framework and the lack of harmonisation between specific provisions and the Constitution of Serbia and the inconsistent implementation of the existing arrangements by the competent authorities in practice. All of this threatens the exercise of the right to privacy, including in particular the inviolability of communication.

In the course of 2013, 317 data controllers submitted to the Commissioner 1,620 records of the data files they keep; this was somewhat higher than in 2012, but nonetheless unsatisfactory. Based on a free estimate of the number of personal data controllers, this means that less than 0.5% of them complied with the relevant provisions of the LPDP. While, of course, there should be no justification for such large-scale disregard for a statutory obligation after more than five years of effectiveness of the LPDP, the Commissioner believes that reasons for this lie in the overall level of required education.

In the course of 2013, the Commissioner acted on twelve requests for transborder transfer of personal data out of Serbia, some of them received in 2013 and some of them carried forward from previous years. The Commissioner passed seven decisions pursuant to the requests, but only one of them was a decision allowing the transborder transfer. The Commissioner believes that the absence of legal provisions that would regulate the

procedure and set clear criteria for acting on these issues constitutes a serious issue and significantly hampers compliance with the requests.

Similarly as in previous years, in 2013 the Commissioner received no information from competent public prosecutors' offices that would confirm the effects of the criminal reports he had filed previously. None of more than 20 such criminal reports were formally dismissed, but none of them resulted in criminal prosecution, either.

In 2013, the Commissioner received 30 judgements of Magistrates' Courts pursuant to petitions for infringement proceedings he had previously filed. By far the most frequent outcomes were judgements which merely confirmed the expiration of absolute statute of limitations on infringement liability (13 of them).

It appears that cases with identical factual and legal basis often resulted in diametrically opposite decisions. Also, the penal policy pursued by Magistrates' Courts is obviously too lenient, given that, of the 11 convictions, in seven cases the respondents got away with mere cautions. Finally, a significant number of cases were terminated due to the expiration of the absolute statute of limitations applicable to the initiation and conduct of infringement proceedings, which is two years; this is an issue that has been raised by the Commissioner, to little avail, in the process of drafting and enactment of the new Law on Misdemeanours.

In 2013, the Administrative Court ruled on four legal actions filed against the Commissioner by rejecting three and upholding only one (for reasons of procedural rather than substantive law), which it returned to the Commissioner for renewed procedure.

In 2013, the Constitutional Court ruled on the petition for a constitutional review of certain provisions of the Law on Electronic Communications filed by the Commissioner and the Ombudsman. The Constitutional Court found them non-compliant with Article 41 paragraph 2 of the Constitution, which guarantees inviolability of letters and other communication.

In this context, 2013 saw no activities of competent authorities to implement the package of "14 measures" (which, among other things, proposes the integration of procedures and the existing duplicated technical resources of various "services" and the police into a single national agency that would provide technical services necessary for interception of communications to all authorised users, with indelible recording of a trail of access to telecommunications that would include all data necessary to subsequently inspect the lawfulness of access), which was proposed jointly by the Commissioner and the Ombudsman back in 2012, although it had garnered strong verbal support at the time when it was proposed.

Throughout 2013, the Commissioner continued implementing a number of activities aimed at promoting and affirming the right to personal data protection, primarily through intensive participation of the Commissioner and his associates in training events and seminars, as well as in roundtables, conferences etc. Other avenues included the media, the Commissioner's website, social networks etc.

In spite of modest staffing levels and the inadequate structure of the human resources, in the field of personal data protection the Commissioner will continue focusing on achieving greater efficiency in handling the large and ever-increasing caseload.

However, the core issues standing in the way of any significant progress in the field of personal data protection are in fact beyond the Commissioner's control and depend mostly or exclusively on the executive and/or legislative branches.

The fact that the number of cases received by the Commissioner in the field of personal data protection in 2013 was more than 50% higher than in 2012 and three times higher than in 2011 seems to indicate that the citizens are increasingly becoming aware of their rights and the possibilities available for the protection of those rights; however, this situation is by no means positive, because the large number of cases may and must also be attributed to large extent to shortcomings of the system and omissions of the competent authorities.

Even after repeated warnings by the Commissioner about the need for radical amendments or, better still, a completely new law on personal data protection, virtually nothing has been done in this regard in 2013, similarly as in previous years. There has been no response even to the "partial" initiatives launched by the Commissioner. As a result, Serbia lacks legislative provisions in highly sensitive areas of personal data processing, such as video surveillance, biometrics, security checks etc. As a result, personal data processing in these areas is in many cases carried out unlawfully. The same is also true of access to data on citizens' electronic communications.

Even after more than three years of adoption of the Personal Data Protection Strategy, the Government has not adopted an Action Plan on Implementation of the Strategy, although it should have done so within three months. As a result of this omission, the Strategy remains a list of good intentions, a dead letter, while in the meantime three years have passed by without any attempt to do what was needed and possible.

Five whole years after the effective date of the Law, although it had a duty to do so and had been warned by the Commissioner on more than one occasion, just as in the previous case, the Government has not adopted a decree that would provide for the protection of particularly sensitive personal data. For this reason, the special protection of particularly sensitive data, which is guaranteed by the law, has remained nothing more than an empty promise for many different categories of persons. As a result, processing of the so-called particularly sensitive personal data in many cases leads to violations of the citizens rights. This is all the more alarming because these rights are flagrantly and quite frequently violated by public authorities.

Objectively, the reasons explained above are a source of a large number of problems and violations of guaranteed human rights and freedoms in this field. It is therefore highly important –even imperative – for competent authorities, including in particular the Government of Serbia and the competent ministries, to qualitatively change their current approach to the situation in the field of personal data protection.