

Analysis of the Limits of Public Officials' Privacy

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All terms used in the text in the male gender refer to the persons of both sexes.

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Introduction

The access to information held by public authorities is one of the corner stones of an open and democratic society based on the rule of law. Likewise, democratic societies rest on the guarantees and effective mechanisms of protection of the citizens' right to privacy. These very principles – transparent operation of authorities and protection of citizens' privacy – represent important indicators for the recognition of a society's level of democracy.

However, although the public should doubtless have access to information about the work of public authorities, this type of information sometimes contains personal data. In this case, one needs to determine which right will prevail – the public's right to know or the right to privacy. Situations in which citizens, media, organizations, movements and parties want to find out information about public officials and decision-makers in the public sector are especially interesting.

This analysis focuses on an increasing problem in the Republic of Serbia, where public institutions impede or deny access to information of public importance on the pretext of protecting the privacy of public officials and decision-makers. We have recognized this practice using mechanisms of free access to information of public importance and exchanging experiences with other organizations and media. Because of this very reason, Partners Serbia, with the support of the Center for Euro-Atlantic Studies, in 2016 developed the initial analysis of the situation in this field, which has helped us to improve our understanding of the size of the described problem, as well as recognize the fact that effective mechanisms of protection of the public's right to know in case of violation of this law are still not working in Serbia.

The purpose of this analysis is to publicly affirm the principle under which public officials and decision-makers have the right to privacy that can be guaranteed, however, only in connection with information and activities that pertain to their private lives, while information relevant for the job they perform on behalf of and for the needs of the public should be publicly available.

At the beginning of the analysis, we have presented the theoretical and legal framework of the public's right to know and the right to privacy. After this, we analyze some cases in which the public has been denied access to information on the qualifications or activities of public officials, which was explained away by the protection of privacy. In the end, we present the conclusions of the analysis as well as recommendations to public institutions with the aim of improving the implementation of the Law on Free Access to Information of Public Importance.

We would like to thank the Commissioner for Information of Public Importance and Personal Data Protection for providing data on some cases that are analyzed later in the text.

We would also like to express our gratitude to the Administrative Court for sending us the relevant judgments, which made it possible to determine the Court's position on the balance between the public's right to know and the right to privacy.

We would also like to thank the Crime and Corruption Reporting Network (KRIK), Center for Investigative Journalism of Serbia (CINS), Dosta je bilo Movement and initiative Ne davimo Beograd for consultations and documents, on the basis of which we have presented the cases in the analysis. We would also like to thank a number of citizens and media we have consulted regarding problems they faced when they tried to learn something about the operation of public institutions, using the mechanism of access to information of public importance.

We express our gratitude to the Open Society Foundation, Serbia, which supported the development of this analysis within the project Initiative for Transparent Information on Public Officials. Within this project, other problems in the implementation of the Law on Free Access to Information of Public Importance have been investigated, such as the enforcement of (or failure to enforce) decisions of the Commissioner for Information of Public Importance and Personal Data Protection, expiry of the statute of limitations in misdemeanor proceedings in the case of denial of the right to access information, and the non-existence of accountability of (responsible) natural persons at authorities for the violation of the Law.

1. Theoretical and Legal Framework

Democratic societies today do not re-examine the need for transparent operation of public authorities. In addition to the constitutional and statutory guarantees of the right to free access to information as an element of the freedom of expression, modern social systems also increasingly insist on proactive transparency. This means that public authorities, acting at their own initiative, inform the public about their work promptly and accurately through webpages, statements, directories, newsletters, etc. However, the prerequisite for this concept is a modern, technically equipped and well-staffed administration, which recognizes the importance of providing to the public timely, truthful and full information about its operation, which, in turn, significantly increases citizens' trust in the operation of the public administration and leaves less room for corruption.

The proactive transparency of Serbian public authorities is still at an unsatisfactory level, and there are omissions even when it comes to the fulfillment of public authorities' obligation to publish and regularly update their newsletters, particularly in the case of public enterprises and companies vested with public powers.¹ In addition to this, the obligation to publish directories referred to in Article 39 of the Law on Free Access to Information of Public Importance (hereinafter referred to as: FOI law) does not include, for example, local public enterprises or mostly or completely state-owned enterprises, despite the clear public interest in having an insight into their operation.²

Serbian citizens, therefore, still realize their right to be informed about the operation of public authorities through the mechanism of free access to information of public importance. This right refers to all data held by public authorities, provided that they have been created during the operation or in connection with the operation of these authorities, and that they are materialized in a particular document. The FOI law envisions a challengeable legal presumption of the justified interest of the public to know, unless where the relevant information refers to a threat to, or protection of public health and the environment, in which case this presumption is irrefutable. Hence, this means that if a public authority denies a particular piece of information to the applicant, it must also prove and explain that there is no justified interest of the public in that specific case. In any case, the public authority applies the test of proportionality, i.e. assesses which interest prevails in the relevant case. The decision to deny a particular piece of information to the applicant must be based on the following criteria:

1 See, Commissioner for Information of Public Importance and Personal Data Protection, *Izveštaj o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaja i Zakona o zaštiti podataka o ličnosti, za 2015. godinu* (Report on the implementation of the Law on Free Access to Information of Public Importance and Law on Personal Data Protection for 2015), the Commissioner for Information of Public Importance and Personal Data Protection, pp. 32-35.

2 *Ibid.*, p. 33.

- That there is an interest opposed to the public's right to know,
- That this interest would be grossly violated if the information were disclosed (damage test),
- That the need to protect the other interest outweighs the public interest to know, and
- If this is necessary in a democratic society (for example, if these interests can be equally protected in some other way).

The limitations of rights must, furthermore, be envisioned under the FOI law, which regulates situations in which a public authority may deny the right to access to information, or interests that may be opposed to this right, as follows:

- 1) If the disclosure of information would expose to risk the life, health, safety or another vital interest of a person; imperil, obstruct or impede the prevention or detection of criminal offence, indictment for criminal offence, pretrial proceedings, trial, execution of a sentence or enforcement of punishment, any other legal proceeding, or unbiased treatment and a fair trial; seriously imperil national defense, national and public safety, or international relations; substantially undermine the government's ability to manage the national economic processes or significantly impede the fulfillment of justified economic interests; make available information or a document qualified by regulations or an official document based on the law, to be kept as a state, official, business or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and outweigh the access to information interest;
- 2) If the information of public importance is already accessible to the public;
- 3) If the applicant is abusing the rights to access information of public importance;
- 4) If this would violate the right to privacy, the right to reputation or any other right of a person that is the subject of information, except if:
 - The person has agreed,
 - Such information regards a personality, phenomenon or event of public interest, especially a holder of a state or political post, and is relevant with regard to the duties that person is performing,
 - A person has given rise to a request for information about him/her by his/her behavior, especially regarding his/her private life.

Therefore, the law recognizes the right to privacy as a potentially conflicting right with the right to access to information of public importance, particularly where information on the work of public authorities includes an individual's personal data. Namely, in addition to ensuring the realization of every individual's right to be informed about the work of public authorities, the right to a free access to information, therefore, also protects the interest of the public, i.e. of the community, to have an insight into the functioning of a system. The right to privacy, on the other hand, protects the personal good of the relevant individual.

However, unlike many international documents – primarily the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms – the domestic legal framework neither guarantees, nor regulates the right to privacy; it, rather, regulates just some of its aspects, such as the secrecy of letters or the right to personal data protection. Therefore, the issue has to be raised of principles and frameworks that provide guidance to public authorities in assessing whether the publication of information would violate the right to privacy of the person referred to in the data contained in the information. In order to understand this process, one also has to understand the notion and concept of privacy. For the purpose of this analysis we will explain the main aspects of the notion of privacy, noting that a more complex classification may differ from one society to another, depending on a set of cultural or political factors, or legal tradition.³

Privacy may be observed in the context of personal autonomy and freedom of choice, which is usually brought in connection with independence in making decisions on the use of contraception, on abortion, on the use of different types of legal or illegal substances, on engaging in sexual intercourse, etc.⁴ This understanding of privacy is closely related to the privacy of the body, which includes the protection of human body from invasive procedures (such as involuntary medical testing).⁵ We may observe the private as something opposed to the public, and we can, therefore, distinguish between the private and public spheres. Within the private sphere, an individual may be free of the influence and interference of other individuals,⁶ in accordance with the understanding of privacy as the right to be left alone, which lawyers Brandeis and Warren affirmed in the late 19th century in their essay *The Right to Privacy*.⁷

This understanding is similar to the concept of territorial privacy, which refers to the establishment of physical boundaries to the entry of third parties into an individual's personal space.⁸ Territorial privacy may be expanded so as to include location privacy, which is particularly important in the modern-day digital age in which geolocation devices can be used for determining a person's movements.⁹

3 For example, a significant contribution to the understanding of the complexity of the notion of privacy in the US context was given by Daniel Solove in: Daniel Solove, *A Taxonomy of Privacy*, University of Pennsylvania Law Review, 2006.

4 Raymond Wacks, *Privacy: A Very Short Introduction*, Oxford University Press, 2015, page 34

5 D.Milenković, *Pristup informacijama, zaštita podataka o ličnosti i tajnost informacija (Access to Information, Personal Data Protection and Secrecy of Information)*, Lawyers' Committee for Human Rights, Belgrade 2009, page 62.

6 See: Raymond Wacks, *Privacy: A Very Short Introduction*, Oxford University Press, 2015, pages 34–38

7 Louis Brandeis and Samuel Warren, *The Right to Privacy*, Harvard Law School, 1890. Available at: <http://www.english.illinois.edu/~people/~faculty/debaron/582/582%20readings/right%20to%20privacy.pdf>

8 D.Milenković, *Pristup informacijama, zaštita podataka o ličnosti i tajnost informacija*, Lawyers' Committee for Human Rights, Belgrade 2009, page 62.

9 According to: Caitlin D. Cottrill, *Location Privacy: Who Protects?* 2011 <http://ares.lids.mit.edu/fm/papers/Cottrill.URISA.pdf>

The privacy of communications is another area that plays an important role in modern-day discussions on privacy. It refers to the privacy and confidentiality of letters, dispatches, e-mails, telephone conversations and other types of communication. The questions who, when, how and under which circumstances may violate the confidentiality of communications, play a very important role in these discussions.

Finally, privacy is frequently mentioned in the context of personal data processing. Alan Westin observed privacy in the context of deciding which information about our private lives, and under which circumstances, will be made known to others.¹⁰ Privacy is brought in connection with circumstances under which others will collect our data and purposes for which they will subsequently use them. Privacy thus becomes the issue of control of the use of information, i.e. personal data, so we may speak about information privacy.¹¹ The analysis primarily focuses on this very understanding, because, within the meaning of the FOI law, a violation of privacy may occur as a result of publication of personal data.

As it has been said before, the legal framework of the Republic of Serbia does not provide clear guidance for understanding what the right to privacy includes. The Constitution of the Republic of Serbia does not guarantee the right to privacy as a separate human right. The term *privacy* is mentioned in two articles of the Constitution. The first refers to the right to a fair trial and basis for removing the public from a trial (Article 32), while the other refers to a ban to undertake activities that jeopardize the privacy of consumers (Article 90).

Still, the Constitution of the Republic of Serbia in several articles guarantees rights which may be said to *stem* from the right to privacy on the basis of previously presented notions of privacy. These are:

- Dignity and free development of individuals (Article 23 of the RS Constitution),
- Inviolability of physical and mental integrity (Art. 25),
- Inviolability of home (Art. 40)
- Confidentiality of letters and other means of communication (Art. 41),
- Protection of personal data (Art. 42),
- Freedom of thought, conscience and religion (Art. 43),
- Freedom of thought and expression (Art. 46),
- Special protection of the family, mother, single parent and child (Art. 66).

10 Alan Westin, *Privacy and Freedom*, 1967

11 A. F. Westin, *Social and Political Dimensions of Privacy*, Journal of Social Issues, Vol. 59, No. 2, 2003, <http://www.privacysymposium.com/reading/westin.pdf>

The most relevant article for the purpose of this analysis is Article 42 of the Constitution, which regulates personal data protection:

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

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

Everyone shall have the right to be informed about personal data collected about him, in accordance with the law, and the right to court protection in case of their abuse.

The processing of personal data is regulated by the Law on Personal Data Protection (LPDP)¹². In order to understand the subject-matter of this analysis, it is particularly important to present three provisions of this law and review how they are applied in parallel with Article 14 of the FOI law.

First of all, Article 3 of the LPDP defines personal data as “any information relating to a natural person, regardless of the form of its presentation or the medium used (paper, tape, film, electronic media etc.), regardless on whose order, on whose behalf or for whose account such information is stored, regardless of the date of its creation or the place of its storage, regardless of the way in which such information is learned (directly, by listening, watching etc., or indirectly, by accessing a document containing the information etc.) and regardless of any other characteristic of such information.” Therefore, the term “personal data” refers to any information on the basis of which an individual may be identified or identifiable, either directly or indirectly. Names and family names of public officials or civil servants represent personal data, and the same applies on data pertaining to their work.

Secondly, Article 3 defines data processing as “any action taken in connection with data, including: collection, recording, transcription, multiplication, copying, transmission, searching, classification, storage, separation, crossing, merging, adaptation, modification, provision, use, granting access, disclosure, publication, dissemination, recording, organizing, keeping, editing, disclosure through transmission or otherwise, withholding, dislocation or other actions aimed at rendering the data inaccessible, as well as other actions carried out in connection with such data, regardless whether those actions are automated, semi-automated or otherwise performed.” In practice, under this provision, the term “personal data processing” refers to any imaginable

12 Serbia is currently in the process of drafting a new law on personal data protection. This process should help overcome problems in the implementation of the applicable Law on Personal Data Protection, as well as harmonize the legal framework of the Republic of Serbia with the EU General Data Protection Regulation, 2016/679.

use of data, including activities that do not alter contents, as well as insight in, and multiplication and transfer of data. We can, therefore, see that the publication of information pertaining to the work of public officials or civil servants represents personal data processing.

Finally, Article 8 of the LPDP defines conditions for the admissibility of personal data processing, and says that “Processing shall not be allowed if [...] a natural person did not give his/her consent to processing, i.e. if processing is carried out without legal authority.” In other words, if a legal basis exists, there is no need for getting a person’s consent for processing. The domestic legal framework contains a number of laws that define the method, purpose and scope of personal data processing. For example, Articles 46 and 47 of the Law on the Anti-Corruption Agency regulate the data on public officials which are contained in the Property Register kept by the Anti-Corruption Agency (ACA), and the data in the Register which are regarded as public. However, the explicit legal basis for data processing in connection with the disclosure of public officials’ personal data often does not exist. Some public institutions receive requests for the access to information of public importance nearly every day, and many of them face dilemmas regarding how to act in connection with such requests if they refer to personal data, including the personal data of public officials.

It has already been said that one of the grounds for restricting the right to access information of public importance is the duty of authorities to prevent the violation of privacy through the disclosure of information. The disclosure of personal data – as we have seen – represents an activity of personal data processing. However, it is important to bear in mind the fact that the **disclosure of personal data, per se, does not constitute a violation of privacy** within the meaning of Article 14 of the FOI law. In other words, the fact that something is personal data does not necessarily mean that it refers to a person’s private life and that it should therefore be protected and remain undisclosed. For example, the name and family name of a judge or a minister are doubtless personal data, but they should be disclosed when court decisions or acts issued by the minister are published. In this context, the violation of privacy should be interpreted in such a way that it may occur through the disclosure of personal data which refer to circumstances or details from one’s private life.

Having received a request to access information pertaining to personal data (including the data on public officials), and assuming that this is information of public importance, an institution should assess on a case-by-case basis which right – the public’s right to know or the right to privacy – prevails. This assessment is called the *test of public interest*. A correct assessment that the public’s right to know outweighs the right to privacy creates the legal basis for data processing, which means that the FOI law represents the basis for data processing. Under these circumstances (please note – where the test of public interest is applied correctly) the legal basis for data processing exists and the relevant person does not need to give his/her consent for data processing. And since the legal basis for the processing (disclosure) of data exists, there can be no violation of privacy within the meaning of Article 14 of the FOI law.

The test of public interest may be applied differently on different types of data. For example, the public's interest to know may prevail in the case of information on a public official's income, but the right to privacy may prevail regarding information on the bank account number into which the income was paid. These cases require the implementation of Article 12 of the FOI law which regulates the rules of extraction of information: "If the requested information of public importance can be extracted from other information contained in the document a public authority is not obliged to allow the applicant insight in, the public authority shall allow the applicant insight in the part of the document containing only the extracted information, and notify him that the other contents of the document is not available." The extraction may be implemented in one of the following ways:

- The first option is the physical extraction of pages of a document, in such a way as to enable to the public to get insight only in the contents of those pages of the document in which the public's interest to know prevails.
- The other option would be to anonymize the data in connection with which the right to privacy prevails.

Data anonymization is an activity of processing of personal data contained in a document or data set, which prevents the identifiability of the person to whom the data refer. Data anonymization is implemented in order to prevent the reidentification of the person whose data are anonymized even if certain measures, such as cross-referencing or merger of data from multiple sources, are applied. Within anonymization, data may be replaced through encryption, generalization or redaction, where the method depends on whether documents are in hardcopy or in the electronic format. When data anonymization is applied, one has to take into account its dual purpose: to prevent the identifiability of the person, while ensuring that the other data contained in the documents keep their original meaning and sense, and ensuring that documents are easily readable and that their context is easy to understand. If not, the contents of the documents will be impossible to understand, which may deprive the public of its right to know.¹³

In order to ensure the correct understanding of the relation between the right to access to information and the right to privacy, we would also like to point out that these rights can be complementary. Namely, if information held by an authority contains somebody's personal data, in order to get this information a person can use the mechanism available in the FOI law, as well as the mechanism available in the LPDP, which, among other things, guarantees the right to be informed about data processing. The difference, however, lies in the fact that the former is available to all, and that information obtained under the FOI law may be further

13 To learn more about the methods, techniques and procedures of data anonymization, see: Partners for Democratic Change Serbia, *Transparency and Privacy in Court Decisions*, 2016, Available at: <http://www.partners-serbia.org/transparentnost-i-privacy-u-sudskim-odlukama/>

inspected and used. On the other hand, the rights pertaining to personal data processing are guaranteed only to the person to whom the data refer (with the exception of data referring to a deceased person, in which case the rights may be exercised by the deceased person's heir). In other words, if an official wants to get information about himself, he/she will rely on the rights provided by the LPDP. If we, as citizens, want to get information on this official, we will rely on the rights provided by the FOI law.

Under Article 14 of the FOI law, information is protected if it may result in the violation of a person's privacy, but the holders of state and political posts are exempted from this right if the information is relevant for the duties they are performing. In other words, this exception does not apply on employees in the public sector who are not regarded as holders of posts. Later in the text, we will briefly focus on the circle of persons to whom this analysis refers, i.e. who in the Serbian legal system enjoys the status of a public official.¹⁴

There are no individual documents that list all subjects regarded as public officials. The FOI law envisions a special treatment of holders of state and political posts, but does not provide any definitions of these terms. This is why multiple regulations need to be consulted in order to understand to which circle of persons the provision refers.

First of all, the Law on Civil Servants defines the persons who have the status of civil servants. These are persons whose positions consists of *tasks from the scope of work of the state authority, courts, public prosecutors' offices, the Republic Public Attorney, services of the National Assembly, the President of the Republic and the Government, Constitutional Court and services of the authority whose members are elected by the National Assembly (hereafter: state authorities) or, in connection with those tasks general legal duties, IT, financial, accountancy, planning and administrative tasks.*

The Law then says that *"the following cannot be considered as civil servants: members of the parliament, the President of the Republic, judges of the Constitutional Court, members of the Government, judges, public prosecutors, deputy public prosecutors and other persons elected on the position by the National Assembly or appointed by the Government and persons who according to special legislation have the status of an official."*

We can, therefore, see that this circle of persons represents a part of the circle of public officials. We should also add to this list the categories of persons who are recognized as officials by two additional laws:

The Law on Employees in Autonomous Provinces and Local Self-Government defines public officials in the following way: *A public official is an elected, designated or appointed person*

14 See: Prof. Zoran Ivošević, PhD, *Pravni položaj javnih funkcionera (Legal Position of Public Officials)*, Union University Law School, 2012.

(except civil servants holding an office) at the authorities of an autonomous province and local self-government unit, or city municipality, as well as at the services and organizations they establish under a special regulation.

Article 2 of the Law on the Anti-Corruption Agency defines officials and public offices as follows:

- An “official” is every person elected, appointed or nominated to the bodies of the Republic of Serbia, autonomous province, local self-government unit, bodies of public enterprises and companies, institutions and other organizations whose founder, and/or member is the Republic of Serbia, autonomous province, local self-government unit and other person elected by the National Assembly;

- A “public office” denotes a function in the bodies of the Republic of Serbia, autonomous province, local self-government unit, bodies of the public enterprises and companies, institutions and other organizations whose founder, and/or member is the Republic of Serbia, autonomous province, local self-government unit as well as functions of other persons elected by the National Assembly and implies managing, decision-taking and enactment of general and individual acts authority;

The privacy protection standards of a thus defined circle of persons are lower than those that apply on civil servants and other persons whose data may be found in the documents held by public authorities. However, it is important to note that the fact that somebody holds a public office does not mean that his or her privacy has been suspended. Public officials have the right to privacy, but it may be guaranteed only in connection with information and activities that refer to their private lives, while information relevant for the duties these persons perform in the name and for the needs of the public should be publicly available.

The privacy of civil servants and other persons employed at public institutions enjoys stronger protection than that of public officials. Still, even they cannot expect their work to be hidden from the public, when they perform activities within their scope of work. As it has already been said, the disclosure of their data *per se* does not constitute a violation of the right to privacy. The circumstances of each case should be observed individually and an assessment should be made on the prevailing interest – the public’s interest and right to get an insight into the work of a public official, or the interest to protect this person’s privacy.

Below, we will review some issues encountered in the implementation of the FOI law in connection with the interpretation of statutory provisions that refer to the balance between the public’s right to know and the right to personal data protection. Our focus will primarily be on the treatment of officials’ personal data, but, in a smaller section, we will also refer to the treatment of civil servants in this respect.

2. Analysis of Practice

In 2016 and 2017, some media, associations of citizens, movements and informal initiatives reported on cases in which public institutions refused to disclose information about their work and explained their refusal by saying that they were protecting the right to privacy of public officials to whom the requested information referred. For example, the Republic Fund for Pension and Disability Insurance (PIO Fund) failed to provide information on the CVs of the then President of the Republic of Serbia and Prime Minister of the Republic of Serbia, stating that neither had given consent for sharing their personal data with third parties.¹⁵ A university refused to publish the PhD thesis of the current National Bank of Serbia Governor, claiming that the thesis should be available only to a limited circle of people who would be able to analyze it properly.¹⁶ The State Prosecutorial Council refused to disclose the average Law School grades of candidates for positions in the public prosecution, in order not to violate the candidates' right to privacy. Referring to the LPDP, public prosecutors' offices sometimes refuse to disclose information that includes personal records, CVs and diplomas of members of the prosecution, while the refusal to disclose information on the prosecutor in charge of the Savamala case received a lot of media attention.¹⁷ An analysis of court decisions, developed by Partners Serbia in 2015, established that there was no uniformity in the anonymization of court decisions, and that, thus, when they issued judgments at the request for free access to information of public importance, some Serbian courts concealed the names of judges who had handed down these judgments in order to protect their privacy.¹⁸ Similarly, one court refused to disclose information on the fees paid to duty judges, quoting the protection of the judges' privacy as the reason.¹⁹ The Belgrade City Institute for Expertise refused to disclose to the public the list of cases in which an expert had been engaged, claiming that the disclosure would violate her privacy.²⁰ All these cases will be analyzed below in order to

15 Krik, Kazna PIO fondu jer krije staž Vučića i Nikolića, (PIO Fund punished for concealing the work experience of Vučić and Nikolić), 2nd June 2016. <https://www.krik.rs/kazna-pio-fondu-jer-krije-staz-vucica-i-nikolica/>

16 N1, Kazna Educonsu zbog doktorata Tabakovićeve (Educons punished because of Tabaković's PhD thesis) , 9th June 2016. <http://rs.n1info.com/a167338/Vesti/Vesti/Kazna-za-University-Educons.html>

17 Positions and Opinions of the Commissioner for Information of Public Importance and Personal Data Protection, Slučaj „Savamala” Poverenik izrekao kazne Višem javnom tužilaštvu (Savamala Case, the Commissioner imposes fines on the Higher Public Prosecutor's Office), <http://www.poverenik.rs/sr/saopstenja-i-aktuelnosti/2545-slucaj-qsavamalaq-poverenik-izre- kao-kazne-visem-javnom-tuzilastvu.html>

18 Ana Toskić and Uroš Mišljenović, *Transparency and Privacy in Court Decisions*, Partners for Democratic Change Serbia, 2015. Available at: <http://www.partners-serbia.org/wp-content/uploads/2016/03/Transparentnost-i-privacy-u-sudskim-odlukama.pdf>

19 Commissioner for Information of Public Importance and Personal Data Protection, *Slobodan pristup informacijama; Stavovi i mišljenja Poverenika, publikacija br 5 (Free Access to Information; Positions and Opinions of the Commissioner, Publication No. 5)*, 2016, page 83-85.

20 Danas, Rok od pet dana za predmete stručnjaka sa sumnjivom diplomom (Cases of expert with suspicious diplomas get a five-day deadline), 26th June 2016. http://www.danas.rs/ekonomija.4.html?news_id=324380

determine whether public institutions properly interpret the right to privacy as the grounds for restricting the public's right to know.

2.1. CVs

a) CVs of the President and Prime Minister of the Republic²¹

In November 2014, the Crime and Corruption Reporting Network (KRIK) requested from the Republic Pension and Disability Insurance Fund records of the work experience of Tomislav Nikolić, the then president, and Aleksandar Vučić, the then prime minister of the Republic of Serbia. Although they were not required to say why they were requesting this information, KRIK journalists said that “finding out whether and from whom the president and the prime minister received funds, and in which periods is of crucial importance for the public.” The request also said that although the access to personal data was requested, “in this case, the interest of the public is justified and outweighs the protection of personal data.”

The Republic Pension and Disability Insurance Fund issued a decision rejecting this request, and said that it had “the requested data, but will not send them to the applicant.” The Fund explained this by saying that “it does not disclose any information in connection with insured persons or beneficiaries of rights to third parties, without the explicit consent, or properly certified power of attorney of the person whose data or case is concerned, as well as without the request of judicial authorities.” The Fund also refers to Article 149 of the Law on Pension and Disability Insurance, under which “the recorded data are used for the realization of rights based on pension and disability insurance and for the purpose of statistics, and the Fund is required to ensure the proper protection of these data.”

In addition to this, the Fund also referred to Article 8 of the LPDP, stating that the “disclosure of data on some persons to third parties without the relevant persons' consent would violate the right to privacy and other personal rights provided by the LPDP”, i.e. that “this type of personal data processing without the consent of the relevant person, i.e. without the legal authorization, under Article 8 item 1 of the LPDP is regarded as inadmissible personal data processing, which is another reason why the Fund will not disclose the requested data.”

Finally, the Fund said that the presented reasons had “satisfied the conditions referred to in Article 14 of the FOI law, under which a public authority shall not fulfill the applicant's right to access information of public importance if it would thereby violate the right to privacy, the right to reputation or any other right of a person that is the subject of information.”

21 The material has been collected owing to KRIK journalists.

KRIK journalists complained to the Commissioner. The Commissioner issued a decision on this occasion, annulling the Fund's decision and ordering it to reopen procedure and respond to the journalists' request. In its new decision, the Fund rejected the request to present copies of the records, stating, among other things, that "regarding information on the employers, employment periods and paid contributions of the relevant persons, as well as the basis on which they gained work experience, the condition of importance of their offices has not been fulfilled, and, from the aspect of applicable regulations governing the positions of the president and prime minister of the Republic of Serbia, the requested data are not of importance for their election, terms of office, competences or legal documents they issue."

However, the Commissioner, as the second-instance authority, assessed that the Fund had wrongly applied the test of public interest in this case, since the "requested documents refer to top Serbian officials, and contain information on their work or employment." The Commissioner notes that although this information "does represent personal data, it simultaneously represents information on the work experience of these persons which is, therefore, included in their CVs. Beyond any doubt, the public has the interest to know information on top state officials' CVs." The Commissioner also recalled that the CVs of the current President and Prime Minister had already been posted on the websites of the President and the Government of the Republic of Serbia. Finally, the Commissioner notes that because of all the listed reasons "in this specific case the condition referred to in Article 14 paragraph 2 of the FOI law has been met for making the requested information available to the public, since the public's interest to know outweighs the interest of the protection of the right to privacy and personal data of persons to whom the data refers" in the context of the relevant provisions of the FOI law. The Commissioner also explains that "when this condition is met, there can be no mention of any threat to the right to privacy of the relevant persons as a serious consequence that would occur if the access to the requested information were allowed within the meaning of Article 9 item 5 of the FOI law. Otherwise, the disclosure of personal data to the public on the basis of the FOI law does not represent inadmissible data processing within the meaning of Article 8 of the LPDP." In view of everything mentioned above, the Commissioner believes that the Fund should disclose the requested information, extract the personal data regarding which the public's interest to know prevails, and anonymize other data (address, citizen's unique personal number, personal number of the insured party, data on paid salaries and fees, etc.), since their publication would represent excessive personal data processing.

Unfortunately, regardless of the Commissioner's decision, which was binding, final and enforceable, the Fund had not provided the requested information for more than 18 months. In 2016, the Commissioner first issued a decision approving enforcement and inviting the Fund to disclose the requested information under the threat of a fine. The Fund ignored this decision, after which the Commissioner on two occasions imposed fines in the total amount of 200,000 dinars, which were forcibly collected.

The authors of the analysis can note that this case has unequivocally confirmed that, as regards top state officials' CVs, the public's interest to know outweighs the officials' right to privacy. It is also important to note that the Fund in this case repeatedly acted in contravention with the Commissioner's acts or ignored them completely. This eventually resulted in the imposition of the fine. The amount of 200,000 dinars certainly represents a negligible amount compared to the total funds at the disposal of the Fund. However, a cause for concern is the fact that, at the time of implementation of austerity measures, Serbian taxpayers and direct beneficiaries of state pensions are forced to collectively pay the Fund's fine. The authors of the analysis do not know whether the activities of the Fund's responsible persons have ever been reviewed.

b) CVs of Officials Appointed and Designated by the Government of the Republic of Serbia

The Dosta je bilo movement in 2015 initiated a campaign entitled *Bring your CVs out in the open*. They requested from the Serbian Government the CVs of elected public officials from more than 40 public institutions, including: Srbijagas, Srbijašume, Institute for Textbook Publishing, Export Insurance and Financing Agency, Nikola Tesla Airport, Electrical Grids of Serbia, PIO Fund, Clinical Center of Serbia, Corridors of Serbia, etc.

In the analysis, we will refer to the case of the CVs of Managing and Supervisory Board members of the Electrical Grids of Serbia Public Enterprise, which were requested from the Serbian Government. All other cases available to researchers are substantially very similar, which includes the contents of the requests, responses of the Government Secretariat and decisions of the Administrative Court.

In this case, the Government Secretariat rejected the request, stating that it did not have the requested documents, and that they had been "officially sent to the Government only for the purpose of the appointment procedure."²² In addition to this, the Secretariat also referred to Article 14 of the FOI law, claiming that the request referred to the "myriad of private data on certain persons", so that it had "the obligation to protect the guaranteed right to personal data protection of all individuals and, therefore, also their privacy."

Dissatisfied with the response, Dosta je bilo movement filed a lawsuit to the Administrative Court, requesting that the decision of the Government's Secretariat-General be annulled.

22 Authors did not see the decision rejecting the request. The quotes have been taken over from the Administrative Court judgment No. 26 U.14086/15 of January 21, 2016. The judgment was issued in connection with the lawsuit filed by the applicant (Enough is Enough). The lawsuit challenges the decision of the Secretariat-General of the Government of the Republic of Serbia. The judgment is available in Serbian at: <http://dostajebilo.rs/sud-odlucio-nikola-petrovic-direktor-ems-da-objavi-biografiju/?lang=lat>

The lawsuit was filed to the Administrative Court because, under Article 22 of the FOI law, a complaint against a Serbian Government decision cannot be filed to the Commissioner, and rights in this case are protected directly by the Administrative Court.

In its January 2016 decision, the Administrative Court upheld the Movement's lawsuit, annulled the decision of the Government Secretariat, ordered the Secretariat to send the requested information and to cover the costs of the administrative dispute for the Movement. According to the Court, the explanation of the Government Secretariat's decision does not show clearly in which way the realization of the right to access the requested information would violate the right to privacy of the candidate whose data were requested.

A number of similar Administrative Court decisions are available on the Movement's website, and they pertain to the cases of the CVs of the Agency for Business Registers Managing Board members,²³ as well as to the CVs of the Managing and Supervisory Board members of the Srbijagas Public Enterprise.²⁴ According to our interlocutor from the Dosta je bilo movement, the Administrative Court rendered a total of 35 similar decisions until the end of 2016.

The case law of the Administrative Court shows that the public's interests to know outweighs the right to privacy of officials appointed by the Serbian Government as far as these persons' CVs are concerned. The authors of the analysis do not know whether the Secretariat made the requested information available in the reopened procedure. The public thus remains deprived of information on the professional competences of persons who hold responsible positions within institutions vested with public powers. Apart from clearly negative effects on public informing, the Government Secretariat's moves have also caused financial damage. In the three quoted Administrative Court judgments, the Government Secretariat was ordered to cover the costs of court proceedings for the Movement in the amounts of, respectively, 16,890, 17,870 and 17,870 dinars. The authors assume that the costs of court proceedings were similar in all other cases. All the amounts were paid from public funds.

23 <http://dostajebilo.rs/wp-content/uploads/presuda-Upravnog-suda-14-U-14064-15-.pdf?lang=lat>

24 <http://dostajebilo.rs/wp-content/uploads/Odluka-Upravnog-suda.pdf?lang=lat>

2.2. Education and Professional Qualifications

a) PhD Thesis of the National Bank of Serbia Governor

In addition to the CVs of public officials and decision-makers, information of public importance doubtless also includes data on their formal education and acquired qualifications. In this context, an illustrative case refers to the PhD thesis of the current National Bank of Serbia Governor, which was requested by the Center for Investigative Journalism of Serbia (CINS). CINS sent the request for access to information of public importance to the Sremska Kamenica-based Educons University as early as in 2014. Despite being private, this University is bound by the Law on Free Access to Information of Public Importance, since public powers have been vested on it under the Law on Higher Education. Specifically, this refers to the competence to issue higher education diplomas, which represent public documents (Article 99 of the Law).

A CINS journalist requested from this institution the Governor's PhD thesis in hardcopy or electronic format. The University first informed the journalist that she could see the thesis at the University once their employee returned from vacation. After another request, the University set an additional condition – that the journalist submit the names and competences of persons who would inspect and analyze the thesis, after which the University would determine whether the thesis would be analyzed well.

Acting on the complaint, the Commissioner determined that the University had not sent the requested information although it had not formally rejected the journalist's request, that there were no obstacles in the way of providing the requested information, and that the University should have sent the requested document by regular mail if it did not have the thesis in the electronic format.

The Commissioner also determined that, for the purpose of realization of the right to access to information of public importance, the University could not impose conditions that were not provided by law. In this context, the University did not act in accordance with the FOI law when it requested from the journalist to provide information on the competences of persons who would analyze the thesis, and when it made its decision on whether it would send the requested documents to these persons conditional on a prior check of their competences. In his decision ordering the University to present the requested information, the Commissioner said that the “subject matter of this administrative dispute is the right to access information of public importance, rather than a professional analysis of the relevant thesis, where the right to access to information of public importance [...] belongs to all under equal conditions, including the journalist in this specific case”.

Although the Commissioner had issued this decision in August 2015, CINS journalists realized their right as late as in June 2016. After the University failed to comply with the Commissioner's decision, the Commissioner issued a conclusion allowing enforcement, inviting the University, under the threat of a fine, to provide the requested information. The University provided the requested information soon after this, in June 2016, i.e. a little more than two years after the CINS journalists had sent the first request to access the information of public importance.

b) Average University Grades of Candidates for Positions in the Prosecutorial Organization

In addition to the PhD thesis of the National Bank of Serbia Governor, another illustrative example referred to the actions of the State Prosecutorial Council (SPC), which rejected two requests for the access to information of public importance made by the Judicial Academy Alumni Club (hereinafter referred to as: Alumni Club), whose requests referred to the criteria applied in deciding on the nomination of candidates for positions in the prosecution.

The May 2017 election to positions in the prosecutorial organization was the first to be implemented after the adoption of the Rules of Procedure on the criteria and standards for the evaluation of the qualifications, competence and worthiness of candidates for first-time deputy public prosecutors (*Official Gazette of the RS*, No. 80/2016), which the Alumni Club challenged before the Constitutional Court as being in contravention with the Law on Public Prosecution.²⁵ Reviewing the legality of the election, the Alumni Club conducted an inquiry of the nominated candidates, their qualifications for the position of deputy prosecutors and the criteria for the nomination of these particular candidates, suspecting that the new Rules had left enough space for arbitrariness and subjectivity of the electoral committee members. The first request filed to the SPC referred to the average university grades of 17 candidates on whose election as deputy public prosecutors the National Assembly of the Republic of Serbia had decided on May 11, 2017, because the Alumni Club believed that the average grades had been taken into account during the selection of candidates. The SPC, however, denied that the candidates' average grades were important for their election, and said that this represented personal data the disclosure of which would violate the candidates' right to privacy. The SPC explained its decision by saying that these persons had not been elected deputy prosecutors, i.e. employed in the prosecutorial organization, but that these were potential future employees

25 The Constitutional Court of Serbia suspended the procedure for assessing the legality of the Rules of Procedure for the election of first-time prosecutors, since the State Prosecutorial Council (SPC), had meanwhile put out of effect the Rules of Procedure and adopted others, which do not contain what the Constitutional Court described as disputable solutions. To learn more about this, see: the Blic daily newspaper, *Ustavni sud obustavio postupak o Pravilniku za izbor tužilaca* (Constitutional Court suspends proceedings on the Rules of Procedure for the selection of prosecutors), <http://www.blic.rs/vesti/drustvo/ustavni-sud-obustavio-postupak-o-pravilniku-za-izbor-tuzilaca/vf520zw>

and that, consequently, the right to privacy outweighed the public's right to know. When the SPC refused to disclose the requested information, the Alumni Club complained to the Commissioner, who upheld the complaint and ordered the SPC to provide the requested information. The Commissioner explained his decision as follows: "The Commissioner believes that the State Prosecutorial Council's reference to the candidates' right to privacy is ungrounded, that the election of members of the prosecution is important not only for the participants in the process, but also for the widest public, and that the availability of the requested information would help improve measures for removing any future omissions".²⁶ After the Commissioner's intervention, the Alumni Club said that owing to the published data, the public could find out that "less than average candidates were nominated for elite Belgrade prosecutors' offices – those whose average university grades were below 8.00, or more precisely, candidates whose average grades were 6.54, 7.19, 7.23 and 7.42, respectively, two of whom had studied for 10 years".²⁷

The other request rejected by the SPC referred to the disclosure of recordings of interviews with candidates nominated for the positions of deputy public prosecutors. The Commissioner again upheld the complaint of the Alumni Club, ordering the SPC to present the requested recordings.²⁸ According to available information, the SPC has still not complied with the Commissioner's decision.

2.3. Officials' Activities that Create Reasons for the Disclosure of Personal Data

Partners Serbia in October 2017 sent a request for access to information of public importance to the Ministry of Defense. One part of the request referred to information in connection with the relief of conscription of Minister Aleksandar Vulin.

Namely, while visiting the Second Soldier Training Center in Valjevo, Minister Vulin said that one of the biggest disappointments of his youth had been when the conscription committee declared him incapable of doing military service for health reasons: "It's difficult when a young man realizes that he can't do everything and, at this age, he thinks he can do everything, I wore prescription glasses of more than 7, two cylinders on one eye and one on

26 <http://www.pravniportal.com/zahtev-za-information-u-o-prosecnim-fakultetskim-ocenama-kandidata-za-zamenike-tuzilaca/>

27 <http://www.rts.rs/page/stories/sr/story/125/drustvo/2727376/alumni-klub-prosecna-fakultetska-ocena-vazna-za-izbor-tuzioca.html>

28 Danas, Šabić naložio da se dostave snimci razgovora za izbor zamenika tužioca (Šabić orders the submission of recordings of interviews of candidates for deputy prosecutors)

http://www.danas.rs/drustvo.55.html?news_id=355723&title=%C5%A0abi%C4%87+nalo%C5%BEio+da+se+dostave+snimci+razgovora+za+izbor+zamenika+tu%C5%BEioca

the other [...] I care about what you think about me, about the Army and the state because I did not serve the army and I envy you endlessly because you are in service. I've never had a greater wish than to serve the state like you do, wearing uniform and carrying weapons, and I'm sorry I did not, but this does not mean that I don't love my state."²⁹ However, an old documentary entitled "Bombing of Serbia – How the War Was Waged" appeared on social media on the same date, and Vulin, talking about his activities as a Yugoslav Left party official during the 1999 NATO aggression, said in the video that he had applied to be a volunteer at the beginning of the bombing, but that he was rejected since there were enough people with the same specialization: "When the bombing started, I applied to be a volunteer, went to Bubanj Potok, spent some time there, but there were simply too many of us. Especially those who had the same RMS (registered military specialization) as me; they were looking for anti-aircraft specialists, not infantrymen..."³⁰

In view of these statements, we sent the following questions to the Ministry:

- Was Minister Aleksandar Vulin relieved of the duty of conscription, i.e. was he declared incapable of doing military service, and if so, why was he relieved of the duty of conscription?
- Was Aleksandar Vulin granted the registered military specialization (RMS number) and when, and could Aleksandar Vulin be admitted in the Yugoslav Army during the NATO bombing if he had not served the army before?

In the request, we stressed that, although the requested data would normally be protected under the Law on Personal Data Protection (LPDP), this was not the case in this situation, because Minister Vulin himself had previously disclosed some of the data, which meant that these data did not enjoy protection under the LPDP (Article 5 of the Law). As regards data that are not available to the public, in our opinion, Minister Vulin's contradictory statements gave a reason to the public to inspect his personal data, in view of the fact that public officials in democratic societies have to be evaluated by the public, and that this was particularly the case because of the duties Minister Vulin discharged and values which he represented in public.

The Ministry of Defense refused to provide the requested information and explained that these were Aleksandar Vulin's personal data, which neither influenced nor were a condition for the discharge of a state function, and that, thus, this information, according to its legal nature, did not represent information of public importance within the meaning of Article 2

29 The Ministry of Defense, 10.7.2017. <http://www.mod.gov.rs/lat/11240/cast-je-sluziti-otadzbin-11240>

30 N1, 11.7.2017, Kako je Vulin hteo da ratuje 1999, ako nije služio vojsku? (How did Vulin want to fight in 1999 if he had not served the army) <http://rs.n1info.com/Comment/StandardComment/509331/Vesti/Vesti/Kako-je-Vulin-hteo-da-ratuje-1999.-ako-nije-sluzio-vojsku.html>

paragraph 1 of the FOI law. The Ministry also referred to the fact that the requested information represented personal data within the meaning of the Law on Personal Data Protection, and that, as such, it could not be publicly available, unless the person to whom the information refers provided his/her consent to disclosure (Article 8 of the LPDP), as well as to Article 9 paragraph 1 item 5 and Article 14 of the FOI law, which has been repeatedly presented in this analysis. In its response the Ministry also stressed that the requested data on Aleksandar Vulin could be found in the Vojevid Information System Database, that the database “has established a register of persons subject to conscription, compulsory labor and requisition while in civilian service,” and that the disclosure of such data was not allowed in response to requests for free access to information of public importance.

After receiving the answer, Partners Serbia complained to the Commissioner, believing that the Ministry’s response was not in accordance with the FOI law. In the complaint, we said that the Ministry had incorrectly applied the test of public interest on the data that did not enjoy protection under the LPDP. We also said that the listed quotations could be found on the official website of the Ministry of Defense. This showed that the Ministry of Defense must have known that Aleksandar Vulin had previously disclosed the relevant data on himself. On the basis of this, we believed that the Ministry was required to send us the data, if it had them. We also said that the rules for the application of the test of public interest, referred to in Article 14 of the FOI law created the legal basis for the disclosure of data, and that the Ministry’s claims that a legal basis for disclosing the data did not exist were unjustified. Finally, all other personal data which might be in the requested documents (for example citizen’s personal identification number, non-relevant medical data, etc.), could have been protected by the Ministry through the implementation of Article 12 of the FOI law, if it believed that the interest of protection of such data outweighed the public’s right to know.

Weighing between the public’s interest to know and the interests of protection of the right to privacy of the person to whom the data refer, in accordance with Article 8 of the FOI law, the Commissioner in this specific case took the position that the requested data should be made available to the applicant, i.e. to the public, that conditions for the implementation of exceptions from the right to privacy referred to in Article 14 item 2 of the FOI law have been met, since the data pertained to persons who held public and political offices. The Commissioner said that, while making the decision, he had taken into account the fact that the data had attracted a lot of public and media attention, in connection with which there had been numerous media reports, and that Minister Vulin’s behavior and statements had provided a basis for this request, so that, regarding this information, conditions for the implementation of exceptions from the right to privacy referred to in Article 14 item 3 of the FOI law had been met. The Commissioner said: “The authorities’ claims that the requested information may not be made available to the public without a prior consent of the person to whom the data refer, could not have resulted in a different decision in this administrative matter because the conditions for an exception from the right to privacy, reputation or any other right of a

person, referred to in Article 14 of the FOI law are not cumulative, and it is enough to fulfill just some of the statutory requirements.”³¹

After the Commissioner’s decision, the Ministry sent documents from which some answers to the above-mentioned questions can be received. According to the documents (recruitment record, RG-10 form) Aleksandar Vulin was declared incapable of serving the army on May 25, 1990. However, the copy of the document received by Partners Serbia does not state the grounds on which Minister Vulin was declared incapable of military service (fields in which the grounds for this decision should be entered are blank).

This case shows that, in the case of public officials, the public’s right to know sometimes outweighs even the data that are regarded as private and irrelevant for taking the office. Also, the specific features of the case may help data controllers to look more closely on the requirements for the implementation of Article 14 of the Law, particularly the part which refers to the *provision of reasons* for the publishing of personal data. The Commissioner’s decision in this case shows that even when public officials make contradictory statements in future, this exception can be applied in order to enable the public to evaluate the truthfulness of these claims. Therefore, although the data are personal, their publication in such cases is in the service of control of officials’ work.

2.4. Salaries and Engagement on Specific Tasks

a) Information on the Prosecutor in the Case – Savamala Case

A representative of the Let’s not Drown Belgrade initiative in June 2016 sent to the Higher Public Prosecutor’s Office in Belgrade a request for a free access to information of public importance, requesting information on the case number and the name and family name of the prosecutor in charge of the Savamala case.

The Prosecutor’s Office issued a decision rejecting the request, referring to Article 9 paragraph 1 item 5 of the FOI law, under which the requested information refers to the data “accessible only to a specific group of persons.” Although the prosecutor’s office did not explicitly refer to the protection of the right to privacy of the prosecutor in the case, we still note that the prosecutor’s office rejected the request stating that “one should take into account the fact that the name and family name are personal data and that the deputy public prosecutor in charge of the case is acting on behalf of the Higher Public Prosecutor’s Office in Belgrade.” The prosecution used both arguments to explain that the “disclosure of relevant data could result in serious legal or other consequences to interests protected by law.”

31 Decision of the Commissioner for Information of Public Importance and Personal Data Protection No.: 071-01-4027/2017-03 of 05.01.2018.

Dissatisfied with the response, the applicant complained to the Commissioner. In his decision, the Commissioner annulled the decision of the Higher Public Prosecutor's Office and ordered it to provide the requested information. In the explanation, the Commissioner stated several reasons for his opinion that the prosecution had been wrong when it decided to deny the requested information: the prosecution did not provide enough arguments in favor of the claim that the disclosure of the information could result in serious consequences to the interests which are protected by law, which outweigh the interest for the access to information; the prosecution did not refer to the regulation under which the requested information is to be guarded as a secret or is available only to a particular circle of persons; and the relevant report of the Ombudsman in connection with the Savamala case "additionally raises the public's interest in information in connection with this event." For the purpose of this analysis, however, of special importance is the Commissioner's explanation that strives to ensure the proper understanding of relations between the public right to know and the right to personal data protection. The Commissioner states that "in this specific case, the requested information on the name and family name of the prosecutor in charge of the case is in connection with the discharge of the prosecutor's duties, referred to in the Law on Public Prosecution, and in this respect, the requirement for making them available to the public, referred to in Article 14 item 2 of the Law, has been fulfilled." The Commissioner also stressed that other personal data, for which no justified public interest to know existed, should be redacted before the applicant inspected the documents.

The Higher Public Prosecutor's Office complied with the Commissioner's decision, and the public now knows who the prosecutor on the Savamala case is. The Serbian National Assembly speaker criticized the Commissioner's decision, claiming that the disclosure of the name of the prosecutor in charge of the case was "dangerous and that public is exerting pressure on the person conducting the investigation".³² Responding to these claims, the Commissioner stated that the generally accepted democratic standards "make the right of the public to get information on the work of public officials indisputable, which certainly includes the members of the judiciary. The democratic world has long since left in the past the times in which powerful and "nameless" people could discharge public duties, adjudicate or conduct investigations".³³

32 <http://rs.n1info.com/a199356/Vesti/Vesti/Maja-Gojkovic-i-Balsa-Bozovic-o-Savamali.html>

33 <http://www.poverenik.rs/sr/saopstenja-i-aktuelnosti/2456-javne-funkcije-ne-mogu-vrsiti-qbezimenu-judi.html>

b) Recusal of Public Prosecutors³⁴

A basic public prosecutor's office in 2015 received a request for access to information of public importance that referred to documents on the basis of which the recusal of a public prosecutor in a case was requested and subsequently decided upon. The basic public prosecutor's office refused to disclose the requested information to the applicant for two reasons: it refused to disclose the recusal request because the public prosecutor's privacy would be violated if the information were published, and the decision on recusal was not disclosed because it had been formally made by another prosecutor's office, and the applicant was instructed to refer to the other prosecutor's office. Dissatisfied with the response of the basic public prosecutor's office, the applicant complained to the Commissioner. The Commissioner ordered the basic public prosecutor's office to disclose the requested information. The Commissioner stated that the "information on the recusal of a public prosecutor in a certain case or activities which members of the prosecution perform as duties of general interest, represent data that should be publicly available since they are in connection with the discharge of public duties and competences, rather than with the private lives of the holders of these offices, and, on top of this, they are paid for this from public funds." This fulfills the requirements referred to in Article 14 of the FOI law. The Commissioner also ordered the prosecutor's office to disclose the decision on the prosecutor's recusal, irrespective of the fact that it had been issued by another public prosecutor's office, since the requested documents were in the possession of the authority to which the request had been sent.

Like in the previous case, we can see that the public nature of operation of the public prosecution is not ensured only through the disclosure of depersonalized information on its activities. On the contrary, this narrow understanding sometimes violates the public's right to know. Rather than that, the public nature of their operation is ensured through the disclosure of data referring to individual public prosecutors (or deputy public prosecutors), which in the presented case refers to the request and decision on the prosecutor's recusal in the relevant case.

c) Data on Members of the Judiciary in Court Decisions

The access to court decisions represents a mechanism for the realization of procedural rights of participants in court proceedings, and for ensuring the transparency of operation of courts, which may significantly improve the public trust in the work of the judiciary. In addition to the fact that court decisions, without a doubt, represent the type of information to which the public should have access, they also contain numerous personal data. The data refer to the parties to the proceedings as well as other participants, such as judges, expert witnesses,

³⁴ Available at: Commissioner for Information of Public Importance and Personal Data Protection, *Slobodan pristup informacijama; Stavovi i mišljenja poverenika (Free Access to Information; Stands and Positions of the Commissioner)*, publication No. 5, 2016.

attorneys, witnesses, victims, etc. Therefore, the right balance needs to be struck between the public's right to know and these persons' right to privacy.

A study conducted by Partners for Democratic Change Serbia in 2015³⁵ determined that Serbian courts do not have harmonized rules for the disclosure of personal data contained in court decisions. The study was conducted on a sample of 40 basic, higher and misdemeanor courts, which were sent requests for free access to information of public importance. The requests referred to specific judgments rendered by these courts. A total of 36 out of 40 courts belonging to the sample disclosed the names and family names of judges, but the fact that these data were left out by the Basic Courts in Gornji Milanovac and Vrbas, and the Higher Courts in Užice and Smederevo is a cause for concern. It is interesting to note that under the internal act of the Higher Court in Smederevo, which regulates the rules of data anonymization in court decisions, such data are not to be anonymized or disclosed, which was obviously not applied when the court responded to the requests.³⁶

The study conducted by Partners Serbia enabled the working group established within the project to develop the Model Rulebook on the Standards of Anonymization of Data in Court Decisions. Not long afterwards, the Supreme Court of Cassation took the study and Model Rulebook into account considerably when it developed its own Rulebook on the Standards of Anonymization and Pseudonymization of Data in Court Decisions.³⁷ This document, among other things, says that the names of judges and public prosecutors (or deputy public prosecutors) should be available to the public. Such a solution is in accordance with the Commissioner's constantly promoted position that persons who appear in court proceedings *ex officio* in order to perform their official duty "enjoy a lower level of privacy protection than the so-called ordinary citizens and their names should be available to the public, since these data are in connection with the discharge of a public office or public duties, rather than in connection with their private lives."³⁸ SPC representatives said during the public debate that the Rulebook should help harmonize the rules of replacement and redaction of data in court decisions throughout the Serbian court network. Although the SPC Rulebook cannot be binding for other Serbian courts, lower courts were expected to agree to implement solutions contained

35 Ana Toskić and Uroš Mišljenović, *Transparency and Privacy in Court Decisions*, Partners for Democratic Change Serbia, 2015.

Available at: <http://www.partners-serbia.org/wp-content/uploads/2016/03/Transparentnost-i-privacy-u-sudskim-odlukama.pdf>

36 Information on judges who received particular cases while the study was being made was available on the Serbian Court Portal, which the researchers could see when they requested specific judgments. In this respect, judges who adjudicated in specific cases could be easily identified, although data were left out or replaced in the relevant judgments.

37 The Supreme Court of Cassation, Rulebook on the Replacement and Redaction (Pseudonymization/Anonymization) of Data in Court Decisions, <http://www.vk.sud.rs/sr-lat/pravilnik-o-zameni-i-izostavljanju-pseudonimizacijanonimizaciji-podataka-u-sudskim-odlukama>

38 The Commissioner, Opinion No.: 011-00-00320/2014-02 of March 31, 2014, Available at: <http://www.poverenik.rs/yu/2011-05-24-08-28-59/1780-anonymization-presuda.html>

therein. Public stakeholders would thus have the opportunity to control the work not only of courts, but also of trial judges who decide “in the name of the people” in relevant cases.

In an intention to determine whether any changes had been made in the anonymization of data in court decisions following the study and the SPC Rulebook, we decided to send requests for free access to information of public importance to the courts which had left out the names of judges in the previous study.

The Higher Court in Užice is an example of a good change of practice because it has meanwhile adopted an internal act regulating this area – Rulebook on the Replacement and Redaction of Data in Court Decisions. In the received judgment, the name and family name of the judge is visible, while the treatment of other data indicates that the court is applying the adopted internal act. The Basic Court in Vrbas also properly anonymized data on the participants in the case, leaving visible the name and family name of the judge who made the decision. The judgment we received from the Higher Court in Smederevo showed inconsistency in the implementation of the rules of anonymization, because the names and family names of the defendants and injured parties were only occasionally anonymized in the judgment. The name of the trial judge is visible, but the partial anonymization of other participants in the proceedings raises concern, since it violates the right to privacy of persons mentioned in the judgment and the Law on Personal Data Protection. Unlike these courts, the Basic Court in Gornji Milanovac continued to conceal the name of the judge who had made the decision, in contravention with the Supreme Court of Cassation Rulebook, relevant practice of the Commissioner, and the principle of transparency of operation of state authorities, observed extensively.

For the purpose of this analysis, we sent requests for free access to information of public importance mostly to misdemeanor courts. Their responses show that misdemeanor courts also have a diverse anonymization practice. While we can praise the Misdemeanor Courts in Belgrade and Novi Sad, we would like to point to the practice of the Appellate Misdemeanor Court and the Misdemeanor Court in Niš. Namely, the Appellate Misdemeanor Court, which should create best practices as the highest misdemeanor court, continues to anonymize the names of its judges, but in such a way that leaves all data visible. The Misdemeanor Court in Niš applies a similar anonymization procedure, which means that the data that rightly enjoy protection under the Law on Personal Data Protection, become or remain public.

d) Duty Judges

The public is sometimes interested not only in information on the adjudication of certain cases, but also in judges’ duty fees. This particular information was requested from a court in 2016, in a request for a free access to information.³⁹ The court rejected the request with the

³⁹ Available at: Commissioner for Information of Public Importance and Personal Data Protection, *Slobodan pristup*

explanation that such information cannot be disclosed without the consent of the judges, and that its disclosure would represent a violation of the right to privacy.

The applicant complained to the Commissioner. The Commissioner said that the “requested information refers to judges and the duties they discharge, rather than to their private lives. Also, this refers to duty fees paid to judges as a bonus on their salary paid from public funds, so that the requested information should be available to the public.” The Commissioner concludes that the “consent of judges to whom the data refer is unnecessary, since one of the conditions for the exception from the right to privacy has been met.” The Commissioner also ordered the protection of the data for which there is no public’s interest to know, such as addresses, citizen’s personal identification numbers, bank account numbers, work experience and other data contained in documents that contain the requested data.

e) Participation of Experts in Cases

This analysis is primarily focused on the treatment of information referring to holders of public offices. Although court experts do not enjoy the status of public officials, the access to information on their work is also included in this analysis, in view of the social importance of this profession. Specifically, the role of court experts is to *provide to the court or another authority conducting proceedings the necessary expertise which is to be used in determining, evaluating or clarifying legally relevant facts*.⁴⁰

In April 2016, the Danas daily newspaper sent to the City Institute for Expertise a request for access to information of public importance that referred to the engagement of an expert in court cases. The request specifically referred to the numbers of the cases, subject matter of the expert analysis, individual values of disputes and parties to the proceedings in the cases on which the expert had worked after 2011. The request was prompted by doubts regarding the validity of the expert’s university diploma voiced by the Danas daily and a participant in the proceeding in which the expert had participated.⁴¹

The Institute had not responded to the request within the statutory time frame, so Danas complained to the Commissioner. The Commissioner ordered the Institute to submit the requested information if it had them. After the Commissioner’s intervention, the Institute responded to the request by saying that it “cannot ensure the right to access to information of public importance since this would violate the expert’s right to privacy pursuant to Article

informacijama; Stavovi i mišljenja poverenika (Free Access to Information; Stands and Positions of the Commissioner), publication No. 5, 2016, pages 83-85.

40 Law on Court Experts, Article 2.

41 http://www.danas.rs/danasrs/ekonomija/zasto_cuti_gradski_zavod_zavod_za_vestacenje.4.html?news_id=320135

14 of the Law, since she did not give her consent to the disclosure of the requested data”.⁴² However, the Commissioner issued another decision and said that the requested information does not refer to the person’s private life, but to the circumstances of importance for her job as an expert. “It’s irrelevant that the expert has not provided her consent for making the requested information available because her consent is not necessary;” it was said in the Commissioner’s decision ordering the disclosure of information.⁴³

Even after such a decisive position of the Commissioner provided in a decision which is final, binding and enforceable, the Institute failed to disclose the requested information to Danas journalists. The Institute informed Danas that it would not disclose the information to them, and that it had filed a lawsuit to the Administrative Court against the Commissioner’s decision.

Since in this case, the Institute represents the first-instance and the Commissioner the second-instance authority (acting at the complaint against the decision of the first-instance authority), the Administrative Court has for years dismissed lawsuits such as this one as inadmissible for a reason. The Commissioner’s statement on this occasion says that: “the Institute is not a party to the proceedings, but a first-instance authority, and as such, it cannot file lawsuits against the second-instance authority. As a first-instance body it can only file an initiative to the Republic Public Prosecutor within the statutory time frame, and ask the Republic Public Prosecutor to file a lawsuit if, in the Prosecutor’s opinion, statutory reasons exist, which the Institute failed to do. The Commissioner’s decision is binding, final and enforceable (not even an admissible lawsuit *per se* stays the enforcement) and the enforcement can be stayed only under a separate decision of the court.”⁴⁴

Not long afterwards, the Administrative Court expectedly dismissed the lawsuit as inadmissible. Irrespective of this, the Commissioner issued a conclusion allowing enforcement in which, under the threat of a fine, he invited the Institute to disclose the requested information. The Institute failed to do so, and the Commissioner used his competences and imposed two fines in the total amount of 200,000 dinars on the Institute.

At the end of this several-month process, the Institute disclosed the requested information to Danas. The Institute’s reaction is probably a result of two circumstances. Firstly, the management of the institution has meanwhile changed. Secondly, seven MPs of the Dveri movement, as well as several lawyers and citizens, sent to the Institute a total of 14 separate requests with identical contents. The Institute thus risked the imposition of multimillion fines if it did not change its attitude towards the requested information.

42 http://www.danas.rs/danasrs/ekonomija/zasto_cuti_gradski_zavod_za_vestacenje.4.html?news_id=320135

43 http://www.danas.rs/ekonomija.4.html?news_id=324380

44 <http://www.poverenik.rs/sr/saopstenja-i-aktuelnosti/2421-kakav-se-interes-stiti-uskracivanjem-legitimnih-prava-javnosti.html>

In view of all the circumstances, we note that the Institute management has caused damage to the interests of the public through the unnecessary delay of public disclosure of requested information. Also, the institution itself sustained damage, since an impression had been created in the public that the Institute participated in the concealment of information about the authenticity of the expert's diploma, which had been brought into question. Finally, damage was caused to the beneficiaries of the institution who indirectly covered the expenses of the fines paid by the Institute as a result of its incorrect behavior.

The texts published by the Danas daily on this occasion attracted the attention of the Anti-Corruption Agency, which referred the case to the First Basic Public Prosecutor's Office in Belgrade. When the public prosecutor dropped the charges, Danas requested the copies of the diplomas of the public prosecutor and prosecutorial assistant who had made the report on the case (the prosecutorial assistant had meanwhile become deputy public prosecutor). Danas substantiated the request by saying that the prosecutor had graduated from the Priština University, that the prosecutorial assistant originated from Kosovo-Metohija, and that it suspected that their diplomas were similar to the diploma of the above-mentioned expert and that this might have been the reason why the charges were dropped.⁴⁵ The prosecution did not provide the requested data. According to Danas, the public prosecutor declared himself incompetent for the part of the request that referred to him, and said that the decision regarding this part of the request would be made by the Higher Public Prosecutor's Office. In addition to this, the public prosecution refused to disclose a copy of the diploma of the prosecutorial assistant because it found that: "there is an interest, based on the Constitution and law, that outweighs the interest of the applicant to receive the requested information within the meaning of this law, and this is the interest of protecting the privacy of the designated civil servant."⁴⁶ Danas then complained to the Commissioner, who established that this information "should be available to the public because it refers to persons who discharge or help discharge public duties at a state authority which prosecutes criminal offenders *ex officio*," as well as that they receive public funds in exchange for their activities, "therefore this information has nothing to do with their private lives and these persons cannot enjoy the same level of privacy protection as ordinary citizens."⁴⁷ As for the part of the request that pertains to the prosecutor, the Commissioner noted that the reasons why no action had been taken at the request of Danas were unfounded.

45 Danas, Tužilac da za tri dana dostavi Danasu diplomu (Prosecutor should send his diploma to Danas in three days), http://www.danas.rs/ekonomija.4.html?news_id=358908&title=Tu%C5%BEilac+za+tri+dana+da+dostavi+Danasu+diplomu

46 Danas, Javni službenici kriju podatke o svom školovanju (Public officials conceal information about their education), http://www.danas.rs/ekonomija.4.html?news_id=347224&title=Javni+slu%C5%BEbenici+kriju+podatke+o+svom+%C5%A1kolovanju

47 Danas, Tužilac da za tri dana dostavi Danasu diplomu (Prosecutor should send his diploma to Danas in three days), http://www.danas.rs/ekonomija.4.html?news_id=358908&title=Tu%C5%BEilac+za+tri+dana+da+dostavi+Danasu+diplomu

f) Names of Mandatory Defense Counsel and Their Fees

Like the engagement of court experts, the work of attorneys may also be a topic of public interest, in view of the social importance of this profession. This issue gains even greater importance when lawyers provide their services within mandatory defense.

The Center for Investigative Journalism of Serbia (CINS) in 2016 drew the attention of the public to the favoritism towards some lawyers in the process of distribution of mandatory defense duties. For the purpose of the study, they sent requests for free access to information of public importance to courts and prosecutors' offices in the territory of the city of Belgrade. Specifically, from the courts they requested information about the names of lawyers who had been designated mandatory defense attorneys and data on the fees paid in the relevant period, stressing that the courts should send the copies of documents in which this information was contained if it was not contained in one document.⁴⁸

The court responded that it could not do this because too much was requested and because of the fact that, pursuant to the Law on Personal Data Protection, it could not disclose the names and family names of the attorneys. Documents were provided only partly, including a document that contained the names and family names of attorneys and their fees. However, the names and family names were anonymized in the document. After this, journalists complained to the Commissioner, stressing that the names of the attorneys and their contact information were publicly available on the website of the Belgrade Bar Association, that their fees for mandatory defense had been paid from the budget, and that they did not understand why this should be protected as personal data. The Commissioner did not uphold the court's explanation that the data could not be made available to the public under the Law on Personal Data Protection, because the lawyers had been hired *ex officio* by the court and because their services had been paid from the Serbian budget. The Commissioner also referred to Article 29 paragraphs 1 and 5 of the Law on the Legal Profession, saying that the name and family name of a lawyer and his address were the mandatory elements of a lawyer's stamp and that they were entered in the register of each bar association. Article 130 of the Statute of the Serbian Bar Association says that the directory of each bar association is a public registry and that its content should be generally available. The Commissioner stressed as important in his decision that lawyers were persons who, within the meaning of Article 15 of the Law on the Legal Profession, practiced law as an independent and autonomous profession with the aim of providing legal assistance to natural persons and legal entities, which means that the requested information on the hiring of lawyers by the court were in the interest of the public and could be made available on the basis of the already mentioned Article 14 paragraph 1 item 2 of the

48 To learn more, see Stavovi i mišljenja Poverenika za informacije od javnog značaja i zaštitu podataka o ličnosti, publikacija br. 5 (Positions and Opinions of the Commissioner for Information of Public Importance and Personal Data Protection, Publication No. 5), Belgrade 2016, pp 81-83.

FOI law, which was not in contravention with the protection of personal data regulated by the LPDP.⁴⁹

The CINS study showed that the earnings of three lawyers had been equal to the total earnings of 511 of their colleagues.⁵⁰ Findings such as this give force to arguments in favor of the publication of requested data, since this has resulted in a public discussion on the criteria and methods for awarding mandatory defense to lawyers. The results of the study are also presented in the database on the CINS website.⁵¹

The Commissioner's opinion has been reaffirmed by the judgment of the European Court of Human Rights in the case of the Hungarian Helsinki Committee versus Hungary (*Magyar Helsinki Bizottsag v. Hungary, Application no:18030/11*). A number of projects of this organization have focused on the improvement of the quality of service of mandatory defense. Within one of their studies, in 2008 they requested from all police administrations information, i.e. lists, with the names of lawyers and number of cases in which they appeared as mandatory defense. Seventeen police administrations provided the lists, while five others refused to do so, saying that lawyers' names represented personal data and that mandatory defense lawyers were not directly bound by the law since they were not state authorities, despite the fact that they were paid for their mandatory defense services from the state budget. In its application to the European Court of Human Rights (ECHR), the Hungarian Helsinki Committee referred to Article 10 of the European Convention for the Protection of Human Rights, which refers to the access to information of public importance through freedom of expression. The court found that this right had been violated and ruled in favor of the applicant.

The reason why the right of the public to know has prevailed in this case is partly contained in the fact that non-governmental organizations have a watchdog role in defending democracy and that their task is to keep a watchful eye on state authorities and other organizations vested with public powers.

According to the arguments of the majority of the judges, Article 8 of the Convention, which refers to personal data protection, was not applicable in this case. This is clearly stated in paragraph 196 of the judgment: "the interests invoked by the Government with reference to Article 8 of the Convention are not of such a nature and degree as could warrant engaging the application of this provision and bringing it into play in a balancing exercise against the

49 Ibid.

50 The Center for Investigative Journalism of Serbia, Troje advokata zaradilo koliko i njihovih 511 kolega (Three lawyers earn as much as 511 of their colleagues),

https://www.cins.rs/srpski/research_stories/article/troje-advokata-zaradilo-koliko-i-njihovih-511-kolega

51 The Center for Investigative Journalism of Serbia, Lawyers in Belgrade database, <https://www.cins.rs/srpski/search-advokati-po-sluzbenoj-duznosti-Belgrade>

applicant NGO's right as protected by paragraph 1 of Article 10 of the Convention."⁵².

However, the majority of the judges share Hungary's concern regarding personal data protection: the reasoning of the judgment thus says: "In our view the importance of data protection has been downplayed in a way that is incompatible with this Court's constant case-law and, moreover, with the approach of the Court of Justice of the European Union when interpreting data-protection legislation. We fear that this might create problems in future data-protection cases and therefore plead for a very narrow and context-specific interpretation of this part of the judgment."⁵³

g) Information on Public Administration Employees

At the end of this chapter, we will deal with dilemmas in connection with the publication of information on the work of public sector employees who do not enjoy the status of public officials. Two judgments of the Administrative Court will be in our focus.

The first one refers to the applicant's 2014 lawsuit against the European Integration Office (EIO). The applicant requested from the EIO to inspect documents that contain information on the employment status of all employees in the authority's Translation Sector. Believing that the requested information represents information of public importance, the applicant said that this disclosure would not violate any of the rights of the relevant persons. The applicant also said that data on some EIO employees, such as the name of their university school, date of employment at the EIO and information about their professional experience before the EIO, could already be found on the website. Nevertheless, the EIO refused to send the requested information,⁵⁴ and the applicant initiated an administrative dispute.

The Administrative Court rejected the lawsuit. In the reasoning, the Court said that the requested data represented personal data "the access to which could violate the right to privacy and other personal rights, where the conditions for the application of the exception referred to in Article 14 of the FOI law have not been met." It went on to say that the EIO collected the requested data "in order to fulfill employment requirements, i.e. in order to hire a particular person in accordance with the Law on Civil Servants" and that the processing of such data "for other purposes would be a type of inadmissible data processing." Finally, the Court also evaluated the applicant's claim that some data on persons who work at the EIO had already been posted on the website. The Court noted that the already disclosed contents pertained to "information on persons who discharge duties of public importance, in which

52 ECtHR judgment, No.: 18030/11, p. 60.

53 ECtHR judgment, No: 18030/11, opinions of Judges Nussberger and Keller, p. 64

54 The response of the European Integration Office was not available to researchers, only the Administrative Court decision was available.

case the exception referred to in Article 14 item 2 of the FOI law may be applied because the persons concerned are the holders of state and political posts.” In other words, the Court believes that the relevant data on public officials should be publicly available, while the same data on employees should be protected.

In the other case, the Administrative Court decided on the Ombudsman’s lawsuit against the Commissioner, filed on the Ombudsman’s behalf by the Republic Public Prosecutor’s Office.⁵⁵ The applicant requested from the Ombudsman a written statement of an employee at the Ombudsman’s Office. The Ombudsman presented the requested document, but anonymized the employee’s name and family name. The Ombudsman explained this move by saying that the requested information was private for the applicant, because he planned to file a lawsuit and a criminal complaint against the employee, so that the requested information in this respect did not represent information of public importance. The Ombudsman also said that a member of the Ombudsman’s staff “cannot be regarded as a person referred to in Article 14 paragraph 1 item 2 of the Law on whom the exceptions from the right to privacy apply.” The applicant filed a complaint which the Commissioner upheld and ordered the production of the requested document in such a way as to make the employee’s name and family name available. The Commissioner substantiated the decision by saying first that the Ombudsman “omitted to prove that the denial of access to information was justified for protecting the prevailing interest,” i.e. that “it is insufficient to state that the publication would cause a violation, but that it needs to be determined whether in the specific case the interest of the protection of privacy outweighs the right to access to information of public importance”. The Commissioner also believes that “the name and family name of the employee who made the official note should be available to the public, since the official persons at state authorities are public service employees who act on behalf of the state and who are paid from public funds, and that, consequently, the public has an interest in their operation, which is why these person cannot enjoy a full protection of privacy.” The Commissioner also says that the requested statement was “given in connection with the activities performed by this person in connection with the discharge of public duties, rather than in connection with his private life, so that conditions for applying the exception from the right to privacy have been met, in accordance with Article 14 paragraph 1 item 2 of the FOI law.”

The Administrative Court upheld the lawsuit and annulled the decision of the Commissioner. The key argument of the Administrative Court was that Article 14 item 2 of the FOI law referred to a “person of interest to the public, and particularly to a holder of state or political office, which the civil servant at the Office of the Ombudsman, who made an official note on behalf of this authority certainly is not.” In connection with this, the Court

55 Since the first-instance authority may not initiate an administrative dispute against a second-instance authority, the Ombudsman filed an initiative to the Republic Public Prosecutor’s Office to file an administrative lawsuit against the Commissioner’s decision.

believes that the Ombudsman correctly applied Articles 14 and 12, by extracting information of public importance from information (personal data) which need to be protected.

We can see that, in the two cases, the Administrative Court differentiated between the data on employees and officials in a public institution, in such a way that for employees the prevailing right is the right to privacy, while the prevailing right for holders of offices is the public's right to know, despite the fact that the same type of information is concerned.

2.5. Assets of Politicians and Public Officials

The access to information on the assets of public officials and candidates for public offices is an important mechanism of democratic control of politicians' work. Together with different institutional mechanisms for the control of the politicians' and public officials' assets, public insight also contributes to the protection of the democratic process and prevention of unlawful influx of money into politics. At the same time, data on the assets of politicians and public officials represent personal data, which causes dilemmas regarding the processing of such data. In continuation, we will deal neither with the method for controlling the assets applied by competent state authorities, nor with the question which data on public officials and politicians should be available to controlling or investigative authorities, but primarily with the question which data on the assets of politicians and public officials should be available to the public and how.

a) Data from the Public Officials' Assets and Income Report – Case of the Belgrade Mayor

At the beginning, it is important to state that public officials are required to file their asset and income disclosure reports to the Anti-Corruption Agency (ACA) within a fixed time frame after they take the office. Article 46 of the Law on the ACA precisely defines the type of data that should be contained in the report. These include the data on the ownership of real estate and different objects, on deposits, shares, claims, etc. However, the reports are not filed in order to become automatically available to the public, but in order to enable the ACA to implement activities within its competence. Only some of the data contained in the report are published in the Agency's Property Register. Article 47 of the Law says that the following data are public:

- Salary and other entitlements received by the official from the budget and other public sources;
- Ownership right on real property in the country of residence or abroad, without specifying the address of such property;
- Ownership right on a vehicle, without specifying the registration number;
- Savings deposits, without specifying the bank and account number;
- Right to use an apartment for official purposes.

Under the Law, public data are also the information about the property of an official if it is public in accordance with other regulations, as well as other information that may be disclosed with the consent of the official or his/her spouse or common-law partner. All other data from the report that are “not deemed public may not be used for other purposes except in proceedings deliberating whether a violation of law has occurred.”

The information which the ACA collected on Belgrade Mayor Siniša Mali, represented the subject-matter of a request for free access to information sent to this independent institution by the Pištaljka portal. Pištaljka’s request referred to a report developed within the data verification procedure for the asset and income disclosure report of Mayor Siniša Mali. After checking all data, the Agency established that there was suspicion that the criminal offense of Failure to Report Property or Reporting False Information had been committed (Article 72 of the Law on the ACA), and filed a report on its findings to the Higher Public Prosecutor’s Office which was expected to take further steps.

The Agency quoted a number of reasons substantiating its decision to restrict the access to the requested documents, including the provisions of the already quoted Article 47 of the Law on the ACA, which treats some of the requested personal data as non-public. The Agency also said that the information contained in the report “represents indications for the existence of grounds for suspicion that criminal offenses prosecutable *ex officio* have been committed and it is therefore likely that it will be used as evidence in criminal proceedings if they were initiated. The disclosure of such information in this stage of proceedings might interfere with the pre-investigative proceedings and criminal charging, because the suspect or another person might undertake actions that might thwart further investigation and create public pressure on the law enforcement, since the public is extremely interested in this case because of the public office which Siniša Mali holds.” Finally, according to the Agency, the publication of the report – which consists of a set of personal data – could undermine legal certainty and violate the presumption of innocence of the person to which the data refer.⁵⁶

The Commissioner, nevertheless, ordered the Agency to submit the requested data, but in such a way as to protect the personal data such as the names and family names of all persons except official persons and Siniša and Marija Mali (the then wife of the mayor), their addresses, personal ID numbers, bank accounts, amounts held at bank accounts, data on the real estate addresses and vehicle registration numbers. The Agency anonymized the above-mentioned and many other data which, according to the assessment of the Commissioner, represent information of public importance, which was why the Commissioner ordered the Agency to comply with the previous decision. The Agency has still not done this, which is why the Commissioner has imposed two fines on the Agency in the total amount of 200,000 dinars.

56 <https://pistaljka.rs/scms/public/media/files/Drugo%20resenje%20agencija%20odbija.pdf>

Pištaljka journalists and researchers tried to use another way to get the information regarding this case, by addressing the Higher Prosecutor's Office (HPPO). Specifically, they requested information about the case number, the relevant criminal offenses, the stage in which the case was, activities which the Prosecutor's Office has undertaken, whether and when Siniša Mali was interrogated, and what the Prosecutor's Office had undertaken in connection with the ACA report of August 2016.⁵⁷ Since the requested information does not represent personal data, we will not analyze this case any longer, noting that the Commissioner has sent to the HPPO an enforcement decision, inviting the HPPO to disclose the requested information or face a fine.⁵⁸

b) Database of Politicians' Assets

Following up on the information contained in the Property Register of Public Officials available at the ACA website, and in an intention to disclose to the public additional information on public officials and politicians, KRIK – the Crime and Corruption Reporting Network – in 2016 set up a web-based database of politicians' assets. This website discloses *what key politicians and their closest family members have, what they did and with whom they engaged in business operations*. The homepage of each profile contains the following data: relevant person's name and family name, position at the Government, date and place of birth, party affiliation, and a short biography. This is followed by the INCOME table, which contains data on the politician's previous public offices or employments, as well as his/her monthly income. Following is the ASSETS table, which shows all the collected data on movables (motor vehicles) and immovables of the relevant politician, and/or his family members. Some politicians' profiles also contain a LOANS table, which contains data on loans and leasing debts of the relevant politicians, members of their extended families or other legal entities in which the politicians or their extended family members have an interest. This is followed by the COMPANIES table, where one can find data on companies in which the relevant politicians or their extended family members are founders or owners, or other legal entities in which politicians or their extended family members have an interest. The homepage of all profiles end by the PROCEEDINGS table, which contains misdemeanor, judicial and other proceedings against the relevant politicians and their extended family members. Furthermore, each politician's profile contains a separate box on "PERSONS MENTIONED IN THE PROFILE," which contains brief information about other persons mentioned in the profile, and another box on DOCUMENTS, which contains the scanned copies of documents with data on assets, related legal entities, contracts, judicial and misdemeanor proceedings, appointments to offices at public enterprises, etc.

57 <https://beta.rs/vesti/drustvo-vesti-srbija/63912-poverenik-izreka0-drugu-novcanu-kaznu-agenciji-za-borbu-protiv-korupcije>

58 <http://www.poverenik.rs/sr/saopstenja-i-aktuelnosti/2657-tuzilastvo-nastavlja-s-urusavanjem-sopstvenog-ugleda.html>

Not intending to analyze individual profiles and data contained in this database, we will quote the Commissioner's position on the establishment of such a database and provide an excerpt from a decision of the European Court of Human Rights (ECHR). Thus, the Commissioner in general believes that the "public may be interested in the publication of information on ... the lives of these persons (holders of state and political offices, author's comment), but this certainly does not mean that there automatically exists a justified public interest in their publication... and that ... in each specific situation, an assessment should be made in view of the public interest whether and which information on a person and his life to disclose." A somewhat more specific conclusion on the data that should be published on such platforms can be drawn from the ECHR judgment *Von Hannover v. Germany* (No. 3) (8772-10, 19.9.2013), where the court specified criteria for the publication of private information of state officials: whether the published information contributes to a debate of general interest; how well-known is the relevant person in the public; what is the prior behavior of the relevant person; what are the contents, format and consequences of the publication of the information; under which circumstances the information was created.

Data available on the website originate from multiple different sources. These are, specifically, responses to requests for free access to information of public importance, and data collected from the Real Estate Cadaster and Agency for Business Registers within separate proceedings which differ from the mechanism of access to information of public importance. It is, therefore, important to note that for data that have not been collected on the basis of the mechanism provided by the Law on Free Access to Information of Public Importance, even stricter mechanisms and principles of personal data protection should apply. This is because the concept of information of public importance means that it refers to the information *held by a public authority body, created during work or related to the work of the public authority body, contained in a document, and related to everything that the public has a justified interest to know* (Article 2 of the FOI law). Such information is intended for everyone (Articles 5 and 6 of the FOI law) *with the purpose of the fulfillment and protection of the public interest to know and attaining a free democratic order and an open society.* (Article 1 of the FOI law). For that very reason, the access to information of public importance is not conditional on the previous payment of fees or fulfillment of other obligations which would require the investment of certain resources, except making a simple request which is intended to specify the requested information.⁵⁹

As opposed to this, data contained in the Real Estate Cadaster are unified in a *set of geospatial and other data on real estate, property rights and certain obligation rights on them* (Article 70 of the Law on the State Surveying and Cadaster). The purpose of this register is not to be limitlessly

59 Also, within the principle of proactive transparency, an attempt is being made to publish all information of public importance even before an official request is sent. The achievement of this intention in a democratic and open society is limited today, primarily because of insufficient resources, and it may be assumed that the principle of proactive transparency will be easier and cheaper to achieve as new technologies develop.

public and available to everyone at all times. This is why the access to documents is conditional on the fulfilment of certain obligations, i.e. the payment of an access fee. Therefore, although this is a public register, different levels of publicity apply in situations when a piece of information is to be inspected by an “interested party” (according to the Law), or when it is published on a generally accessible webpage and thus made permanently accessible to (and searchable by) the general public.

For this reason, the privacy complaint should be largely upheld, especially in the context of further processing of collected data (for example, through the publication of documents). This gains particular importance if the data refer to persons who are not officials but may be treated as related persons within the meaning of the Law on Anti-Corruption Agency,⁶⁰ and even more so if these are third parties for which this Law does not envision a specific treatment. For this very reason KRIK has undertaken some measures to protect personal data, i.e. to anonymize data, and these measures have been mostly applied consistently.

This database is generally important because it results in better information of the public, and it gains particular importance when information showing disproportion between politicians’ or public officials’ income and expenditure appear in the public. Platforms such as this one can also help the public to grasp and to understand better connections between officials and politicians, on the one hand, and persons who might undermine the protection of public interests to favor private interests by influencing policies and interfering in different ways in the operation of public institutions in the stage of development or implementation of regulations, on the other.

c) Importance of Publicly Available Information on the Officials’ Assets for the Control of Operation of Courts

At the end of this Chapter we would like to point to another important reason because of which the public has to get an insight in the officials’ assets. As a rule, public officials are also responsible persons at legal entities – public institutions – and the competent state authority may file a request for initiating misdemeanor proceedings against them if it believes that the institution has violated the law through its actions. An important case for this analysis is the Belgrade Misdemeanor Court case against the Laza Lazarević psychiatric hospital and the responsible person in this institution, Slavica Đukić Dejanović. The proceedings referred to the unlawful use of personal and particularly sensitive medical information concerning a patient, where the editor of a tabloid read out this information in a live television show with national coverage. Having overseen the implementation of the LPDP, the Commissioner filed

60 Under Art. of the Law on the Anti-Corruption Agency, „related persons” are the *spouse or common-law partner of the official, lineal blood relative of the official, lateral blood relative to the second degree of kinship, adoptive parent or adoptee of the official, as well as any other legal entity natural person who may be reasonably assumed to be associated in interest with the official.*

a criminal complaint against several unidentified persons for the violation of Article 146 of the Criminal Code (Unauthorized Collection of Personal Data) as well as a request for initiating misdemeanor proceedings.

The Misdemeanor Court ruled that the institution and responsible person were responsible for the unlawful processing of personal data.⁶¹ On this occasion, the Court admonished the institution and the responsible person. Quoting a number of reasons that explain this decision, the court also said that the “judge took into account the facts that refer to the financial and family circumstances of the charged responsible person and the financial position of the legal entity and the fact that this is an important health care institution as well as the fact that they have never been punished in misdemeanor proceedings before, and on the basis of everything mentioned above, the judge believes that even without a punishment, they will refrain from such and similar misdemeanors...”. The reasoning goes on, but fails to clarify how the family circumstances of the responsible person are relevant for the case, or in which way the financial situation in this specific case has resulted in the imposition of an admonition, rather than a punishment. According to the Register of Property and Income of Public Officials, Slavica Đukić Dejanović has a monthly income of 198,989 dinars on the basis of her pension and the status of the minister without portfolio in the Government of the Republic of Serbia alone.⁶² According to the available information, this amount is four times higher than the average salary in the Republic of Serbia,⁶³ which represents a reason for reviewing whether this court decision is correct.

3. Conclusions and Recommendations

On the basis of the described cases, we may conclude that the implementation of the Law on Free Access to Information of Public Importance is still not satisfactory. The issue we have presented shows that public institutions frequently deny the access to information of public importance to the public, referring to the necessity to protect the privacy of public officials and decision-makers.

This practice particularly raises concern if we know that the privacy of “ordinary citizens” is violated on every corner and that the mechanisms for sanctioning the violations of the right to privacy are not fully implemented. This situation is illustrated by the fact that the Privatization Agency database with personal data of more than five million adult Serbian citizens was compromised in 2015 and remained available to an unlimited number of internet

61 Judgment available at: <https://www.krik.rs/wp-content/uploads/2017/10/Presuda-Slavica-%C4%90uki%C4%87-Dejanovi%C4%87-slu%C4%8Daj-Aleksandar-Kornic.pdf>

62 This was current data on the date of adoption of the judgment of the Misdemeanor Court in Belgrade, <http://www.acas.rs/acasPublic/izvestajDetails.htm?parent=pretragalzvestaja&izvestajId=36167>

63 <http://www.cekos.rs/prose%C4%8Dne-neto-zarade-plate-oktobar-2017-godine>

users for several months. We can only guess how many times the database has been downloaded, and for which and whose needs the data from this database are being used today. In the meantime, the Agency has been dissolved, the statute of limitations on the misdemeanor proceedings has expired,⁶⁴ and no information is available regarding the measures undertaken by the Ministry of the Interior and public prosecution in connection with the Commissioner's relevant criminal complaint. The other illustrative case has already been mentioned – the case in which medical data pertaining to a patient of the Laza Lazarević Hospital were initially given to the Ministry of Health, forwarded to an unidentified employee of the Ministry of the Interior, and then sent to the editor-in-chief of a tabloid, who disclosed them in a nation-wide TV broadcast. The Commissioner's criminal complaint in this case has seen no epilogue either, while – as we have already seen – the hospital and the responsible person at the hospital were imposed a judicial admonition in the misdemeanor procedure because of the unlawful processing of particularly sensitive personal data.

Under such circumstances, one may rightfully conclude that the privacy of Serbian public officials is better protected than the same right of “ordinary” citizens.

The holders of public offices should not expect their CVs and qualifications to be kept away from the public eye, unlike decisions they make and activities in which they participate. This conclusion is based on the positions of the Commissioner as the authority in charge of protecting the right to free access to information and personal data protection, as well as on the comparative practice and case law of the European Court of Human Rights. At the same time, the most important criterion for the Administrative Court, in making a balance between the public right to know and the right to privacy, is whether the person to whom data refer is considered to be a public official or a public service officer. And while, in our opinion, an expert public discussion on the treatment of personal data and privacy of public service officers in the performance of activities in the name of the public should be opened, there is no dilemma that the case law of the Administrative Court regarding the treatment of officials' personal data favors the public's right to know and establishes the obligation of public institutions to respect this right.

Like the public's interest to know outweighs the right to privacy in the case of the CVs of the President of the Republic, Prime Minister, directors of public enterprises and members of managing boards of public institutions, we believe that this should also be the case where numerous other public officials are concerned, e.g. those in local government authorities, cultural, educational and health care institutions, independent institutions, utility enterprises, etc. The same principle should also be adopted in connection with the officials' qualifications.

64 N1, 12.1.2017. *Zastareo postupak za curenje podataka iz Agencije (Proceedings on leakage of data from the Agency falls under the statute of limitations)*,
<http://rs.n1info.com/a220880/Vesti/Vesti/Curenje-podataka-iz-Agencije-za-privatizaciju-zastarelo.html>

Without wishing to assume the steps that will be taken in connection with each future request for a free access to information of public importance sent to public institutions, we maintain that the test of public interest should be applied in accordance with the previously mentioned principle, that the right to officials' privacy should be interpreted more restrictively in the case of "ordinary" citizens, in such a way that it may be guaranteed only regarding information and activities that pertain to their private lives.

We have to note that the erroneous application of the test of public interest in a number of cases has incurred expenses for the citizens of Serbia, both in the shape of fines imposed by the Commissioner in accordance with his competences, and in the shape of expenses awarded in the Administrative Court judgements to the plaintiff and paid by the relevant institution. Special concern is raised because same institutions repeat this practice in the case of the same or very similar sets of facts.

Likewise, no information shows that responsible persons at public institutions have been held liable in any way for not complying with the Commissioner's decisions which are final, binding and enforceable.

Public institutions may have different motives for denying information on public officials. It is certain that some institutions which erroneously apply the test of public interest do this because of their insufficient knowledge of the legal framework, and particularly the way in which the FOI law and LPDP should be simultaneously implemented. As a result, public institutions sometimes do not know which right should prevail, so they decide to "overprotect" privacy, believing that this is safer and less detrimental, or, in other words, that the consequences of an erroneous assessment can be corrected more easily when the public is denied the right to know than when a person's right to privacy is violated. In this context, we believe that this analysis provides clarification and guidance which public institutions will be able to use in order to overcome dilemmas in their operation.

The authors, nevertheless, believe that the right to privacy was used in some cases presented in the analysis as an excuse for protecting public officials from the legitimate critique of the public and from the reassessment of their competences and quality of work. This conclusion is based on the fact that institutions persist in refusing to provide the requested information even after the Commissioner applies his legal competences – orders the disclosure of the information or threatens to impose a punishment, or imposes it because of the institution's refusal to disclose the information. The crucial thing in those cases is to unblock mechanisms for the implementation of the Commissioner's decisions.

Still, regardless of the motives, the described practice significantly restricts the control role of the public, reduces the accountability and transparency of public institutions and makes citizens insufficiently informed. Legitimate expectations regarding privacy in other contexts are

thus compromised, while controversial issues of importance for the public have no outcome.

In view of the presented conclusions, we may single out the following recommendations to public institutions:

Public institutions should **establish the principle of proactive transparency**, both regarding general information on their operation and regarding CVs, professional qualifications and activities of public officials and decision-makers, which means that they should post such information on their websites. The public could thus develop a position on the manner in which public resources are managed even without relying on the mechanisms provided in the Law on the Free Access to Information of Public Importance.

In **striking a balance between the public's right to know and the right to privacy**, if information refers to the holders of public offices and decision-makers, the public's right to know should prevail in the case of information on the duties this person performs. The right to privacy should prevail in the case of information on the person's private life.

The Government of the Republic of Serbia should **ensure the enforcement of the Commissioner's decisions** whenever public institutions refuse to comply with them.

Additional resources should be **secured for the staff of the Commissioner** for Information of Public Importance and Personal Data Protection in order to improve the mandate of this institution. This would enable the Commissioner to act on complaints more speedily, which would result in a speedier realization and protection of the right to a free access to information of public importance, and therefore also stronger control of operation of public institutions.

The administrative inspectorate of the Ministry of State Administration and Local Self-Government should **more intensively apply its inspection competences** on the administrative bodies who fail to comply with the Commissioner's decisions.

A **mechanism of accountability at public institutions** should **be established** for failing to comply with the Commissioner's decisions which are final, binding and enforceable. This mechanism may be applied at public enterprises pursuant to the provisions that regulate the requirements for the dismissal of directors (A Director is dismissed before the expiry of the period to which he was appointed if: 4) it is determined that he is causing damage to the public enterprise through the violation of his managerial duties, misconduct or in any other way, Article 49 of the Law on Public Enterprises).

The Law on Free Access to Information of Public Importance should be improved, in such a way as to remove vagueness and facilitate the application of the test of public interest within the meaning of Article 14 of the Law. Specifically, it is necessary to:

- Establish criteria for assessing whether the disclosure of personal data constitutes a violation of privacy,
- Establish rules for the treatment of data on public officials and their work in connection with reasons for limiting the public's right to know,
- Specify that personal data processing is lawful when the public's interest to know prevails.