



litigation

under the access to
public information
legislation



Access to Information Programme

**LITIGATION
UNDER THE ACCESS
TO PUBLIC INFORMATION LEGISLATION**

**Alexander Kashumov
Kiril Terziyski**



Access to Information Programme
Sofia 2012



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LITIGATION UNDER THE ACCESS TO PUBLIC INFORMATION LEGISLATION

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ABBREVIATIONS USED IN THE BOOK

AC	- Administrative court
AD	- Joint Stock Company, JSC
ACSC	- Administrative Court Sofia - City
ACSR	- Administrative Court Sofia - Region
AIP	- Access to Information Programme
AP	- Additional Provisions
APA	- Administrative Procedure Act
APC	- Administrative Procedure Code
APIA	- Access to Public Information Act
AVSA	- Administrative Violations and Sanctions Act
BEH	- Bulgarian Energy Holding EAD (Single Person Joint Stock Company)
BFSA	- Bulgarian Food Safety Agency
BHC	- Bulgarian Helsinki Committee
CC	- Constitutional Court
CCA	- Community Centers Act
CPC	- Civil Procedure Code
CCD	- Constitutional Court Decision
CEC	- Central Election Commission
CHA	- Cultural Heritage Act
CMO	- Council of Ministers Order
CoM	- Council of Ministers
CPDP	- Commission for Personal Data Protection
CRB	- Constitution of the Republic of Bulgaria
DPIA	- Disabled People Integration Act
EAD	- Single Person Joint Stock Company
ECHR	- European Convention on Human Rights - European Court of Human Rights
EOOD	- Single Person Limited Liability Company
EPA	- Environmental Protection Act
EU	- European Union
FCA	- Fair Competition Act
FP	- Final Provisions
GIS	- Government Information Service
MAF	- Ministry of Agriculture and Food
MEET	- Ministry of Economics, Energy and Tourism
MES	- Ministry of Emergency Situations
MEYS	- Ministry of Education, Youth and Science
MF	- Ministry of Finance
MJ	- Ministry of Justice

MOEW	- Ministry of Environment and Waters
MoI	- Ministry of Interior
NATO	- North Atlantic Treaty Organization
NCCD	- National Construction Control Directorate
NCID	- National Center for Information and Documentation
NEC	- National Electricity Company (NEK EAD)
NGO	- Non-governmental organization
NHIF	- National Health Insurance Fund
NIICH	- National Institute for Immovable Cultural Heritage
NIS	- National Intelligence Services
NPP	- Nuclear Power Plant
NRA	- National Revenue Agency - Nuclear Regulatory Agency
NVS	- National Veterinary Service
OOD	- Limited Liability Company
PC	- Penal Code
PCC	- Penal Procedure Code
PCIA	- Protection of Classified Information Act
PDPA	- Personal Data Protection Act
PDPOHGOA	- Public Disclosure of Property Owned by High Government Public Official Act
PFIA	- Public Financial Inspection Agency
PIFCA	- Public Internal Financial Control Agency
PPA	- Public Procurements Act
SAC	- Supreme Administrative Court of the Republic of Bulgaria
SAYS	- State Agency for Youth and Sports
SCC	- Sofia City Court
SEWRC	- State Energy and Water Regulatory Commission
SF	- State Fund
SG	- State Gazette
SM	- Sofia Municipality
SMC	- Sofia Municipal Council
SRPO	- Sofia Region Prosecution Office
SAA	- Social Assistance Agency
STA	- State Tourism Agency
TD	- Territorial Department
TPC	- Tax Procedure Code
UDP	- Urban Development Plan
UN	- The United Nations
ViK	- Water Supply and Sewerage

FOREWORD TO BE CONTINUED...

The development of the litigation on certain issues related to the implementation and the interpretation of the provisions of the access to information legislation and its exemptions has been continuing. Access to Information Programme has been permanently analyzing and systematizing the court practices. The most important achievements in these practices, as well as failures to strengthen the transparency as a fundamental principle of government in Bulgaria can be found in the series of four books we have published and the book you are holding.

Authors of the analytical texts in these books are the attorneys-at-law from the Access to Public Information Legal Team - Alexander Kashumov, Head of the Legal Team, and Kiril Terziyski.

The value of their analysis is not so much in the theoretical grasp of the problems emerging in the court practices since a big part of these practices are result of their work in defense of the access to information. They are the ones who elaborate on the arguments for free access to information not just for particular clients, but on the ground of the principle that all information generated and held by public institutions, which minor legally prescribes exemptions, should be accessible. Their analysis is a result of their personal professional fights and causes, of their involvement in advocacy campaigns, of their everyday meetings with the people exercising their right of access to information, of the discussions with representatives of the state administration. That is the reason why this analysis lack any formal addenda and unnecessary references as it is an analysis made by attorneys-at-law with a case. Hence, it is not a coincidence that Alexander Kashumov was awarded as an „Attorney of the Year“ in 2008, being nominated particularly by court reporters.

I believe that the book will be useful for everybody with serious interest in the developments in the area, for everybody who are practically interested in the development of Access to Public Information Act litigation. Behind the court fights which appear rather tricky for the ones with no legal background, one can see the social context in which the practices are being developed.

In plenty of cases in which the administration refuses access to information, it is clear - from the rational point of view, as well as from the point of view of the court decisions, that the law has been used as a tool to cover the work which has not been done, the unclear contracts which were signed, even the unwillingness for openness.

The results of the litigation are effective in several directions, under the condition that there is knowledge about them. In this case, the statement holds that those who don't

know history are destined to repeat it. Such an example is the long and repetitive attempt described in the book to oppose „documents“ and „public information.“

The successful court practice results in changes in the practices of openness. This is the case with the access to the transcripts from the sessions of the Council of Ministers. In 2002, the information was protected on the base of preparatory documents. Now, it is available for use in the Internet. Whether the debates have moved from the Council of Ministers' hall to the nearby cafes or other places - being an argument of the believers that transparency should have limits, is a question subject to research. That is why we would need access to the transcripts whose content will reveal if the arguments of those discussing a particular decision correspond to the promises on which the political party has won the elections and formed government.

Successful litigation results in increase civil activity which is particularly important for the discussion of policies and for their implementation as specific practical activities.

Successful litigation brings to stability/consistency of administrative practices as well. In a lot of cases, it pushes the administration to review and reconsider its institutional capacity in order to be more transparent to the citizens and to change its practices.

No matter how slow the court fights seem, they are a guarantee for the genuine stability and consistency of practices in the provision of access to information and the transparency.

Certainly, the history of the court practices is significant and can be effective only if, in the first place, it is comprehended, and in the second place - when it becomes an element of the advocacy work of citizens, organizations, and business for more transparency, and in the third place but not least - when the media support transparency for every citizen and do not treat the information as their own belonging. The three moving forces are present in Bulgaria.

The Access to Public Information Act was adopted in 2000 and since then the Bulgarian society has walked a long way of fights for more transparency.

What history of court practice tells us is that the positive development depends on the transparency fighters. The requests for more transparency through the exercise of the right of access to information are the driving force of the process without which it will not be possible. Territories are not ceded without claims to be taken. Sometimes, this happens through crises but eventually it always brings to the recognition of expanded borders.

On the other hand, the defenders of the territories also fight back, not only at home. If we follow the debates between the institutions of the European Union regarding the amendments to Regulation 1049/2001, we will notice that there is no state in which the „friends of transparency“ could lay arms down and enjoy their achievements.

During the past 20 years, there was a boom of the adoption of access to information laws around the world. However, do the laws adopted during the past 20 years work and what are the driving forces for their implementation? They work where there is public pressure, institutional support by information commissions and commissioners, advocates or transparency.

In Bulgaria, it is exactly the litigation which slowly but we hope consistently gains the institutional support for the information seekers. The history of the latter's fight show that there is not state which cannot be questioned. Where do the threats to transparency come, it is not always possible to foresee. If the exaggeration of the importance of the re-use of public sector information, or the exaggeration of the significance of the open data, or the regress to the concept that only particular interested groups have the right to all information because only they can take part in expert discussions on certain politics - is to be proven by practice.

However, the genie has gone out. According to a national representative poll performed by Market Links, 45 % of Bulgarian citizens know about the existence of the Access to Public Information Act. Citizens are the biggest group filing requests to the institutions. The number of requests filed during the 12 years of the APIA implementation place Bulgaria among the first in a list of 90 states with effective laws.

The book depicts these fights as well. That is why it cannot be boring and will be continued...

Gergana Jouleva

Executive Director

Access to Information Programme

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We thank to the Human Rights and Governance Grants Program of the Open Society Institute - Budapest for the financial support for the publication of the book, and for the number of activities preceding this edition.

I. GENERAL OVERVIEW

1. Content and purpose of the Access to Public Information Act

The Access to Public Information Act (APIA) was adopted in 2000¹ as part of the public administration reform in Bulgaria.² At the same time, the law regulates the obligations of public institutions for provision of the information they hold, stemming from Art. 41, Para. 1 of the Constitution of Republic of Bulgaria. According to the Constitutional Court interpretation as of 1996, the substance of those duties was subject to regulation by law.³

The Access to Public Information Act provides for a definition of *public information*, determines the scope of obliged bodies, persons who have the right of access to information, as well as the obligations for the provision of information. Information should be provided either at the initiative of the obliged body (obligations for proactive publication are established by Art. 14-15a of the APIA), or at the request of a seeker. The law also regulates the exemptions from the right to information and the procedure for information provision at a request. Specific provisions relate to the court review on the decisions and the refusals of access to information under the law, as well as the sanctions. An important element of the APIA is the stipulation for judicial review over the classification marking of information, as well as the court's authority to request necessary evidence for exercising it.

In 2008, the APIA was amended in a positive direction.⁴ The scope of the obliged bodies was extended by the inclusion of the so called bodies governed by public law, as well as natural and legal persons, financed under European Union funds and programs. The territorial units of executive bodies were also entrusted with the obligation for the provision of information. Also, an obligation for online publication of information was established. The scope of the trade secret exemption was narrowed to instances in

¹ Promulgated in State Gazette (SG), issue 55/2000.

² Together with the Civil Servant Act, the Law on the Administration, the Law on State and Municipal Procurements.

³ Constitutional Court Decision No. 7 as of June 4, 1996 on Constitutional Case No. 1 as of 1996.

⁴ Promulgated in SG, issue 104/2008.

which the provision of information would result in unfair competition in business. The burden for proving that certain information is of the above type was entrusted to the administrative body.

The 2008 APIA amendments introduced for the first time the *balance of interests* test. This means that even if certain information formally falls within the exemptions, it is nevertheless subject to disclosure if public interest overrides the secrets. The miscellaneous provisions of the APIA list specific hypotheses of *overriding public interest*. Some of these instances are formulated narrower, others - broader. From discretionary power, the provision of partial access has become an imperative obligation.

Pursuant to Art. 2, Para. 1 of the APIA, the purpose of the law is that citizens form their own opinion on the activities of the obliged bodies. The case law establishes broad understanding of the issue, the Supreme Administrative Court referring to the text from Recommendation Rec(2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents:

Access to public information is of great significance in a democratic society in view of ensuring transparency in state administration and the presence of information on matters of public character. In Recommendation (2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents, it has been set forth that „wide access to official documents allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities that govern them, whilst encouraging informed participation by the public in matters of common interest; fosters the efficiency and effectiveness of administrations and helps maintain their integrity by avoiding the risk of corruption; contributes to affirming the legitimacy of administrations as public services and to strengthening the public's confidence in public authorities.“⁵

⁵ Decision No. 4694/2002 on adm. case No. 1543/2002 of the Supreme Administrative Court (SAC), Five-member Panel. Case *Alexei Lazarov v. the Council of Ministers*.

2. Court Review on the Access to Public Information Act Decisions

Approximately at the time of APIA adoption, access to information laws were adopted in the Czech Republic, Slovakia, Romania, Moldova and Albania. It was typical that European countries in transition to democracy enact such laws, the first for the region being Hungary (1992). However, in the late 90s and the beginning of the new century, national laws on access to information (or freedom of information, as some are called) in the world were not as many as today, when their number is around 90.

The access to (freedom of) information laws in different countries vary in terms of the oversight of the law implementation. In some countries, an independent administrative oversight body is established - Freedom of Information Commissioner/ Commission/ Ombudsman - like in Hungary, Australia, Ireland, United Kingdom, Canada, Mexico, Chili, Germany, Slovenia, Serbia, Macedonia, some states of the USA.⁶ Besides the commissioners, some systems establish oversight functions by means of complaint review to the so called administrative tribunals. In another group of countries, no such specialized institutions are established - Poland, the Czech Republic, Slovakia, Romania, Croatia, the Netherlands, Bulgaria. In these countries, the oversight is implemented by the courts.⁷ The litigation is of substantial significance for the development of the access to information practices in countries like the Netherlands, the USA. Bulgaria is undoubtedly part of this group as well.

Discussions regarding access to information legislation focus on the peculiarities and differences between the oversight exercised by the Court and by the Commissioner. Commissioners, except considering complaints, usually organize trainings for the administration, evaluate the capacity of the institutions, run public awareness campaigns, make recommendations, prepare guidelines, and statements on legislation. Courts only deal with complaints. Proceedings before the commissioners are usually shorter and free. Their decisions, however, are rarely respected equal to the decisions delivered by the courts, especially on sensitive issues. In many cases, they have the character of recommendations.

⁶ One can check which laws stipulate the establishment of commissioners, commissions, ombudsmen in the comparative study on national access to information laws in the world: <http://www.rti-rating.org/results.html>

⁷ Laura Neuman's paper *Enforcement Models: Content and Context*, part of the *Access to Information Working Paper Series* of the World Bank, 2009 gives as an example systems where only judicial control is applied USA, South Africa, and Bulgaria. See p. 13: <http://siteresources.worldbank.org/EXTGOVACC/Resources/LNEumanATI.pdf>

In Bulgaria, the procedure before the administrative courts is relatively fast. The hearing is scheduled within 2-3 months of the submission of the complaint and can be heard only in one session. As a rule, a decision should be delivered within the legally prescribed period of one month. The proceedings before the Supreme Administrative Court (SAC) are slower. In cases in which the SAC operates as the second instance court, an year may pass between the appeal and the hearing. If the five-member panel of the SAC considers an appeal against the decision of the three-member panel of the SAC, the case may be scheduled within a few months. Decisions of the SAC are usually delivered within the legally prescribed one month time limit.

The fees for considering complaints are not high - 10 BGN (appr. 5 Euro) is the fee for natural and legal non-profit entities, which are the most common complainants. The fee for the second instance court is twice lower. In such cases, generally, there is not a legal possibility to use free legal aid. Costs are awarded to the successful party, if specifically and timely requested, the so called legal advisers' fee is subject to reimbursement at amount up to 150 BGN. Therefore, justice in cases against refusals of information is administered relatively quickly and is not expensive. Decisions of courts are binding for the administration and failure to comply is sanctioned with a fine, while deliberate frustration of enforcement is a crime (Article 286 of the Criminal Code).

The degree of openness of public administration also varies for different countries. For example, for the pioneer in this area - Sweden, whose law is effective since 1766, it can be said that transparency and readiness to provide information are deeply rooted in the culture and practices of public administration. In many countries, however, the history and tradition are associated with the culture of secrecy and the exercise of the right of information is difficult. Efforts are needed to develop a culture of open government and broad citizen participation in decision-making.

In Bulgaria, citizens are comparatively active in using the APIA. A 2010 national representative opinion poll showed increase in the awareness of the existing law to 45%. If the right of the requesters is violated, they address the courts. Administrative courts decide on cases independently and their decisions have a disciplining effect on the administration. For example, in 2009, the courts delivered decisions on 137 cases, out of which 104 were decisions to repeal the decision of the administration⁸.

⁸ Government annual report on the state of the administration, adopted with a decision of the Council of Ministers, page 130. Accessible in Bulgarian at: <http://www.strategy.bg/Publications/View.aspx?lang = bg-BG&Id = 81>

3. Developments and Tendencies in APIA Litigation

In the previous four books on APIA litigation, the main themes and issues arising in the course of law implementation were identified and analyzed. The period 1998-1999 was characterized by filing of the first complaints against refusals of information by state authorities, the courts leaving them without consideration in the common case. The adoption of the Access to Public Information Act in 2000 established not only a procedure for the provision of information by public authorities, but also the legal basis for addressing the courts in cases when access was refused or the citizens' right to information was violated in any other way. The first refusals were made right after the enforcement of the law in 2000. The first complaints were filed at that time. In 2001, the Supreme Administrative Court delivered an important decision that although not explicitly provided by law, the silent refusals are subject to judicial review.⁹ During the next 2002, the first decision on a case initiated by a journalist was delivered. The judgment contained a broad understanding of the term public information as any information, knowledge about someone or something, regardless of the storage medium.¹⁰ It also assumed a narrow interpretation of the exemption applicable to information of no significance of its own (preparatory document).

In 2003, the questions about access to the contracts of public bodies with private companies and information about their execution were raised. During the next 2004, the court ruled that such information may not be refused in full and every case should be examined for affected rights or interests of third parties. That same year, for the first the court repealed as unlawful a refusal grounded in the state secret exemption - the content of the contract between of the Minister of Finance with the „Crown Agents“. As a result of another case brought to court by the AIP against the refusal of the secret Rules of Organization of Work on the Protection of State Secrets in the People's Republic of Bulgaria (1980), the government declassified 1,484 documents, classified before the enforcement of the Protection of Classified Information Act (2002). Also, in the same year, the refusal of the Supreme Judicial Council to allow journalists to attend its sessions was repealed.

In 2005, the Supreme Administrative Court drew out the principle that it is not necessary to prove the personality of the complainant - legal person, as the right of access to information is a right to everyone. In the beginning of 2006, the court practice in terms of the scope of *public information* was summarized, the list of categories that could be

⁹ Ruling № 8645/2002 on adm. Case No. 6393/2001 of SAC, Five-member panel. Case *Center for Independent Living v. Social Support Agency*.

¹⁰ Decision No. 4694/2002, adm. case No. 1543/2002 of the SAC, Five-member panel. Case *Alexei Lazarov v. the Council of Ministers*.

classified as a state secret was narrowly interpreted, and the position was taken that even in those cases, the public authority should consider the provision of partial access. Also, the scope of the official secret was interpreted narrowly by the repealing of the refusal of the Minister of Regional Development and Public Works to provide access to the concession contract with the „Trakia Highway“ AD. Furthermore, it was assumed that data relating to persons holding high government positions and related to the forming of an opinion on the work of the public institution must be provided.

In 2007, the practices of narrow interpretation of the state secret exemption were reaffirmed as the court obligated the National Intelligence Services to disclose documents related to the case of Georgi Markov.¹¹ The practices related to the narrow interpretation of the trade secret exemption were also developed.

During the period 2008-2012, the case law on the interpretation of the term *overriding public interest* has developed. The courts have assumed a narrow interpretation of the exemptions related to the so-called preparatory documents, trade secret, and personal data. There have been complaints against the deletion of certain information in the documents provided. The period was also characterized by more decisions delivered by the administrative courts in the country.

This brief overview gives an idea of one-way trend. In some cases, a contradictory practice or decisions which undertake a more restrictive interpretation of the right to information, but it was always only on certain matters. Moreover, most often, the practice has become more consistent in compliance with the principles inherent in this type of legislation and relevant international standards.

If in previous years the approach towards the litigation was more or less of comprehending the contents of the law and related legislation, the nature of current cases is different. For example, when addressing the issue of which data are personal, a precise balance is sought, the border at which the two competing rights are respected - access to information and protection of personal data. It can be concluded that the process of comprehension of the basics of the law in this area by the legal community has been completed and currently solutions are sought on specific issues raised by real life and public debate and attitudes.

¹¹ The documentation amounting at 100 volumes was used by the plaintiff, the journalist Hristo Hristo, for the writing of the book *Kill the Tramp: the Bulgarian and British State Policies with Regard to the Georgi Markov Case*, Sofia, 2008. The documents were also used for the book *The Emprite of Overseas Companies*. Sofia, 2009.

One of the concrete results of this development of the case law is the improvement of the access to information. Citizens, journalists and NGOs receive more information. Institutions have begun to develop more transparency practices by publishing information online. Lawmakers take into consideration and comply with the results from the litigation. The latter was one of the main reasons for the 2008 APIA amendment. Today, a citizen can receive 7,000 pages of documents related to an EU funded project, including agreements with subcontracting companies, on two digital discs for 1 BGN (0.5 Euro), without encountering a refusal. An association can obtain, although it was after legal battles, but thus unconditionally, the legal analysis on the performance of the concession contract „Sofia water“ EAD.

All stated above shows that the system works and it works especially like a system, in which the willingness or unwillingness of a civil servant or political figure to provide information is of no special relevance. Thus, a basis for a stable and consistent development of society is created, because without accountability of government and participation of citizens in decision-making neither democracy, not individual liberty is possible.

4. Unification of the Supreme Administrative Court Practice on the APIA

To date, there is no comprehensive systematization of the litigation under the Access to Public Information Act (APIA) made by the Supreme Administrative Court, nor is there interpreting decision on the application of one or other provisions of law. However, in some decisions, the court panels include as part of their judgments analysis on previously delivered decisions on a certain topic. These decisions, which make a review and systematization of practice, are essential to its consistency and to avoid conflicting interpretations.

For example, such an analysis of practice in relation to the interpretation of public information is made in Decision No. 9720/10.10.2006 on administrative case No. 5011/2006, SAC, Five-member panel. The court panel has analyzed the developments in the interpretation of the concept by the Supreme Administrative Court, has considered nine rulings, and has made the conclusion which practice is one-way and on which issues the views are conflicting.

Analysis of eleven other court rulings relating to silent refusals under the APIA is a subject of examination in another decision of the SAC. The judgment recalls the controversy related to the appeal of these refusals, the two cases which triggered this controversy, the practice of declaring silent refusals null and void, as well as, the approach established in the meanwhile of not considering them as equivalent to explicit refusals. Finally, the judgment emphasizes the firm conclusion that the silent refusals are considered „intolerable legal phenomenon.“¹²

Such systematic overviews on specific issues are of significance to the application of the APIA and are useful for the overview of the practice, as well as to ensure a uniform approach to hearing and deciding on cases.

¹²Decision No. 3508/ 20.04.2004, adm. case No.10889/2003, SAC, Fifth Division. The decision is analyzed in the chapter that deals with the personal data protection..

5. About the Book

The present book contains comments on court decisions that we consider important in the process of creating legal practice on the APIA. Most of these are delivered by the Supreme Administrative Court, but there are decisions of the Administrative Court - Sofia City and the administrative courts in the country which have not been appealed and entered into force. Rarely, we also comment on decisions which are not enforced because they have been appealed, but they show important trends or have the potential to create a new practice. The commented decisions that have come into force, are cited by their number and the date and number of the file, the court, the court panel, the judge-rapporteur, respectively, the judge in the case of one-member panel. This applies especially to the court decisions of more significant in terms of the interpretation of legal norms.

The book contains annotations of court cases which resulted in changes in the practices or strengthening of the access to public information right principles.

The main conclusions that can be drawn from the analysis of the case law are that in fact the right to information is regarded as a principle and its limitations - as an exception. Courts examine in detail both the grounds for the refusals and the nature of the requested information even if it is classified. The approach of narrow interpretation with regard to the trade secret and the so called preparatory documents exemptions has been undertaken. When personal data are considered, a balance is sought between competing rights. Courts evaluate the existence of overriding public interest in the disclosure of information even where restrictions apply and have identified categories of cases in their practice.

The issues related to the new categories of obliged bodies remain still unsolved or with contradicting solutions.

The analysis starts with an overview of the issues related to the exercise of the right of access to information. They contain the term *public information*, scope of obliged bodies, filing of requests, litigation fees. The other main issue is the exemptions from the right of information. It is natural that leading is the second group of problems - a comparative view on similar studies from the USA would support that.¹³ At the same time, our own experience of analysis and preparation of over 220 court cases, supported by Access to Information Programme, as well as the permanent monitoring of practices, the provision of legal help on specific cases, and the organization of trainings for the public administration allow for identification of tendencies.

¹³ See: US Department of Justice, Freedom of Information Act Guide & Privacy Act Overview u na EPIC, Litigation Under the Federal Open Government Laws.

The review follows the structure of the law. The texts on specific issues are short and we have tried to select the most relevant court decisions. When necessary, references are made to relevant international and European documents. The book would be useful to practicing legal officers, representatives of the public administration, academics, but also to students, journalists, and a wider audience who are interested in the topic.

II. TERMS, SCOPE AND PROCEDURES UNDER THE APIA

1. „Public Information“

1.1. Scope of „public information“

Pursuant to Art. 10 of the APIA, the citizens have the right of access to the information contained in the acts of the government bodies - the so called official public information. Pursuant to Art. 11 of the APIA, the information which is collected, created and kept in connection with official information, as well as in the course of the activities of the bodies and their administrative structures, is also accessible - the so called official public information. Also, according to Art. 2, Para. 1 of the APIA, public information is information related to public life in the Republic of Bulgaria and providing an opportunity to form own opinion on the work of the obliged bodies.

The term *public information* has found broad understanding in the court practice. As early as 2002, the Supreme Administrative Court ruled that the term *public information* should be understood as *information, knowledge of someone or something related to public life in the country, respectively, the activities of the bodies obliged under Art. 3 of the APIA*.¹⁴ In another decision from 2006, the SAC pointed out that:

*The case law, referring to the definition of the term „information“ from the Dictionary of the Bulgarian Language, has specified the concept of „public information“ as information or knowledge of someone or something related to the public life in the country, respectively, the activities of the bodies obliged under Art. 3 of the APIA. This information may be contained in documents or other material media, created, received or held by the bodies obliged under the APIA.*¹⁵

¹⁴ Decision No. 4694/16.05.2002 on adm. case No. 1543/2002 of the SAC, Five member panel, judge-rapporteur Marina Michailova, who signed the decision with dissenting opinion. Case *Alexei Lazarov (Capital Weekly) v. the Council of Ministers*.

¹⁵ Decision No. 962/27.01.2006 on adm. case No. 6515/2005 of the SAC, Fifth Division, judge-rapporteur was the presiding judge Vania Ancheva. Case *Center for Nongovernmental organizations in Razgrad v. the Executive Director of a Hospital*.

Based on those grounds, the court repealed the decision of the first instance court, which had assumed that the APIA did not stipulate a procedure for requesting documents. According to the SAC, documents fell within the scope of the APIA, since:

...under the argument of § 1 of Additional Provisions of the APIA, documents are material medium of information.

The case pertained to the request of the documentation related to a procurement procedure launched by a hospital in Razgrad. The question if the documents fall within the scope of the APIA is additionally discussed below in relation to the issue about the formulation of the request.

In 2006, a decision of the Five-member panel of the SAC the gave an analysis and systematization of the case law on the concept of public information. According to the ruling, the practice of the Supreme Administrative Court is constant since the delivery of Decision No. 1453/2002. According to it, public information under the APIA is:

a) each set of data structured after specific criteria with a goal and purpose (see e.g. Decision No. 3875 as of 28.04.2005 on administrative case No. 592 as of 2005 and Decision No. 7522 as of 29.07.2005 on Administrative Case No. 3265 as of 2005, both delivered by the SAC, Five-member panel and many others.),

b) and any information about any position or business of any of the bodies obliged under Art. 3 (explicit Decision No. 962 as of 27.01.2006 on administrative case No. 6515/2005 delivered by the SAC, Fifth Division; and Decision No. 3101 as of 23.03.2006 on a.c. No. 8452 as of 2005, and Decision No. 9097 as of 21.09.2006 on administrative case No. 5319 as of 2006, both delivered by the SAC, Fifth Division; Decision No. 9486 as of 04.10.2006 on administrative case No. 3505 as of 2006 by the SAC, five-member panel, etc.),

c) but not related to the interpretation of legal provisions (Decision No. 2757 as of 15.03.2006 on administrative case No. 8209 as of 2005).¹⁶

It is apparent from the above stated that the understanding of the Supreme Administrative Court about the scope of the concept of public information is wide. It covers not only documents, but also information stored on other physical media. Moreover, the right of access to information under the law may be also exercised in the form of questioning, if the requestor does not know in what documents the answers are contained.¹⁷

¹⁶ Decision No. 9720/10.10.2006, adm. case No. 5011/2006, SAC, Five-member panel, judge-rapporteur Alexander Elenkov. Case *Yulian Cholakov v. the Council of Ministers*.

¹⁷ *Ibid.*

The definition given by Art. 2, para. 1 of the APIA should be seen as related to the language of Art. 10 and Art. 11 of the APIA. Thus, by way of interpretation it can be concluded that the term „public information“ also encompasses documents which seemingly would not be counted here. In its decision as of 2012, the Supreme Administrative Court found:

...At first glance, the data contained in the personal prison file does not relate to public life in the Republic, but indirectly, from the attached to the file warrants, initial and current reports, psychological findings, risk assessments and other documents prepared during and related to the stay of the person in prison till the execution of his sentence, a conclusion may be drawn and an opinion formed about the activities of body obliged under the law - the officials of the Directorate General „Execution of Sentences.“ Moreover, the cited legal definition should not be viewed in isolation from the other provisions of the law. The latter contains legal definitions of types of public information, and that of official public information in particular: information, which is collected, created and held in connection with the activities of the bodies and their administrative structures.¹⁸

1.2. Access to Information and Requests for Creation of Information

According to the Supreme Administrative Court (SAC) practice, citizens can not only identify documents of interest to them, but also to set forth questions in their requests to which the administration should respond within the procedure and the manner provided by the APIA (by providing relevant documents, for example). The issue is discussed in the course of proceedings of one of the already cited cases in connection with the questions set forth in an access to information request from 2005. The applicant sought to obtain information if the Council of Ministers (CoM) has adopted the practice to process the pre-election or other type of correspondence of the governing party, since when did this practice exist and on what legal basis was it introduced. The probable reason for his interest stems from the fact that after he had made a proposal to the governing political party for an amendment to a legal act, he surprisingly received a response letter from another place and institution, namely, the Public Relations Department of the CoM. According to the five-member panel of the SAC, the

¹⁸ Decision No. 2082/13.02.2012 on adm. case No. 3992/2011 of the SAC, Fifth Division, judge-rapporteur Andrey Ikonov. The court proceedings (*M.H. v. the Directorate General „Execution of Sentences“*) were initiated after the request of a parent for access to the prison file of a convicted with executed death penalty.

citizen has the right to request information on this issue, without having any prior knowledge which documents contain it. The court justified their opinion as follows:

... Apparently, the direct purpose of the applicant is to form his own opinion on the base of the received responses about the work of the Council of Ministers. Consequently, with the request as of May 16, 2005, he had requested access to public information under the meaning of Art. 2, Para. 1 of the APIA.

However, in its practice, the SAC accepts that the information to which access is sought should be contained in existing documents. The APIA does not provide for requesting the creation of a document. On this occasion, in 2006 a five-member panel of the Supreme Administrative Court held:

... public information should refer to existing documents. Thus, it follows that the Ministry of Foreign Affairs has no obligation to create new documents, in order to satisfy the requested access.¹⁹

The request sought to obtain information about conditions placed on the Bulgarian government for the release of two abducted Bulgarian citizens in Iraq. The court held that there was no evidence for the existence of such information. In another case from 2011, the SAC noted that the requested information was held in different registries of classified information within various structures of the Ministry of Defence, covered a large period of time (21 years), it was contained in numerous documents and materials and did not exist in the form demanded by the requestor. Based on that factual argumentation, the court concluded:

... In the case, the request demands the creation of a new document containing a huge amount of information for 21 years. The law does not provide for such an obligation for the bodies obliged under the Art. 3 of the APIA.²⁰

The thesis that access to information whose existence has not been proven is not due is compatible with international standards.²¹ At the same time, proving that certain information exists, is not always easy for a person outside of the administration.

¹⁹ Decision No. 1165/01.02.2006 on adm. case No. 9728/2005 of the SAC, Five member panel. Case *P. Penchev v. the Ministry of Foreign Affairs*.

²⁰ Decision No. 7927/06.06.2011 on adm. case No. 4714/2011 of the SAC, Five member panel. Case *William Popov v. the Ministry of Defence*.

²¹ The quoted decision refers to Recommendation (2002) 2 of the Council of Europe Committee of Ministers to the member states with regard to access to public information.

Sometimes, however, the question arises whether the administration has gathered all the information necessary to perform its statutory obligations. It is even more significant if the issue is subject to public consultation and information is necessary for the participation of stakeholders in this process. In 2011, the question arose as to whether certain documents compiled by the company - executor of the Urban Development Plan (UDP) of the Varna city in relation to private assignments, have to be collected by the municipal administration, and appended to the administrative file of the UDP. The Access to Public Information Act does not provide for the possibility to demand from the administration to collect certain documents. However, their absence in the municipal administration impede citizens to get to know them. The applicable law in this case is different. According to Art. 256 of the Administrative Procedure Code (APC):

Failure to perform factual activities that the administrative authority is obliged to do by law is subject to appeal within 14 days of the submission of a request to the body to perform these.

Using this procedure, the citizen from Varna city Nikolay Tsvetkov requested the mayor of the Municipality of Varna to collect the above-mentioned documents. The subsequent refusal was challenged before the court. The Supreme Administrative Court ruled that:

... from an objective point of view, it has not been proven that the drafting of such plans was assigned, therefore there is no obligation for the Municipality of Varna to incorporate any of these to the UDP.²²

The interesting thing here is that the court did not dismiss the possibility to require public authorities to fulfill their obligation to collect information pursuant to Art. 256 of the APC. Rather, it appears that if the municipality had contracted the drafting of the documents, then the obligation to append them to the file would have been valid.

²² Decision No. 35/03.01.2012 on adm. case No. 10447/2011 of the SAC, Third Division.

2. Formulation of requests for access to information

The question of how to formulate a request is concerned by the provision of Art. 25, Para. 1 of the APIA, where are enumerated the requisites of the request (conditions of validity *sine qua non*), and in particular item 2 of this provision, according to which the request for access to information must include a description of the requested information. The question of how to formulate a request for access to information is developed in Art. 29, Para. 1 of the APIA, according to which, when it is not clear what information precisely is being requested or it is too broadly defined, the requester is informed about that and has the right to specify the subject of the requested information.

During the years these provisions of the act were interpreted by the courts mostly regarding the clarity of the requests for access to information, as well as whether the requesters have the right to demand access to specific documents or they should indicate descriptively the information they request.

2.1. Access to information - access to documents

As early as 2003, in the case-law appeared a debatable question - whether the requesters could describe the demanded information in their requests by indicating specific documents. This issue was interpreted differently and with contradictions by the Supreme Administrative Court (SAC). In the beginning there was court practice, according to which the requesters have the right of access to information, but not of access to specific documents. In their decisions the judges were putting forward the following conclusions:

In the case of requesting access to a document, an act granting access to public information is not due²³.

In a lawsuit against a refusal of the Council of ministers to provide a copy of the minutes of a government meeting, a five-member SAC panel stated that:

... the request should contain the requisites (conditions) under Art. 25, Para. 1, items 1 to 4 of the APIA, item 2 requiring it to contain a description of the requested information. The request filed by the cassation appellant does not satisfy the requirements of Art. 25, Para. 1, item 2 of the act - i.e. it does not contain a description of the requested information. The said request is drafted broadly and only the preferred form of

²³ Decision No. 1461/19.02.2004 on adm. case No. 8825/2003 of the SAC, Fifth Division. *Case of Apostol Stoychev v. Popular Library (Community Center) „Hristo Botev“, village of Banevo.*

accessing the information is indicated - requirement under item 3 of Para. 1 of the Art. 25 of the act. The administrative body has not carried out its obligation, either, under Art. 29, Para. 1 which provides that in case that it is not clear exactly what information is sought or when it is formulated broadly, the administrative body should notify the requester who has the right to specify the subject of the requested public information²⁴.

In a case concerning a refusal of the Ministry of Finances to provide a copy of the contract concluded with the British company „Crown Agents“, a three-member SAC panel arrived at the conclusion that:

A general indication that what is requested is the provision of the said contract cannot be accepted as a fulfillment of the requirement under Art. 25, Para. 1, item 3 of the APIA, the contract being the material carrier where the demanded public information is materialized, but in itself it cannot be qualified as such under the legal definition in Art. 2 of the APIA. Pursuant to Art. 29 of the APIA in the case where the requested information is too broadly defined, the requester is notified of that and has the right to specify the subject of the demanded public information, the failure of carrying out this obligation constitutes grounds for leaving it without consideration. This is why the procedure under Art. 29 of the APIA should have been carried out in order for the requester to specify the subject of the information sought as a set of data, of which he wishes to be informed, in order to form his own opinion on the activities of the body²⁵.

In the beginning of 2004 this case-law was abandoned with the overruling by a five-member SAC panel of the quoted three-member panel decision on the case regarding a refusal of the MF to provide a copy of the contract with „Crown Agents“. In their observations in the decision the judges concluded that:

It is obvious that by requesting a paper copy, Terziiski has requested access to the public information, contained in the stipulations of the contract, and not in the set of 110 sheets of paper as a material carrier of public information. In this case the general term of „contract“ is specified and is requested not just any one but the one, concluded between the Bulgarian government and the British company „Crown Agents“. The conduct and procedural statements of both parties to the dispute show that it is clear and undisputable to them what precisely is the public information sought²⁶.

²⁴ Decision No. 4694/16.05.2002 z. on adm. case No. 1543/2002 of the SAC, Fifth Division. *Case of Aleksey Lazarov v. the Council of Ministers.*

²⁵ Decision No. 11682/15.12.2003 z. on adm. case No. 3080/2003 of the SAC, Fifth Division.

²⁶ Decision No.113/09.03.2004 z. on adm. case No. 38/2004 of the SAC, Five-Member panel, judge-rapporteur Andrey Ikonov. *Case of Kiril Terziiski v. the Minister of Finances.*

With this decision of the five-member SAC panel the debated question in case-law was unequivocally settled and till 2006 the court panels were reaffirming this practice, accepting that documents constitute material carriers of information and there is no obstacle to describing requested information under the APIA by indicating specific documents. Another five-member SAC panel, for example, pointed out in a decision:

It should not be forgotten that the term information is synonymous of document. The word information should be understood as a document, which provides a piece of information about something. The content of the document is the information which it provides about some specific facts or circumstances. Therefore, without a document there can be no access to public information. The access to the public information is tantamount to receiving the document which contains this information²⁷.

In some of their decisions three-member SAC panels, acting as second instance, also admitted that there is no obstacle to describing the requested information by indicating a specific document. For example:

1. *The circumstance that what is requested is access to documents, and not to the information contained therein, is irrelevant for the APIA and is a matter of terminology clarification. Obviously, if the requester had known the content of the materialized in the corresponding document information he would not need access to it. And since the acts of state and local authorities contain by definition official public information the conclusion of the District court, that access to public information is not due by the body under Art. 3 of the APIA when the type of information contained therein is not explicitly indicated, is unfounded²⁸.*

2. *Erroneous is the conclusion of the Razgrad District court that access to documents is not regulated by the APIA. This erroneousness is shown, for example, by the provision of Art. 10 of the APIA, which defines as official public information the content of the acts of state and local authorities²⁹.*

3. *The case-law, referring to the definition of the term „information“ according to the Bulgarian Interpretation Dictionary, specifies the notion „public information“ as a piece of information or knowledge about someone or something, related to public life in the country, respectively about the activity of the subjects obliged under Art. 3 of the APIA. This information can be contained in documents or other material carriers, created, received or held by the subjects obliged under the APIA³⁰.*

²⁷ Decision No. 1165/01.02.2006 on adm. case No. 9728/2005 z. of the SAC, Five-Member panle, II college.

²⁸ Ruling No. 3548/20.04.2005 on adm. case No. 3170/2005 of the SAC, Fifth Division.

²⁹ Ruling No. 6774/12.07.2005 on adm. case No. 4183/2005 of the SAC, Fifth Division.

³⁰ Decision No. 962/27.01.2006 on adm. case No. 6515/2005 of the SAC, Fifth Division.

Afterwards in 2007 anew some decisions appeared stating that under the APIA can be requested access to information, but not just access to documents as material carriers of the information³¹. The most probable explanation of this second debate in court practice is that in 2007, without prior preparation, the cases under the APIA were submitted to trial by the Third division of the SAC instead of the Fifth division, which has considered them for 7 (seven) years. This led to a partial loss of continuity in case-law. Precisely for that reason in the previous volume of Selected cases on the APIA, where we summed up the court practice for the period 2005-2008, we noted that it would be necessary again, through new court decisions, to achieve harmony with the existing positive case-law.

So far the problem with contradictory and unstable court practice is settled, after that in 5 of the AIP supported cases after 2008 different court panels united again in their decisions around the conclusion that

*whether what is requested is the specific material carriers of the information or what is requested is a description of the information itself is irrelevant about the fact that it is due*³².

In this relation, a decision of a five-member SAC panel, acting as second instance, of 24.07.2008 overruled the refusal of the Minister of Culture to provide a copy of an order of his. It should be noted that with this decision, not only the cited court practice on the issue access to information - access to documents was corrected for the second time, but in it the judges set out the most detailed arguments so far why whether a specific document is requested or what is requested is a descriptive presentation of the information in it, is without any importance for the validity of the request for access to information:

In this case the three-member panel has erroneously accepted that as the initial request is formulated - access to a copy of an order - it is not a request for access to public information since it does not include a description of the former in accordance with Art. 24, Para. 1, item 2 of the APIA. Such a conclusion is in contradiction with the provision of Art. 26, Para. 1, item 3 of the APIA, according to which one of the forms of provision of access to public information is copies on a paper carrier, which literally is enough in order to accept that by requesting a copy of the order there is a valid request under Art. 24 of the APIA for access to the demanded public information - a copy of the indicated order. Moreover the title of the said order - on appointing the working party

³¹ Decision No. 10010/22.10.2007 on adm. case No. 2591/2007 of the SAC, Third Division.; Decision No. 439/14.10.2008 on adm. case No. 5161/2007 of the SAC, Third Division.

³² Two decisions of a Five-Member SAC panel, a decision of a Three-Member SAC panel and two decisions of the ACSC.

on drafting a project of ordinance, referred to in Art. 5, Para. 4 of the Protection and Development of the Culture Act - contains itself the very description of the requested information that must be included in the designated form - a copy of the order. Also important is the fact that according to the last paragraph in Para. 4 of Art. 26 of the act, the administrative body is bound to respect the preferred form of access, which in this case is a copy of the said order. The filed request for provision of a copy of the order is not in contradiction with Art. 27, Para. 1 of the APIA, since the excluding conditions described in it are not met. Indeed, documents are the material carriers of information, as the three-member panel has rightfully accepted, but it is too restricted and unfounded to accept that in this case a copy of the order is requested almost as an end in itself. This is because the content of the order is explicitly indicated, which by itself leads to the conclusion that the information, to which access is sought, is precisely its content³³.

Also with a decision by a five-member SAC panel, as second instance, of 23.02.2011 the Minister of Interior was obliged to decide on a request for access to the contract(s) of the already former Ministry of Emergency Situations with the company „Kontrax“ about the design, implementation and support of the Center for Aerospace Monitoring and information about its/their execution. The refusal was motivated by the fact that the applicant had requested access to documents, which he was entitled to do under APIA. The five-member SAC panel, though, pointed out that whether what is requested is the specific material carrier of the information or the request contains a description of the information itself, is irrelevant about the fact that it is due. This is the fourth decision by a five-member SAC panel since the adoption of the APIA, which rules that whether the requester has formulated a request for access to information or to a document is of no relevance. In this SAC decision, as in the fore mentioned, the observations of the court on this issue are detailed and thorough:

The three-member SAC panel - Fifth Division wrongfully accepted that when the provision of a document is requested, and not information as a description of a piece of information or knowledge about someone or something, then the information is not due. The law has defined the information that should be provided under the act - this is all information related to the public life in the country and giving the opportunity to the citizens to form their own opinion on the activity of the obliged under the act subjects. The information requested by the cassation appellant meets the legal definition. The law has also exhaustively defined the exceptions, which allow for, although public, the information not to be provided. The one accepted by the court is not among them. Whether what is requested is the specific material carrier of the information or the request contains a description of the information itself, is irrelevant about the fact that it is due. The material carrier of the information, in this case the court has

³³Decision No. 8969/24.07.2008 on adm. case No. 6569/2008 of the SAC, Five-Member panel, I college.

*accepted - the relevant documents, is not something that is requested for its material substance, but for the information that it contains*³⁴.

In the sense that whether what is requested is the specific material carrier of the information or the request contains a description of the information itself, is irrelevant about the fact that it is due, was rendered a decision³⁵ of a three-member SAC panel of January 2012, which overruled the refusal of the manager of „ViK“ OOD - Sliven to provide copies of protocols of the general assembly of the company. Identical conclusions have been made by two panels of the Administrative court, Sofia city (ACSC). By a decision of 07.07.2011³⁶ the ACSC overruled a refusal of the chief architect of the capital to provide a list and copies of the documents, included in a file on ordering the enforcement of a building prohibition. By a decision of 03.04.2012 the ACSC annulled a refusal of the chief secretary of the Ministry of Economy, Energy and Tourism (MEET) to provide access to a letter of the MEET and all documents related to this letter and the assertions about amounts made in it, spent out of the state budget for maintenance of the positive image of the Bulgarian nuclear energy sector³⁷.

All these decisions show that continuity in positive court practice, according to which it is of no relevance whether the request contains a description of the information itself, or what is requested is a specific document, was restored in recent years.

2.2. When the request is not clearly formulated

In one of the cases supported by AIP the issue whether the request contains a clear and precise description of the information sought was interpreted on two court instances. The question was raised as a dispute on a request made by the editor in chief of the local newspaper to the city mayor. In the request the information sought was described as follows:

- Number of contracts of the Pazardzhik Municipality with contractors and suppliers in the period from November 2007 to November 2010;
- List of contractors and value of the contracts;
- Outstanding amounts so far on completed contracts.

Instead of delivering a decision on the request for access to information the municipality has sent a notification to the requester that he should specify the subject of the information sought by indicating the specific contracts that he is interested in,

³⁴ Decision No. 2761/23.02.2011 on adm. case No. 13930/2010 of the SAC, Five-Member panel, II college.

³⁵ Decision No. 881/17.01.2012 on adm. case No. 3126/2011 of the SAC, Fifth Division.

³⁶ Decision No. 3317/05.07.2011 on adm. case No. 3009/2011 of the ACSC, II Division, 22nd panel.

³⁷ Decision No. 1832/03.04.2012 on adm. case No. 348/2012 of the ACSC, II Division, 37th panel.

after which the municipality's administration will proceed with asking the consent of third parties who are parties to these contracts. As early as this stage of the case, supported by the AIP legal team, a clarification was made to the request, in which was stated that the requester wishes to obtain information in the form of reference for all contracts, concluded by the Pazardzhik Municipality with service providers or suppliers of goods within the defined period, the reference including the names of the parties to the contracts and the prices, as well as information on completed contracts under which the municipality has not paid all sums due. The clarification noted that there was no way of describing in a more clear and specific fashion, the contracts that interest the requester, than by indicating the type of the contracts (supply of goods or provision of services) and the period in which they are concluded. Although the APIA does not provide for such an act, the mayor sent to the „Videlina“ newspaper editor in chief a second notification that he should specify the subject of the information sought by indicating specific contracts that interest him. After receiving the second notification about clarifying of the request, the requester filed a complaint against a silent refusal of the municipality's mayor. As a result the Administrative court - Pazardzhik repealed the mayor's silent refusal. He appealed the decision before a three-member SAC panel, which upheld the first instance ruling and noted:

The argument made about a violation of the substantive law is developing in the sense that the second letter from the mayor to the requester constitutes a demand, provided by law, for specifying the information sought, and is not a refusal of its provision. The SAC finds the argument unfounded. In the request for access to information and the clarification thereto the information sought is clearly enough specified - number of contracts concluded by the municipality for execution and delivery for the indicated period, a list of the contractors and the contracts amount, as well as the unpaid, until the moment of the request, amounts. Obviously, there is no interest of the requester towards some specific contracts, as the mayor is insinuating in his letters, but there is one general interest about the number of the contracts, contractors in them, their total amount and the outstanding amount left³⁸.

Thus once again the courts practice did not allow the administration the opportunity to speculate with the APIA provisions concerning the description of the information sought in the request for access. In this regard, in previous years, twice other three-member panels of the SAC as a second instance reached nearly identical conclusions about the clarity of the requested information. In the first case the SAC accepted that

³⁸ Decision No. 2077/10.02.2012 on adm. case No. 4763/2011 of the SAC, Fifth Division. *Case of Videlina v. the Mayor of Pazardzhik*.

*evident from the request itself, it contains a specific and precise description of the requested information - access the contents of two audit acts of the PIFCA.*³⁹ In the second case the SAC accepted that the indication in the request that what is sought is access to *all the information available on the public registers in the Municipality of Razgrad - number, title and conditions of use*, leads to the conclusion that the request is clearly formulated and the requester wants to be given information about what public registers the municipality is keeping and what are the conditions of access to them⁴⁰.

³⁹ Decision No. 10539/22.11.2002 on adm. case No. 5246/2002 of the SAC, Fifth Division. *Case of Association „Public barometer“ - Sliven v. the Public Internal Financial Control Agency.*

⁴⁰ Ruling No. 3335/13.04.2005 on adm. case No. 3169/2005 of the SAC, Fifth Division. *Case of NGO center - Razgrad v. the Mayor of Razgrad Municipality.*

3. Broader range of obliged subjects

Under the Access to Public Information Act (APIA) all state and local bodies are obliged to provide information. An obligation to provide information is provided for public law entities as well as natural and legal persons financed from the budget. In the years following the adoption of the APIA, case-law was accumulated according to which the category of „state bodies“ clearly includes both the authorities of the executive and those of the judicial and legislative powers. Court practice was created according to which the National Health Insurance Fund (NHIF) and the Central Election Commission (CEC) are obliged to provide information in their capacity as state bodies under the law.

In 2008 the APIA was amended (State gazette, number 104 of 5 December 2008) in several directions. A part of the amendments concerned the enlargement of the range of the obliged subjects under the law by including the regional offices of the bodies of the executive and the creation of the category „public law organizations“. The new writing of Art. 3 of the APIA:

Art. 3. (1) (Amended SG No. 104/2008) This act shall apply to access to public information that is created by or kept with the state bodies, their regional offices, and the local self-governance bodies of the Republic of Bulgaria, hereinafter referred to as „the bodies“.

(2) (Amended SG No. 104/2008) This act shall also apply to the access to public information, which is created by and kept with:

- 1. bodies, subject to the public law, other than those under sub-art. 1, including public law organizations;*
- 2. individuals and legal entities as far as only their activities financed with funds from the consolidated state budget, subsidies from the European Union funds or allocated through EU projects and programs, are concerned.*

The legal definition of the notion „public law organization“ is given in § 1, item 4 of the Miscellaneous provisions of the act:

„Public law organization“ shall be a legal person which regardless of whether it performs commercial or production activities, is established to satisfy public interest and for which some of the following conditions are satisfied:

- a) more than the half of its revenues for the previous financial year come from the state budget, the budget for the state public social security, the National Health Insurance Fund, from the municipality budgets, or from contractors under Art. 7, item 1 or 3 from the Public Procurement Act;*

b) more than the half of the members of its management or oversight body are appointed by contractors under Art. 7, item 1 or 3 from the Public Procurement Act;

c) is subject to management control by contractors under Art. 7, item 1 or 3 from the Public Procurement; management control shall be when a person may exercise dominating impact upon the activities of another person.

Public law organization shall also be a medical institution - trade company, who has received more than 30% of its revenues for the previous year come from the state and/or municipal budget and/or from the budget of the National Health Insurance Fund.

After the adoption of these provisions some court practice has also accumulated on their implementation.

3.1. Regional offices of state bodies

In the first years after the adoption of the APIA it was frequent practice for the regional offices of state bodies, instead of issuing decisions on the requests for access to information, to forward them straight to the central administrative body, arguing that under law it is only that body that is an obliged subject, but not its regional offices. As early as 2003 this practice was the reason for proposing (and even adopting on first hearing) an amendment to the APIA specifying that obliged subjects under the law are both state bodies and their regional offices. This change became into fact with the amendments of the act of December 2008. Thus the Bulgarian law was put into conformity with the European standards in the area of access to information, since in the Council of Europe Convention on Access to Official Documents it is also stipulated that government and administration at national, regional and local level are obliged to give access to information.

Before this change in the APIA there were no lawsuits against refusals of regional offices of state bodies to provide information. After the amendment in the law filing complaints against refusals of regional offices of state bodies became possible. In two cases, supported by AIP, were repealed refusals of regional offices of the National Revenue Agency (NRA) to provide access to information. In both of these cases the issue whether these administrative bodies are obliged subjects under the APIA was not considered debatable. The cases were formed following complaints of the Association „Center of the NGOs in Razgrad“. In the lawsuit against a refusal of the Territorial direction of the NRA - Razgrad, which was repealed by the Supreme Administrative Court (SAC), the court panel accepted as a given and did not comment

the fact that the territorial direction is an obliged subject under the APIA. In the case led against a refusal of the territorial direction of the NRA - Varna, which was repealed by the Administrative court - Varna, was noted that:

... In this case the request is filed before a competent administrative body, which is an obliged subject under Art. 3 of the APIA⁴¹.

3.2. Public law organizations

After the introduction of the public law organizations as obliged subjects under the APIA in 2008, AIP supported several cases, mainly against refusals of trade companies, with the objective of proving that these are subjects obliged to provide information under the APIA in their capacity as public law organizations. This was done against refusals of „ViK“ OOD - Sliven (water/sewerage supply company), the National Electric Company (NEC), the Bulgarian Electric Holding (BEH) and two municipal companies in Blagoevgrad.

The question whether „ViK“ OOD - Sliven is an obliged subject under the APIA was raised in a case following a complaint of Association „Public barometer“ - Sliven against a silent refusal of the manager of the trade company. During the proceedings the counsel of the water company laid down an argument that the company is not an obliged body under the APIA, since it does not constitute a public law organization under the APIA. The silent refusal was repealed by the Administrative court - Sliven, which accepted in its decision that:

... „ViK“ OOD Sliven is a trade company with 51% state share, therefore under letter „c“ of § 1, item 4 of the Miscellaneous provisions of the APIA, it constitutes a public law organization, i.e. an obliged subject under Art. 3, Para. 2 of the APIA.

The court panel reached the conclusion that regardless of the trade character of the company it is created with the purpose of the satisfaction of public interests and is managerially controlled by assignors under Art. 7, item 1 or 3 of the Public Procurement Act (PPA), since the state rights in the company capital are exercised by the Minister of regional development and public works. Afterwards, this judgment was overruled by the SAC, but on the type of the information sought, and not because the supreme justices did not share the conclusions of the first instance that the water company is a public law organization⁴². This court practice found a sequel in another case of

⁴¹ Decision No. 157/27.01.2011 on adm. case No. 3250/2010 of the Administrative court - Varna.

⁴² Decision No. 10970/29.07.2011 on adm. case No. 13143/2010 of the SAC, Fifth Division.

Association „Public barometer“ - Sliven against a refusal of the manager of „ViK“ OOD - Sliven, where the SAC, as a cassation instance, explicitly declared that:

... Under the legal definition and having in mind the percentage share of the state in the capital of the trade company is correct the court's conclusion that it falls under the definition in § 1, item 4, letter „c“ of the Miscellaneous provisions of the APIA, therefore it is an obliged subject under Art. 3 of the act.⁴³

With the support of AIP were started several cases against refusals of the National Electric Company (NEC) and „Bulgarian Energy Holding“ EAD (BEH) to provide information with the motive that these are trade companies and are not obliged subjects under the APIA. Most of those cases were started following complaints of the nongovernmental organization „Green Policy Institute“. At the end of 2010, all cases were dismissed by rulings of the Administrative Court - Sofia City, the panels always reaching the conclusion that neither the BEH, nor the NEC are obliged subjects under the APIA. Concerning the NEC the judges accepted that the NEC does not constitute a public law organization under § 1, item 4 of the Miscellaneous provisions of the APIA, since both of the requirements of the law were not met, i.e. the company should be created with the purpose of satisfaction of public interests and be managerially controlled by assignors under Art. 7, item 1 or 3 of the PPA. The court accepted that the NEC is a company, created with the purpose of satisfaction of public interests, but is not controlled by assignors under Art. 7, item 1 or 3 of the PPA. This is because the owner of NEC's capital is BEH, which is neither a state body, nor a public law organization under the definition of the APIA.

Concerning the BEH, the ACSC reached the conclusion that the company is not a public law organization under the APIA by accepting that both of the requirements of the law were not met, i.e. the company should be created with the purpose of satisfaction of public interests and be managerially controlled by assignors under Art. 7, item 1 or 3 of the PPA. The court accepted that the BEH is managerially controlled by assignors under Art. 7, item 1 of the PPA (since the only owner of the company capital is the state through the Minister of Economy, Energy and Tourism), but the company is not created with the purpose of satisfaction of public interests, therefore the BEH does not constitute a public law organization under the definition of the APIA.

Subsequently, all of the rulings of the ASCS were upheld by the SAC with the exception of one of the cases where the supreme justices accepted that the NEC must provide information under the APIA, but in its capacity of a legal entity, financed by the state budget (Art. 3, Para. 2, item 2 of the APIA), since the information sought concerned

⁴³ Decision No. 881/17.01.2012 on adm. case No. 3126/2011 of the SAC, Fifth Division.

specifically the project Nuclear Power Plant „Belene“, and the company was receiving funds from the state budget for its implementation⁴⁴.

In two cases led against refusals of municipal companies from Blagoevgrad, the Administrative court - Blagoevgrad reached the conclusion that a specific trade company does not constitute an obliged subject as a public law organization under the APIA, since it is not created with the purpose of satisfaction of public interests. In one of those cases a complaint against the manager of „Parking lots and garages - Blagoevgrad“ EOOD was rejected, and in the other one the same happened to a complaint filed against the manager of „Biostroy“ EOOD - Blagoevgrad. What is remarkable is that in both of those cases the managers of the corresponding companies considered themselves obliged subjects under the APIA and their refusal were motivated differently. Thus, in the much contested decision of refusal from the manager of „Parking lots and garages“ was noted that the company is a public law subject under Art. 3 of the APIA, and in the refusal of the manager of „Biostroy“ was noted that the company *without a doubt is a public law organization under the legal definition of § 1, item 4 of the Miscellaneous Provisions of the APIA*. The conclusions of the Administrative court - Blagoevgrad on both cases were upheld by the SAC as a second instance⁴⁵.

3.3. Legal entities, financed with funds from the state budget

Court practice concerning the obliged subjects under Art. 3, Para. 2, item 2 of the APIA - individuals and legal entities, financed with funds from the state budget - is still scarce. In the first years after the adoption of the act in practice were raised some questions as whether the trade companies with a 100% state or municipal share constitute obliged subjects as entities, financed with funds from the state budget, or whether a participation in the capital of a company is not enough and it is necessary for the company to have received financing from the budget for that particular year. This issue was not decided in favor of the information seekers, since it was accepted that a participation in the capital of a trade company is irrelevant and in order to satisfy the provisions of Art. 3, Para. 2, item 2 of the APIA, it is necessary to have specific financing.

Concerning this category of obliged subjects under the APIA, in 2011 the ACSC repealed a silent refusal of the president of Popular library (community center) „Rayna Knyaginya“ in Sofia. In case proceedings of the popular library's counsel argued that

⁴⁴ Ruling No. 6740/16.05.2011 on adm. case No. 3129/2011 of the SAC, Fifth Division.

⁴⁵ Ruling No. 11970/27.09.2011 on adm. case No. 11817/2011 of the SAC, Fifth Division, and Ruling No. 12011/28.09.2011 on adm. case No. 11849/2011 of the SAC, Fifth Division.

the popular library's president is not an obliged subject under the APIA, therefore there was no duty for him to decide on a request for access to information. The court panel, though, did not accept that argument and reached the conclusion that:

... Under Art. 3, Para. 2, item 2 of the APIA this act is also applicable to access to public information, that is created or kept as far as only their activities financed with funds from the consolidated state budget, subsidies from the European Union funds or allocated through EU projects and programs, are concerned. Under the provision of Art. 2, Para. 2 of the Popular Libraries (Community Centers) Act, they are legal non-profit entities. Article 21 of the Popular Libraries (Community Centers) Act provides that they collect funds from the following sources: membership fees; cultural educational and information activities; subsidies from the state and municipal budgets; rentals of movable and immovable property; donations and legacies; other revenue. Item 3 of the said provision shows that the activity of popular libraries is financed partly with funds from the state budget. Therefore, the popular libraries are an obliged subject under Art. 3, Para. 2, item 2 of the APIA in relation to the activity, financed with funds from the consolidated state budget⁴⁶.

With these arguments the court repealed the silent refusal and ordered the president of the popular library to issue an act on the request for access to information, noting in the court ruling that the president of the community center is the person, which under the Popular Libraries (Community Centers) Act is representing the popular library. This is why the said president is bound when a request for access to public information is filed to issue an act under the APIA.

⁴⁶Decision No. 4642/27.10.2011 on adm. case No. 4092/2011 of the ACSC, I Division, 16th panel, entered into force.

4. Time limits for challenging the decisions under the APIA

The explicit refusals on requests for access to public information are subject to challenge before the respective administrative court within 14 days of notification of the requester. This time limit is set out in the APC (Administrative Procedure Code), to which the APIA is referring in relation to the procedure on challenging.

According to Art. 40, Para. 1 of the APIA:

The decisions for granting access to public information or for refusals to grant access to public information may be appealed before the administrative courts or before the Supreme Administrative Court depending on the body, which issued the decision, under the provisions of the Administrative Procedure Code.

According to Art. 149, Para. 1 of the APC:

The administrative acts can be challenged within 14 days of their notification.

In this regard there is no relation between the APC and its predecessor Administrative Proceedings Act (APA) on the time limits on challenging administrative acts. The APA provided also a 14 days time limit for challenging administrative acts. With the adoption of the APC, though, were introduced provisions on extension of this time limit in the cases of irregular notification of the administrative act.

According to Art. 140 of the APC:

(1) When in the administrative act or in the notification of its issuing it is not indicated before which body in within what time limit a complaint may be filed, the respective time limit for challenging under this section is extended to two months.

(2) When in the administrative act or in the notification of its issuing it is incorrectly indicated that it is not subject to challenging, the time limits for filing a complaint under this section are extended to six months.

These provisions of the APC are not only applied when challenging refusals under the APIA, but are really useful, since the requesters not always know that they have the right to challenge the refusals under the APIA, even less do they know which court is competent to hear their complaint and what is the time limit to file it. Precisely for that reason, when in a refusal under the APIA it is not indicated before which court and / or in what time limit it is subject to challenging, the requesters often miss the opportunity to challenge the act, which prevents the exercise of their right of access to information.

In the cases, supported by the AIP legal team, there has been no instance when in the challenged refusal under the APIA it was incorrectly indicated that it is not subject to challenging, and therefore the court has never applied the provision of Art. 140, Para. 2 of the APC on extension of the time limit to six months. In a significant number of the cases on access to information though court practice on Art. 140, Para. 1 of the APC, on extension of the time limits to two months, was accumulated.

For example, in a case led against the refusal of the chief secretary of the President to provide information on the President's pardon in Bulgaria, a panel of the SAC accepted that:

The challenged decision of the chief secretary does not indicate before which body and in what time limit it may be challenged. This circumstance, according to Art. 140, Para. 1 of the APC extends the time limit for filing a complaint to 2 months⁴⁷.

In a case led against a refusal of the Ministry of Agriculture and Foods (MAF) to provide information about a license issued for the execution of the selection with the breed „Bulgarian Shepherd Dog“, a panel of the SAC noted that:

In the challenged refusal the opportunity and time limit for its challenging are not indicated, therefore the present panel of the Supreme Administrative Court finds that the complaint is filed within the legal time limit and is admissible⁴⁸.

In two cases the ACSC also accepted that a complaint that is filed in the two months limit under Art. 140, Para. 1 of the APC is admissible, since in the refusal under the APIA the court and time limit for challenging are not indicated. In one of these cases was challenged the refusal from the director of the 28th Air Detachment (the government air service) to provide information on the flight expenses of the Prime Minister. The panel indicated that:

The complaint is admissible - it is filed by a due party in the time limit under Art. 140 of the APC, against an administrative act open to challenge⁴⁹.

⁴⁷ Protocol ruling of the 02.02.2011 on adm. case No. 10370/2010 of the SAC, Fifth Division. *Case of Lyuben Obretenov („Sega“ newspaper) v. the President.*

⁴⁸ Decision No. 2139/11.02.2011 on adm. case No. 2342/2010 of the SAC, Fifth Division, upheld with Decision No. 7619/01.06.2011 on adm. case No. 4389/2011 of the SAC, Five-Member panel. *Case of the non-profit „International Association Karakachan Dog“, Plovdiv v. the MAF.*

⁴⁹ Decision No. 3482/12.07.2011 on adm. case No. 6873/2010 of the ACSC, II Division, 32nd panel. *Case of Vesselka Venkova („Dume“ newspaper) v. the 28th Air Detachment.*

In the other case was challenged a refusal of the Bulgarian Accreditation Service to provide access to a report of a peer review of the European Co-operation for Accreditation. The panel indicated that:

... given the lack of indication in the administrative act before which body and in what time limit a complaint may be lodged, as well as the lack of data about the date of delivery of the said act, the court accepts that the complaint, subject to the present litigation, is filed within the two months preclusive time limit set out in Art. 140, Para. 1 of the APC by a legitimated person under Art. 147, Para. 1 of the APC, and against an administrative act open to challenge, therefore it is admissible⁵⁰.

In a case led against a refusal of the mayor of Harmanli Municipality to present a copy of a report from a Public Financial Inspection Agency inspection in the municipality, a panel of the Administrative court - Haskovo accepted that the lack of even one of the requirements in the administrative act - before which organ or the time limit for lodging a complaint - leads to an application of Art. 140, Para. 1 of the APC and extension of the time limit for challenging. In its motives the panel indicated that since in the challenged refusal is indicated only before which court a complaint may be filed, but not in what time limit, then the provision of Art. 140, Para. 1 of the APC should be applied⁵¹.

The provision of Art. 140, Para. 1 of the APC and the case-law on its application show that introduction of longer time limits for lodging complaints against refusals under the APIA, where before which court and in what time limit a complaint may be filed are not correctly indicated, ensures adequately the defense of the right of access to information in court.

⁵⁰ Decision No. 2083/19.04.2012 on adm. case No. 40/2011 of the ACSC, I Division, 1st panel. *Case of Georrgi Todorov v. Bulgarian Accreditation Service.*

⁵¹ Decision om 30.03.2012 on adm. case No. 778/2011 of the Administrative court - Haskovo. *Case of Ivan Atanasov v. Harmanli Municipality.*

5. Costs and expenses in the cases under the APIA

In 2011 was noted a tendency towards an increase of the cases where the courts order the requesters to pay costs and expenses for legal advice of the institutions when the complaints against refusals of the administrations are rejected. Thus, for example, the National Movement „Ecoglasnost“ was ordered to pay costs and expenses for legal advice to the state in a case where the issue was the substitution of nuclear fuel in NPP „Kozloduy“⁵². The citizen William Popov was ordered to pay costs and expenses in a case led against a refusal of the Ministry of Defense to provide information in relation to the number of closed down units, unsuitable or no longer needed armament and equipment by species and genera, etc⁵³. Vessela Venkova, journalist in „Duma“ newspaper, was ordered to pay costs and expenses in a case led against a refusal of the 28th Air Detachment to provide information about the flight expenses in the country of Prime Minister Borissov⁵⁴. The listed cases are only examples but the problem is larger. It is disturbing that this is becoming a trend since, so far, such cases were exceptional. The origin of this trend is rooted in Art. 143 of the Administrative Procedure Code adopted in 2006, which introduced costs and expenses liability for complainants, when the court rejects the challenge. In 2007 the Constitutional court rejected a request of the Ombudsman for declaring this norm counter to the constitution⁵⁵, and in 2010 the SAC adopted an interpretative decision, according to which in cases where the court rejects the complaint or the complainant retracts his complaint, this party owes payment of costs and expenses for legal advice, when the administrative body is represented by an in-house counsel in the administrative court proceedings⁵⁶. The most serious problem is that in the said decisions of the Constitutional court and the SAC no distinction is made between the different categories of applicants and types of cases, and such distinction exists and it is determined mostly by whether a private or a public interest is defended in a certain case.

⁵² Decision No. 5621/20.04.2011 on adm. case No. 8872/2010 of the SAC, Fifth Division.

⁵³ Decision No. 7927/06.06.2011 on adm. case No. 4714/2011 of the SAC, Five-Member panel.

⁵⁴ Decision No. 3482/12.07.2011 on adm. case No. 6873/2010 of the ACSC, II Division, 32nd panel.

⁵⁵ Decision No. 5/2007 on const. case No. 11/2006 of the Constitutional court.

⁵⁶ Interpretative decision No. 3/13.05.2010 on interpr. case No. 5/2009 z. of the SAC, General assembly of the colleges.

6. Silent refusals

The case-law in the direction of repealing silent refusals continues its solid trend. In the period 2009-2011, the Supreme Administrative Court, the Administrative Court Sofia City, and administrative courts in the country have repealed tens of silent refusals by the administration in access to information litigation, supported by AIP. According to this case-law, the only procedure recognized by the Access to Public Information Act when an obliged body receives a regular request for access to information is to respond by issuing a motivated decision for granting or for refusing access to information, whereby it notifies, in writing, the applicant for its decision.

2009

In 2009, the ACSC repealed a silent refusal by the Mayor of the Sofia Municipality (SM) to provide a copy of the contract for Feasibility Research and its accompanying documents for the project „Management of Domestic Wastes in the Sofia Municipality“ for financing from the EC funds, signed on 24th of October, 2007 between the SM and a consortium of three companies. In its judgment, the Court remarks that:

... After not making a statement within the legally prescribed time limit on the request, the Mayor of the SM has made a significant breach of the proceedings rules stated in Art. 38 and Art. 39 of the APIA, which require an explicitly written form of the refusal to provide access to public information, and namely that form to be objectified in a motivated decision, stating the legal and factual grounds of the refusal, and which is given to the applicant. The silent refusal as per the APIA is not permissible, whereby the latter for that reason is to be repealed, without looking into the matter of the argument.⁵⁷

Later, this decision of the ACSC was upheld by the SAC as the higher instance.⁵⁸

With identical arguments, the ACSC repealed the silent refusal of the State Directorate of Forestry - Sofia to provide information regarding whether it has paid the company „Vitoshka ski“ JSC fees for use of land in the area of Tourist Center „Aleko“ in National Park „Vitoshka“ for the year of 2008, respectively which months were such fees paid for.⁵⁹ The same motives were given by the ACSC for the repeal of the silent refusal of the Chairman of the State Agency for Youth and Sports (SAYS) to grant access to the list of the legal persons, including sports federations, which received financial assistance

⁵⁷ Decision No. 28/08.06.2009 on administrative case No. № 1003/2008 of the ACSC, II division, 31st panel.

⁵⁸ Decision No 14896/07.12.2010 on administrative case No. № 11136/2009 of the HAC, Fifth division.

⁵⁹ Decision No. 40/26.05.2009 on administrative case No. 179/2009 of ACSC, II division, 37th panel.

from the SAYS for the period January 1st, 2007 - January 1st, 2009.⁶⁰ In another decision, a panel of the ACSC repealed a silent refusal of the Regional Governor of Sofia Region to provide information for all construction schemes, general and detailed construction plans, entrusted by the Regional Governor for the period 2005-2009. Besides the above-stated motives, the Court remarks that:

... The failure of the Regional Governor to issue a decision regarding the request for access to public information is behaviour not acceptable by the law. Which is so because it is an underlying principle in administrative law that the institutions cannot behave in a way contradicting the behaviour prescribed by the law, and Art. 28 of the APIA imperatively obligates the obliged bides to present a motivated decision.⁶¹

The conclusion that the silent refusal is materially unacceptable behaviour and only on that basis, it is subject to repeal, was reached also by a three-member panel of the SAC when rejecting the silent refusal of the Minister of Health to provide information related to the completed external assessment of the activity of nongovernment organisations that received financing on the programme „Prevention and Control of HIV/AIDS.“⁶² The same motive was used by a three-member panel of the SAC to repeal a silent refusal by the SM to provide information regarding the leaves of absence and business trips of the Chairman of the Sofia Municipal Council (SMC).⁶³ The motives of a five-member panel of the SAC were also similar in a case against a silent refusal of the Ministry of Interior to provide a citizen with a copy of the documents that served as a basis for specific police actions against him as a teacher and chairman of the Municipal Coordination Council of the Syndicate of Bulgarian Teachers in the Yakimovo Municipality, Region of Montana.⁶⁴

2010

In 2010, The Administrative Court - Yambol repealed a silent refusal of the Mayor of the Municipality of Yambol to provide information related to an assigned public procurement for reconstruction and rebuilding of an existing building in a complex for social services for children and adults in the town of Yambol. In the motives, the Court indicated that the failure to respond within the time limit is a silent refusal which is

⁶⁰ Decision No. 47/25.05.2009 on administrative case No. 1778/2009 of the ACSC, I division, 2nd panel.

⁶¹ Decision No. 74/2.11.2009 on administrative case No. 4852/2009 of the ACSC, II division, 26th panel.

⁶² Decision No. 15581/17.12.2009 on admin. case. N. 6496/2009 of the HIC, Third division. This Decision was overruled by Decision No 7489/07.06.2010 on admin. case No. 761/2010 of the HAC. Five-member panel - II collegiate, signed with special opinion by the judges Marina Mihaylova and Andrey Ikonov.

⁶³ Decision No. 3532/17.03.2009 on admin. case No. 5863/2008 of the HAC, Third division.

⁶⁴ Decision No. 11326/05.10.2009 on admin. case No. 7060/2009 of the HAC, Five-member panel.

contrary to the law and therefore is to be repealed.⁶⁵ With the same motive, the Administrative Court - Silistra repealed a silent refusal of the Mayor of the Municipality of Silistra to provide information regarding the sums paid by the Municipality of Silistra to transportation companies in the period 2007-2010.⁶⁶

The ACSC rejected a silent refusal of the Chief Secretary of the President of the Republic of Bulgaria to provide access to the transcript of the meeting of the Heads of State of Bulgaria and Russia in 2008 in Sofia. In the judgment, the court indicated that:

Pursuant to the provision of Art. 28, para. 2 of the APIA, the administrative body is obligated to issue a decision regarding the request made for access to public information, whereby by the institution's estimation, that decision may be affirmative - to provide the requested information - or nugatory - to refuse the provision of the same, but the institution is not given the normative permission to remain silent. In connection to that, the Court finds that any silence of an administrative body regarding a request for provision of public information, made to it, considering the imperative provision of Art. 28, para. 2 of the APIA, is illegal.⁶⁷

Several times in 2010, silent refusals were also subject to repeal by panels of the SAC. By a decision from May, the SAC upheld a decision of the ACSC, whereby a silent refusal of the Sofia Municipality to provide access to the prepared strategy and program for the green areas in the city of Sofia was repealed.⁶⁸ By a decision from October, the SAC repealed the silent refusal of the Minister of Health to provide a copy of a „Master Plan for Reform of the Hospital Sector of the Republic of Bulgaria.“⁶⁹ By a decision of the SAC from November, two more silent refusals of the Minister of Health were repealed. In the first case, the request was for a copy of the job description of seven positions in the Legal Directorate of the Ministry.⁷⁰ The second request was for the statements and reports prepared in the Ministry, regarding the adoption of the Regulation on the Accreditation of Medical Establishments.⁷¹

⁶⁵ Decision No. 131/11.05.2010 on admin. case No. 96/2010 of the Administrative Court - Yambol.

⁶⁶ Decision No. 70/04.11.2010 on admin. case No. 156/2010 of the Administrative Court - Silistra.

⁶⁷ Decision No 3593/11.11.2010 on admin. case No 5159/2010 of the ACSC, II division, 237th com. Judge Slavina Vladova.

⁶⁸ Decision No. 6924/27.05.2010 on admin. case No. 10715/2009 of the HAC, Fifth Division.

⁶⁹ Decision No. 11766/12.10.2010 on admin. case No. № 128/2010 of the HAC, Fifth Division.

⁷⁰ Decision No. 12784/01.11.2010 on admin. c. No. 1911/2010 of the HAC, Fifth Division.

⁷¹ Decision No. 13238/08.11.2010 on admin. c. No. 1910/2010 of the HAC, Fifth Division.

2011

In 2011, the trend of repealing silent refusals continued steadily in the litigation. In these cases, the courts again accepted that the silent refusal is, in the light of APIA, a non-permissible by the law failure to act of the administrative institutions, as well as that the only legally recognized possibility for the obliged bodies upon receipt of a regularly made request is to make an explicit decision regarding the provision of information, or the refusal to provide access.

By a decision from 20.01.2011, the ACSC repealed a silent refusal of the Mayor of the Sofia Municipality on a request for access to the investment programme of the municipality for 2010 for the expenses for the acquisition of private real estate.⁷² The information was requested in connection to the expenses made by the municipality for the acquisition of private real estate related to the reconstructions of blvd. „Lomsko Shose.“

By a decision from 27.01.2011, the AC - Varna repealed a silent refusal of the Director of Territorial Directorate of the NRA to provide access to information, connected to the amount and collection of the public revenues of the local judicial authority. In the ruling, the Court pointed out that:

*... The rules for good administration in a democratic and law-abiding state with a civil society exclude the inaction of the obliged bodies under the APIA.*⁷³

By a decision dated 14.02.2011, the AC - Varna rejected a silent refusal of the Mayor of the Municipality to issue a decision on an electronically filed request for access to information regarding the construction of a new building in the city. In its motives, the Court indicated that since the Municipality of Varna has approved Internal Access to Information Implementation Rules, and since they indicate that requests submitted by e-mail are considered as written requests, then the Municipality has become obliged to issue a decision on the request submitted electronically.⁷⁴

By a decision dated 21.02.2011, the AC - Pazardzhik repealed the silent refusal of the Mayor of the Municipality of Pazardzhik to provide access to information in the form of reference regarding all contracts, signed by the Municipality for provision of goods or services in the period 2007-2010, where the reference includes the names of the parties to the contracts and the price, as well as information on the executed contracts,

⁷² Decision No. 301/20.01.2010 on admin. c. No. 8149/2010 of the ACSC, II Division, 27th panel.

⁷³ Decision No. 157/27.01.2011 on adm. c. No. 3250/2010 of the Administrative Court - Varna, Judge Gergana Stoyanova.

⁷⁴ Decision dated 14.02.2011 on adm. c. No. 3831/2010 of the Administrative Court - Varna, Judge Maria Ganeva.

where the Municipality still owes the contracted amounts.⁷⁵ The decision was upheld by the SAC in early 2012.⁷⁶

By a decision dated 9.05.2011, the ACSC repealed the silent refusal of the Director of the National Veterinary-Medical Service (NVMS) to provide information regarding an inspection carried out by the NVMS to a shelter for stray dogs in the city, managed by the „Association for Animal Protection - Pleven 2008.“⁷⁷

By a decision dated 12.12.2011, the ACSC repealed the silent refusal of the Director of the National Information Centre (NIC) to provide access to information regarding the diploma of the former executive director of National Agricultural Fund Kalina Ilieva.⁷⁸

Trends in the Repealing of Silent Refusals

Besides the above consistent litigation of repealing silent refusals, two new elements ought to be remarked, related to the adoption of the Administrative Procedure Code.

The first of those is that by the passing of the APC, a one-month time period was introduced for appealing silent refusals (Art. 149, para. 2 of the APC). This time frame is significantly more favorable for the requestors than the previous regulation as per the Law of Administrative Processes, according to which silent refusals were to be appealed within 14 days of the deadline for the issuing of a decision by the administrative body. Inarguably, the longer time frame for appealing silent refusals better guarantees the right of protection of those seeking information.

The second element is related to the provision of Art. 174 of the APC, according to *which when the Court obliges the institution to issue an administrative action or document, the Court also determines a deadline for that*. The application of this provision is related to the operative part of the court decisions repealing silent refusals under the APIA. Still, as a whole, judges assume that the silent refusal under the APIA is not permissible and on those grounds alone is to be overturned, without looking into the legal argument on the merit. In these cases, the court panels return the file to the administrative body, obligating the latter to issue an explicit written decision on the request for access to information. It is getting more frequent during the last 2 years that in case of repeal of the silent refusal, the court will also decide on the merits the legal argument, and when it finds that none of the restrictions to the right of access to information applies, to obligate the administrative body to provide the requested

⁷⁵ Decision No. 86/21.02.2011 on admin. case No. № 62/2011 of the Administrative Court - Pazardzhik.

⁷⁶ Decision No. 2077/10.02.2012 on admin. case No. 4763/2011 of the SAC, Fifth division, Judge-rapporteur Andrey Ikonomov.

⁷⁷ Decision No. 2191/09.05.2011 on admin. case No. 2109/2011 of the ACSC, I division, 4 panel.

⁷⁸ Decision No. 5654/12.12.2011 on admin. case No. 292/2011 of the ACSC, II division, 24 panel.

information. The common for the two types of operating parts of these court decisions (return for decision or obligate to provide the information) is that they fall within the hypothesis of the quoted provision of the APC, since they require the administrative body to issue a written decision in response to the received request for access to information. The case-law on access to information shows that setting an explicit deadline for making the decision (correspondingly for the providing of information) in the operating part of the court decision helps a lot for the timely fulfillment of that obligation on the side of the administration. The cases in which an administrative body executes a court decision requiring it to provide information are normal administrative practice. We have to also indicate, however, that too often when a silent refusal has been repealed and the unanswered request has been returned for reconsideration (without deciding the legal argument on the merits), it happens that the administration refuses to provide the requested information, this time with an explicit written decision.⁷⁹ In relation to that, it must be noted that there is a positive administrative practice where after the repeal of a silent refusal and return of the request for reconsideration (without explicit instruction to provide access to the information), the respective administration provides access to the requested information. For example, when executing a court decision regarding a request for access to information, the Bulgarian Agency for Food Safety (BAFS) provided in July 2011 information regarding an inspection carried out by the agency's representatives to the shelter for stray dogs in Pleven.⁸⁰ In another case, after a court repeal of a silent refusal on an access to information request and return of the request for explicit decision, the respondent institution even published the entire requested information on its web page. After the ACSC repealed the silent refusal of the chairman of the State Agency for Youth and Sports (SAYS) to provide access to the list of juridical entities and sports federations that received financial assistance from SAYS for the period between 1 January 2007 and 1 January 2009 with a decision as of May 2009, the SAYS published the entire requested information in its web page in June 2009.⁸¹

⁷⁹ An issue analyzed in the previous book in the series (viz. Access to Information Litigation in Bulgaria 2005-2008: Selected Cases, volume 4, p. 32).

⁸⁰ Decision No. 2191/09.05.2011 on admin. case No. 2109/2011 of the ACSC, I division, 4 panel.

⁸¹ Решение № 47/25.05.2009 г. no a.g. № 1778/2009 г. на АССТ, I отделение, 2 състав.

III. LIMITATIONS TO THE RIGHT OF ACCESS TO INFORMATION

1. International Standards Regarding Limitations to the Right of Access to Public Information

The right of access to information held by state bodies is guaranteed by Art. 19 of the Universal Declaration of Human Rights,⁸² Art. 19 of the International Covenant on Civil and Political Rights,⁸³ Art. 10 of the European Convention on Human Rights (ECHR).⁸⁴ The area of access to ecological information, the detailed regulation of which precedes historically that of the general access to any public information, is under the effect of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.⁸⁵ All indicated international instruments set forth specific requirements regarding the exemptions to the right of access to information.

The detailed development of the standards in the area of access to information held by national institutions begins within the European Council back in 1981. In that regard, two recommendations by the Committee of Ministers to the member states were adopted.⁸⁶ In 2009, the first international binding treaty in the area was adopted - the Council of Europe Convention on Access to Official Documents. The Convention was signed by 14 states, ratified by 5 states, and is yet to come into effect after a total of

⁸² Approved by the Parliamentary Assembly of the UN on 10 December, 1948.

⁸³ Approved on 16 December, 1966, in effect since 23 May, 1976, published in the State Gazette issue 43, 28 May, 1976.

⁸⁴ The relevance of the ECHR can be drawn from two judgments of the European Court of Human Rights in 2009 (Judgment dated 14 April 2009 / Application No. 37374/05 Judgment as of May 26, 2009 on the Case Kenedi v. Hungary).

⁸⁵ Adopted in 1998 in Aarhus, Denmark, also known as the Aarhus convention. Ratified by law promulgated in SG, issue 91 from 2003, the text was published in SG, issue 33 for 2004 (under the name Aarhus Convention).

⁸⁶ Recommendation R (81) 19 and Recommendation R (2002) 2 of the Committee of Ministers to the Member States regarding the access to official documents, accessible in Bulgarian at: http://www.aip-bg.org/documents/rec2_bg.htm .

ten member states ratify it.⁸⁷ The Republic of Bulgaria has not yet ratified the Convention.⁸⁸ It also contains the heretofore most detailed international regulation regarding the restrictions of the access to official documents.

At an European Union (EU) level, there is a legal regulation that provides for a general right of access to documents held by EU institutions. That is Regulation 1049/2001.

Documents regulating the protection of personal data are Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, are Regulation (EC) No. 45/2001 of the European Parliament and the Council dated 18 December, 2000, on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the Community and on the free movement of such data. Those instruments are relative, since the protection of personal data is one of the exemptions to the right of access to official documents. The conflict between the two rights is subject to the practice of the European Court of Justice.

Related to the topic of access to information and its limitations in the area of the access to environmental information regarding are Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

⁸⁷ The list of countries that have signed and ratified the convention is available at:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG>

⁸⁸ According to the analysis of the Consistency report between the Bulgarian legislation and the Convention, made by the AIP in 2010, the Bulgaria legislation allows the signing and ratifying the convention without law changes.

Requirements to the Access to Information Limitations

According to the international standards, the limitations to the access to information are only applicable if certain cumulative conditions are present. According to Art. 3, par. 1 of the Convention on Access to Official Documents:

Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting, specified in the Convention.

The text recreates a similar phrasing, provided by Art. 10, par. 2 of the European Convention on Human Rights.⁸⁹ The legal literature describes the three conditions or requirements for the applicability of the limitations to the right of access to information as *three-part test*. According to that test, a limitation to the right of access to information is only permissible when it is:

- explicitly prescribed by law;
- proportional to the purpose of protecting one or more of the legally prescribed interests;
- necessary in a democratic society.

The *three-part test* is also provisioned in Regulation (EC) No. 1049 from 2001 of the European Parliament and the Council from 30 May, 2001 on the public access to documents of the European Parliament, the Council, and the Commission, as well as in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

⁸⁹ These conditions are applied to the limitations of the right to acquire and distribute information, guaranteed by art. 10 of the ECHR. An identical „triple test“ is provided for in art. 8, par. 2 of the ECHR regarding the limitations of the right to respect the personal and family life. The Convention has been ratified by law, accepted by the People's Assembly on 31 July, 1992, published in SG issue 66 from 1992. In effect in the Republic of Bulgaria since 7 September 1992.

The Requirement of „Necessity in a Democratic Society“

In addition to the above-quoted paragraph 1, in the following paragraphs 2 and 3 of art. 3 of the Convention on Access to Official Documents (the Convention), the following is stated:

2. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

3. The Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

An overview of the three paragraphs of Art. 3 of the Convention leads to the conclusion that three conditions - or requirements - for applicability of the limitations of the right to information have been established. According to them, a limitation to the right to information may be permissible only when:

- It is to a degree proportional to the protection of the listed interests,
- Provision of the information will harm or may harm the protected interests,
- There is no overriding public interest in the disclosure.

These three additional conditions should be regarded as part of the requirement for „necessity in a democratic society.“⁹⁰

The presence of these additional conditions, part of the requirement „necessity in a democratic society“, should also be cumulatively given. For example, if there is no proportionality, i.e., there is a rejection to give access to the whole information in a given document to protect a name or address in it, the limitation will be disproportionate, and therefore illegally applied.⁹¹ At the same time, if there is harm to come from the provision of the information, but there is overriding public interest in its disclosure, then it should be provided.

⁹⁰ An argument for that is contained in the circumstance that while the requirements that the limitation must be „prescribed by law“ and to aim for „the protection of a legitimate interest“ are obvious in content, the requirement „necessity in a democratic society“ needs further clarification. In its practice regarding article 10 of the ECHR, the European Court on Human Rights supposes that the limitation is „relevant and sufficient“, and that there is a „pressing social need“ for its application (see Judgments on the cases *Lingens vs. Austria*, *Sunday Times vs. UK*, *Handyside vs. UK*, *Castels vs. Spain*, and many others). The check if the limitation is „relevant and sufficient“ is obviously a check for proportionality of the interference, while the check for „pressing social need,“ which, according to the case-law of the Court includes „balance of interests“ (*Lingens* and others), can be assumed that it coincides in content with the harm and the balance of interest tests.

⁹¹ Regarding the juridical practice on the adherence to the principle of proportionality, see below.

The requirements of Art. 3, par. 2 of the Convention are also known as „harm test“ and „balance of interests“ principle.⁹² They are also encountered in other international documents, such as the „balance of interests“ principle explicitly stated in the Aarhus Convention. According to its Art. 4, par. 4, last sentence, all provided for „The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure...“

Harm Test - Time Limits for the Applicability of the Limitations

The provision of Art. 3, par. 3 of the Convention on Access to Official Documents foresees time limits, after the duration of which the states must not apply limitations to the right to information. The requirement for determination of time limits is the realization of the so-called „harm test.“ For example, in par. 38 of the Explanatory Report, among the rest, it is assumed that:

*... Legislation could for example set down varying requirements for carrying out harm tests. These requirements could take the form of a presumption for or against the release of the requested document.*⁹³

The legislative introduction of presumption against the provision of the requested document may be in the form of a legislative determination of time limits of protection of the information. On the question regarding the legal terms for application of the limitations as one of the forms of the „harm test“, the Explanatory memorandum also states:

The outcome of the „harm-test“ is closely connected with the lapse of time. For some limitations, certain events inevitably lead to the cessation of that limitation. In other instances, the passage of time may reduce the damage of release of the information.⁹⁴

Therefore determining legal time limits of applicability or „duration“ of the limitations practically means that at the moment of defining given information as limited for access, it is at its most sensitive, while with the passing of time, the sensitivity decreases, and with that, the protection via limiting access should fall away.

⁹² Comp par. 36-38 of the Explanatory Report to the Convention on Access to Official Documents, accessible at the following location: http://www.aip-bg.org/pdf/expl_report_conv_access_bg.pdf

⁹³ Ibid.

⁹⁴ Ibid., par. 39.

2. Access to Information Limitations as per the Bulgarian Legislation

The indicated requirements to the limitations have been reflected in Bulgarian legislation. The limitations to the right of access to information are described in a law, and the legitimate interests correspond to the ones listed in the Convention on Access to Official Documents. The normative acts provide for the requirement for proportionality in the application of the limitations and the harm test and the balance of interests, forming the requirement of „necessity in a democratic society.“ Below you can find in which instruments and in what ways the specified conditions have been introduced to the legislation.

2.1. Limitations Must be Prescribed by Law

The right of access to public information is not absolute. In Art. 41, Par. 1, Item 2 of the Constitution, is stipulated that the right of every person to seek, obtain, and disseminated information is subject to limitation for the protection of other rights and legal interests, which are: the rights and reputation of others, as well as the national security, public order, people's health, and morals.⁹⁵ „According to the Constitutional Court, this right [in art. 41] also has the corollary of an obligation to provide information“⁹⁶. Regarding the limitations of the right as per Art. 41 of the Constitution, the following interpretation was assumed in 1996:

... Here also, as in each separate case connected to the interpretation of the limitations, it is necessary to establish that their application - regardless of the fact that the provision for them is in defence of another constitutionally recognised interest, the interpretation must be based on the assumption that is not a question of choosing between two contradictory principles, but for the application of an exception of on principle (the right to seek and receive information), and that exception is subject to a limiting interpretation.⁹⁷

Therefore each limitation to the right of access to public information is regarded as an exception of the principle of general accessibility and is subject to a limiting interpretation.

⁹⁵ The content of this norm completely coincides with the text of art. 19 of the International Covenant on Civil and Political Rights.

⁹⁶ Decision No. 7 dated 4 June, 1996, on Constitutional Case No. 1/1996.

⁹⁷ Ibid.

1. In national laws for access to information (or for freedom of information), it is usual to find an exhaustive listing of the limitations to the right to information. There is also a separate part, section, chapter, division, dealing with the limitations. The detailed establishment of the limitations or some of them may be contained in other laws.

The Bulgarian Access to Public Information Act contains a listing of the limitations (art. 37, par. 2). Their settlement in the APIA is, however, scattered. Pertaining to this matter are also art. 5, art. 7, art. 13, par. 2, art 17, par. 2, art. 37 of the APIA.

The listing of the limitations is present in art. 37, par. 1 of the APIA, where the reasons for refusing access to information are indicated. They include information classified as state or business secret, information under art. 13, par. 2 (preparation documents and information, related to negotiations) and information relating to third parties⁹⁸. The category of limitation for protection the interests of third parties should cover commercial secrets and the personal data protection.

The regulation related to the limitation to the right of information is also contained in other laws. For example, in the Law of Protection of Classified Information (PCIA), the definitions of the terms „state secret“ (art. 25) and „business secret“ (art. 26) are given, and the procedure of classifying information is provisioned for. The Personal Data Protection Act (PDPA) gives a definition of the term „personal data“ (art. 2, par. 1) and provisions for the hypotheses (art. 4) of their permissible processing, which includes the access to such data. In par. 1, p. 9 of the Additional Decrees of the Fair Competition Act, there is also a definition of the term „commercial secret,“ which is detailed in art. 17 of the APIA.

Of significance to the application of the limitations are also the norms foreseeing sanctions for the provision of unregulated access to information covered by the limitations. Art. 357 of the Criminal Code (CC) there is a provision for criminal liability for the publication of a state secret, art. 284 of the CC provides for liability in case of publishing a business secret, art. 360 of the CC makes criminal the publication of another secret specified by a law, a decree of the Council of Ministers, or an executive order, art. 145 of the CC provides for liability in case of dissemination of so-called personal secret. Separate laws, such as PCIA and the PDPA, provide for administrative liability for administrative breaches.

⁹⁸ The provisioned in Art. 37, par. 1, p. 3 reason for refusal in the cases when the information was received within the last six months is not an actual limitation. Its purpose is not to protect a certain legitimate interest, but to prevent abuse of the right and overloading administration.

2. Not each norm that mentions the term „secret“ can be used as legal grounds for limiting the rights as per the APIA⁹⁹. As per the judicial practice, the norm that can be used as grounds for a refusal should be with a clear and specific content. For example, a refusal cannot be argued for with a reason of „business secret“ by quoting a legal decree that obligates the state institutions „when performing their official obligations to not publicize facts or circumstances they became aware of during or because of the execution of their business/work obligations“ (a number of decrees still introduce „business secrets“ in that way). The only sufficient grounds for refusal on that argument may be *a specific decree ... [of a law] by the force of which the requested information is defined as business secret*.¹⁰⁰ In the specific case, the plaintiff - the Civil Society „Social Barometer“ - Sliven requested of the Director of the Agency for State Internal Financial Control access in the form of a copy of an audit record. According to the interpretation of the SAC, the norm, according to which the ASIFC institutions are required to keep business secret is not grounds to limiting access to audit reports¹⁰¹.

The range of the limitation must be strictly adhered to when explaining a refusal. It is not permitted to widen its interpretation and application. For example, the limitation provided for in the PCIA for access to „reports ... on the operative work of the security services“ is not automatically applied for each case regarding a report, issued by such services. This category is not applicable to requested report of the security services relating to ... *the participation of Bulgarian citizens or companies in the petroleum trade with Iraqi companies or state institution or representatives during the time of Saddam Hussein's regime*¹⁰². According to the Court, ...*in this case, the subject of the request for access is not the operative work of those services, but only the result thereof*¹⁰³.

Therefore, despite the fact that the quoted limitation may have been originally valid for classifying information as state secret, it cannot be used as grounds for the classifying of such report, nor legal grounds for refusal as per art. 37, par. 1, p. 1 of the APIA.

⁹⁹ If the terminology, accepted in the practices of the European Court of Human Rights or art. 10 and art. 8 of the ECHR, the conclusion can be drawn that national courts have requirements to the „quality of the law“ introducing a limitation of the right as per the LAPI.

¹⁰⁰ Decision No. 10539/22.11.2002 on admin. case No. 5246/2002 of the HAC, Fifth division, judge-reporter Marina Mihaylova.

¹⁰¹ For years now the access to the audit reports of the inheritor of the ASIFC - the Agency of Financial Inspection - has been free.

¹⁰² Decision No. 6/03.01.2006 on admin. case No. № 4268/2005 of the HAC, Fifth division, judge-reporter Vanya Ancheva.

¹⁰³ Ibid.

2.2. Interests Protected as per the Convention on Access to Official Documents and Bulgarian Legislation

According to the Council of Europe's Convention on Access to Official Documents, approved in 2008, a limitation to the right of access may only be permitted for the interests of specific, exclusively listed interests. According to art. 3, par. 1 of that convention, limitations are only permissible in the protection of:

- a. national security, defence and international relations;
- b. public safety;
- c. the prevention, investigation and prosecution of criminal activities;
- d. disciplinary investigations;
- e. inspection, control and supervision by public authorities;
- f. privacy and other legitimate private interests;
- g. commercial and other economic interests;
- h. the economic, monetary and exchange rate policies of the state;
- i. the equality of parties in court proceedings and the effective administration of Justice;
- j. environment; or
- k. the deliberations within or between public authorities concerning the examination of a matter.

The listing of legitimate interests is exhaustive and the member states of the Council of Europe may not approve protection of a wider circle of interests. They may, however, narrow the range of the protection by excluding from the national laws some of the interests listed in the Convention. In par. 22 of the Explanatory Report to the Convention, the following comment can be found:

The list of limitations in Article 3, paragraph 1, is exhaustive. The limitations are applied to the content of the document and the character of the information. That, naturally, does not bar national legislation to decrease the number of reasons for limitations or to formulate the limitations more narrowly, with the intent of guaranteeing wider access to official documents...

In Art. 41, par. 1, sentence the second of the Constitution, there is a list of the legitimate interests, the protection of which implies the right to seek, receive, and disseminate information may be limited. The context of the text is completely repeated in art. 5 of the APIA. The content of art. 37, par. 1 is more specific, and so is that of other norms of the APIA that state more precisely the protected interests.

If we look for the correlation of the categories listed in the Convention on Access to Official Documents and Bulgarian legislation, we'll find it, generally for all eleven of them. As per art. 25 of the Protection of Classified Information Act, state secret envelops the protection of four categories of interests - national security, defence, foreign policy, and constitution-protected order. These four interests are specified in a slightly different way in the three sections of the list - Attachment No. 1 to art. 25 of the PCIA.

Plans and systems for building security, for example, which fall in the category of protection of public safety, may be classified in certain cases as state secret¹⁰⁴, while in other occasions are listed as business secrets.

Investigation secret is provisioned for in art 198 of the Criminal Procedures Code, and disciplinary investigations fall under the protection of the work file of the state employees as per the Law of the State Employee. Separately, their data fall under the protection of personal data.

The provision in art. 13, par. 2, p. 1 of the APIA for a limitation relating to the so called preparation documents is applicable in three of the cases listed by the Convention for Access to Public Documents. Those are the changes and inspections realized by the institutions of power, the discussions within or between public institutions on some subject, and the protection of the equality of the sides in court proceedings. Regarding the checks and internal discussions before making a decisions, there is a judicial practise, while the equality before court proceedings is a situations that has not, this far, arisen as a problem. According to a report on a check of Inspectorate at a Ministry, the limitation of art. 13, par. 2, p. 1 of the APIA is applicable, but subject to reasonable judgment for overweighing „public interest“¹⁰⁵. Regarding the attempt of Sofia Municipality to use „attorney secret“ for the refusal to provide an analysis of the concession of „Sofia Water,“ executed by a hired attorney company, the courts ruled that was insufficient¹⁰⁶. The party making the order to the attorney company may not use „attorney secret“ as grounds for refusal, but only the limitations provisioned for in art. 37, par. 1 and 2 of the APIA¹⁰⁷.

¹⁰⁴ E.g. as relates to the systems of protection of Bulgarian diplomatic and consulate missions, pursuant to art. 31 of section II of the list-attachment No. 1 to art. 25 of the LPCI.

¹⁰⁵ Decision No. 15158/10.12.2010 on admin. case No. 3051/2010 of the HAC, Fifth division, case *Bulgarian Helsinki Committee vs. Ministry of Justice*.

¹⁰⁶ See final Decision No. 4195/30.03.10 on admin. case No. 10514/2009 of the HAC, Fifth division. Case *National Committee for Improving the Water Supply vs. Sofia Municipality*.

¹⁰⁷ *Ibid.*

The protection of the personal sphere is provisioned for in the Personal Data Protection Act, art. 2, par. 1 of which also defines the term „personal data.“ The definition of „commercial secret“ is given in art. 17, par. 1 of the APIA, where it is subject to protection except in the cases of overwhelming public interest. In the specific cases of „information about the environment,“ protection is provisioned for also for information volunteered by a third party, where its revelation would affect them negatively and they disagree to its being provided (art. 20, par. 1, p. 5 of the Law on Protection of the Environment). Again in the specific case of the LPE, there is also protection for the information related to, for example, the location of rare animals. The purpose is protection from abuse of that information.

Table 1: Correspondence of the protected interests as per the Convention on Access to Official Documents and as per the Bulgarian legislation

Interest protected by art. 3, par. 1 of the Convention on Access to Official Documents	Interest protected by the Bulgarian legislation	Related Bulgarian Legislative Norm
a. National Security, Defence, and International Relations;	Interests related to National Security, Defence, Foreign policy or Constitutional order;	Art. 25 of the PCIA
b. Public safety;	Interests related to internal security;	Art. 25 and 26 of the PCIA
c. Prevention, investigation and prosecution of criminal activities;	Investigation of criminal actions;	Art. 198 of the CPC
d. Disciplinary investigations;	Information from the working file of the state employee;	Art. 17, par. 3 of the LSE
e. Inspection, control and supervision by public authorities	Preparatory materials before a final action;	Art. 13, par. 2, p. 1 of the APIA
f. Privacy and other legitimate private interests;	Personal data; Personal secret;	Art. 2, p. 1 of the PDPA Art. 145, par. 1 of the CC
g. Commercial and other economic interests;	Trade secret; Information voluntarily provided by a third party;	Art. 17 of the APIA Art. 20, par. 1, p. 5 of the LPE
h. The economic, monetary and exchange rate policies of the state;	Economic security;	Art. 25 PCIA and section III of the list-attachment No. 1, partially section II
i. The equality of parties in court proceedings and the effective administration of Justice;	Advice before final decision; Negotiations;	Art. 13, par. 1, p. 1 of the APIA Art. 13, par. 1, p. 2 of the APIA
j. Environment;	Protected species;	Arte 20, par. 1, p. 6 of the LPE
k. The deliberations within or between public authorities concerning the examination of a matter.	Consulting, advice before deciding a final action; Negotiations before a decision.	Art. 13, par. 2, p. 1 of the APIA Art. 13, par. 2, p. 2 of the APIA

At the same time, in some cases the protection of a certain interest is not necessary to happen via a limitation. For example, the protection of intellectual property is not realised via a limitation of the access to information and, as pre the APIA, it is not grounds for refusal of information. In the cases of copyright, the product is not a secret, but instead its distribution without the author's permission is prohibited. In case of necessity of such protection, it is executed via a choice of the form of access to information made by the authority - art. 27, par. 1, p. 3, hypothesis 2 of the APIA. Therefore the access to such information is, originally, permitted.

2.3. Proportionality of the Aim to Protect One or More Protected Interests

In Ruling No. 7 dated 04.06, 1996 on Constitutional case No. 1/1996, the Constitutional Court accepted that:

...the limitations (exceptions) that these rules may be subjected to are applied within limits and only to provide protection of the competing interest.

Therefore by an obligating interpretation of art. 41, the rule has been introduced that each limitation must be proportional to the goal and to protect one or more of the protected interests.

The connection of the limitations with the corresponding protected interest has been provided also in the APIA with the norm of art. 5. The latter decree defines the rights and interests competing with the right of access. In its practice, the Supreme Administrative Court does, in fact, seek for the correlation between the specific limitation that the administrative institution has quoted, and the protected interest. For example, seeking the consent of a third party - business person - must be to protect their interests. The determination of those interests is not, however, arbitrary, but must conform to objective criteria. Furthermore, in its comparatively early practice, the SAC has accepted that:

If there is discussion on the subject whether the request interferes with rights or legal interests of the third party, the current composition [of the Court] accepts that there is no breach of such legal rights and interests of the commercial company - third party. The request is for data that have a statistical nature and do not interfere with the commercial activity of the company, nor are they working secret¹⁰⁸.

¹⁰⁸ Decision No. 4716/25.05.2004 on admin. case No. 8751/2003 of the HAC, Fifth division. Nearly identical to Ruling No. 4717/25.05.2004 on admin. case No. 8752/2003 of the HAC, Fifth division. (The cases are regarding refusals of the Mayor of Vidin Municipality to provide information regarding the contract signed between Vidin Municipality and Municipal Company "Cleaning", and information regarding its execution.)

Therefore not all information pertaining to the business is subject to protection, but only such the revelation of which would breach its rights and legal interests.

Narrow Interpretation of the Limitations

The narrow interpretation of the limitations is one of the forms of application of the principle of proportionality. All limitations of the right to seek, receive, and publish information are under the understanding, according to the Constitutional Court, that:

... it is not a question of choosing between two contradictory principles, but for the application of an exception of on principle (the right to seek and receive information), and that exception is subject to a limiting interpretation and only to provide protection of a competing interes¹⁰⁹.

This assumption is applied further by the Supreme Administrative Court in its practice, where the right to information is regarded as a principle, and the application of the limitations, legally expressed in the Protection of Classified Information Act and the Personal Data Protection Act, as exception to this principle¹¹⁰.

The proportionality of the goal to protect one or more interests is expressed also in the limiting interpretation of the limitation. For example, in the ruling in the case *Zoya Dimitrova vs. the Secretary of the President of the Republic of Bulgaria*, the court assumed that the goal of the Protection of Classified Information Act is to protect data regarding the operative work of the security services. The administration's attempt to include in that category the results of those reports was disproportionate to the purpose of the law. In that respect, also, the court ruling stated that the quoted category of information, subject to classification as state secret under the PCIA, is not applicable.

¹⁰⁹ Decision of the Constitutional Court No. 7/4.06.1996 on const. case No. 1/1996, SG issue 55/1996.

¹¹⁰ Decision No. 9595/19.11.2004 on admin. case No. 7897/04 of the HAC, Five-members constitution. Case *Vasil Chobanov vs. the Supreme Judicial Council*.

Grounding of the Refusals

Another manifestation of the principle of proportionality is the legal requirement for demonstrating factual arguments and indication of the legal grounds by the administrative institution in case of refusing public information. In practice, these requirements are applied particularly strictly in the cases of refusals on the grounds of presence of classified information¹¹¹. In expression of the rule „principle vs. exception“ is also the provision of art. 41, par. 3 and 4 of the APIA for the right of the Court to exercise control for the legality of what is marked for security.

Granting of partial access

The granting of partial access is provided for in Art. 7, Para. 2 of the APIA. A typical example is access to documents that also contain personal data. In such cases the words or passages that reveal personal data must be blacked out and copies of the documents without this data must be provided (if a copy is the requested form of access). For example, in the case of *D. Totev v. The Chief Tax Director* concerning a refusal to provide access to a letter by the latter addressed to a certain individual subject to taxation regarding questions of taxation¹¹², the court's instructions required that the individual's name and address be blacked-out. The same holds for the personal data of witnesses indicated in an act establishing administrative liability¹¹³. The personal data of prisoners in their prison files also shall be subject to this protection, but the rest of the information shall be disclosed¹¹⁴.

¹¹¹ See Decision No. 5451/22.05.2006 on admin. case No. 6363/2005 of the SAC, Fifth division, upheld by Ruling No. 10731/2006 on admin. case No. 7669/2006 of the SAC, Five-members panel (case *Silvia Yotova ks. Minister of Regional Development and Public Works* regarding the contract with „Magistrala Trakia“ JSC); Decision No. 11682/2003 on admin. case No. 3080/2003 of the SAC, Fifth division, upheld by Ruling No. 2113/2004 on admin. case No. 38/2004 of the SAC, Five members panel (case *Kiril Terziyski vs. the Minister of Finance* regarding the contract with „Crown Agents“).

¹¹² Decision No. 6017 of 2002 of the SAC, Five-member Panel on Administrative case No. 10496 of 2002. Published in *Access to Information Litigation: Selected Cases, 2002*, p. 217. Regarding the implementation of the court decision, see Letter from the Chief Tax Directorate No. 24-00-113 as of March 10, 2003 on the implementation of certain provision of the Tax Procedure Code.

¹¹³ Decisions No. 9822 of 18 December 2001 on Administrative Case No. 5736/2001 by SAC, Fifth Division.

¹¹⁴ Decision No. 2082 as of February 13, 2012 of the SAC, Fifth division on adm case No. 3992/2011, the case was brought by Ms. M.H. mother of one of the last death sentenced persons against the Ministry of Justice.

There is also no reason to refuse partial access to contracts between public institutions and private companies.¹¹⁵ To this end, the institution should not restrict access to all of the information in the contract.¹¹⁶

Provision of partial access is also compulsory in cases in which part of the requested information is classified as state or official secret. According to the SAC, *„even if we accept that through the disclosure of the results of the work of the security services there might arise some harm from the disclosure of the protected information, this risk can be avoided through the granting of partial access.“*¹¹⁷

2.4. Necessity of the limitation of the access to information in a democratic society

Protection from harm or the risk of harm to protected interests

The test for possible harm or risk of harm by disclosure of information is part of the general test applicable to access to information restrictions provided for by the Convention on Access to Official Documents. Pursuant to the Bulgarian legislation it is applicable to the classified information exemption as well as to the trade secret, the preparatory documents and on-going negotiations exemptions. The provisions regulating the harm test are stipulated in different statutes.

Some of these statutes use the wording „disclosure of the information would have adverse effects“ - see Art. 4, Para. 4 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and Art. 26, Para. 1 of the PCIA. In other acts the concept of „harm or risk of harm“ is used - see Art. 25 of the PCIA.

In certain cases the assessment of whether the disclosure of the given information will harm or could harm a protected interest is entirely left up to the administration. This

¹¹⁵ Decision No. 4716 of 25 May 2004 on Administrative Case No. 8751/2003 by SAC, Fifth Division, Decision No. 4717/ 2004 on Administrative Case No. 8752/2003 by SAC, Fifth Division (the cases concerned refusals by the mayor of the Municipality of Vidin to disclose information concerning a contract signed between the Municipality of Vidin and the municipal company Chistota and information concerning the contract's fulfillment).

¹¹⁶ Decision No. 8190 of 20 July 2006 on Administrative Case No. 3112/2006 by SAC, Fifth Division. The case concerned the municipal mayor's refusal to provide access to a contract for concession for trash collection and removal in the city of Razgrad.

¹¹⁷ Decision No. 5 of 3 January 2006 on Administrative Case No. 4596/2005 by SAC, Fifth Division. The case was *Zoya Dimitrova v. the Chief Secretary of the President of the Republic*, which examined the refusal to provide the security services' report regarding participation by Bulgarian firms in trade with Iraq in violation of the UN embargo.

is true in the case of the restriction concerning the so-called preparatory documents (Art. 13, Para. 2, Item 1 of the APIA) or the prospective/on-going negotiations (Art. 13, Para. 2, Item 2 of the APIA).

In some cases the legislation stipulates that the assessment of whether the disclosure of certain information will harm or could harm protected interests must be made in advance. This is the case with the so-called classified information - state or official secret, which shall be marked with secrecy grading since its creation. At that time should be made the assessment of the presence of possible harm. More complicated is the question regarding the trade secret. Pursuant to § 1, Item 7 of the Competition Protection Act under this exemption may fall only information that a given trader has taken necessary measures to keep secret.

On the other hand, in cases of preparatory documents or ongoing negotiations (Art. 13, Para. 2, Item 1 and 2 of the APIA) the potential harm may be assessed either at the moment of conception of the information, or at the moment of receiving of access to information request.

According to the court the answer to the question whether the marking of a document with security grading only after the receipt of an access to information request is a breach of the law is negative. In the case against the Ministry of Finance regarding the contract with „Crown Agents“ the court did not find a violation by the fact that the marking dated October 2004, but access was denied on that ground in April 2004¹¹⁸.

One element in the evaluation of eventual harm from disclosure of certain information is the **temporary character** of the restriction - the time limits on the protection of information introduced by legislation (see above). The maximum duration of these time limits is fixed by the law and can be extended only in cases of certain restrictions and only as an exception (see Art. 34, Para. 2 of the PCIA).

¹¹⁸The three-member panel rejected the complaint, the presiding judge had a dissenting opinion. A five-member panel overturned the first instance decision (the decision of the three-member panel) on adm. case No. 592/2005 but not on different than marking with security grading ground.

Principle of the harm test - time limits for the protection of exempted information

1. As it was pointed out the setting of time limits for the protection of information is form of a presumption of potential harm. Till the adoption of the Protection of Classified Information Act (PCIA) the obliged authorities were given the possibility to classify information without any time limits. The PCIA established three level of classification as state secret respectively for a period of five, 15 and 30 years (Art. 34, Para. 1 of the PCIA). The time limits correspond to the degree of harm or danger to the protected interests in case of disclosure. The maximum period for protection of the state secret is 30 years which may be extended to 60 years at the most with a decision of the State Commission on Information Security, which is established by law (Art. 34, Para. 2 of the PCIA).

The time frame for the protection of information as official secret is six months (Art. 34, Para. 1, item 4 of the PCIA). The information protected under the preparatory documents) and ongoing negotiations exception (opinions and recommendations drafted by or for the obliged authority, statements and consultations may be restricted for a period no longer than two years from its creation (Art. 13, Para. 2 of the APIA)¹¹⁹.

2. The law provides for two types of time limits for the protection of classified information. These are the time limits provided by the act itself - such as the time limits for the protection of information classified as state or official secret. Once set-up they last just as much as stipulated in Art. 34, Para. 1 of the PCIA. Reconsideration may occur only if the regular review shows a necessity to change the level of classification (Art. 35, Para. 4 of the PCIA).

On the contrary, the time limits for the protection of preparatory documents (Art. 13, Para. 2, item 1 of the APIA) or documents generated on the occasion of ongoing negotiations (Art. 13, Para. 2, item 2 of the APIA) are set-up not by the law itself, but by the competent officer who applies the exemption. The law only defines a frame and the maximum period for classification - the exemption is not applicable after the expiration of a period of two years after the creation of the information. Thus, the administration has the discretionary power in determination the time limits. Indeed, the comparative analysis leads to the conclusion that this restriction reaches its end at the time of the adoption of a final act. Once a final act is adopted the protected interest justifying the restriction - to prevent exercise of undue pressure over experts, commentaries, assessments which were the basis of adoption of an act drops

¹¹⁹ In 2007 an amendment to the PCIA reduced from two years to six months the period for protection of official secret. In 2002 the protection period under Art. 13, Para. 2 of the APIA was reduced from 20 to two years.

The expiration of the protection period of classified information established by the law is a ground to seek free access to it¹²⁰. Similarly, the ground for protection, respectively for refusal under the APIA falls with the expiration of the legal time limits, for example for the preparatory documents under Art. 13, Para. 2, item 1 of the APIA¹²¹.

Change of the time limits for the protection of information. Review of the classified information

The test for the actual existence of the harm or risk of harm to protected interests defined in Art. 25 and Art. 26 must be carried out by a review stipulated by the law to take place every two years. There is no impediment to this review being conducted in the face of public interest in the disclosure of the information when a request has been submitted following the APIA. Such reconsideration was conducted in 2004 by the Minister of Finance with respect to the contract with Crown Agents and in 2005 by the Minister of Regional Development and Public Works with respect to the contract with „Trakia Highway“ Jsc. In the latter case the security marking „for administrative use“ was removed and the contract was provided.

Regarding documents, classified prior to the adoption of the PCIA in 2002 applies § 9 of the Miscellaneous and Final Provisions of the PCIA. This provision stipulates that one year after the enter into force of the PCIA all classified documents shall be reviewed, and after expiration of this term all security grading are deemed to be one level lower.

¹²⁰ Decision of 14 March 2006 on Administrative Case No. C-31/ 2005 by the SCC, III-G panel, upheld by the Decision of 11 June 2007 on Administrative Case No. 3C-321/2006 by SAC, Fifth Division. (*Hristo Hristov v. the Director of the National Intelligence Services* concerning documents related to the writer Georgi Markov, who was killed in London).

¹²¹ Decision No. 7483 of 11 July 2007 on Administrative Case No. 818/2007 by SAC, Fifth Division, upheld by Decision No. 11257/2007 on Administrative Case No. 9280/2007 by a SAC Five-Member Panel. (*Yordan Todorov v. the Minister of the Interior* regarding documents concerning the rental of housing properties owned by the MoI).

3. Classified Information. State Secret

Art. 37, item 1 of the APIA provides for a ground for refusal of access to information when:

1. (Amendment - SG, vol.45 of 2002) *the requested information is classified information constituting a state or official secret...*"

The restriction related to protection of classified information is also mentioned in Art. 7, Para. 1 of the APIA. At the same time, Art. 5 of the APIA stipulates that the right of access to public information cannot be upheld at the expense of national security.

According to the PCIA, three types of information are subject to classification according to the law:

- state secret;
- official secret;
- foreign classified information

Information subject to classification as state secret is one of the types of classified information. National security is one of the legitimate interests protected by state secrets. Pursuant to Art. 25 of the PCIA the classification as state secret protects the interests of the national security; the foreign policy; the defence; the constitutionally established order.

3.1. History of the Adoption of the Legislation Related to the State Secret

In Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996, the Constitutional Court adopted an interpretation of Art. 39-41 of the Constitution emphasizing that:

„among the grounds listed in Art. 41, Para. 1, sentence 2, that relating to national security is in dire need of a legislative regulation, since it relates to information that in principle is subject to classification, hence it is possible for it to be defined in advance as a 'body of information' that includes concrete facts and circumstances.“

Prior to 1990 the matter related to state secret was regulated by the Rules for the organization and work for the protection of state secret of the People's Republic of Bulgaria, adopted with Council of Ministers ordinance No. 30/1980. The Rules were classified themselves and were marked with security grading back in 1980 at the time

of their adoption¹²². The Rules constitute Annex 2 to ordinance No.30/1980. Extraordinary for that time is the practice to classify as state secret statutes which are subject to promulgation and to be marked with security grading¹²³.

In 1990, a List of Facts, Information and Objects Constituting State Secret was adopted with a decision of the Parliament and promulgated in SG, Issue No. 31 of 1990. With the Regulation on the Activities of the National Security Service Concerning the Protection of Strategic Objects and Actions and the Preservation of State Secrets of the Republic of Bulgaria, adopted via Council of Ministers ordinance No. 324 of 1994, the procedure for the classification of documents and state secrets was adopted and promulgated in SG, Issue No. 5 of 1995. The regulation introduced three levels of classification for information constituting state secret: „secret,“ „top secret“ and „top secret with particular importance“ (Art. 20). Subsequently, the same procedure was stipulated in the Regulations for the Implementation of the Law for the Ministry of the Interior, promulgated in SG, Issue No. 113 of 1998, without any significant changes. Perhaps the most essential change was the removal of the security units and corresponding officers from state bodies and organizations.

In fulfillment of the established policy for joining NATO and in accordance with Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996, of the Constitutional Court, the Protection of Classified Information Act (PCIA) was adopted. The adoption of such laws was necessary for the acceptance of new member countries in NATO at the end of the 1990s and the beginning of the new 21st century.

The PCIA for the first time completely regulated the matter by stipulating a definition of classified information, the officials who have the right to classify information; the procedure for classification; the levels of classification and the time limits for the protection of information. A significant achievement of the act is the requirement to reconsider all previously to the adoption of the act classified documents¹²⁴. Furthermore, the PCIA provides for regular review of classified information at least once in every two years¹²⁵. Rules for the implementation of the law were also adopted¹²⁶.

¹²² *AIP v. the Council of Ministers* (Administrative Case No. 9898/2002, SAC, Fifth Division; Administrative Case No. 11243/2003, SAC, Five-Member Panel). The case was against the refusal of the Government Information Service Directorate to provide access under the AIP to the previously classified Regulation on the Protection of State Secrets in the NRB. In a closed hearing on April 11, 2003 the SAC marked the document with grading „secret“ instead of the previous „top secret“ on the ordinance for its adoption.

¹²³ The fact that the documents were classified imposed court proceedings a *huis clos* before the SAC.

¹²⁴ § 9 the Miscellaneous and Final Provisions of the PCIA.

¹²⁵ Art.35, Para. 4 of the PCIA.

¹²⁶ Adopted with a Council of Ministers Ordinance No. 276 as of December 2, 2002, promulgated in State Gazette, Issue 115, as of December 10, 2002.

3.2. Criteria for classification as „State Secret“

Pursuant to Art. 25 of PCIA state secret is:

„A state secret is the information defined in the list in Appendix No. 1, unregulated access to which would create danger to or would harm the interests of the Republic of Bulgaria related to national security, defense, foreign policy or protection of the constitutionally established order.“

The provision contains several elements and substantive criteria which determines the scope of the lawful classification. On one hand the law enumerates exhaustively the protected interests which justify the classification. On the other hand, as Appendix to the law it lists specific categories of information specifying the protected interests. Thirdly, it provides a criteria for classification - the assessment of harm or risk of harm to the protected interests. Depending on the degree of harm Art. 28 of the PCIA range the classified information in four levels of classification (three for „state secret“ and one for „official secret“). Different time limits for protection are set forth for each of them.

Protected interests

Pursuant to Art. 25 of the PCIA the following interests shall be protected:

- National security;
- Defence;
- Foreign policy;
- The constitutionally established order.

In the mean time § 1, item 13 of the Miscellaneous and Final Provisions of the PCIA gives a quite broad definition of „national security“.

„National security“ is a state of the society and the state, at which the basic human rights and liberties are protected, the territory integrity, the independence and the sovereignty of the state, the democratic functioning of the state and civil authorities are guaranteed, as a result of which the nation preserves and increases its well-being and is developing.

Departing from this definition in the PCIA, the restriction related to the national security may be interpreted and applied too broadly. Nevertheless, further the act delimits which specific interests of the Republic of Bulgaria are connected to the

national security. Pursuant to § 1, item 13 of the Miscellaneous and Final Provisions of the PCIA these are the guarantee of the sovereignty and territory integrity and the protection of the constitutionally established order, and more specifically:

- Obtaining information on foreign countries or information of foreign origin, necessary for the decision-making process by senior government authorities;
- Detection, prevention and combating:
 - Aggressions against the independence and territory integrity;
 - Secret aggressions which:
 - Harm or put at risk political, economic and defence interests of the state;
 - Are targeted to forcible change of the constitutionally established order of the state;
 - Terrorist attacks, unlawful trafficking of people, arms and drugs, as well as unlawful trafficking of goods and technologies which are under international oversight, money laundering and other specific risks and threats.

According to well established case-law the refusals grounded on the protection of classified information exemption shall state the protected interest. The lack of such explicit statement is sufficient ground the refusal to be held unlawful and repealed by the court. The SAC found that a refusal is unlawful when „despite the explicit instructions of the court in the supplementary statement the Minister failed to specify which one of the above mentioned legal requisites he considered as a ground to refuse access to the applicant...“¹²⁷ Under legal requisites the court referred to the protected interests.

¹²⁷ Decision No. 7517 as of July 29, 2005 of the SAC, Fifth division of adm. case No. 3084/2005. *Case of Ivan Ionchev v. the Ministry of Interior.*

List - Appendix No. 1 to Art. 25 of the PCIA

1. It is common practice in European countries from the region to list in the statute specific categories of information which may be subject to classification. Historically this approach is familiar in Bulgaria as well. Appendix No. 1 to Art. 25 of the PCIA, lists 64 categories of information whose protection permits classification as state secret¹²⁸. They are divided into three categories:

- information concerning the country's defense (Section I);
- information concerning the country's foreign policy and internal security (Section II);
- information concerning the country's economic security (Section III).

The titles of the sections partly coincide with the protected interests (defence, foreign policy), in the rest of the cases it seems that they overlap depending of the intent of the legislator. Section II also covers two of the protected interests - related to the foreign policy and national security in connection to the internal security¹²⁹. If we look merely at the title of Section III it does not relate directly to any of the protected interests. But if we have a closer look on the seven categories covered by this Section we notice that item 1 and 4 mention negotiation of financial contracts, and respectively the way of functioning of oversight and alerting devices, related to the national security. Item 5 and 6 mention categories of information clearly related to the foreign policy as far as they aim at the protection of data from foreign countries. It may be assumed that the interests of the national economy - item 2 of Section III and the economic interests of the state (item 3) are protected in order to avoid improper use of this information by another state at our expense. Item 7 explicitly refers to the security and the defence of the country.

On the other hand, it appears that national security covers defense and foreign policy, but also extends to internal security and defense of the national economy (Section III, Items 2 and 3).

¹²⁸ In comparison, in Section 4 of the Czech statute of 1998 25 and two additional categories are listed, Section 4 of the act in Latvia of 1996, amended in 2001 lists 14 categories, the Polish act of 1999 lists 30 categories in the first section, 40 in the second section and 26 in the third section.

¹²⁹ Shall be noted that in some legal systems, for example in the USA, informatish shall be classified only for the protection of national security which is defined only with regard to the defense and the foreign policy. See Executive Order No. 13526 of the President Obama as of December 9, 2009 (which reproduces the policy and provisions on this matter of the former Presidents).

After the adoption of the PCIA the refusals grounded on the classified information exemption became more common. In 2001, the annual AIP audit did not report any refusal on this ground¹³⁰, in 2002 after the adoption of the PCIA such refusals accounted to 91¹³¹. In most of the cases this is due to the failure to reconsider classified documents prior to the adoption of the act, pursuant to § 9 of the Miscellaneous and Final Provisions of the PCIA¹³². In other cases the classification was pursuant to the then newly adopted law¹³³.

2. Concerning the scope of the specific categories of information listed in Appendix No. 1 to Art. 25 of the PCIA the SAC by way of interpretation imposed a prohibition on broad application of this provision. For example, in connection to one category of information, namely Section II, item 9 mentioning the protection of national security the court held that:

„this legal provision is irrelevant to the pending case because it refers to „reports ... on the operational activities of security services“ while in this case the subject of the access to information request is not access to the activities of the services themselves, but access to the results of their activities“¹³⁴

Subject of the request in this case was a report by the National Intelligence Service and the National Security Service to the President about the participation of Bulgarian companies in trade with Iraq in violation of the UN embargo. The court held that the report on the investigation led by the security services does not relate to the operational work of the services, it is rather the result of their secret work.

Unlike many other laws, the PCIA does not provide for prohibition for classification. Many other jurisdictions contain such prohibitions. For example, the above mentioned Executive Order of the US President on the classification of national security materials provides for a prohibition on classification. In this regard an important question arise - whether the PCIA can be an instrument to classify information in order to conceal

¹³⁰ *Fulfillment of Obligations under the APIA by the Bodies of the Executive Power*, Sofia 2001, p.37 available at the following address: <http://www.aip-bg.org/pdf/reportaip.pdf>

¹³¹ *The Year of Rational Ignorance*, Sofia 2002, p. 48, available at the following address: <http://www.aip-bg.org/pdf/aip-report-2002.pdf>

¹³² The cases brought by AIP against the Council of Ministers, the case of *Hristo Hristov v. the National Intelligence Services*.

¹³³ The cases of *Kiril Terziyski v. the Minister of Finance* concerning the Crown Agents contract, *Zoya Dimitrova v. the Head of the President's Administration*.

¹³⁴ Decision No. 5 of 3 January 2006 on Administrative Case No. 4596/2005 by SAC, Fifth Division. The case was *Zoya Dimitrova v. the Chief Secretary of the President of the Republic*, which examined the refusal to provide the security services' report regarding participation by Bulgarian firms in trade with Iraq in violation of the UN embargo.

crimes, wrongdoings, violation of human rights, administrative errors. So far the question was not considered by the court and it is not clear whether such prohibition may be imparted by way of interpretation.

It is interesting to note which categories from the list in Appendix No. 1 to Art. 25 of PCIA are indicated as grounds for classification of information as a state secret. Access to the report by the National Intelligence Service and the National Security Service to the president about the participation of Bulgarian companies in trade with Iraq in violation of the UN embargo was refused on the grounds (at the stage of the court proceedings) of Item 9 from Section II of the List-Appendix No. 1 of Art. 25 of the PCIA. The category includes reports concerning the operative work of the security services and is clearly related to the defense of national security. The contract between the Minister of Finance and the British company Crown Agents, entitled „Measures to Assist the Reform of the Bulgarian Customs Administration,“ was classified on the basis of Items 2 and 3 of Section III of the List-Appendix No. 1 of the PCIA¹³⁵. As mentioned above, these categories relate to the economic interests of the state, but the first case is a question of research work, while the second relates to technical, technological and organizational decisions. A receiving order from the State Reserves and Wartime Supplies Agency was refused on the basis of Item 10 of Section II of the List-Appendix. It turns out that the State Reserve is traditionally considered „allocated and used budgetary funds and state property for special purposes related to national security“.

The time limit of protection as state secret. Partial access

1. With the adoption of the PCIA in 2002, time limits for the protection of information classified as state and official secrets were introduced into the legislation for the first time. A comparison of the PCIA with documents compiled by NATO in 2002 shows that the Bulgarian law reproduces the four security levels according to which information should be classified and documents should be marked. According to Art. 28 of the PCIA the secrecy gradings are:

- top secret;
- secret;
- confidential;
- for administrative use.

The first three categories relate to state secrets, while the last concerns official secrets. The security grading corresponds to the potential danger or harm which could result from the disclosure of the information (Art. 28, Para. 2 of the PCIA). Accordingly, the

¹³⁵ Accessible since 2009 on the website of the Ministry of Finance.

time limits stipulated in Art. 34, Para. 2 of the PCIA for the protection of classified information for the respective secrecy gradings are:

- top secret - 30 years;
- secret - 15 years;
- confidential - 5 years;
- for administrative use - six months after an amendment to the PCIA in 2007.

Pursuant to Art. 34, Para. 2 of the PCIA the time limits can be extended with decision of the SCIS when national interests so require, but not for longer than the original limits. When the time limit expires, the level of classification is removed - Art. 50, Para. 2, Item 1 of the Regulations for the Implementation of the PCIA (RIPCIA) - while the security stamp on the document should be crossed out with a horizontal line. Pursuant to Art. 36, Para. 2 of the RIPCIA, in such cases the date, legal basis for the removal, position, first name, last name, and signature of the official carrying out the removal should be noted.

Even if information has been classified, citizens still have the right to receive the requested information when the time limit for its protection has expired. At that point, its classification level should be removed, according to the SAC¹³⁶. With its decision the SAC repealed the refusal of the Chairperson of the National Intelligence Service (NIS) to provide access to documents related to the Bulgarian writer and BBC journalist Georgi Markov, murdered in London in 1978¹³⁷.

2. Pursuant to Art. 37, Para. 2 of the APIA, even in cases in which information is classified as a state or official secret, access can be provided to only that part of the information whose access is not restricted. In connection with a request for access to a report by the security services, the SAC ruled:

*„even if we were to accept that the release of the result would risk the disclosure of information protected under Item 9 [of Section II of the List-Appendix to Art. 25 of the PCIA], this risk could be avoided through the provision of partial access according to Art. 37, Para. 2 of the APIA.“*¹³⁸

In other words, the court clearly binds the provision of partial access as a guarantee of the right of access to public information with a precise assessment of the possible

¹³⁶ Decision by SAC, Fifth Division on 11 June 2007 on Administrative Case No. ZS-321/2006, in the case of Hristo Hristo v. the Director of NIS.

¹³⁷ The case was brought by the journalist Mr. Hristo Hristov. The information received in 2007 was the basis of the book „The Double Life of Agent Piccadilly“.

¹³⁸ Decision No. 5 of 3 January 2006 on Administrative Case No. 4596/2005 by SAC, Fifth Division. The case was *Zoya Dimitrova v. the Chief Secretary of the President of the Republic*.

harm made by the classifying authority. The harm is subject to evaluation pursuant to Art. 28, Para. 2 of the PCIA, which stipulates that the path used to reach such classification should be objectively traced. In this regard, the SAC delivered a ruling for the corresponding document requiring the responding party:

„to present in corresponding order the appendices to the reports about the incident of 1 March 2006 at the fifth block of Nuclear Power Plant Kozloduy described in the complaint, as well as a document listing the grounds according to which this information was classified.“¹³⁹

3.3. Judicial review on the respect of the requirements and criteria for classification as „state secret“

1. As it was already underlined, according to Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996 the Constitutional Court took the following approach on the relation between the right to information and its restrictions:

„this is not a question of a choice between two opposing principles, but rather of the application of an exception to a single principle (the right to seek and receive information); such an exception is subject to a narrow interpretation and only in order to guarantee the protection of a competing interest.“

In respect of the consistent interpretation of the Constitution, lawmakers stipulated in Art. 41 of the APIA the court's jurisdiction to rule on the lawfulness of the marking of the information as classified (Para. 4, amended when the PCIA came into force - SG vol. 45 of 2002). It also stipulates the requirement that public institutions and other subjects obliged under the PCIA to motivate their refusals, even in the case of a state secret, by indicating not only the legal but also the factual grounds for refusal.

2. Contrary to the abolished List of facts, information and objects constituting state secret, the PCIA does not introduce the presumption that the disclosure of information belonging to categories listed in Appendix No. 1 harms protected interests. The SAC thus found:

„[the idea] that information should be considered classified under the force of law is based on an incorrect interpretation of Item 9 of Section II of Appendix No. 1 to Art. 25 of the PCIA and is not shared by the present court panel.“¹⁴⁰

¹³⁹ Protocol on Administrative Case No. 8948/2007 by SAC, Third Division.

¹⁴⁰ Decision No. 5 of 2006 on Administrative Case No. 4268/2005 by SAC, Fifth Division, in the case of *Zoya Dimitrova v. the Head of the President's Administration* regarding access to a report by the security services. The decision is final.

Consequently, under the PCIA, information can constitute a secret only if it was classified after an evaluation establishing that its free disclosure would lead to danger or harm to the protected interests (Art. 25 of the PCIA). In court practice requirements were later established not only for grounds for refusals based on state secrets, but also for the very classification of information as a state secret.

3. In its practice concerning the application of the APIA and specifically, in cases of refusals to provide access to information grounded on the state secret exemption, the SAC established definite requirements for the administration. Within the framework of legal action on appeal against a refusal on the grounds of the existence of classified information, the respondent bears the burden of proof. The court's authority to exercise control over the security gradings:

„implicitly presumes the administrative body's obligation to provide data about when the security marking occurred and on what grounds.“¹⁴¹

This requirement also includes the furnishing of proof showing „what security marking the information in question bears and when was created,“¹⁴² as well as the establishment of the necessary „data concerning the type and character of the information, qualifying it as a state secret and the corresponding legal grounds for its definition as such.“¹⁴³

4. Second, to guarantee the effective protection of the constitutionally guaranteed right of access to information, lawmakers stipulated that a decision to refuse to provide public information must cite the legal and factual basis for the refusal - Art. 38 of the APIA. In this case, the lawmakers' explicit intention that the factual basis for the refusal be cited is obvious.¹⁴⁴ An administrative body's recourse to Art. 15, Para. 3 of the Administrative Procedure Code (APC), which allows for the indication of the legal basis alone in the issuing of an act, is impermissible. This is because:

„the precedence of special legal provisions above general ones rules out the possibility of applying Art. 15, Para. 3 of the APC in the pending case.“¹⁴⁵

¹⁴¹ Decision No. 2113 of 2004 on Administrative Case No. 38/2004 by SAC, Five-Member Panel, *Kiril Terziyski v. the Minister of Finance*, regarding access to the Crown Agents contract.

¹⁴² Decision No. 3329 of 2004 on Administrative Case No. 4256/2003 by SAC, Fifth Division, upheld in that part by Decision No. 10075 of 2004 on Administrative Case No. 4662/2004 by SAC, Five-Member Panel.

¹⁴³ Decision No. 11682 of 2003 on Administrative Case No. 3080/2003 by SAC on Administrative Case No. 3080/2003, upheld by the above-cited Decision on Administrative Case No. 38/2004 by SAC, Five-Member Panel (*Kiril Terziyski v. the Minister of Finance*, regarding access to the Crown Agents contract).

¹⁴⁴ Decision No. 111 of 2004 on Administrative Case No. 7641/2003 by SAC, Fifth Division, entered into force.

¹⁴⁵ Decision No. 5 of 2006 on Administrative Case No. 4268/2005 by SAC, Fifth Division, in the case of *Zoya Dimitrova v. the Head of the President's Administration* regarding access to a report by the security services. The decision is final.

Again, the mere indication that the requested information belongs to a given category of information (section and point) on the list in Appendix No. 1 to Art. 25 PCIA are not sufficient grounds for refusal in the sense of Art. 38 of the APIA. Factual bases for the definition of the information as constituting a state secret must also exist and be presented, because otherwise:

„it is not possible for the court to verify the legality of the refusal.“¹⁴⁶

The third guarantee of the effective protection of the right to information is Art. 41, Para. 3 of the APIA, which gives the court the authority to demand the necessary proof, including the document to which access was refused, in the exercise of its authority under Art. 41, Para. 4 of the APIA (the possibility for an in camera review).¹⁴⁷

¹⁴⁶ Решение № 9154/2004 г. по а.г. № 4408/2004 г. на ВАС, Пето отделение, влязло в сила.

¹⁴⁷ Това правомощие е упражнено напр. от ВАС, Пето отделение, по а.г. № 3080/2003 г., а.г. № 9898/2002 г., а.г. № 4120/2004 г., от СГС III-Ж състав по а. г. № 642/2002 г.

4. Classified information. Official secret

In two court cases in 2009 the court repealed refusals grounded on classified as official secret exemption. This is the case of National Movement *Ekoglasnost v. the Nuclear Regulatory Agency (NRA)*. The chairperson of the NRA refused access to the reports prepared by the Nuclear Power Plant „Kozlodui,“ as well as all the annexes, regarding the March 1, 2006 incident on the fifth block of the nuclear plant. Access to the annexes was refused on the basis of the *official secret* exemption. The SAC¹⁴⁸ upheld the first instance ruling,¹⁴⁹ repealing the refusal. The chairman of the NRA was required to provide the information. The first instance had grounded its decision on the lack of motivation of the refusal why the requested information would have been classified and what interests were to be protected.

In another case, the ACSC found that the chairperson of the State Energy and Water Regulatory Commission has unlawfully denied access to the approved business plan of the Water Supply and Sanitation Ltd - Sliven to the citizen Yuri Ivanov. The refusal was grounded on the *official secret* exemption. The court stressed out that the mere statement that the information was classified is not sufficient for the lawfulness of the classification procedure. To meet the legal requirements the information had to be marked with the appropriate level of classification. The evidences brought during the proceedings clearly show that the document lacked the marking for *official use only*¹⁵⁰.

¹⁴⁸ Decision No.12942 as of Nov.3, 2009 of the SAC, Third Division, on adm. case No. 15672/2008.

¹⁴⁹ Decision No. 777 as of Oct. 17, 2008 of the ACSC, First Division, 15 panel, on adm. case No. 2898/2008.

¹⁵⁰ Decision No. 71 as of Jan. 18, 2010 of the ACSC, Second Division, 30 panel, on adm. case No. 5399/2009.

5. Judicial review under Art. 41, Para. 3 and 4 of the APIA. Oversight over the legality of secrecy marking

1. According to Art. 41, Para. 3 and 4 of the APIA:

(3) Upon appeal of a refusal to grant access to public information on the grounds of Art. 37, Para. 1, point 1, the court may, in a closed hearing, request the necessary evidence from the body.

(4) (*Amendment - SG, vol. 45 of 2002*) In cases under Para. 3 the court shall decide on the lawfulness of the refusal and on the marking of the information as classified.

This control over the legality of classification is also stipulated in other laws. This is necessary so that the court may make the correct decision in an appeal against a refusal of information based on a restriction related to the protection of classified information. To this end:

„it is necessary to clarify the question of the nature of the information in order to assess the lawfulness of its classification.“¹⁵¹

The review of the lawfulness of the classification is a preliminary procedure to be undertaken in order to enable the court to resolve the final legal question pending before it.

Over the years, the court has repeatedly exercised its authority under Art. 41, Para. 3 and 4 of the APIA. The SAC, as well as the ACSC, has followed this practice. The correctness of the final decision determines the obligation *ex officio* for the court to exercise its authority under Art. 41, Para. 3 of the APIA and to demand the necessary evidence.¹⁵²

Over the years, the right to request documents pursuant to Art. 41, Para 3 of the APIA was exercised in few cases by the SAC and the ACSC. It shall be noted, that the court adopted a broad interpretation of this provision. The courts usually apply it not only when it comes to classified information, but also when the circumstances of the case and the nature of the document are not straightforward. For example, pursuant to this provision the court requested a copy of a report on the alleged substitution of nuclear fuel in NPP „Kozlodui“. Access to parts of the report was denied on the ground of trade secret exemption. The court ordered the defendant to give the report in full to

¹⁵¹ Decision No. 5 of 2006 on Administrative Case No. 4268/2005 by SAC, Fifth Division.

¹⁵² Ibidem.

the justices in order to assess the nature of the document and the lawfulness of the refusal.¹⁵³ The ACSC requested for in-camera review the report of the internal investigation conducted by the Public Prosecution Inspectorate of the Sofia District Prosecutor's Office¹⁵⁴. In the latter case access was refused on the ground of the protection of preparatory documents - Art. 13, Para. 2, Item 1 of the APIA.

2. The practice of requesting evidence pursuant to Art. 41, Para. 3 of the APIA began in 2003. At that time SAC panels requested the relevant information from an administrative body for the purpose of reviewing them in an in camera session and ruling on both the lawfulness of the security stamp marking, as well as the lawfulness of the appealed refusal to provide access.

What is the subject of such a review under Art. 41, Para. 3 and 4 of the APIA? In the first two cases in which this procedural action was taken, the disputed document which was marked as classified was requested and subsequently reviewed in a closed session. In one of the cases - *AIP v. the Council of Ministers* - this was the Regulations for the Organization of Work to Protect a State Secret in the People's Republic of Bulgaria from 1980,¹⁵⁵ while the other - *Kiril Terziyski v. the Minister of Finance* - concerned the contract with the British firm Crown Agents.¹⁵⁶ In both cases, however, the court conducted a review of the information in an in camera session and established the existence of the corresponding security stamps. In these cases, no rulings on the lawfulness of the security stamp markings were made. The reason for this was that the established stamps were affixed according to legal provisions applicable prior to the adoption of the PCIA, which does not require the stamps to include requisite information such as the date, legal basis for classification and the name of the official who had done the classification. In light of the absence of any subsequent indication on the part of the institutions as to when and for what reason the security markings were

¹⁵³ Administrative case No. 2889/2010 of the ACSC, 30 panel. Case of the *National movement „Ekoglasnost“ v. the Ministry of Economy, Energy and Tourism*.

¹⁵⁴ Decision No. 3959 as of December 02, 2010, ACSC, 1st Division, Panel 13, adm. case No. 3617/2010. Case of *Nikolai Kolev v. The Prosecution Office*.

¹⁵⁵ *AIP v. the Council of Ministers* (Administrative Case No. 9898/2002, SAC, Fifth Division; Administrative Case No. 11243/2003, SAC, Five-Member Panel). After the adoption of the PCIA in 2002 AIP filed an appeal in court against a refusal by the Governmental Information Service Directorate to provide access under the APIA to the previously classified Regulation for the Protection of State Secrets in the NRB, adopted by the Council of Ministers in 1980. The court case can be seen as one of the stimuli for the Council of Ministers to reevaluate information in accordance with § 9 of the Miscellaneous Provisions of the PCIA and for the declassification of 1,484 documents during the summer of 2004. The Regulation in question were among the declassified documents.

¹⁵⁶ *Kiril Terziyski v. the Minister of Finance* (Administrative Case No. 3080/2003, SAC, Fifth Division; Administrative Case No. 38/2004 SAC, Five-Member Panel).

made, in both cases the SAC panels ruled that without receiving the grounds from the relevant bodies as to what criteria and bases were used to determine that the information constitutes a state secret, the court cannot evaluate the lawfulness of such markings nor exercise effective control over the legality of such markings and refusals to grant access. It remains an open question in light of the circumstances to what extent it was correct for the court to return the request to the body for new consideration, rather than requiring it to present in the legal proceedings the complete grounds and evidence supporting its claim that the information in question was classified.

In 2004 in court practice concerning Art. 41 of the APIA, the question was raised about the court's authority to review the content of such information in its rulings on the lawfulness of security stamp markings. After a repeated refusal by the Minister of Finance to provide information in the form of a copy of the contract with Crown Agents, the SAC Three-Member Panel again requested and established the contents of the security stamp on the contract.¹⁵⁷ In a court decision the content of the security stamp was established, but from evidence presented by the responding side it became clear that a commission, following § 9 of the Final and Miscellaneous Provisions of the PCIA, had reviewed the classification of the contract, which was completed before the PCIA entered into force, after which a new security stamp was affixed in accordance with the new PCIA. The finding was that a security stamp of „secret“ had been affixed to the contract, but was then crossed out with a straight line. A new stamp of „confidential“ had been affixed, which included the signature of the responsible person, as well as an indication of the grounds for the classification - § 9 of the Final and Miscellaneous Provisions of the PCIA - and a date. Two members of the judicial panel accepted the lawfulness of the classification and the refusal. The viewpoint of the head of the panel, who signed a dissenting opinion, is interesting:

„on the factual side it was imperative to clarify the content of the concept 'organizational-technical protection'... (in the sense of Item 3 of Section III of the list in question here - Appendix No. 1 to the PCIA). On the legal side it was imperative to check whether the original stamp of 'secret' was applied in accordance with the rules...“

Thus, this position firmly includes a review of the content of the information with the purpose of deciding the legality of its classification with respect to the security stamp marking. For this reason, the dissenting opinion also states that the contract does not

¹⁵⁷ *Kiril Terziyski v. the Minister of Finance 2* (Administrative Case No. 4120/2004, SAC, Fifth Division; Administrative Case No. 592/2005, SAC, Five-Member Panel).

contain any information corresponding to the description in Appendix No. 1 to Art. 25 of the PCIA. Hence follows the final conclusion:

„since the contract of 29 November 2001 is none of those things, a legal basis for declaring it classified information is lacking.“¹⁵⁸

The position set out in the dissenting opinion was accepted by the SAC Five-Member Panel, which found that the lower court had not ruled on the lawfulness of the security marking under either the current or the amended statute. For this reason, its conclusion that the processing contract contained classified information was unfounded, since:

„the court should have ruled on whether the contents of the contract constituted information about the organizational-technical and program defense of automated systems or networks of bodies belonging to the national government or to local governmental bodies and their administrations. [They should have ruled] on whether it constituted research work of particularly essential significance to the interests of the national economy, ordered by state bodies, or whether it was information regarding technical, technological and organizational decisions, whose disclosure would threaten to harm economic interests important to the country. [They should have ruled] on the lawfulness of the security marking „secret“ and „confidential“ with respect to the provisions in §9 of the Final and Miscellaneous Provisions of the PCIA.“¹⁵⁹

In court practice it is also accepted that in proceedings concerning Art. 41, Para. 3 and 4 of the APIA, the opposing sides have the right to familiarize themselves with the court's findings before the pleadings. In cases in which this has not been fulfilled:

„There exists a fundamental violation of the rules of court procedure, since after the conclusion of the oral arguments the court proceeds towards the pronouncement of a decision according to Art. 186 of the Civil Procedure Code (CPC) and cannot carry out other procedural activities, including the collection of evidence, regardless of the fact that there is a special provision concerning this in the Access to Public Information Act. The appellant's right to fair trial is violated, since that party is not able to familiarize itself with the facts and circumstances established by the court in a closed session before the closing of the oral arguments in the case.“¹⁶⁰

Similarly, even the return of the documents demanded by the court to the administrative body (as in the case of the Council of Ministers) after findings has been

¹⁵⁸ Decision No. 9472 of 16 November 2004 by SAC, Fifth Division.

¹⁵⁹ Decision No. 3875 of 28 April 2005 by SAC, Five-Member Panel.

¹⁶⁰ Ibidem.

made and the hearing of the case in an open session constitutes a breach of the law. This is because:

„the court's action in carrying out the collection of evidence in a closed session without the participation of the litigants is a fundamental violation of the rules of court procedure and is grounds for repealing a court decision in returning the case for new hearing to a new panel from the court. The court has confused its competence to demand evidence, which is permissible in a closed session, with that of its collection, which is not permissible in a closed session.“¹⁶¹

Following this established court practice, in recent years the evidence collected by following the proceedings under Art. 41, Para. 3 and 4 has been appended to the case-file. In this respect, the courts' interpretation is also in accord with the Obligatory Instructions for the Classification of Court and Remanded Cases, which was adopted by the State Commission for Information Security (SCIS) with Protocol No. 209-I of 23 November 2004.¹⁶²

In more recent practice, the tendency has arisen for the court to demand the grounds for classification of information under the PCIA. This practice is similar to court practice in more advanced countries such as the United States. In a ruling as of 31 March 2008, a SAC panel instructed the administrative body:

„to present in corresponding order the appendices to the reports about the incident of 1 March 2006 at the fifth block of Nuclear Power Plant „Kozlodui“ described in the complaint, as well as a document listing the grounds according to which this information was classified.“¹⁶³

¹⁶¹ Decision No. 6977/ 2004 on Administrative Case No. 11243 of 2003 by SAC, Five-Member Panel.

¹⁶² Available at:

<http://www.dksi.bg/NR/rdonlyres/E95F849E-12EB-404F-AA84-8B2CB0F4CA6D/0/ZUsadfinal.doc>

¹⁶³ Protocol on Administrative Case No. 8948/2007 by SAC, Third Division (denial to grant the appendices to the report drafted on the occasion of the March 1, 2006 accident in the nuclear power plant Kozlodui).

6. Preparatory documents under Art. 13, Para. 2 Item 1 of the APIA

The preparatory documents exemption is one of the most commonly used grounds for refusal. According to Art. 13, Para. 2, Item 1 access to administrative public information can be refused if:

„relates to the preparatory work of an act of the bodies, and has no significance in itself (opinions and recommendations prepared by or for the body, reports and consultations)“

The aim of this restriction is to preserve in certain cases the independence of the consultative process and administrative evaluation until the completion of the relevant procedure. According to the APIA, this restriction cannot last more than two years after the creation of the information. The wide use¹⁶⁴ of this restriction by the administration as ground for refusal of information has led to legal debates and subsequently to a more precise delineation of the limits of its applicability in a series of court decisions. In the meantime, with the 2008 APIA amendments a new paragraph 4 of Art. 13 was stipulated, according to which this exemption is not applicable in cases of overriding public interest in disclosure.

6.1. Preparatory documents and information about the environment

Over the last few years a positive case law has been accumulated regarding the preparatory documents exemption and requests for access to information about the environment. In all these cases the court consistently held that requests for environmental information shall always be assessed under the Environment Protection Act (EPA) which is special law with regard to the APIA and which does not provide for an exemption similar to that under Art. 13, Para. 2, Item 1 of the APIA.

This conclusion was drawn by the ACSC on the case of Ivailo Hlebarov, member of the Environmental Association *For the Earth*, against the mayor of Sofia Municipality. The applicant requested a copy of the contract for *Prefeasibility Study* and accompanying documents for the project *Waste Management of Sofia Municipality* financed by Operational Programme Environment 2007-2013. The Municipality refused access to documents as they are part of public procurement documentation and have „no significance in themselves.“ The Administrative Court Sofia City (ACSC) rescinded the silent refusal. In its reasoning the court points out that there is no doubt that the requested information relates to the environment and therefore the authority should

have applied the procedure for granting access to information set forth under the EPA rather than to rely on the general law (APIA), which, indeed, is inapplicable when it comes to environmental information .¹⁶⁵

The Supreme Administrative Court adopted the same reasoning as a court of second instance in the case of the National Movement *Ekoglasnost* against the refusal of the Ministry of Environment and Water (MOEW) to provide access to the Minutes from the session of the National Council on Biodiversity held on November 25, 2007, when the buffer zone of Rila mountain was not included in the network for protected environmental areas NATURA 2000 because of two votes short. The ACSC repealed the decision holding that:

„...the hypothesis of restriction to the right of access set forth in Art. 13, Para. 2, Item 1 of the APIA is not applicable to the pending cases, as the special law does not refer to it, and Art. 20 of the EPA does not provide for similar exemption. In this regard, access to information related to the environment cannot be denied on the ground of Art. 13, Para. 2, Item 1 of the APIA for that reason, the exemption provided for by the APIA are not relevant in assessing requests for environmental information“¹⁶⁶.

The court goes further concluding that:

*The court finds that with regard to the specificity of the object and its importance and impact on the environment, through the EPA the legislator has widened the scope of access by limiting the possible exemptions in this *lex specialis* derogating to the general law which is the APIA. Given that the provision of Art. 20 of the EPA is imperative, as it is the special law with regard to the APIA, the court cannot ignore it, especially when it comes to information related to the environment. The purpose of the law also imposes this conclusion since the matters related to the environment are subject to public debate which excludes restriction to their access grounded on preparatory documents exception.*

The ACSC decision was upheld by the SAC as second instance and emphasized the first instance court correctly adjudged that the EPA was the applicable law as *lex specialis*, which takes into account the high public interest in this kind of information and which has undoubtedly been considered in reaching the decision upon the contested administrative act¹⁶⁷.

¹⁶⁵ Decision as of August 10, 2009, of the ASCS, 2nd Division, 23 Panel, on adm. case No 1648/2009. The decision is final.

¹⁶⁶ Decision No. 930 as of September 11, 2008 of the ACSC, First division, 6 panel, adm. case No. 3681/2008.

¹⁶⁷ Решение № 8921/6.07.2009 г. по а.г. № 15062/2008 г. на ВАС, Трето отделение.

6.2. Preparatory documents and access to audit and internal investigation reports

The possible broad and contrary to the law interpretation and application of Art. 13, Para. 2, Item 1 of the APIA by the obliged authorities when requesting access to audit and internal investigation reports was curbed by the court in several decisions during the last few years. The court interpretation of this restriction with regard access to internal investigation reports contains two main features. The first is that documents not related to the final adoption of an act acquire significance in themselves as they enable the citizens to make an opinion on how the administration works. The second is that the drafted upon the investigation report, except opinions and recommendations, contains fact findings which have independent significance as they reflect the factual situation at given time and cannot be changed by subsequent acts.

With a decision as of December 10, 2010 the SAC as a court of second instance quashed the refusal of the Ministry of Justice to the reports of the Inspectorate within the Ministry of Justice (MoJ) on the inspections of prisons which took place in 2007 and 2008. The information was sought by the Bulgarian Helsinki Committee (BHC) and related more specifically to the living conditions in prisons, the state of medical care in prisons, and the work conditions of inmates. The refusal was grounded on the lack of independent significance of the reports and on the fact that they contain findings and recommendations which would be the basis of a subsequent act, which is a ground for refusal under Art. 13, Para. 2, Item 1 of the APIA. The court held that the reports contained not only recommendations to the Minister of Justice, but also findings of facts made during the inspections. According to the court, these findings have an independent significance because they reflect the current situations in the places of deprivation of liberty at the time of the inspection. This situation does not depend on the opinions and the recommendations of the supervisors and cannot be changed by subsequent acts. The Court also stressed on the fact that the MoJ never presented the final act adopted on the basis of the reports. According to the Court, the restriction under Art. 13 of the APIA aims to restrict access to official information only in cases where it is connected to the preparation of an act and the public can access the final act itself¹⁶⁸. On the contrary, when final act, incorporating this internal information has never been adopted, access to it could not be denied on the ground of Art. 13, because it would be absolutely impossible for the public to access the information¹⁶⁹.

¹⁶⁸ This argument is applicable not only to reports but to any information under Art. 13, Para. 2 of the APIA and further develops the well established court practice of the SAC - Decision No. 4694 as of May 16, 2002 on adm. case No. 1543/2002 of the SAC; Decision No. 7863 as of August 29, 2005 on adm. case No. 7088/2004 of the SAC, Fifth division, upheld by Decision No. 2308 as of March 6, 2003 on adm. case No. 10940/2005 of the SAC, Five-member panel.

¹⁶⁹ Decision No. 15158, as of December 12, 2010, SAC, Fifth division, adm. case No. 3051/2010.

This interpretation was further clarified by decision as of December 2, 2010 of the ACSC which repealed refusal of the Prosecution Office to provide access to the report on the state of the Sofia Regional Prosecutor's Office for 2008. The refusal was grounded on the assumption that the report has preparatory nature and has no significance in itself, therefore exempted under Art. 13, Para. 2, Item 1 of the APIA. In its decision,³³ the court held that the report is the final act of oversight and audit of the prosecutors under Art. 142, Para. 2 of the Judiciary Act. For this very reason, it cannot be assumed that this act had no significance in itself and only had a character of opinion or recommendation. In this regard the court held that:

The acts referred to in Art. 13, Para. 2, Item 1 of the APIA have mostly technical character, related to the technical preparation of another act, in respect of which the information contained in this preparatory act would not have any independent significance, but would be objectified in the final act, which itself would be subject to access on general grounds. Apparently, in the pending case the information objectified in the final act is the inspection pursuant to Art. 142, Para. 1 of the Judiciary Act, which has its own significance, constitutes public information within the meaning of Art. 2, Para.1 of the APIA as it relates to the public life in the Republic of Bulgaria and gives the citizens to make their own opinion on the activities and work of the obliged under the Act authorities¹⁷⁰.

Thereafter, the SAC overturned this ACSC decision, but not because the supreme justices did not agree with the first instance holdings, but because the requester expressly declared before the court panel (declaration objectified in minutest of the hearing) that he was given access to the report. Therefore, the court emphasized that:

The purpose of the APIA is to enable the citizen to form their own opinion on the activities of obliged authorities through receiving of information. With the requester's access to the report the purpose of the law was achieved, therefore it lacks the legal interest in challenging the decision¹⁷¹.

With a decision as of March 22, 2011, the ACSC- repealed the refusal of the Social Assistance Agency (SAA) to provide access to the report on the activities of social workers in the best interest of children in some specific cases. The Chairperson of the SAA refused access on the ground that the information related to the adoption of subsequent act and had no significance in itself (Art. 13, para. 2, item 1 of the APIA). The court ruled that the establishment of facts in the report does not fall under the protection of Art. 13, para. 2, item 1 of the APIA. According to the court, even if the report relates to the preparation of subsequent acts, it has an independent significance

¹⁷⁰ Decision No. 3959 as of December 2, 2010, ACSC, First division, 13th panel, adm. case No. 3617/2010.

¹⁷¹ Decision No. 16703 as of December 19, 2011, SAC, Fifth division on adm. case. No. 2344/2011.

as it reflects the current situation of the protection of children at the time of the inspection¹⁷². The decision was not appealed and became final.

6.3. Preparatory Documents and Overriding Public Interest

As it was pointed out above with the 2008 APIA amendments a new paragraph 4 to Art. 13 was stipulated, according to which:

Access to administrative public information shall not be restricted when there is overriding public interest in the disclosure.

In this regard, in two cases supported by AIP, the court grounded its decisions repealing refusals under Art. 13, para. 2, item 1 of the APIA on the overriding public interest in disclosure. Both cases were against refusals of the Chairperson of the National Construction Control Directorate (NCCD) to provide access to information on the construction of a chair lift in the Rila Mountain.

In one of the cases the requester sought access to three ordinances of the Deputy Chief related to the activity of the State Acceptance Committee and the Protocol establishing the safety of the lift. The Chief Secretary of the NCCD refused access to the information on the ground that the information relates to the preparatory work of an act and has no significance in itself, therefore falls under the exemption of Art. 13, Para. 2 of the APIA. The ACSC repealed the refusal and compelled the Chief Secretary of the NCCD to grant access to the information. The court held that acts of public authorities are official information within the meaning of Art. 10 of the APIA and access to it cannot be restricted pursuant to Art. 13, Para. 2 of the APIA, which only applies to administrative public information (Art. 11 of the APIA). The court further emphasized that even if the information was administrative, the exemption is yet not applicable because:

„...for the purposes of comprehensiveness, the court finds that the following shall be noted: access to information, even if it falls under Art. 13, Para. 2 of the APIA, and which is connected to the construction works and safety licenses and authorizations for the lift which is intended for large public use cannot be withheld because of the presence of overriding public interest in disclosure“¹⁷³.

¹⁷² Decision No. 1348 as of March 22, 2011 of the ACSC, First division, 18th panel, adm. case No. 7863/2010.

¹⁷³ Decision No. 2455 as of July 19, 2010, ACSC, Second division, 25th panel, adm. case No. 2261/2010. Final decision.

The second case related to the copy of the authorization for use of the lift. The ACSC repealed the refusal holding that:

„The court finds that the lawfulness of construction works in essence is a matter of public interest and pursuant to Art. 13, Para. 4 of the APIA access to such information cannot be denied even if some of the hypothesis of Art. 13, Para. 2 of the APIA are applicable¹⁷⁴.

Both decisions were not appealed by the NCCD and became final.

¹⁷⁴ Decision No. 2088 as of June 24,2010, ACSC, Second division, 29 panel, adm.case No. 2382/2010. The decision is final.

7. Seeking third-party consent under Art. 31 of the APIA

As in previous years significant part of court decisions concerned challenging the authorities' refusals to provide information on the ground that third party's rights may be affected. Most frequently, these grounds were based on „trade secret exemption“ or „personal data exemption“. Sometimes refusals were grounded on the simple statement of the fact that the requested information affected the interest of a third party and that his consent to the disclosure had not been obtained (Art. 31 of the APIA).

The SAC came to the conclusion that the information sought related to third parties, but did not affect their interests in a way that their explicit consent for disclosure was needed. This would have been the case if the information constituted trade secret, industrial secret or other interest protected by law¹⁷⁵. The case was brought by Mr. Tsvetan Todorov, editor in chief of *Naroden glas daily* against a decision of the Administrative court-Lovech, rejecting his complaint challenging the refusal of the Chairperson of the Municipal Council to provide information regarding the exact amounts paid by the Municipal Council to central and local media to publish regulations and announcements.

By adopting similar reasoning the SAC repealed the refusal of the Government Information Service (GIS) to provide information regarding the repair works in the office of the former Prime Minister - Sergei Stanishev done in 2007. The action was brought by the journalist Pavlina Trifonova from *24 Hours daily*. The GIS refused information on the overall expenses for the repairs, the bids of the competing companies, as well as the price of each item purchased for the repairs. The refusal was grounded on the protection of third party interests, lack of an explicit consent to disclose the information, and trade secret. The refusal was upheld by three-member panel of the SAC¹⁷⁶. The decision was appealed and with its decision³³ as of March 2009 a Five-member panel¹⁷⁷ repealed the decision of the first instance and turned the request back for reconsideration according to the court instructions on the interpretation and application of the law. With regard to the allegation that the information affected third party's interests the court held that:

„In consistency with Art. 37, Para. 1, Item 2 of the APIA access to the information may be refused on the ground that disclosure might affect third party's interests and her/his explicit consent for disclosure lacks except if overriding public interest is present. The evidences of the case do not show that an explicit consent for disclosure of

¹⁷⁵ Decision No. 51, as of April 16, 2009 of the SAC, Third Division, on adm.case No. 7588/2008.

¹⁷⁶ Decision No. 13417, as of December 8 2008 of the SAC, Third Division, on adm. case No. 10498/2007.

¹⁷⁷ Decision No. 4273, as of March 31, 2009 of the SAC, Five-member panel, adm. case No. 1205/2009.

information connected to the third party was solicited. The authority which relies upon this exemption should have sought such consent and if such was explicitly refused should have based its decision on this lack of consent.“

With regard the allegation that the information sought constituted trade secret, the court emphasized that:

„... this Five-member panel of the SAC finds that the contested decision was adopted in violation of Art. 17, Para. 3 in relation to Art. 2 of the APIA... The refusal is grounded on the mere citation of Art. 17, Para. 2 but it does not state the circumstances which may result in unfair competition among traders. The lack of reasons with regard to these circumstances necessary for the proper application of this provision substantiates the unlawfulness of the refusal in this part and its repeal.“

In 2009, for a consecutive time the refusal of the government to provide information regarding the contracts with Microsoft Co for the procurement of software licenses necessary for the public administration was repealed. The action was brought by the journalist Rosen Bosev from *Capital weekly*. The complaint was against the refusal of the GIS, grounded on the protection of third party interests, namely of the CAD Research and Development Center „Progress“ Ltd, which explicitly had refused its consent for disclosure. The ACSC overruled the refusal as unlawful and returned the case to GIS for reconsideration in compliance with the instructions given by the court. In its judgment, the justices stressed out that the Director of the GIS should have requested the consent for the disclosure of the requested information from the contracting party, namely Microsoft Corporation and not the reseller CAD Research and Development Center „Progress“ The presented during the hearings Open License Agreement had been signed by Dimitar Kalchev- former Minister of State Administration, and Mr. Bill Gates for Microsoft Co¹⁷⁸.

In another case the SAC as a second instance upheld the decision of the ACSC that a contract between the State Tourism Agency (STA) and a private company for the provision and exploitation of an exhibition stand at the global exhibition of travel agencies World Travel Market 2007 held in London, is public. In their judgment the justices noted that no evidence was deposited in the course of the court proceedings that would substantiate the conclusion that the disclosure of the requested information related to a third party would have affected its interests. Therefore its explicit consent for the disclosure was not needed and in addition no proof that the third party had ever refused to disclose the requested contract was presented before the court¹⁷⁹.

¹⁷⁸ Decision as of March 20, 2009 of the ACSC, First Division, Seventh panel, adm. case No. 3971/2008.

¹⁷⁹ Decision No. 7095 as of June 1 2009, of the SAC, Third Division, adm. case No. 9503/2008.

In another case, the ACSC ruled that a refusal of the Sofia Municipality grounded on the attorney-client privilege of confidentiality was unlawful. Gancho Hitrov, Chairman of the *National Committee for Improvement of Water Supply in Bulgaria* requested a copy of the legal analysis of the performance of the concession contract between the Sofia Municipality and Sofia Water JSC. The subject of the contract was the management of the water system and sanitation in Sofia for the period 2000 - 2007. The mayor's refusal stated that since the legal analysis was drafted by a law firm it falls under the duty of confidentiality ought by lawyers and counselors. In its reasoning, the court stressed out that the subject of the *privilege of confidentiality* as defined by the law is only a person having legal capacity and quality as counselor. Whatever profession the mayor may have, as an obliged body under the APIA he does not act in a capacity of lawyer¹⁸⁰. Therefore, he is not bound to keep the privilege of confidentiality and he cannot rely on this ground to refuse access to information. The decision was upheld by a three-member panel of the SAC as second instance. With regard to the allegation of attorney-client privilege the court emphasized that:

The finding of the court that the information is not covered by the attorney-client privilege is lawful. The information sought is created on the basis of public procurement and has as main subject the analysis of the performance and non-performance of the concession agreement between the Municipality of Sofia and Sofia Water JSC. The provision of Art. 45 of the Attorneys Act provides that the attorney must keep secret all information conferred to him by his client without time limits. The legal analysis is commissioned by the Sofia Municipality, therefore the above mentioned provision would have been applicable if the information was sought from the co-contractor (the law firm) not from the commissioner (the Municipality). Consequently, the first instance court correctly found that there is no legal requirement for the obliged under Art. 3, Para. of the APIA authority to keep the information secret on the ground of attorney-client privilege¹⁸¹.

With regard to the general allegation that the information affects third party interests the court pointed that:

Correctly the first instance court found that the challenged refusal was in breach of the substantive and procedural rules. The provision of Art. 31 Para. 1 and 2 of the APIA requires the obliged authority to solicit the consent of the third party which is affected by the information within the period of seven days of registration of the access to information request. The authority failed to comply with this requirement and in breach of the law just assumed that information cannot be provided without the consent of the law firm, without making the above mentioned request of consent.

¹⁸⁰ Decision No. 31 as of June 16 2009 of the ACSC, Second Division, 33 panel adm. case No. 1884/2009.

¹⁸¹ Decision No. 4195 as of March 3, 2010, SAC Third division, adm. case No. 10514/2009.

Even if the requested information affects third party's interest, but this third party is obliged body under the APIA, his/her consent for disclosure is not required. On this ground, the SAC upheld a decision of the Administrative Court of Varna, repealing the refusal of the Mayor to provide a copy of the contract between the municipality and the Regional Police Directorate for the protection of public order within the municipality of Varna¹⁸².

In another case, the SAC ruled that tax and insurance information fall within the scope of the APIA. According to the court, if the tax authority receives a request for such information, it is required to assess whether the affected party is not an obliged body under the APIA or whether there is overriding public interest in disclosing the information. If none of these circumstances are present, the tax authority shall seek the consent of the person to whom the information relates, pursuant to Art. 31 of the APIA. Only after receiving an answer from that party the authority may take a decision¹⁸³.

7.1. Overriding Public Interest and Protection of Third Party Interests

In three cases supported by AIP, the court repealed refusals on access to information request grounded on the lack of third party consent explicitly holding that there was overriding public interest in disclosure.

Administrative court - Razgrad upheld two complaints of the Chairman of the Association *Non-Governmental Organizations Center Razgrad* Mr. Georgi Milkov against refusals of the administration grounded on the protection of third affected party and his/her lack of consent to the disclosure. The first was against the refusal of the Mayor to provide information on 12 projects financed by EU funds. The second was against the refusal of the Chair of the Regional Inspectorate to the Ministry of Education, Youth and Science to provide access to reports establishing conflict of interests of persons holding high public offices. In both cases the court found the refusals unlawful and held that access to information shall not be restricted when there is overriding public interest in disclosure.

In one case, supported by the AIP legal team, the ACSC explicitly motivated its repeal decision with the existence of overriding public interest. The complaint was against refusal grounded on the lack of third party's consent for disclosure. The information sought related to documents held by the director of the National Institute for Preservation of Immovable Cultural Values. The precise document was the authorization of the Director of the Institute given to NGOs to plant on April 29, 2009

¹⁸² Decision No. 15919 as of Dec. 22, 2009 of the SAC, Third Division, adm. case No. 5460/2009.

¹⁸³ Decision No. 2045 as of Feb. 16, 2010 of the SAC, Fifth Division, adm. case No. 9995/2009.

a Maple tree in the garden of the National Art Gallery. The requestor also sought all relevant documentation regarding authorizations or refusals of intervention in historic gardens in Sofia, classified as cultural heritage for the period June 1, 2008 - June 1, 2009. The court noted that considering the nature of the information and the principle of openness and transparency of the management of cultural heritage, set forth in Art. 3 of the Cultural Heritage Act, there is clearly overriding public interest, which requires the body to release the information, even if this would harm interests of third parties¹⁸⁴.

7.2. Overriding Public Interest and Trade Secret Exemption

In four cases during 2010 and 2011 the court found that even if the trade secret exemption is applicable the refusals of the public administration are unlawful if there is overriding public interest in disclosure.

With a decision as of March 2010, the ACSC repealed the refusal of the Chairperson of the Nuclear Regulatory Agency (NRA). The information sought was about the technical decision of the NRA and its attachments on the substitution of nuclear fuel in the Nuclear Power Plant (NPP) „Kozlodui“. The refusal was grounded on the lack of consent for disclosure of the information by the third party, namely the NPP „Kozlodui“ and the stipulation of a confidentiality clause in the agreement between the NPP „Kozlodui“ and the Russian supplier of fuel. The court held that the information sought is environmental within the meaning of the Environmental Protection Act (EPA) and the conditions for its disclosure shall be assessed under its provisions. The EPA provides for a narrow interpretation of the restrictions to the access to information and requires the public authority to take into consideration the public interest in disclosing the information¹⁸⁵.

With a decision as of December 29, 2010, the Administrative Court - Lovech repealed the refusal of the Mayor to provide access to the contract between the municipality and a private company for the repair works of the respite care facility in town. The Mayor grounded his refusal on the fact that the information sought is protected as trade secret and affects third parties who did not consent to the provision of information. The Court found that this consent was not to be solicited since the third party itself was also required to provide information because it received funds from the municipal budget, therefore, was obliged under the APIA authority. The Court emphasized on the presence of overriding public interest in the disclosure of the information¹⁸⁶.

¹⁸⁴ Decision as of Feb. 22 2010, of the ACSC, Second Division, 23 panel, on adm. case No. 5139/2009.

¹⁸⁵ Decision No. 670 as of March 29, 2010, ACSC, 36th panel, adm. case. No.3857/2009.

¹⁸⁶ Decision as of December 29, 2010 of the Administrative court - Lovech, adm. case No. 197/2010.

The Administrative Court - Lovech repealed the refusal of the Mayor of the Municipality of Lovech to provide a copy of the contract between the Municipality and a private company for the construction and maintenance under the project „Improvement of the physical and vital environment in the municipality of Lovech“. The refusal was grounded on the fact that the information was protected as trade secret and its disclosure would bring to unfair competition between business persons. Furthermore, the refusal was based on the lack of consent to provide the information of the third person (the company) concerned. The court compelled the mayor to provide the information pointing out that the refusal was not grounded on any specific circumstances showing that disclosure of the information would lead to unfair competition. The court held that even if disclosure would result in unfair competition, the legislator gave precedence to the overriding public interest, therefore information shall be released. According to the court, the public interest is undoubtedly present when it comes to public procurement contracts¹⁸⁷.

With a decision as of June 16, 2011 the Administrative Court - Smolyan repealed the Mayor's refusal to provide information on contracts for waste management and waste treatment. The court emphasized that the APIA established a legal presumption of overriding public interest in the disclosure of the requested information¹⁸⁸.

It is interesting to note that the balance of interests and the assessment of the presence of public interest were considered mainly by administrative courts in the country.

7.3. Overriding Public Interest and Revealing of Wrongdoings

In two cases in 2011 the court repealed refusals to provide information on the ground of overriding public interest when the information aimed at revealing wrongdoings.

With a decision as of January 10, 2011, the ACSC repealed the refusal of the Chief Secretary of the Ministry of Economy, Energy, and Tourism to provide full access to a report on the substitution (with not licensed and not enough risk protected fuel) of nuclear fuel in the Nuclear Power Plant „Kozlodui“. The Court found that there was overriding public interest in the disclosure since the report focuses on specific facts revealing the presence or lack of correction scheme for the replacement of fresh nuclear fuel with recycled¹⁸⁹.

¹⁸⁷ Decision as of February 16, 2011 of the Administrative court - Lovech, adm. case No. 196/2010. Final decision.

¹⁸⁸ Decision No. 195 as of June 16, 2011 the Administrative Court - Smolyan, adm. case No. 169/2011.

¹⁸⁹ Decision No. 109 as of January 10, 2011 of the ASCS, Second division, 30th panel, adm. case No. 2889/2010.

With a decision as of June 1, 2011, a five-member panel of the SAC upheld the decision¹⁹⁰ of a three-member panel as of February 2011 repealing the refusal of the Ministry of Agriculture and Food to provide information on the licensing for the selection of the breed Bulgarian Shepherd Dog. The nongovernmental organization *International Association Karakachan Dog*, town of Plovdiv, requested information about the application procedure for a license for the selection of the breed by another non-profit organization *Bulgarian Cinologic League for Bulgarian Shepherd Dog*, town of Montana. With a decision as of February 2011, a three-member panel of the SAC repealed the refusal of the minister in its part where the complete license application documents submitted by the *Bulgarian Cinologic League for Bulgarian Shepherd Dog* were refused. In their judgment, the justices signify that the public debate for many years on the question if the recently registered breed Bulgarian Shepherd Dog was different or identical to the breed Karakachan Dog clearly emphasize the existence of overriding public interest in the disclosure¹⁹¹.

¹⁹⁰ Decision No. 2139 as of February 11, 2011 of the SAC, Fifth division, adm. case No. 2342/2010.

¹⁹¹ Decision No. 7619 as of June 1, 2011 of the SAC, Second Division, five-member panel, adm. case No. 4389/2011.

8. Personal Data Protection Exemption

The protection of personal data is not among the explicitly provided for by Art. 37, phrase 1 of the APIA exemptions to the right of access. Nor it is explicitly mentioned under Art. 41, phrase 1 of the Constitution which protects „the rights and reputation of others“. Nevertheless, there is no doubt that the personal data is connected to the protection of the „rights of others“. This protection falls under the scope of Art. 37, Para. 1, Item 2 of the APIA according to which the protection of third party interests is a lawful and legitimate ground for refusal.

During the last twenty years Bulgaria has signed and ratified the international instruments, guaranteeing the protection of personal data. In 1992 the European Convention on Human Rights (ECHR) has been ratified. Pursuant to the case law of the European Court on Human Rights (ECtHR) Art. 8 of the ECHR covers the protection of personal data. In 2003 the Convention No. 108 as of 1981 for the protection of individuals with regard to automatic processing of personal data has been ratified¹⁹².

With the joining of Bulgaria to the European Union the *acquis communautaire* became part of the Bulgarian legislation. This meaning that data is protected pursuant to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

8.1. History of the Adoption of Data Protection Legislation

The legislation before 1989 has relatively weak requirements for the protection of personal information as part of the general protection of privacy. For example, the divulgence of private secret entrusted or known to someone in his professional capacity was criminalized and punishable under Art. 145, Para. 1 of the Criminal Code of 1968. The disclosure of the secret of adoption is also punishable since 1982 (Art. 145, para. 2 of the Criminal Code)¹⁹³. The 1971 Constitution guarantees the protection of private life, the secrecy of correspondence and communications¹⁹⁴, but does not provide for protection against data collection, data storage and data processing. The protection of privacy is fully guaranteed for the first time in 1991 by Art. 32, Para. 2 of the Constitution. Pursuant to this provision no one shall be followed, photographed, filmed,

¹⁹² Promulgated in State Gazette . Issue No. 26, March 21, 2003, amended by State Gazette, Issue No. 93, November 26, 2010.

¹⁹³ Amendment promulgated in State Gazette, Issue No. 28 of 1982.

¹⁹⁴ Provision stipulated in Art. 50 and 51. Whether this provision was applied at all is another question.

recorded or subjected to any other similar activity without his/her knowledge or despite his express disapproval, except if such activities are required by law. A definition of „personal data“ and the procedures for its protection are set forth by the Personal Data Protection Act (PDPA) adopted in 2001 and entered into effect in January 2002¹⁹⁵.

Pursuant to Art 2, Para. 1 of the PDPA „persona data“ is defined as „any information, which makes it possible to identify an individual directly (e.g. through a personal ID number) or indirectly - through on or more specific features, related to his physical, physiological, psychological, genetic, economic, cultural, or social identity.“ The definition closely follows Directive 95/46/EC. The principle is that any and all information relating to a natural person is considered as „personal data“ within the definition of the PDPA.

The initial redaction of Art. 2 of the PDPA lists categories of data which are presumed to fall within the definition of „personal data“. This is information about the person which reveals his/her physical¹⁹⁶, psychological, mental, family, economic, cultural or social identity.¹⁹⁷ According to the former wording of Art. 2, Para. 2 of the PDPA the „personal data of natural persons, related to their participation in civil associations or to their participation in oversight boards of legal persons, as well as related to the exercise of public authority“ should have been added to the categories above. As a result, the scope of the law was unusually broadened in breach of all relevant international standards.¹⁹⁸ The free access to public registers and to information necessary for the accountability and transparency of public authorities was endangered.

The PDPA was amended in 2005 after range of harsh criticism on the consistency of several statutory provisions with the relevant national standard. Particularly problematic was the above-mentioned redaction of Art. 2¹⁹⁹. This provision was redrafted and changed - the category related to the „social identity“ has dropped. Since the 2005 amendments the definition of „personal data“ does not cover data of natural persons related to their participation in oversight boards of legal persons and data related to the exercise of public authority.

¹⁹⁵ Promulgated in State Gazette, Issue No. 1 of 2002.

¹⁹⁶ With an amendment to Art. 2, Para. 1 of the PDPA promulgated in State Gazette, Issue No. 70 of 2004 the human genome was added to these categories.

¹⁹⁷ The weird concept „public identity“ in the field of protection of personal data is due to incorrect translation of the term „social identity“, mentioned in Art.2, a of EC Directive 95/46.

¹⁹⁸ The PDPA draft bill discussed in 2000 provided for protection of legal persons. The AIP critical analysis of this proposed draft bill is available in Bulgarian at:
http://www.aip-bg.org/documents/meet_aip_bg.htm

¹⁹⁹ Promulgated in State Gazette, Issue No. 103 of 2005. AIP addressed its critics and recommendations.

8.2. Constitutional balance between the protection of personal data and the right to information of the public

The degree of protection of privacy of individuals is not the same in all cases. The degree of protection is lower when it comes to „public figures“. The Constitutional court interpreting Art. 39, Art. 40 and Art. 41 of the Constitution in its Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996 held that:

„...In terms of the significance of the right to hold an opinion for the freedom of the political debate - part of the public discussion, the statements which affect the activities of the public authorities or which constitute criticism to political figures, civil servants or government officials are entitled to greater degree of protection.“

The above cited decisions reflects the ECtHR principles which holds „The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance²⁰⁰.“ This is even more important as „freedom of political debate is at the very core of the concept of a democratic society“²⁰¹. In this regard the balance between the competing rights shall be struck on a case by case basis, but the narrow interpretation of the restriction related to the „protection of reputation of others“ has tolerated publication in the press of qualifications such as „the basest opportunism“, „immoral“ and „undignified“²⁰² or even as „idiot“²⁰³. The interpretation of the concept of „public figures“ is broad covering not only public officials but all persons whose behaviour, statement and opinions may have an impact on the public opinion and the citizens at large. According to both, the ECtHR and the Constitutional court the authority to make the fair balance between the competing interests weight upon the legislator, the executive and the judiciary²⁰⁴.

In the beginning of 2012 the Constitutional court elaborated sophisticated approach with regard to the balance between the right to information and the protection of personal data. Even though the case referred to the Constitutional court related to

²⁰⁰ Case of Lingens v. Austria, Application no. 9815/82, para. 42.

²⁰¹ Ibidem.

²⁰² Decision on the case of Case of Lingens v. Austria.

²⁰³ The case of Oberschlick v. Austria 2. The journalist has used the word „Trotell“.

²⁰⁴ Constitutional Court Decision No. 7 of 4 June 1996 on Constitutional Case No. 1 of 1996 , SG vol. 55/ 1996. The abovementioned paragraph was reproduced in the AIP amicus brief to the Constitutional court on constitutional case No. 14/2011, available in Bulgarian at: http://www.aip-bg.org/legislation/Ипоекмозакону_у_смаиобууа/

the constitutionality of a provision of Access and Disclosure of Documents and Announcing Affiliation of Bulgarian Citizens to the State Security and the Intelligence Services of the Bulgarian National Armed Services Act.²⁰⁵ The provision whose constitutionality was questioned in this instance is Art. 25, item 3 of the Act which provides that affiliation to the State Security and Intelligence Services may be announced based on data for the person in reference documents (registration diaries and card indexes). In its reasoning the court lays the common principles of the balance between the constitutional right to information and its restrictions. In its decision No. 4 as of March 26, 2012 the Constitutional court reiterates the principles set forth by Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996 but further develops its reasoning with special regard to the right of information and the protection of personal data by holding that:

„These two fundamental rights are in this case in collision because they both are not absolute rights, therefore they may be restricted in accordance with the principle of proportionality. The permissible under the Constitution restriction of personal rights shall be within limits which enable the exercise of the constitutional right to get access guaranteed by Art. 41, Para.1. The citizens' right to information is essential for making an informed choice. On the other hand, this right is not absolute either and may be restricted pursuant to Art. 41, Para. 1 and 2 of the Constitution - it cannot be exercised to the detriment the rights and reputation of others, as well as to the detriment of national security, public order, public health and morals and the information under Para. 2 shall not be protected as state or any other established by law secret and shall not affected the rights of others.“

As a consequence, the Constitutional court clearly establishes the requirement to make a balance between these conflicting rights. The leading feature of this balance shall be the principle of proportionality. This means that the degree of interference with the right of privacy shall correspond to the purpose of the public access to information. The decision brings forward one of the reasons the balance in favour of the right of access - the right to an informed choice and informed decision.

In the abovementioned decision the Constitutional court reiterates the principle drawn in 1996 that „statements that affect the operation of the government agencies or constitute criticism of political figures, government officials or the government, deserve a greater degree of protection. Hence the conclusion, that the government as a whole, and in particular the individual political figures and government officials, are exposed

²⁰⁵ Access and Disclosure of Documents and Announcing Affiliation of Bulgarian Citizens to the State Security and the Intelligence Services of the Bulgarian National Armed Services Act, promulgated in SG, Issue No. 102, as of December 19, 2006, last amended by SG, Issue No. 48 as of June 24, 2011.

to public criticism at a level, higher than that for private persons.²⁰⁶ In the meantime, the court sophisticated this interpretation in the light of subsequent legislative and social changes by adding that:

„In principle the degree of protection of personal data of individuals under Art. 3 of the Act Announcing Affiliation to the Former Security Services (person who hold or have held certain public offices listed in the Act) is much lower compare to the protection offered to other citizens. For example public officials are required to declare information on their incomes, assets, savings, and receivables. The declarations are published and accessible online. They are also required to publish some other usually protected data in order to establish conflict of interests.“

Therefore, the level of protection of personal data of public figures is much lower compare to the protection of private individuals. As far as the fair balance between competing rights shall be secured by the legislator, the executive and the judiciary it shall be assessed on the basis of the same criteria in every case. In respect to the proper APIA implementation this requirement necessitates the assessment of the relevant facts and substantive rights in each access to information request.

8.3. Access to Public Information and Access to Personal Data

1. Pursuant to Art. 2, Para. 4 of the APIA it does not apply to access to personal data. In the mean time, pursuant to Art. 31, Para. 1 of the APIA, the time limit for consideration of the request may be extended by no longer than 14 days when the information sought relates to a third party and his consent for disclosure is necessary.

2. Pursuant to Art. 2, Para. 1 of the PDPA any information related to identified or identifiable person constitutes personal data. In a decision of 2009 the Commission on the Protection of Personal Data emphasized:

In its practice the Commission has repeatedly held that the forename and the surname is not sufficient in order to unequivocally identify a person.²⁰⁷

As a result, only information which allows the person to be unequivocally identified would constitute „personal data“.

3. As it was mentioned above, according to Art. 2, Para. 4 of the APIA does not apply to access to personal data. However, the prevailing case-law established an exception to

²⁰⁶ In its decision of 2012 the Constitutional court expressly grounded its decision on the interpretation drawn in this paragraph of Constitutional Court Decision No. 7 of 4 June 1996 on Constitutional Case No. 1 of 1996.

²⁰⁷ Decision No. 44 as of January 14, 2009 of the Commission on Protection of Personal Data, complaint No. G-44/04.06.2008.

this rule when the information is at the same time public within the meaning of the APIA and personal within the meaning of the PDPA. When the information sought by the access to information request falls within the definition of „public information“ access shall be granted pursuant to the APIA. For the disclosure of the personal data contained in the documents the explicit consent of the affected parties shall be solicited and if such is not given the information shall be disclosed in a manner such as it does not reveal this data.

For example, a decision of the SAC of the early 2001 found that the requested copies of acts establishing liability and the subsequent acts establishing offences of the authorities of the Ministry of Environment and Waters which were explicitly mentioned by the minister in response to the oral question of a Member of the Parliament constitute public information within the meaning of Art. 10 of the APIA.²⁰⁸ According to the court it is apparent that the requester did not seek „personal information“. The court noted that „it is true that the documents contain in their significant part personal data such as names, addresses, positions held etc. of the officials and the witnesses.“²⁰⁹

8.4. Consent of the affected parties

The decision cited above found that even if the Minister of Environment and Water in his capacity of obliged authority thought that „the disclosure of personal data would have affected the interests of third parties, he should have applied Art. 31, Para. 2 of the APIA“. This means that he should have had solicited the affected parties' consent and if such is explicitly refused". If these measures were undertaken and meaningful partial access is possible there is no ground for refusal under Art. 37, Para. 1, Item 2 of the APIA.

In a similar way the court considered as access to information request the application for paper copies of all letters signed by the Minister of Education and Science during the period from *01.01.2002 till 31.12.2003 in which he approves the practice of over-enrollment in secondary schools. To reach this conclusion the court took into consideration the fact that this matter was discussed in parliamentary committee. According to the court the obliged authority is required to issue a decision upon the access to information request when the information sought is public within the meaning of the APIA.*²¹⁰

²⁰⁸ Decision No. 9822 as of December 18, 2001, SAC, Fifth division, adm. case No. 5736/2001. Case of *Lazov v. the Ministry of Environment and Waters*.

²⁰⁹ Ibidem.

²¹⁰ Decision No. 9830, November 8, 2004, SAC Fifth division, adm. case No. 4544/2004. Case of *Tanya Petrova v. the Ministry of Science*.

The application of Art. 31 of the APIA supposes the identification of the affected parties

The obliged authority shall first identify the affected persons in order to start the procedure of solicitation of his/her consent. The mere possibility that some parties may be affected by the disclosure is not sufficient for the application of Art. 31. In 2012, in relation to an appeal complaint of the Ministry of Justice claiming that personal data of third parties shall be protected the SAC held:

In this case the appellant focuses on the hypothetical possibility that personal data of third parties may be contained in the documents. Neither the contested decision nor the evidences and statements produced during the court proceedings [...] give any specificity on the persons who might be affected. If, indeed, disclosure would affect third parties, the competent authority should apply Art. 31, Para. 2,3 and 4 of the APIA and Art.26, Para. 2 of the PDPA respectively and solicit their consent, and eventually if such is not given it should provide access to the personal data of Mr. Dimitrov in such a manner as it does not reveal personal data of third parties²¹¹.

As a consequence, the lack of identification of affected parties does not allow the application of the personal data protection exemption. After completing this first step - the identification of affected persons, the competent authority shall undertake the second - soliciting his/her consent for revealing it, unless there is overriding public interest in the disclosure. In the latter, explicit consent is not required.

The cases cited above clearly show that the access to information requests do not aim at access to the personal data contained in the documents. This conclusion departs from the wording of the request itself or is drawn by way of interpretation by the court. Therefore, the court found that the only consistent with the law way to proceed is to require the institution to solicit the third parties consent and if such is not granted, to compel the authority to provide partial access.

²¹¹ Decision No. 2082 as of February 13, 2012, SAC, adm. case No. 2992/2011. Access to a prisoner file was sought.

Explicit consent is not required when the affected party is an obliged authority or if there is overriding public interest in the disclosure

If by means of access to information request is sought not only public information but personal data as well we will face „*conflict between two constitutionally guaranteed rights - the right to information and the right to privacy and in order to resolve the conflict one shall step aside.*“²¹² In this case if there is no overriding public interest in the disclosure the access to information shall be restricted. This is the case for example of amounts paid to a natural private person from the municipal budget, because despite that the information on public money expenses is public the disclosure would reveal the person's economic identity.²¹³

The 2008 APIA amendments oblige the competent authority to make a balance of interests in case of competing rights and if rights and legitimate interests of third parties are affected (Art.31, Para 5 and Art. 37, Para. 1, Item 2 of the APIA). Indeed, according to the international instruments and other national legislation one of the most common hypothesis of applying the balance of interests and overriding public interest in the disclosure is in cases of conflict between the right to information and the protection of privacy. The practice of the ECtHR also supports this conclusion. In Bulgaria this requirement is not only enshrined in the APIA but also results directly from Art. 41 and Art. 32 of the Constitution and their interpretation by the Constitutional Court.

8.5. Access to data under the APIA which does not require the consent of the affected party

Over the years a case law was established on access to information about the qualifications of public officials, information on participation in oversight bodies, incomes, assets, education and diplomas of public officials, allocation of state subsidies of MPs. Some questions, thought, remain unsettled by the court practice - the publicity of additional benefits (in addition to the salary) of public servants and the names of the persons to whom pardon was granted by the President of the Republic of Bulgaria.

²¹² Decision No. 6438 as of June 13, 2006, SAC Fifth division, adm, case No. 2527/2006.

²¹³ *Ibidem*. Shall be noted that information on the salary and benefits of public servants is generally accessible. See below.

Information related to the position and qualifications of the person

1. According to the Supreme Administrative Court:

„...information related to the position and the names (of persons having the authority to issue acts pursuant to Art. 55, Para. 1, Item 6 of the Integration of People with Disabilities Act) shall be considered as official public information within the meaning of the definition of Art. 10 of the APIA - information contained in the acts of state bodies in the course of exercise of their powers. The finding of the first instance court that the requested information relates to natural persons, but in their capacity of state officials exercising public authority in the establishment of administrative liability pursuant to the Administrative Violations and Sanctions Act and establishing infringements pursuant to the Integration of People with Disabilities Act in the area of social assistance is lawful and correct“²¹⁴.

2. When the data relates to the exercise of official professional duties it cannot be seen as „personal“. This is the case of information on the number, purpose and duration and incurred expenses of official trips of a Deputy mayor. According to the Supreme Administrative Court:

„These data cannot be considered as „personal“ within the meaning of Art. 2 of the PDPA since they do not relate to specific natural person but relate to the exercise of official duties of a Deputy mayor of a municipality.“²¹⁵

Information about the participation in commissions (committees)

The matter whether data of members of commission constitutes personal data was raised on the occasion of a refusal of an appointed information officer in the Ministry of Justice. In 2010 information about the names and positions of members of commission appointed on the basis of Art. 35, Para. 4 of Council of Ministers ordinance No. 324/30.12.2009 for the implementation of the national state budget for 2010 for the assessment of social significance of projects of NGOs acting in the public interest and funded by state subsidies. The court found that the requested information is public and rebutted the arguments of the MoJ justifying the refusal by holding that:

„...information containing data of such nature cannot be considered as „personal“. Under the APIA information which only states the official position of the members and does not contain any other identification data relating to their personal lives. In this regard, the information sought does not affect the third parties and their consent for disclosure is not required.“²¹⁶

²¹⁴ Decision No. 240 as of January 9, 2008, SAC Fifth division, adm. case No. 6700/2007.

²¹⁵ Decision No. 3101/2006 on Administrative Case No. 8452/2005 by SAC, Fifth Division. Case of *Georgi Milkov v. the municipality of Razgrad*.

²¹⁶ Decision No. 1902, April 21, 2011, ACSC, First division 16 panel, adm. case No. 6954/2010. The decision was appealed to the SAC.

Similar was the decision of the ACSC on the case of refusal of the Chief Secretary of the President to provide information about the names of the members of the Pardon Committee to the Vice President.²¹⁷ Soon after the inauguration of the new President Mr. Plevneliev the information was provided upon a new request for the same information.²¹⁸

Information about declared incomes and assets of public figures

Since 2000 the persons holding high public offices are required to submit annual declarations on their incomes and assets. The requirement is laid down in the Public Disclosure of Property Owned by High Government Officials Act (PDPOHGOA). Since 2007 the declarations are available online in a public register. Before this online publication several questions with regard the public access to the declarations were settled by the court. Art. 6, para. 1 of the PDPOHGOA was amended in 2006.²¹⁹ The current provision stands that anyone has access to the register of declarations, the initial wording provided for access only to the management of the mass media.

In this connection, the editor in chief of a local newspaper sought access to a specific declaration but access but the competent authority - the Chairperson of the National Audit Office failed to reply within the time limits. The silent refusal was challenged and the court repealed it by rebutting the authority's arguments. The court held that the Audit Office is obliged to grant access since the provision of the law was clear and did not require any further interpretation even more that:

„...the provision of the PDPOHGOA is a special to the PDPA law. The purpose of the legislator as it is evident from the text of the law and especially from its title is that the incomes and assets of the high public officials shall always be public. The act is a kind of anticorruption measure which cannot be derogated by reference to the PDPA.²²⁰

The court repealed the refusal in the part refusing access to verification of authenticity of the declared statements and imposed sanctions for non-compliance with time frame limits for submission of declarations. The repeal in this part is on ground of procedural breaches so it is not clear whether it violates substantive law.

²¹⁷ Decision No. 1767, April 14, 2011, ACSC, Second division, 31 panel, adm. case. No. 9104/2009. The decision was appealed to the SAC.

²¹⁸ The information disclosed was the basis of a publication in *Trud daily* printed on February 17, 2012.

²¹⁹ Amended by SG, Issue No. 38 of 2006.

²²⁰ Decision No. 3508, April 20, 2004, SAC, Fifth division, adm. case No. 10889/2003. Case of *Diana Boncheve v. the National Audit Office*.

Information about education and qualifications

1. The practice to assess whether the person whose data is in question is listed in Art. 3 of the PDPOHGOA i.e. is a high government official was further developed by a five-member panel of the SAC. Subject of the request this time was not information about the incomes and assets but about the education and qualifications of all senior public servants within a ministry, heads of directorates, government experts and consultants. The first instance held that access to this information cannot be provided and even more, the authority was not required to apply Art. 31 of the APIA and solicit the consent of the affected parties.²²¹ A five-member panel of the SAC, acting as second instance completely refuted this holding and compelled the authority to grant access:

„... information about the names, education and qualifications of the deputy ministers, chief secretary and members of the political cabinet of the Minister of education and science. All these persons are covered by the PDPOHGOA and would have to submit declarations (Art. 2, Para. 2, Item 3, 28 and 30). Their names are publically available and accessible via the electronic public register. The rest of the data - about the education and qualifications are not subject to publication into a register but are necessary for the citizens to form an opinion whether the senior political and managerial staff in the area of education and science in Bulgaria has the necessary academic and professional capacity to effectively exercise the conferred state authority in this area of the public life. Indeed, the solution of the pending problem shall be the same as the matter is decided for the Minister of Education and Science whose short but comprehensive biography (with a photo), as well as his asset declaration are available on the website of the Council of Ministers²²².

As a consequence, according to the court a balance of interests shall always be made when the requested data relates to persons holding high public offices. There is overriding public interest in disclosure in cases when the requested data is necessary to form an independent opinion whether they possess the necessary qualifications to ensure quality and effective exercise of the vested public authority and fulfillment of their professional duties. It is remarkable that the abovementioned decision precedes with two years the 2008 APIA amendments introducing the overriding public interest test. At that time the legal ground for this assessment of competing interests is the Constitutional interpretation in Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996 and in Art. 2, Para. 1 of the APIA.

²²¹ This is so because all „hypothesis under Art. 31 of the APIA relate to public information affecting third parties. According to the court panel the information sought was not public but constituted personal data of the managerial staff within the Ministry of Education and Science.

²²² Decision No. 9486, as of October 4, 2006. SAC, Five member panel. Adm. case No. 3505/2006. Case of *168 Hours daily v. the Ministry of Education and Science*.

2. In a recent decision on a similar matter the ACSC held that the diploma is always associated with a particular natural person and disclosure would always affect that person in his/her individual capacity. This is despite the fact that the diploma is related to necessary qualification requirements to hold the office. As a consequence the court found that this person would be affected by the disclosure, therefore the presence of overriding public interest should be assessed in order to disregard lawfully the lack of consent. The court held that:

„Certainly the diploma of the former executive director of State Fund „Agriculture“ and the published by the media facts on the matter is of overriding public interest within the meaning of § 1, Item 1 of the Miscellaneous and Final Provisions of the APIA, including given the fact that this position requires certain academic and professional qualifications related to the specificity of the Fund - to be a Treasurer of the payments from the European Union funds. Such information would undoubtedly increase the accountability and transparency of this authority and would meet the need for clarification on this public matter²²³.“

Information on spending of public funds and Members of Parliament allowances

1. In July and August 2011, a public debate was held in the media about the transparency of political parties' financing from the state budget. In the Political Parties Act, there is a norm providing that the state attributes subsidies to the parliamentary represented parties on the basis of their seats in the Parliament. The sum attributed to each MP is defined by order of the Minister of Finance. Therefore, the question was to which parties the 17 independent MPs sent their attributed subsidy. According to the court the declarations to which political parties the funds were allocated are public information within the meaning of the APIA. The court reached this conclusion because the declarations reveal the allocation of budget subsidies to political parties. The legal basis for this allocation is Art. 27, Para. 2 of the Political Parties Act which itself is the ground for adoption of an order of the Minister of Finance (Order No.108/01.02.2011). According to the SAC the declaration does not contain any personal data, therefore the refusal cannot be grounded on this exemption. The court also emphasizes that the consent for disclosure of the affected party is not to be solicited since the affected party is an obliged under the APIA authority to provide access to public information. The court compelled the Ministry of Finance to provide the information.²²⁴

²²³ Decision No. 2072 as of April 19, 2012 on adm. case. No. 633/2012, ACSC, the decision is not final.

²²⁴ Decision No. 5343 as of November 24, 2011 of the ACSC, First division, 5th panel, adm. case No 7543/2011. Case of *Darik radio v. the Ministry of Finance*.

2. In another case on the same subject matter another panel of the ACSC had also found that the requested information is public because of the source of funding. In this regard the court held:

„...the financial allowances of MPs are not personal incomes of the MPs, disconnected from their professional duties and mandate which they perform. Along with their capacity of natural persons they are vested with public powers. The legal system does not allow the figure of the „anonymous“ Member of Parliament. Pursuant to Art. 67, Para. 1, phrase 1 of the Constitution the Members of Parliament represent not only their constituencies but the entire nation. In their capacity of public figures they are exposed to greater public scrutiny and to higher accountability and transparency requirements than private individuals. They are known to the public by identifying themselves not only through their deeds and political affiliation but also through their decisions including on how to spend budget funds when they have the discretion to dispose with them.²²⁵

From the foregoing it can be concluded that according to the ACSC panel the *„particular public law status of MPs is incompatible with the purpose of the PDPA to guarantee the respect of privacy and personal life“*. By refuting the respondent's argument in this regard the court found that the political beliefs of MPs does not constitute personal data. On one hand, this information relates to publically known people, on the other - they knowingly expose themselves to the public by revealing also their political views.

Before the assessment of the balance between the right to information and the protection of personal data in this specific cases the court added: *„in this regard the restriction to the right of access to information shall be narrowly interpreted as far as the concealment would harm the public interest which is much more significant than the particular private interest of the affected person whose data would be disclosed.“*

Beside the lower level of protection of the personal sphere that enjoy MPs the court takes into consideration the public interest with regard to the purpose of the APIA. According to the court *„the number of the MPs who have left the respective parliamentary groups who have filed declarations for purposes of transferring the public subsidy to other political parties as well as the MPs will to transfer the subsidy to a specific party are matters related to the political life in the country. This information would enable the citizens to form an opinion on the activities of the subjects of the political process in Bulgaria and on the spending of budget funds.“*

²²⁵ Decision No. 1442 as of March 19, 2012, ACSC, 34 panel, adm. case. No. 6243/2011. Case of *Pavlina Jivkova v. The Ministry of Finance*.

Information on additional benefits and payments to public servants

During the first few months of 2012 a heated public debate took place whether information about allocated to public servants additional benefits shall be released. The preliminary question whether and to what extent such information is public arose in this regard. Different branches within the executive provided data in different form and to different degree. Some provided the exact amount received by each public servant, some provided row data for a specific category of employees, some provided the total amount of additional allocations for the entire body in question and others simply refused access to any kind of such information. In fact an appeal was lodged back in 2011 against the refusal of such kind of information.

According to the ACSC information on allocated additional benefits is "public within the meaning of Art. 2, Para. 1 of the APIA because it would enable the requester to form an opinion on the work of the competent authority and how it promotes its employees and on what criteria in order to allow every citizen as potential addressee to expect and to know that the respective public servant would perform well his/her duties, for which he/she would be stimulated solely by the head of the institution pursuant to rules established by law.

Since the information is public it shall be subject to balance of interest test in order to assess which interest overrides - the public interest and the right to know or the protection of personal data. Pursuant to § 1, Item 6 of the Miscellaneous and Final Provisions of the APIA overriding public interest is presumed when the „requested information aims at the revealing of corruption and abuse of power, increase of transparency and accountability of obliged bodies under Art. 3“. According to Art. 31, Para. 5 if third parties are affected their consent for disclosure is not required if there is overriding public interest. Accordingly, the court held that "the requested information even if it contains personal data on allocation of bonuses which would be revealed of members of the Political cabinet aims at the increase of transparency and shall be released even if there is explicit refusal of the affected parties pursuant to Art. 34, Para. 4 of the APIA.²²⁶

²²⁶ Decision No. 5317 as of November 23, 2011 of the ACSC, Second division, 28th panel, case No. 6487/2011. Case of *Dinka Hristova, Sega daily v. the Ministry of Labor and Social Policy*. The decision was appealed by the respondent.

APPENDIX

LITIGATION CASE NOTES BY TOPIC

OBLIGED BODIES

Yurii Ivanov
vs. „ViK“ OOD - Town of Sliven

Yurii Ivanov vs. „ViK“ Ltd - Town of Sliven

First Instance Court - administrative case No. 287/2010, Administrative Court - Sliven

Second Instance Court - administrative case No. 3126/2011, Supreme Administrative Court, Fifth Division

Request:

On July 18, 2010, Yurii Ivanov filed an access to information request to the Regional Governor of Sliven. Demanding copies of the minutes of the general meetings held on the „ViK“ (Water Supply and Sewerage) Ltd - Sliven for the period 2005 - August 2010. On August 23, 2010, Mr. Ivanov received a notification letter that the request was forwarded by the Regional Governor's Administration to the competent „ViK“ Ltd. - Sliven.

Refusal:

The Director of „ViK“ - Sliven did not issue a decision on the filed request within the 14-days period prescribed by the APIA.

Complaint:

The silent refusal of the Director of „ViK“ - Sliven was challenged before the Administrative Court - Sliven.

Developments in the Court of First Instance:

During the proceedings, the Director of "ViK" - Sliven that the requestor should not be granted access to the requested information, as APIA provided for requesting access to information, but not access to documents. The Director also argued that the requested information could be obtained from the Trade Companies Register, where the minutes from the general meetings of the company were published. The complainant submitted written comments, which stated that the Trade Companies Register Act introduced no obligation to publish all minutes from general meetings of a company in the Trade Register, but of these general meetings, at which decisions were taken that result in new entries, cancellations and announcements. Therefore, the publicity of the Trade Companies Register did not mean that APIA was not applicable when an explicit request was filed for access to minutes from general meetings.

Court Decision:

With a Decision No. 180 as of December 22, 2010, the Administrative Court - Sliven rejected the complaint assuming that the APIA provides for requesting access to information but not to specific documents. A positive moment in the decision is that according to the court, the Director of the „ViK“ - Sliven is obliged body under the APIA since the state owns 51 % of the company capital. Thus, the company is public-law organization under the meaning of § 1, item 4, letter, „c“ of the Additional Provisions of the APIA.

Court Appeal:

The decision of the Administrative Court - Sliven was appealed before the SAC. The appeal stated that it was irrelevant to the provision of the information when it was due if the request is for a specific material carrier of information or for a description of the information. The case law of the SAC was emphasized, according to which it was irrelevant if the requestor had formulated a request for access to information or for access to a document.

Developments in the Court of Second Instance:

The case was heard in an open court session held on December 19, 2011 and scheduled for judgment.

Court Decision:

With a Decision No. 881 as of January 17, 2012, the SAC repealed the decision of the first instance court and the refusal of the Director of the „ViK“ - Sliven. In their judgment, the justices pointed out that the company was obliged under the APIA authority as public law organization, considering the percentage of state ownership of its capital. The court further found that the minutes from the general meetings of the company had the characteristics of official public information, as they are indicative for the activities of the company for a certain period of time and would enable the citizen to form an opinion on the activities of the obliged authority.

EXISTENCE OF INFORMATION

*Konstantin Bobotsov
vs. the Mayor of the
Municipality of Plovdiv*

Konstantin Bobotsov vs. the Mayor of the Municipality of Plovdiv

First Instance Court - administrative case No. 989/2011, Administrative court - Plovdiv

Request:

On February 15, 2011, Mr. Konstantin Bobotsov filed a request to the municipality of Plovdiv. He sought access to an audit report for 2010 under the Improvement of Air Quality Program in Plovdiv.

Refusal:

The Chief Secretary of the municipality issued a decision granting full access to the requested information. The requestor paid the cost estimated to 0.14 BGN, but instead of the audit report, the requestor was given a notification that the information (the report) itself was to be drafted.

Complaint:

The decision was challenged before the Administrative Court - Plovdiv. The complaint states that the decision is unlawful, as the requestor did not access the information sought but in the mean time he was charged with a fee.

Developments in the Court of First Instance:

The case was heard in two open court sessions and on September 15, 2011 was scheduled for judgment. During the trial the complainant adduced evidence proving that at the time of the filing of the request, the audit report was in process of compilation and drafting. Therefore, instead of issuing decision granting access and collecting fee, the Chief Secretary should have informed the requestor that the information did not exist.

Court decision:

With a decision No.1500 as of October, 2011, the Administrative Court - Plovdiv repealed the Chief Secretary's resolution granting access and returns the file for reconsideration. The Administrative Court - Plovdiv repealed the decision of the Chief Secretary signifying that the challenged decision was unlawful since the requested information had not existed neither at the moment of the filing of the request nor at the moment of the delivery of the decision which substantiated the lack of ground for issuing a decision for provision of access to that information. Instead, the hypothesis of Art. 33 of the APIA should have been applied by informing the requestor that the municipality did not dispose of the requested information.

**ACCESS TO INFORMATION -
ACCESS TO DOCUMENTS**

*William Popov
vs. The Ministry
of Emergency Situations*

William Popov vs. The Ministry of Emergency Situations

First Instance Court - administrative case No. 8978/2009, SAC, Fifth division

Second Instance Court - administrative case No. 13930/2010, SAC, Five member panel

Request:

On May 7, 2009, William Popov filed a request to the Ministry of Emergency Situations (MES) for the contract for the design, construction, and maintenance of the Aerospace Observation Center between „Kontrax“ Company and the MES. He also requested information about the performance of the contract.

Refusal:

With a letter as of May 27, 2009 the MES notified the requestor of the extension of the period for responding to the request because of the substantial volume of the information sought. With a decision as of June 5, 2009 the Ministry granted access to the information in the form of consultation. All financial information of the cost of the Center was provided, including cost of equipment for receiving visual information in real time from the point of crisis. Thanks to this equipment the Prime Minister and the Minister had the opportunity to watch in real time the rescuing of a drowning man in Pancharevo Lake. Access to the rest of the information was denied on the ground that pursuant to the APIA, a requestor may only seek access to information but not access to documents.

Complaint:

The partial refusal was challenged before the SAC with the AIP help. The complainant argued that the requested documents related directly to the activities of the MES and that the obliged authority wrongly held that the APIA does not provide for access to specific documents, but only to information.

Developments in the Court of First Instance:

At the first open hearing, the case was adjourned in order to enable the constitution of the Ministry of Interior (MoI) as a party (in the meantime the MES was closed, and the MoI was its successor). In June 2009, the case was heard in an open court session and was scheduled for judgment.

Court Decision:

With a Decision No. 10529 as of September 8, 2010, the SAC dismissed the complaint on the ground that there was no description of the information sought in the request.

Court Appeal:

The decision was appealed before a five-member panel of the SAC. The complaint stated that there is a well established judicial practice on the question that people can seek access to documents under the APIA. Relevant case-law of the SAC was cited - when the Court found that the request for a specific document is a valid request for access to information.

Developments in the Court of Second Instance:

The case was heard in an open court session in January 2011 and was scheduled for judgment.

Court Decision:

With a Decision No. 2761 as of February 23, 2011, a panel of the SAC revoked the decision of the First Instance. The Justices found that the three-member panel wrongly held that access may be refused if the requestor pointed a specific document and did not simply describe the information. The law defines „public information“ as any information relating to the public life and which enables the citizens to form their own opinion on the activities of the obliged authorities. The information sought falls under this definition. Furthermore, the APIA exhaustively enumerates the exemptions of the right of access and the one the refusal was grounded in is not on the list. The obligation for provision of the information does not depend on the material carrier. The material carrier of the information - in the specific case the document, is not being requested for its material subject but for its information content.

PREPARATORY DOCUMENTS

*Bulgarian Helsinki Committee
vs. the Ministry of Justice*

*Lachezar Lisicov (Desant daily)
vs. the President of Bulgaria*

*National Movement Ekoglasnost
vs. the Ministry of Environment
and Water*

Bulgarian Helsinki Committee vs. the Ministry of Justice

First Instance Court - administrative case No. 4858/2009, ACSC, First division, 19th panel

Second Instance Court - administrative case No. 3051/2010, SAC, Fifth division

Request:

In June 2009, the Bulgarian Helsinki Committee (BHC) requested the reports of the Inspectorate within the Ministry of Justice (MoJ) on the inspections of prisons which took place in 2007 and 2008. The BHC was particularly interested what were the findings in the reports about the living conditions in prisons, the state of medical care in prisons, and the work conditions of inmates.

Refusal:

The public servant responsible for the provision of access to information in the MoJ sought the opinion of the director of Execution of Sentences Directorate within the Ministry. He had not allowed access to the reports on the ground that the BHC team had free access to the prisons. Therefore, they could form an opinion of the matters of their interest. Having in mind these considerations, the MoJ decided that the reports of the Inspectorate were for official use only and had recommendatory character and did not constitute public information within the meaning of the Access to Public Information Act (APIA). Therefore, access was denied.

Complaint:

The refusal was challenged before the Administrative Court Sofia City (ACSC). The complainant stated that the reports on the inspections were not internal acts and had independent significance.

Developments in the Court of First Instance:

The case was heard in an open court session and was scheduled for judgment.

Court Decision:

With a decision No. 106 as of November 24, 2009, a panel of the ACSC dismissed the complaint. The Court held that the reports had no significance in themselves, and the findings and recommendations therein were the basis to issue a final act of the Minister of Justice, therefore the refusal was correctly grounded in Art. 3, Para. 2, Item 1 of the APIA.

Court Appeal:

The decision of the ACSC was appealed by the BHC with the help of Access to Information Programme (AIP) before the Supreme Administrative Court (SAC). In the complaint it was pointed out that the reports compile two parts - findings on specific problems and recommendations aiming at the adoption of a final act. The exemption under Art. 13, Para. 2, Item 1 of the APIA does not cover the factual findings made during the inspection.

Developments in the Court of Second Instance:

The case was heard in an open session on November 10, 2010 and was scheduled for judgment.

Court Decision:

With a decision No. 15158 as of December 10, 2010 a panel of the SAC overrode the decision of the First Instance and repealed the decision of the MoJ. The justices agreed with the complainant that the reports contained not only recommendations to the Minister, but also findings of facts made during the inspections. According to the Court, these findings have an independent significance because they reflect the current situations in the places of deprivation of liberty at the time of the inspection. This situation does not depend on the opinions and the recommendations of the controllers and cannot be changed by subsequent acts. The Court also stressed on the fact that the MoJ never presented the final act adopted on the basis of the reports. According to the Court, the exemption under Art. 13 of the APIA aims to restrict access to official information only in cases where it is connected to the preparation of an act and the public can access the final act itself. On the contrary, when final act, incorporating this internal information has never been adopted, access to it could not be denied on the ground of Art. 13, because it would be absolutely impossible for the public to access the information.

Lachezar Lisicov (Desant daily) vs. the President of Bulgaria

First Instance Court - case No. 5159/2010, ACSC, Second division, 37th panel

Request:

On April 26, 2010 Lachezar Lisicov, a journalist from *Desant daily* filed a request to the Chief Secretary of the President. He requested:

- the transcript of the *in private meeting* held on January 18, 2008 between the Bulgarian President Georgi Parvanov and the former President of the Russian Federation Vladimir Putin;
- the transcript of the meeting of the official delegations.

Refusal:

Within the 14-days time limit, the President's Administration failed to reply.

Complaint:

With the help of AIP, the journalist brought a complaint before the ACSC against the silent refusal. The complaint stated that the silent refusal was unlawful as the APIA requires the public authority to issue an explicit decision on the request and in case of refusal to motivate it. The complainant argued that the requested information is public within the meaning of Art. 2, Para. 1 of the APIA as it enables the citizens to form their own opinion on the work of the President representing the State in its international relations and none of the restriction to the right of access is applicable.

Developments in the First Instance:

The case was heard in an open court session on October 14, 2010 and was scheduled for judgment. The Chief Secretary of the President's Administration, who is authorized to decide on access to information requests, argued that transcript of the *in private meeting* of the Presidents cannot be provided as the international practice is such conversations not to be recorded. He also claimed that the meeting was widely covered by the media and this was enough for the public to form its opinion.

Court Decision:

With a Decision No. 3593 as of November 11, 2010, a panel of the ACSC repealed the refusal and compelled the administration of the President of Bulgaria to provide the information. The court held that according to the administrative practice, records of official meetings, discussions and sessions are being made. The court pointed out that pursuant to the Regulation for the Implementation of the State Protocol Act the *in private meetings* are not excluded from the general obligation to make and keep records. The court also stressed on the fact that this was official meeting and the fact that the conversation was only between the two heads of state does not mean that it was confidential and even if this was the case the public authority is still obliged to issue a motivated decision on the access to information request. The decision is final because the Chief Secretary of the President's Administration did not appeal the first instance decision within the timeframe. A day after the court decision, the transcript of the meeting of the two delegations and a memo of the *in private meeting* prepared by the Chief Secretary of the President were published on the website of the President.

National Movement Ekoglasnost vs. the Ministry of Environment and Water

First Instance Court- administrative case No. 3681/2008, Administrative Court-Sofia City, First Division, 6th Panel

Second Instance Court - administrative case No. 15062/2008, Supreme Administrative Court, Third Division

Request:

With a written request for access to information as of November 2007, submitted to the Ministry of Environment (MOEW) and Water, Petar Penchev, a deputy chairperson of the National Movement Ekoglasnost, demanded access to the Protocol from the session of the National Council on Biodiversity (NCBD) to the MOEW held on November 25, 2007, when the buffer zone of Rila mountain was not included in the network for protected environmental areas NATURA 2000 because of two votes short.

Refusal:

With a decision No. 218 as of November 15, 2007, the Chief Secretary of the Ministry of Environment and Water, Mr. Tamer Beysimov, refused to provide access to the requested information on the ground of Art. 13, Para. 2, Item 1 of the APIA (information relates to the preparatory work of an act and has no significance in itself). The grounds for the refusal also stated that the requested Protocol from the session of the consultation body to the Minister was related to the operational preparation of the decisions, did not have a significance of its own, and contained opinions, recommendations, and expert positions about the second review of the 26 protected areas for the wild birds and the 16 protected areas for the protection of the habitats of the wild flora and fauna.

Complaint:

The refusal was challenged before the Supreme Administrative Court (SAC). Court case No. 12966/2007 was initiated in the Third Division of the SAC. With a ruling the case was sent to the jurisdiction of the Administrative Court - Sofia City since the refusal had been signed by the Chief Secretary of the ministry, and not by the minister himself. At the same time, AIP started to legally assist the case.

Developments in the Court of First Instance:

The case was heard in an open court session on September 1, 2008 and scheduled for judgment. AIP prepared written notes for the complainant. They stated that the requested information related to the Protocol from the session of the NCBD undoubtedly resembled environmental information under the meaning of Art. 19 of

the Environmental Protection Act (EPA). The information about the session of the NCBD regarded territories and areas which should be included in the NATURA 2000 network. That was why the information was related to the components and factors and consequently constituted environmental information as stipulated by Art. 19 of the EPA. Consequently, the hypotheses for the restrictions of access to information stipulated by Art. 13, Para. 2 of the APIA were generally inapplicable since there was neither reference to them, nor were they provided as relevant texts by Art. 20 of the EPA. The provision of Art. 20 of the EPA listed the acceptable restrictions to the access to environmental information. Undoubtedly, the regulation of access to information by the EPA set a special regime with regard to the provisions of the APIA.

Court Decision:

With a Decision as of September 11, 2008, a panel of the Administrative Court-Sofia City (ACSC) repealed the refusal of the Chief Secretary of the MOEW. In their judgment, justices assumed that the requested protocol was undoubtedly „information related to the environment“ and did not fall within the exemptions from the right of access to environmental information as stipulated by the Environmental Protection Act. Consequently, environmental information may not be denied on the ground of the provision of Art. 13, Para. 2 of the APIA since the grounds for refusal stipulated by the APIA may not be applied in cases when requests for access to environmental information were to be decided. According to the court, such a conclusion was drawn also from the sense of the law, as the environmental issues were subject to public discussion which excludes the restriction of access to preparatory documents. Even more, the court obligated the MOEW to provide the requested document within 14-days period after the decision came into effect.

Court Appeal:

The decision of the ACSC was appealed by the MOEW before the Supreme Administrative Court with the main argument that there had been no valid request for access to environmental information but only a request for the provision of a copy of a document which had no significance of its own.

Developments in the Court of Second Instance:

A hearing of the case in an open court session in the SAC was scheduled for June 2009.

Court Decision:

With a Decision No. 8921 as of July 6, 2009, the SAC rejected the appeal filed by the MOEW and upheld the decision of the first instance court. In their judgment, the justices pointed out that the requested information was environmental information, and thus a special law is applicable that regulate those public relations, more precisely, the provisions of Art. 17 and Art 20, para. 1 of the EPA, which had not been considered at the issuing of the administrative act under appeal.

TRADE SECRET

William Popov vs. the Ministry of Justice

*Pavlina Trifonova (24 Hours daily)
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William Popov vs. the Ministry of Justice

First Instance Court - administrative case No. 4238/2009, ACSC, Second Division, 29th Panel

Second Instance Court - administrative case No. 14068/2009, SAC, Fifth Division

Request:

On May 7, 2009, William Popov filed an access to information to the Minister of Justice. With the request Popov demanded information in the form of a list of all contracts for consulting and training services contracted by the Ministry of Justice (MOJ) in the period 1990 - 2008.

Refusal:

With a Decision as of 30 May 2009, signed by a senior expert at the Ministry of Justice, the requestor was denied access to the requested information. The decision stated that the requested contracts contained personal data and affect the interests of third parties; some of them had been entered in the public register of the Public Procurement Agency (PPA); other contracts may turn to be trade secret, thus their provision or dissemination would result in unfair competition between companies; there was no written consent to provide the requested information; the ministry had contracts from 2005 to the time of issue of the decision. There was an objective obstacle for the provision of documents belonging to a prior period since repeated floods resulted in the destruction of part of the documents.

Complaint:

The refusal was challenged before the ACSC. The complaint stated that the applicant did not want to get access to all contracts signed by the ministry within the specified period and the specified topic, but requested information in the form of a reference, so that the grounds stated in the contested decision could not find application with regard to the requested information.

Developments in the Court of First Instance:

The case was heard in an open court session held on July 14, 2009 and scheduled for judgment.

Court Decision:

With a Decision No. 54 of 13 August 2009, the ACSC repealed the refusal and obligated the MJ to provide access to the requested information. In their judgment, the court

stated that the contracts being outside the scope of the Public Procurement Act (PPA) was not a ground for refusing to provide the requested information. It is pointed out that the administrative authority was required to prepare and present information on available contracts for the period 2005 - 2008. It was also emphasized that the administrative authority unreasonably used as grounds the third party's interests, the trade secret exemption and the unfair competition which could not be triggered by the disclosure of contracts whose implementation had ended in 2008. In this case, the administrative body should have required the consent of the third parties, and not to issue a denial of access to public information. The Court further notes that the repeal of the State Archives Act (SAA) has not removed the obligation of the Minister of Justice to store documents for 10 years pursuant to Article 10, Para. 4, item 1 of the SAA (repealed). Therefore, in the archives of the Ministry, the documents from 1999 to 2009, which contained the requested information, should be available. The earlier of them had to be handed over to the state archives or destroyed under Articles 11 and 12 SAA (repealed). Such circumstances had not been stated in the challenged decision. If these documents were still preserved in the archives of the Ministry, the administrative body should have prepared the requested list, encompassing 1990; if they were not available, the decision should have explicitly stated this fact.

Court Appeal:

The Decision of the ACSC was appealed by the MJ before the SAC. The court appeal repeated the arguments stated in the decision for denial issued by the MK.

Developments in the Court of Second Instance:

The case was heard in an open court session held on May 31, 2010 and scheduled for judgment.

Court Decision:

With a Decision No. 10396 as of July 30, 2010, a panel of the SAC repealed the court appeal and upheld the decision of the first instance court. In their judgment, the justices pointed out that a refusal issued on the ground of third person's consent, when such a consent had not been sought, was always unlawful. The court also found that the quoting of the trade secret exemption was also ungrounded since the disclosure of information about contracts whose execution had been completed, without stating any specific circumstances which would have deter trade functions, could not result in unfair competition.

Pavlina Trifonova (*24 Hours daily*) vs. the Government Information Service

First Instance Court - administrative case No. 2977/2007, Administrative Court Sofia City, II Division, 37th Panel

First Instance Court - administrative case No. 10498/2007, SAC, Third Division

Second Instance Court - administrative case No. 1205/2009, SAC, Five-member Panel - First Panel

Request:

On June 14, 2007, Pavlina Trifonova, a journalist in 24 Hours weekly, submitted a request under the procedure stipulated by the Access to Public Information Act (APIA) to the Government Information Service (GIS). The journalist requested access to information about repair works in the office of the Prime Minister - Sergei Stanishev. More specifically:

- What was repaired and what was the total cost of the repair works?
- What had conditioned the repair works?
- Which were the contracted companies, which were the other bidders in the public procurement tender and why the contractors were selected among others?
- What were the bids of the other competing companies?
- What was the price of the new furniture, by listing the price of every item?
- Who selected the new furniture?
- What would be done with the old furniture?
- When was the last time the office of the Prime Minister had been repaired?

Refusal:

On June 28, 2007, the journalist received a letter from the Director of the GIS - Ms. Tania Dzhadzheva. The information provided with the letter was scarce and gave answers to some of the questions that had been set forth. With regard to the rest of the questions, an explicit refusal had been issued. The letter informed that the reparation works had been planned as an activity and included replacement of the floor cover, replacement of the electrical system and internal wiring, wall painting, replacement of furniture in the office, etc. The reparation works were done by „Radina Gesheva“ Architecture Atelier which had subcontracted the services of four companies. The answer went that the last reparation works of the cabinet had been done 9 years

ago, that the new furniture had been selected by a five-member commission, and that the old furniture would be used in other rooms and offices of the building of the Council of Ministers (CoM) after a respective reparation (lacquering, reupholstering). With regard to the rest of the questions related to the other bidders in the public procurement, the price they had offered, as well as the price of every item, a refusal was issued on the ground of the provision of Art. 37, Para. 2 of the APIA since the information regarded third parties' interests and their written consent for the disclosure had not been obtained. Besides, according to the Director of the GIS, the bidders in the tender for that special public procurement had signified that part of the information was confidential.

Complaint:

With the assistance of AIP, the answer of the GIS was appealed in its part which had refused information before the Administrative Court - Sofia City (ACSC). Since the answer had been too broad, while the questions set forth in the request were very specific, a comparison was made in the complaint between the questions and the respective parts of the answer of the GIS. It was apparent from the comparison drawn that a partial refusal had been issued. There was a silent refusal with regard to the information about the overall cost of the reparation works, the grounds for selecting the contracting company, the names of the four subcontracting companies, and the names of the five-member commission which had chosen the furniture. There was an explicit refusal on the ground of the provision of Art. 37, Para. 1, Item 2 of the APIA (information regarding third party's interests and their written consent for the disclosure had not been obtained) with regard to the information about the names of the bidders in the public procurement tender procedure, the price they had offered, and the price of the furniture (by items).

Developments in the Court of First Instance:

The case was heard and twice postponed by the ACSC for the collection of evidence. At the third session, it was scheduled for judgment. Subsequently, the court withdrew its ruling for starting the court proceedings and sent the case to the jurisdiction of the Supreme Administrative Court (SAC). The SAC heard the case in two court sessions, in May and October 2008, and scheduled it for judgment.

Court Decision:

With a Decision No. 13417 as of December 8, 2008, a panel of the SAC, Third Division, dismissed the complaint. The court panel assumed that the refusal of the Director of the GIS had been issued in compliance with the provision of Art. 37, Para. 1, Item 2 of the APIA since the information about the overall costs of the prime minister's office

planned reparation works, the price of the new furniture, and the names of the bidders in the tender for a public procurement for the reparation works affected third party's interests as under the provision of Art. 31, Para. 1 of the APIA.

Court Appeal:

The decision of the three-member panel of the SAC was appealed before a five-member panel of the same court. It was argued that the appealed administrative decision clearly showed that the Director of the GIS had used the APIA provided exemption, which gave grounds for a refusal of information when it affected the interests of a third party and its consent for the disclosure had not been obtained, without following the procedure of seeking for the third party's consent. It was also noted that according to the SAC practices, pursuant to the APIA, an assessment should be made in every particular case if any third party rights or legal interests might be affected by a request for access to information. No evidence that the administrative body had made such an assessment in the particular case was traceable in the grounds of the appealed decision. It was not clear why it had been decided that the request for access might affect rights or legal interests of a third party.

Developments in the Court of Second Instance:

The case was heard in an open court session in March 2009 and scheduled for judgment.

Court Decision:

With a Decision No. 4273 as of March 31, 2009, a Five-member Panel - Panel I of the SAC repealed the decision of the three-member panel which had dismissed the complaint, repealed the partial refusal of the Director of the GIS, and turned the request back for reconsideration after the court instructions about the interpretation and application of the law. According to the court, no evidence was found during the proceedings for requesting the written consent of the third party whose interests would have been affected by the provision of information about it. If the obliged body had quoted the legal exemption, it should have sought the explicit written consent of the third party or parties and if such had been refused, then it should have grounded the refusal in the lack of consent. The court panel also found that the Director of the GIS quoted the provision of Art. 17, Para. 2 of the APIA as a ground for the refusal, without specifying the conditions which would have resulted in unfair competition for the companies. The lack of grounds conditioning the application of the quoted provision determined that part of the refusal as unlawful and necessitated its repealing. The court decision is final.

Nikolay Tsvetkov vs. the Municipality of Varna

Court of First Instance - administrative case No. 2917/2008, Administrative court - Varna

Court of Second Instance - administrative case No. 5460/2009, SAC, Third Division

Request:

On September 24, 2008 Nikolay Tsvetkov filed a request to the mayor of Varna. He sought access to the contract between the municipality and the Regional Police Directorate (RPD) for the protection of public order within the municipality, signed in 2000.

Refusal:

With a decision as of September 29, 2008 the secretary general of municipality of Varna refused access to information on ground of Art. 37, Para. 1, item 2 of the APIA. According to the decision, the information affects the interest of a third party (the RDP - Varna) which did not consent to the release of information. It is pointed out that disclosure would jeopardize the well established and effective system of order protection and would create possibilities of abuse with the information contained in the contract.

Complaint:

The refusal was challenged before the Administrative Court - Varna. The complaint stated that Art. 31, para. 5 APIA does not require the explicit consent of the affected third party, when it is obliged body under the APIA itself and when the requested information is public information as defined by the law. In our case both conditions were met. On one hand the RPD-Varna is obliged to provide information body (Art. 3, para 1 APIA). On the other hand, the information sought is undoubtedly public within the meaning of Art. 2, para. 1 as it relates to the public life and gives the requestor an opportunity to make his own opinion on the activities of the municipality and the RPD-Varna in performing their duties to maintain the public order.

Developments in the Court of First Instance:

The case was heard in an open court session and scheduled for judgment.

Court Decision:

With decision No. 111 of February 2, 2009 the Administrative Court-Varna repealed the decision and gave binding instructions to the mayor to grant access to the contract. The Court ruled that both parties - the municipality and the RPD-Varna are obliged

bodies within the meaning of Art. 3, Para. 1 of APIA. The case falls under Art. 31, Para. 5 of the APIA, therefore the consent of the third party was not compulsory. Furthermore, even if the information affects third party's interest the information shall be released if there is overriding public interest in disclosure. In addition, the court states that providing a copy of the contract would not undermine public order, nor would jeopardize the effectiveness of its protection, which depends only on the specific operational activities of the Police in performing the terms of the contract.

Court Appeal:

The decision of the lower court was appealed by the mayor to the SAC. The appeal stated that the first instance court did not consider at all whether the requestor had legal interest to seek the information, consequently to appeal the refusal of access to it.

Development in the Court of Second Instance:

The case was heard in an open court session in December 2009 and scheduled for judgment.

Court Decision:

With decision No. 15919 as of December 22, 2009 the SAC upheld the first instance decision. The Justices stated that the exercise of the right to information in this case cannot harm third party's interests, nor can be a danger to the public order within the municipality. The decision is final.

Zarko Marinov (*Otzvuk* newspaper) vs. the Municipality of Smolyan

First Instance Court - administrative case No. 169/2011, Administrative court - Smolyan

Second Instance Court - administrative case No. 9760/2011, Supreme Administrative Court, Fifth division

Request:

With a request as of March 2011, the chief editor of the regional newspaper *Otzvuk* Mr. Zarko Marinov requested from the Mayor of Smolyan copies of two municipal agreements.

- Agreement between the Municipality of Smolyan and Titan-Clean LTD - town of Kardzhali, as of 2006 for winter maintenance and snow removal, maintenance of public parks, lawns and landscaping; waste collection and disposal, cleanliness of public space;
- and Agreement between the Municipality of Smolyan and Eco Titan Group JSC as of 2008 for waste disposal and management of waste depot located within the municipality.

Refusal:

The Mayor sought the consent of the third parties concerned - the contractors who explicitly refused access to be granted. In response, the mayor provided partial access to the contracts - the costs and the liability clauses were blacked out.

Complaint:

The partial refusal was challenged before the Administrative court - Smolyan with the AIP help. The complainant stated that pursuant to Art. 31, Para. 5 of the APIA explicit consent of the affected parties is not required if there is overriding public interest in the disclosure of information. In this respect, § 1, item 5, „f“ of the Miscellaneous and Final Provisions of the APIA establishes a legal presumption that overriding public interest is always present where the information relates to the parties, sub-contractors, the subject, the cost, the rights and obligations, terms and liability agreed when one of the party is an obliged under the APIA public authority.

Developments in the Court of First Instance:

The case was heard in an open court session and was scheduled for judgment.

Court Decision:

With a decision No.195 as of June 16, 2011, the Administrative court - Smolyan repealed the partial refusal and compelled the Mayor to provide full access. The court held that the APIA establishes a legal presumption for overriding public interest in the disclosure of the information. The respondent failed to produce any evidence refuting this presumption, therefore the court found for the presence of public interest.

Appeal:

The Mayor appealed the decision before the Supreme Administrative Court (SAC). The complaint states that the legal presumption is refutable and the burden of proof is on the onus of the party claiming the presence of overriding public interest.

Developments in the Court of Second Instance:

The case is scheduled for an open court hearing on May 30, 2012.

Court Decision:

With a Decision No. 8706 as of June 18, 2012, the SAC rejected the appeal of the mayor of the Municipality of Smolyan and upheld the decision of the first instance court. In their judgment, the justices pointed out that the requestor was not obliged to prove the existence of overriding public interest, but the obliged body which had claimed that there was not overriding public interest had to prove it.

Valentin Nenkov (*Videlina daily*) vs. the Municipality of Pazardzhik

First Instance Court - administrative case No. 62/2011, Administrative court - Pazardzhik

Second Instance Court - administrative case No. 4763/2011, SAC, Fifth division

Request:

On November 16, 2010, the chief editor of *Videlina daily* Mr. Valentin Nenkov filed a request to the Mayor of Pazardzhik for access to contracts between the Municipality and suppliers for the period 2007-2010. He also sought information about the co-contractors, the cost of the contract, the unpaid amounts to the co-contractor. On November 30, 2010, the Mayor sent a notification to specify the request by enumerating specific contracts to which he seeks access. After specification, the Mayor would proceed to seeking consent of the third parties (co-contractors) for disclosure.

Specification:

On December 3, 2010, the requestor filed his specification. He narrowed the volume of information by stating that he requested a written reference covering the name of the co-contractors and the cost of the contract. He also wanted information on the debts of the Municipality to private entities. He paid attention that he is not in the position to be more specific except by defining the type of contract (for services or for goods) and the exact time frame. Apart from that, the requestor adduced arguments that with the 2008 amendments to the APIA, the explicit consent of the third party - co-contractor is not required if there is overriding public interest in the disclosure of information. The existence of overriding public interest is presumed when the information relates to the name of the parties to the contract, the subcontractors, the subject, the price, the rights and obligations, terms, and penalties and liability (pursuant to § 1, item 5, „f“ of the Miscellaneous and Final Provisions of the APIA) when at least one party to the contract is obliged under the APIA authority.

Refusal:

The Mayor failed to issue a decision within the 14 day time limit under the APIA.

Complaint:

The silent refusal was challenged before Administrative court - Pazardzhik.

Proceedings before the Court of First Instance:

The case was heard in an open court session on February 17, 2011 and was scheduled for judgment.

Court Decision:

With a decision No. 86 as of February 21, 2011, the Administrative court - Pazardzhik repealed the silent refusal and returned the file to the Municipality for reconsideration. The court emphasized that the only consistent with the APIA way to proceed with access to information requests is to issue a formal explicit decision either granting or refusing access.

Appeal:

The Mayor appealed the first instance court decision before the SAC. The complaint reiterates the concern that during the period 2007-2010 the Municipality had concluded thousands of contracts and the requestor should have determined precisely to which contracts he had sought access.

Proceedings before the Court of Second Instance:

The case was heard in an open court session on February 8, 2012 and was scheduled for judgment.

Court Decision:

With a decision No. 2077 as of February 10, 2012, the SAC found the complaint ungrounded and upheld the first instance decision. The court found that the chief editor of *Videlina* daily made sufficient specifications to his request - number of concluded contracts for goods or services for specific time period, list of co-contactors, the cost and unpaid amounts to co-contactors. According to the justices, it is obvious that the requestor had a general query with regard to contracts to which the Municipality is a party and did not express any specific interest in particular contract, what the Mayor tried to imply to the requestor.

Naroden Glas newspaper vs. the Municipal Council of Lovech

First Instance Court - administrative case No. 23/2007, Regional Court of Lovech

Second Instance Court - administrative case No. 7588/2008, SAC, Third Division

Request:

On May 18, 2007, Tsvetan Todorov, editor in chief of *Naroden Glas* newspaper, Lovech, submitted a request to the Chairperson of the Municipal Council of Lovech to obtain access to the following information:

- Information on the amount of funds spent for publication of regulations and announcement in local and central newspapers for the period 2004 - 2006 out of the municipal budget (pursuant to the Local Self-Government and Local Administration Act those shall be promulgated in a local newspaper);
- Information on how the funds were allocated among the respective newspapers -numerically;
- Information on who and how identified which newspaper shall print the announcements. What were the selection criteria?

Refusal:

With a decision as of June 1, 2007, the Chairperson of the Municipal Council provided to the requestor information that the total amount of money spent out of the Municipal Council's budget for publications in central and local newspapers covering the period 2004- 2006 was 853, 00 BGN. The Chairperson refused to provide information about the allocation of the funds among the respective newspapers since that was information that would affect the interests of third parties and may not be disclosed without their explicit consent (Art. 37, Para. 1, Item 2 of the APIA). The Chairperson further informed the requestor that the municipal administration published announcements in different media whose selection was guided by the prices they offered and the audience they covered.

Complaint:

The partial refusal was appealed before the Regional Court of Lovech (RCL). The complaint stated that it was not in the interest of the administration to keep the information on how public funds were spent from the society. The budget and the way it was allocated, including the municipal budget, was a public matter. The law itself provided for a balance in favor of the citizens' right to know how public funds were

spent. It was also stated that according to the Supreme Administrative Court (SAC) practice, the mere allegation that certain information affected the interests of a third party was not sufficient ground for refusal. A particular exemption, for example, trade secret, should be present.

Developments in the Court of First Instance:

After the start of the proceedings in the RCL, two of the media (*Duma* daily and *Lovech Press*) which had received funds from the municipality for the publication of regulations and announcements were constituted as interested parties. The case was heard in an open court session in March 2008 and was scheduled for judgment.

Court Decision:

With a Decision No. 2 as of March 21, 2008, a panel of the Regional Court of Lovech dismissed the complaint. In their judgment, the justices noted that it had been evidenced that the Municipal Council had requested the consent of *Duma* daily and *Lovech Press* and they had explicitly, in a written form, dissented the disclosure of the requested information. It was also pointed out that in such cases, Art. 31, Para. 4 of the APIA provided that the administrative body had the discretion to refuse or to provide access in a manner that did not reveal information about those third parties. That discretion, however, was within the scope of the operational independence of the respective body and provided for a legal opportunity, rather than an obligation, thus was not subject to court oversight. The court judgment ended with the conclusion that the information about the amount of money received by each newspaper for publications constituted trade secret.

Court Appeal:

The decision of the Regional Court of Lovech was appealed by Tsvetan Todorov with the help of AIP before the SAC. The appeal stated that in the particular case no information that would affect the interests of a third party as under the stipulations of the law had been requested. No information that might have harmed a trade secret as defined by the procedure and pursuant to the provisions of the Fair Competition Act had been requested. The requested information was about the amount of money allocated by the Municipal Council for the publication of regulations and announcements. Spending of public money should be transparent to the highest extent. For that purpose, the least possible to be done was to provide information about the amount of money spent on particular activities. The written dissent of the third parties in the current case was irrelevant. The fact of receiving payments from a public institution could not be a subject of secrecy by itself. That was why the current case was not about the legally protected right of a third party to express dissent which

might serve as a ground for refusal. The obliged body under the APIA should have decided by itself that no ground for restriction of the right of access to information had existed and that access should have been provided. Lastly, arguments were set forth that it had not been proven that the requested information constituted trade secret and its disclosure might have resulted in unfair competition.

Developments in the Court of Second Instance:

The case was heard in an open court session on February 16, 2009. Written notes were presented on behalf of the complainant, stating the recently established practices by the SAC on an identical case against the refusal of the mayor of the Municipality of Razgrad. According to that judgment of the SAC, information about money allocated by the municipality to local media for the publication of decisions, orders, announcements, invitations, protocols and other documents of the municipality, were public information under the stipulations of the APIA and should be provided at a request.

Court Decision:

With a Decision No. 5121 as of April 16, 2009, a panel of the SAC, Third Division, repealed the decision of the Regional Court of Lovech, repealed the refusal of the Chairperson of the Municipal Council and obligated the latter to provide access to the information requested under point 2 of the request within a 14-days period after the decision came into effect. In its judgment, the court found that no evidence had been presented during the proceedings to prove the conclusion that the provision of the requested public information related to third parties would have harmed their interests in a way that would have conditioned the necessity of their explicit consent for the disclosure - trade secret, production secret or other circumstance legally protected from public access. It also found ungrounded the conclusions of the regional court that the information requested under point 2 of the request for access constituted trade secret. Such an argument had not been set forth neither by the administrative body, nor by the interested parties. It was apparent from the explicit dissents of the third parties that they did not contain any statements that might have grounded them in the trade secret exemption. Quite the contrary, blanket statements like „our interests would be harmed“ were used which did not correspond in any way to the conclusion that the dissents would protect the trade secrets of third parties. The judgment of the court panel ended with the conclusion that all bodies obliged under the APIA which used the trade secret exemption should state the circumstances relevant for the respective case which conditioned the requested information as protected. The obliged body should state which characteristics of the requested information defined it as a trade secret whose disclosure might harm the interests of the person they concerned. That was why the quotation of a legal text was not enough as a ground, making the refusal ungrounded.

PERSONAL DATA

*Mariika Hartova
vs. the Ministry of Justice*

*Ilia Valkov (Darik Radio)
vs. the Ministry of Finance*

*Liuben Obretenov (Sega daily)
vs. the Chief Secretary of the President*

Mariika Hartova vs. the Ministry of Justice

First Instance Court - administrative case No. 7157/2010, ACSC, First division, Second panel

Second Instance Court - administrative case No. 3992/2011, SAC, Fifth division

Request:

Ms. Hartova requested from the Ministry of Justice (MoJ) information about the execution of the capital punishment adjudged to her son. Precisely, she wanted to know where the sentence was executed on January 17, 1989. She also sought access to her son's prison file.

Refusal:

In July 2008, the senior legal expert within the MoJ issued a decision to refuse access on the ground that the information was not public within the meaning of the APIA and it affected the interest of a third party. The refusal also emphasized that the information contained in the prison files did not solely relate to the convicted but also to third parties, that the information was created for internal use and only limited number of employees had access for purposes of fulfilling their professional duties and obligations.

Complaint:

The refusal was challenged before the ACSC. The complaint states that the refusal lacks grounds as it enumerates number of contradictory arguments. For example, according to the refusal, the information is nor public or personal. According to the MoJ administration, disclosure of information would harm the interest of third parties, but it is completely unclear who they are - the prison staff or other prisoners.

Developments in the Court of First Instance:

At first, in June 2009, the ACSC found the refusal void on the ground of lack of authority of the senior legal expert to decide upon access to information requests. With a decision as of July 2010, the SAC overturned the first instance court decision and returned the case to the ACSC for judgment on the merits. Before the SAC, the MoJ proved that the signing person was authorized by the minister to handle requests, therefore the refusal was not void. On January 20, 2011 the case was heard in an open court session and was scheduled for judgment.

Court Decision:

With a decision No. 356 as of January 26, 2011, the ACSC repealed the refusal and returned the case to the MoJ for reconsideration with clear instructions to grant access. The court emphasized that the refusal was unlawful since it did not point whose interests might be affected by the disclosure of information. The justices also stress that the administration failed to produce any evidence showing that the consent of the third parties was sought. They go further highlighting that even in case of formal lack of consent this ground for refusal might be circumvented by granting partial access pursuant to Art. 37, para. 2 of the APIA. The court found that the public authority misinterpreted and misapplied the APIA by holding that the information sought did not fall within the meaning of the definition of public information under the APIA as the prison files contain documents related to the official information which are generated and kept by the administration in fulfillment of professional duties.

Appeal:

The MoJ appealed the first instance court decision before the SAC. The appellant argued that the court should have summoned the Directorate General „Execution of Sentences“ within the MoJ and it should have required the prison file in question as evidence in order to establish the facts.

Developments the Court of Second Instance:

The case was heard in an open court session on February 1, 2012 and was scheduled for judgment.

Court Decision:

With a decision No. 2082 as of February 13, 2012, the SAC found the complaint ungrounded and upheld the first instance court decision. The court signified that the fact that the Directorate General „Execution of Sentences“ is independent from the MoJ legal entity did not deprive the Minister of Justice of authority to provide (respectively refuse) information related to the Directorate General activities as this entity is under the authority of the MoJ. The court also agreed that at first glance, the information contained in the prison file did not directly relate to the public life, but implicitly the orders, initial and current reports, psychological findings, risk assessment and other documents generated and related to the stay of the convicted in prison enabled the citizen to make his own opinion on the activities of the obliged authority. Therefore, the court found that this information fell within the scope of application of the APIA.

Ilia Valkov (*Darik Radio*) vs. the Ministry of Finance

First Instance Court - administrative case No. 7543/2011, ACSC, First division, Fifth panel

Request:

In summer 2011, a public debate was held in the media about the transparency of political parties' financing from the state budget. In the Political Parties Act there is a norm providing that the state attributes subsidies to the parliamentary represented parties on the basis of their seats in the Parliament. The sum attributed to each MP is defined by order of the Minister of Finance. Therefore, the question was to which parties the 17 independent MPs sent their attributed subsidy. In August 2011, Ilia Valkov filed a request to the Ministry of Finance (MF) for access to copies of the MPs declarations to find it out. The media interest was triggered by the fact that some MPs have declared their political affiliation to parties other from those which they have been nominated and elected as MPs.

Refusal:

With a decision as of August 10, 2011, the Ministry of Finance refused access on the ground of personal data protection exemption. According to the Director of iHuman resources? Directorate, within the MF who signed the refusal the declarations announcing political affiliation of MPs contain personal data within the meaning of Personal Data Protection Act (PDPA).

Complaint:

The refusal was challenged before the ACSC. The complaint stated that the MPs are public figures within the meaning of the European Court of Human Rights case-law, therefore exposed to greater extent to publicity and scrutiny than private individuals. It also emphasized that MPs hold high public office, therefore information on property, assets and income shall also be publicly available in order to increase transparency and prevent wrongdoings and conflict of interests. In this line of thinking, information on the allocation of state subsidy cannot be in any way personal data.

Developments in the Court of First Instance:

The case was heard in an open court session on November 3, 2011 and was scheduled for judgment.

Court Decision:

With a decision No. 534 as of 24 November, 2011, the ACSC repealed the refusal and returned the case to the MF for reconsideration with clear and compulsory instructions to grant access to the MPs' declarations. The court emphasized that blank of the declaration was produced as evidence during the trial proceedings and it came clear that they do not contain any personal data. The court further pursued by finding that affiliation to political party is not personal data. Apart from that an MP is obliged under the APIA body, therefore their consent for the disclosure of information is not required by law.

Liuben Obretenov (*Sega* daily) vs. the Chief Secretary of the President

First Instance Court - administrative case No. 9104/2009, ASCS, Second division, 31st panel

Second Instance Court - administrative case No. 9708/2011, SAC, Fifth division

Request:

On November 23, 2009, the journalist from *Sega* daily, Mr. Liuben Obretenov filed a request to the Presidency. He sought information about the names of the members of the Pardons Committee and the names of the persons to whom pardon was granted in 2008 and 2009.

Refusal:

With a decision as of 3 December 2009, the Chief Secretary of the President refused access on the ground of personal data protection. The Chief Secretary further fears that disclosure of the names of the members of the Pardons Committee may result in pressure over them and their impartiality may be compromised.

Complaint:

With the AIP support, the explicit refusal was challenged before the Administrative Court - Sofia City (ACSC). The claimant argues that the decision-making and pardoning process shall be more transparent. The pardon privilege is exercised in the public interest. Thus, it supposes unconditional openness and disclosure at least of the names of the Pardons Committee. The complaint also stresses on the principle that the sentencing is always public; therefore disclosure of names of pardoned people does not infringe their personal data protection.

Proceedings before the Court of First Instance:

In July 2010, the ACSC decided to terminate the case and found that the complaint was barred for expiration of time limits for appeal. The decision to drop the case was challenged before the SAC which overruled it and returned the case to the ACSC for judgments on the merits. On March 14, 2011 the case was heard in an open court session and was scheduled for judgment.

Court Decision:

With a decision No. 1767 as of April 14, 2011, the ACSC repealed the refusal and compelled the Chief Secretary to provide partial access. The court found that the Chief Secretary should have had provided the names of the members of the Pardons Committee and rebutted the argument that pressure might have been exercised upon them. The court goes further by pointing out that the president, ministers, chairs of agencies etc., might also be under duress in some circumstances, but this does not mean that their names should be kept secret. With regard to the pardoned persons, the court found that the Chief Secretary should have had provided information but in a way that the persons cannot be unequivocally identified. According to the court, information on how many Bulgarian citizens and how many foreigners have been granted pardon, the type of crime the pardoned was convicted for, is undoubtedly public and shall be released.

Appeal:

The ACSC decision was appealed by both parties. The Chief Secretary maintained his assertion that the information is protected as personal data, therefore exempted from disclosure. The claimant with the AIP support argued that the information would enable the requestor to make an opinion on the exercise of the presidential pardon privilege.

Proceedings before the Court of Second Instance:

The case will be heard in an open court session on May 28, 2012.

ATTORNEY-CLIENT PRIVILEGE

*National Committee for Improvement
of Water Supply in Bulgaria
vs. Sofia Municipality*

National Committee for Improvement of Water Supply in Bulgaria vs. Sofia Municipality

Court of First Instance - administrative case No. 1884/2009, ACSC, Second Division, 33 panel

Court of Second Instance - administrative case No. 10514/2009, SAC, Fifth Division

Request:

On December 23, 2008 Gancho Hitrov, chairperson of the *National Committee for improvement of water supply in Bulgaria*, filed a request of access to information for a copy of the legal analysis of the performance of the concession contract between the Sofia Municipality and Sofia Water JSC for the period 2000-2007, drafted by a law firm in late 2008 on the Municipality request.

Refusal:

With a decision as of February 2, 2009, the mayor refused access because the legal analysis was drafted by a law firm and was protected under the attorney-client privilege.

Complaint:

The refusal was challenged before the ACSC. The complaint stresses out that the duty of confidentiality is not an exemption under the APIA, nor under any special law regulating access to information and its restrictions. Pursuant to Art. 7, Para. 1 the free access of information may be limited only if exemption is provided for by law. Second of all, subject to the duty of confidentiality is the attorney at law - he is not entitled to disclose information related to his/her client. It would be unreasonable the obligation of confidentiality to be a burden to the client.

Developments in the Court of First Instance:

The case was heard in an open court session and scheduled for judgment.

Court Decision:

With a decision No. 31 as of June 16, 2009 a panel of the ACSC repealed the mayor's refusal and returned the case for reconsideration. The court emphasized that the subject of the *duty of confidentiality* as defined by the law is only a person having legal capacity and quality as *counselor*. Whatever profession the mayor may have, as an obliged body under the APIA he is not a *lawyer*. Therefore, there is no legal

requirement for the mayor to protect the information on grounds of attorney-clients privilege and cannot rely on it as ground to refuse access to public information.

Court appeal:

The ACSC decision was appealed by the mayor before the SAC. The appeal stated that the requested information was not public as defined under the APIA.

Developments in the Court of Second Instance:

The case was heard in an open court session on February 24, 2010 and was scheduled for judgment.

Court Decision:

With its decision No. 4195 as of March 30, 2010 the SAC upheld the first instance court decision. The court did not consider the argument that the information was not public as defined by the APIA because the refusal was not based on that ground and such objection was not raised before the first instance. In their judgment, the justices pointed out that the requested information had been prepared on the base of public procurement tender and had in its focus the analysis on the execution or lack of execution of the concession contract signed between the Sofia Municipality and Sofia Water JSC. The provision of Art. 45 of the Attorney Act stipulates that the attorney is obliged to keep the secret of their client with no time limitations. The preparation of the legal analysis assigned by the Sofia Municipality, thus the above cited provision would have been applicable if the information had been requested by the consortium, but not if requested by the contracting authority. That was why the conclusion drawn by the first instance court that the body obliged under Art. 3, Para 1 of the APIA had no obligation to protect the attorney-client privilege was lawful.

Subsequently, the mayor of the Sofia Municipality refused again to provide the requested information. The repeated refusal was repealed by Decision No. 4107 as of December 2010 of the ACSC, First Division, Panel 5, on administrative case No. 3907/2010. After the repealing of the second refusal, the mayor of the Sofia Municipality provided the requested information.

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