

6. MANNER OF ACCESS TO INFORMATION

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One of the key problems in the implementation of the law is the manner in which institutions allow access to the requested information.

Despite the fact that requests for information ask for copies of documents, some institutions allow access exclusively by means of direct insight into documents, not allowing their content to be recorded permanently in any way.

Court practice has confirmed that the primary obligation of institutions is to consider the possibility to exercise the right of access to information in the manner required in the request, and to determine some other manner only in case when there are objective obstacles or difficulties, where they also have the obligation to explain it.

The Law on Free Access to Information, Article 4, paragraph 1, item 1, Article 12, paragraph 1 and Article 13

A request should specify the manner in which the requester desires to gain access to information, with the aim of allowing access to information in the manner that suits the requester.

The right to access information includes the right to ask, receive, use and spread information held by the public authority bodies.

Access to information held by the public authority bodies can be realized:

- 1) by direct insight into public records, the original or a copy of information on the premises of the public authority body;
- 2) by the requester copying in writing information on the premises of the public authority body;
- 3) by the public authority body copying in writing, photocopying or translating the information and forwarding the copy, photocopy or translation to the requester, directly by post or e-mail.

Court practice development

At the beginning of the law enforcement, the Administrative Court rejected all the complaints by which we asked annulment of the decisions by which access to information in the manner required by the request is not allowed with the explanation that **the law does not prescribe the obligation of the public authority body „to grant the request in every case with a view to the manner in which access to some information will be realized“.**

UPRAVNI SUD REPUBLIKE CRNE GORE
U.br. 940/2006

BROJ: 06/30-34
PODGORICA, 25.09.2006.

U IME NARODA

Upravni sud Republike Crne Gore, u vijeću sastavljenom od sudija Gordane Pot, kao predsjednika vijeća, Dragana Djuretića i Ljubicke Popović – Kustudić, kao članova vijeća, uz učešće službenika Suda Snežane Popov, kao zapisničara, rješavajući upravni spor po tužbi tužioca Mreže za afirmaciju nevladinog sektora - MANS, iz Podgorice, protiv rješenja tužene Agencije Crne Gore za prestrukturiranje privrede i strana ulaganja - Podgorica, br. UP 39/1 od 04.07.2006. godine, u nejavnoj sjednici održanoj dana 19.09.2006. godine, donio je

P R E S U D U

"The complaint is rejected..."

Obrazloženje

Osporenim rješenjem tuženog, dozvoljen je tužiocu pristup traženim informacijama i određeno da će se pristup informacijama ostvariti neposrednim uvidom u prostorijama tuženog.

Tužilac u tužbi navodi da je tuženi organ prilikom donošenja rješenja

„In response to the complaint, the defendant, mainly, states that the information requested by the accusing party represents material including several hundred pages, and since the defendant has no technical means for photocopying and copying, it would have to take the material to a xerox shop, which would interfere with his regular work, and cause significant expenditures to the accusing party. That is why it was decided that access to information be done on the premises of the defendant. Otherwise, according to the Law on Free Access to Information the body assesses from the request which manner is most suitable to the given situation. It is proposed to refuse the complaint.“

Zakonu o slobodnom pristupu informacijama, ne postoji obaveza organa da prihvati način pristupa informacijama po predlogu iz zahtjeva, već organ cijeni koji je način u datoj situaciji najpogodniji. Predlaže da se tužba odbije.

Verdict of the Administrative Court from 19 September 2006

Sud je razmotrio tužbu, odgovor na istu, pobijano rješenje i ostale spise predmeta, pa je našao da tužba nije osnovana.

Odredbama člana 13. stav 1. Zakona o slobodnom pristupu informacijama propisani su načini na koje se može ostvariti pristup informacijama, a jedna od mogućnosti je (tačka 1.) neposrednim uvidom u javnu evidenciju, original ili kopiju informacije u prostorijama organa vlasti, dok je odredbama člana 18. stav 2. istog zakona, propisano, pored ostalog, da se rješenjem kojim se dozvoljava pristup informaciji određuje i način pristupa.

S obzirom na to neosnovani su navodi tužbe da je tuženi povrijedio

"Provisions of Article 12 of the mentioned law, which the accusing party quotes in its complaint, prescribe the content of the request for access to information, and not the obligation of the body to meet in every case the request with regard to the manner in which access to a particular information is to be realized."

obaveza organa da u svakom slučaju udovolji podnosiocu zahtjeva u pogledu načina na koji će se ostvariti pristup nekoj informaciji.

Iz navedenih razloga, Sud je našao da je osporeno rješenje pravilno i zakonito, pa je tužbu odbio.

Sa izloženog, a na osnovu člana 37. stav 1. Zakona o upravnom sporu, odlučeno je kao u dispozitivu.

UPRAVNI SUD REPUBLIKE CRNE GORE
Podgorica, 19.09.2006 godine

Zapisničar,
Snežana Popov, s.r.

PREDSJEDNIK VIJEĆA
Gordana Pot, s.r.
11. Koryferobuk

Verdict of the Administrative Court from 19 September 2006

MANS submitted to the Supreme Court a request for extraordinary investigation of the decision of the Administrative Court which states the following:

According to Article 12 paragraph 1 item 2 of the Law on Free Access to Information the request for access to information should include the manner in which the requester desires to realize access to information. The provision that the requester should opt in the request for the manner in which access to information is to be realized is aimed at enabling the requester to have access to information in the manner that suits him/her.

Direct insight into the requested documents represents a significant limitation of the right to free access to information, which can be determined from the chronological sequence of events...

...It should be pointed out that the Agency by its decisions allowed exclusively insight into the requested documents, without the possibility to copy them in writing, photocopy them, scan or photograph them...

The Supreme Court refused the request for extraordinary investigation of the court decision and determined that the decision of the Administrative Court is legal ***„because the content of the request for access to information from Article 12 of the Law on Free Access to Information does not mean absolute obligation of the public authority body to meet in every case the request of the requester with regard to the manner of access to some information, but the body shall through its decision determine that manner.“***

The verdict also states „decisive is the fact that the requester is allowed access to the requested information, by direct insight on the premises of the defendant, and that the requester is granted the required right, in compliance with the concrete conditions in the concrete case, through proper application of Article 18 paragraph 2 and Article 13 paragraph 1 of the Law on Free Access to Information.“

VRHOVNI SUD REPUBLIKE CRNE GORE
Uvp.br.64/2006

PODGORICA, 08.12.2006.

U IME NARODA

Vrhovni sud Republike Crne Gore, u vijeću sastavljenom od sudija Vučinić Stanke, kao predsjednika vijeća, Bogičević dr Čedomira i Ivanović Sretena, kao članova vijeća, uz učešće službenika suda Orović Mirjane, kao zapisničara, odlučujući o izjavljenom zahtjevu za vanredno preispitivanje sudske odluke - presude Upravnog suda RCG U.br.940/2006 od 19.09.2006. godine, kojeg je podnio tužilac Mreža za afirmaciju nevladinog sektora - MANS iz Podgorice, u sjednici vijeća održanoj dana 23.11.2006. godine, donio je

P R E S U D U

„The request for extraordinary investigation of the Court decision is refused.“

O b r a z l o ž e n j e

Presudom Upravnog suda RCG U.br.940/2006 od 19.09.2006. godine, odbijena je tužba tužioca Mreže za afirmaciju nevladinog sektora - MANS-a iz Podgorice, podnijeta protiv rješenja tužene Agencije Crne Gore za prestrukturiranje privrede i strana ulaganja - Podgorica, br.UP 39/1 od 04.07.2006. godine.

Protiv označene presude tužilac je podnio zahtjev za vanredno preispitivanje sudske odluke, zbog pogrešne primjene materijalnog prava. Predlaže se da se pobijano rješenje poništi, koji predlog se u smislu čl.46. st.2. Zakona o upravnom sporu može razmatrati samo kao predlog za ukidanje ili preinačenje osporene presude.

U sjednici vijeća ispitana je pobijana presuda u granicama podnijetog zahtjeva a pri tome i po službenoj dužnosti u smislu čl.45. Zakona o upravnom sporu, pa je ovaj sud našao da je zahtjev za vanredno preispitivanje sudske odluke neosnovan.

U predmetnoj stvari sporno pitanje je, da li je tužena Agencija za prestrukturiranje privrede i strana ulaganja povrijedila Zakon o slobodnom pristupu informacijama kada je umjesto tražene kopije odredjenih informacija donijela rješenje kojim je utvrdila pravo tužiocu, da ostvari uvid u tražene informacije neposredno u prostorijama tuženog organa.

Verdict of the Supreme Court from 23 November 2006

Odredbom člana 12. stav 1. tačka 2. Zakona o slobodnom pristupu informacijama određeno je da zahtjev za pristup informaciji treba da sadrži način na koji se želi ostvariti pristup informaciji.

Sa druge strane, odredbom čl.13. st.1. istog zakona određen je pristup informaciji u posjedu organa vlasti, pri čemu je jedna od mogućnosti neposredni uvid u javnu evidenciju, original ili kopiju informacije u prostorijama organa vlasti.

Sadržina zahtjeva za pristup informacijama iz čl.12. Zakona ne znači apsolutnu obavezu organa vlasti da u svakom slučaju udovolji podnosiocu

„Content of the request for access to information from Article 12 of the Law does not mean absolute obligation of the public authority body to meet in every case the request of the requester with regard to the manner in which access to some information is realized, but the body shall determine such a manner by its decision in terms of Article 18 paragraph 2 of the same law in every concrete case, in accordance with the concrete circumstances related to the nature of the concrete request.

Having in mind concrete circumstances, determined in the administrative procedure with the body to which the request was submitted, that the requested information represent material including several hundred pages, and that such extensive material had to be taken to some other place to be photocopied, which would interfere with the regular work of the accused body, reasonable conclusion is made that by passing the disputed decision law has not been violated to the detriment of the accusing party. Decisive is the fact that the requester is allowed access to the requested information by direct insight on the premises of the accused body, and that the requester is granted the required right, in compliance with the concrete circumstances in the concrete case, by proper application of Art. 18. para .2. and Art.3 para.1 of the Law on Free Access to Information.”

Kod napred navedenog stanja stvari u spisima predmeta, materijalno pravo je pravilno primijenjeno i odluka Upravnog suda kojom je odbijena tužba utemeljena je na zakonu, čime se zahtjev za vanredno preispitivanje pokazuje kao neosnovan.

Sa izloženog a na osnovu čl.46. st.1. Zakona o upravnom sporu, odlučeno je kao u izreci.

VRHOVNI SUD REPUBLIKE CRNE GORE

Podgorica, 23.11.2006. godine

Zapisničar,
Mirjana Orović,s.r.



Тачност преписа потврђује
Председник вијећа, Кленик суда
Stanka Vučinić,s.r.

After quoting the principles and standards included in international documents on human rights and freedoms, the Supreme Court changed its practice.

Excerpt from the request for extraordinary investigation of the Court decision:

*According to **Article 4 paragraph 1 item 1 of the Law on Free Access to Information the right of access to information** includes the right to request, receive, use and spread information held by the public authority bodies.*

The right to free access includes the right of the requester to use and spread information access to which has been granted, which in case when direct insight is allowed is not possible for the information obtained exclusively by insight cannot be used for example as a proof for filing a crime report and initiating of criminal proceedings, nor can it be submitted to other interested persons i.e be spread, whereby the right to free access to information is significantly restricted.

Also, according to Article 1 paragraph 3 of the Law on Free Access to Information access to information is guaranteed at the level of principles and standards included in the international documents on human rights and freedoms.

Universal Declaration on Human Rights, Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and without frontiers."

International Covenant on Civil and Political Rights, Article 19: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether orally, in writing, or in print, in the form of art, or through any other media of his choice."

European Convention on Human Rights and Fundamental Freedoms, Article 10: "Everyone shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference of public authority and regardless of frontiers. This Article shall not prevent states from requiring licensing of broadcasting, television and cinema enterprises."

Free access to information granted in the manner which allows exclusively direct insight into the requested information without the possibility to photocopy, scan, photograph or record the information represents a significant restriction to the free access to information.

Through a new verdict **the Supreme Court annuls the verdict of the Administrative Courts** and states that **the body has a primary obligation to consider the possibility to grant access to information in the manner required in the request, and if there are objective obstacles or difficulties for realization of such a request to determine some other manner.**

Along with that, the Supreme Court took a stand that the **body is obliged to explain why it opted for another manner and not for the manner of providing information as asked in the request.**

VRHOVNI SUD REPUBLIKE CRNE GORE
Uvp.br.83/2006

BROJ 071892-806
PODGORICA, 10.01.2007

VRHOVNI SUD REPUBLIKE CRNE GORE, u vijeću sastavljenom od Ivanović Sretena, kao predsjednika vijeća i sudija Stojanović Petra i Bogičević dr Čedomira, kao članova vijeća, uz učešće službenika suda Orović Mirjane, kao zapisničara, rješavajući po zahtjevu za vanredno preispitivanje sudske odluke - rješenja Upravnog suda RCG, U.br.944/2006 od 11.10.2006. godine, kojeg je podnio tužilac Mreža za afirmaciju nevladinog sektora - MANS iz Podgorice, u nejavnoj sjednici održanoj dana 08.12.2006. godine, donio je

P R E S U D U

.....Verdict of the Administrative Court of RoM is annulled..."

10. 2006. godine i predmet vraća tom sudu na ponovni postupak.

O b r a z l o ž e n j e

Presudom Upravnog suda RCG, U.br.944/2006 od 11.10.2006. godine, odbijena je tužba tužioca Mreže za afirmaciju nevladinog sektora - MANS-a iz Podgorice, podnijetu protiv rješenja tuženog Ministarstva zaštite životne sredine i uređenja prostora - Podgorica, br.03-05-25/06 od 29.06.2006. godine, kojim je odlučeno o pristupu informaciji, na način utvrđen u dispozitivu tog akta.

Protiv ove presude tužilac je podnio zahtjev za vanredno preispitivanje sudske odluke, zbog povrede materijalnog prava predlažući da se pobijana odluka poništi, koji predlog se shodno odredbi člana 46. st.2. Zakona o upravnom sporu ima smatrati kao predlog za ukidanje ili preinačenje pobijane presude.

U sjednici vijeća razmotreni su cjelokupni spisi predmeta ispitana pobijana presuda u granicama propisanim u čl.45. ZUS-a i ocijenjeni navodi podnijetog zahtjeva, pa je vijeće našlo da je:

Zahtjev za vanredno preispitivanje sudske odluke je osnovan.

Odredbom člana 13. Zakona o slobodnom pristupu informacijama propisani su načini na koje se može ostvariti pravo na pristup informaciji a jedna od mogućnosti je i neposrednim uvidom u javnu evidenciju, original ili kopiju informacije u prostorijama organa vlasti.

Verdict of the Administrative Court from 22 December 2006

„Provision from Article 13 of the Law on Free Access to Information prescribes the manner in which the right to access information can be exercised, one of the possibilities being also direct insight into public records, the original or a copy of information on the premises of the public authority bodies.

However, this does not mean arbitrariness of the body to determine the manner of insight by its own discretion. The primary obligation of a body is to consider the possibility to exercise this right in the manner required in the request, in terms of one of the manners as of Article 13 of the mentioned law, and if there are objective obstacles or difficulties for realization of such a request, to determine some other manner. This in particular for reason that the right to access information includes also the right to accept, use and spread information in the sense of Article 4. paragraph 1 item 1 of the mentioned law.

Apart from that, the body is obliged to explain why it has opted for another, and not for the manner of providing information as required in the request.”

U pobijanoj presudi se pak, polazi samo od činjenice da ne postoji obaveza organa da u svakaom slučaju udovolji podnosiocu zahtjeva u pogledu načina na koji će ostvariti pristup nekoj informaciji, ali se ne daje obrazloženje zbog čega u konkretnom slučaju ne postoji mogućnost ostvarivanja prava na način kako je tražen.

Prednje ukazuje na pogrešnu primjenu materijalnog prava (član 42. st. 1. tač. 2. Zakona o upravnom sporu), zbog čega je presudu valjalo ukinuti da bi sud u ponovnom postupku raspravio sporno pravno pitanje ostvarivanja prava na pristup informaciji i pravilno primijenio materijalno pravo.

Sa iznijetih razloga, a na osnovu člana 46. st. 1. ZUS-a, odlučeno je kao u izreci ove presude.

VRHOVNI SUD REPUBLIKE CRNE GORE

Podgorica, 22. 12. 2006. godine

Zapisničar,
Radojka Djordjević, s.r.



Predsjednik vijeća,
Stanka Vučinić, s.r.

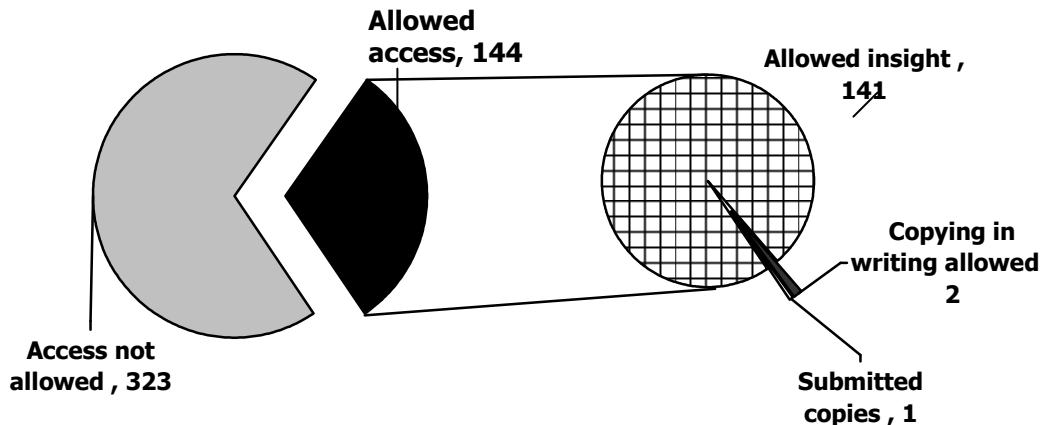
B. Jovsimović

Case study 10: Respect for the Court Decisions

Most institutions respect the verdict of the Supreme Court, so that even in cases when access to information is allowed in the form of insight, they allow scanning of documents or recording of their content in some other manner.

However, **exclusive prescribing of insight into information is still abused in practice, in particular by the institutions holding information on privatization.**

Out of a total number of 467 submitted requests, the Council for Privatization and the Agency of Montenegro for Economic Restructuring and Foreign Investments granted access to 144 requests, of which we received only one copy and were allowed copying in writing in only two cases, and for all other cases only insight into documents was allowed.



The first problem represents **the very fixing of the time for insight** into a document, so that, for example, between 29 September and 04 October 2006, only after sending as many as 46 official letters did we manage to fix the time for having insight into information access to which had been granted to us.

Institutions in charge of privatization still **do not allow copying in any manner whatsoever of the content of information access to which was granted**, explaining that by lack of technical possibilities, i.e. by the fact that they do not have a photocopier.

While having insight, **the requester is even not allowed to use pen and paper**, so that none of the information access to which was allowed can be recorded.

In order to overcome „technical deficiencies“, MANS offered to scan the documents access to which was allowed by its own equipment, but the Agency refused this.

6. Manner of access to information

We tried to record the content of documents with a camera and a camcorder, as well as to record the act of having insight by a dictaphone, but these institutions responded to such efforts of ours by calling the security and interrupting the act of having insight.

After that, by a special enactment we were **forbidden to take technical equipment including mobile phones** into the Government building, where these institutions have their seats while having insight into documents.

Such a ban does not apply to other persons, nor does it apply to representatives of MANS when they visit the Government building for other purposes.



NVO - M A N S -
BROJ 25-90/09
PODGORICA 11. 09. 2007

Podgorica, 11. septembar 07. godine

MREŽA ZA AFIRMACIJU NEVLADINOG SEKTORA – MANS
Dalmatinska 188
Podgorica

„At the same time we are informing you that you can have direct insight, in accordance with Article 13, item 1 of the Law, without technical equipment and mobile phones, so that we avoid possible misunderstandings. Security officials of the Government of RoM will be informed on the arrival of your representatives and will adhere to the entrance procedure in the same manner as the previous time.“

... kao i prilikom prethodnog vašeg dolaska.
Očekujem vašu saradnju.

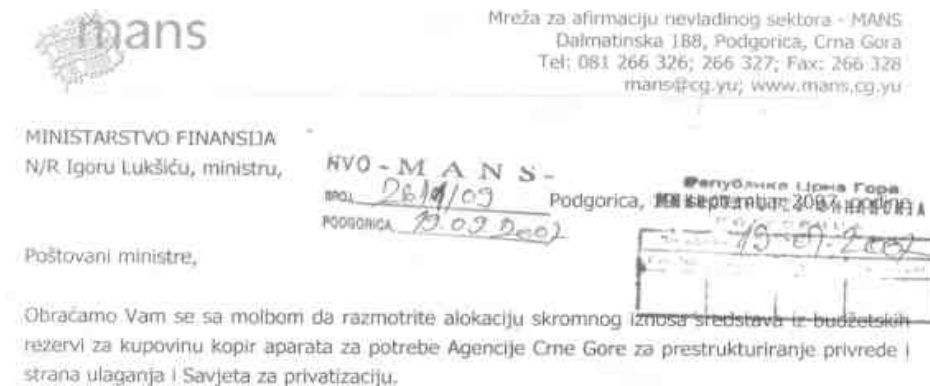
S poštovanjem,

Ovlašćeno lice,
Gordana Bakić
Gordana Bakić

Official Letter of APPSU from 11 September 2007

6. Manner of access to information

Since, according to the Council and the Agency, it is the lack of a photo copier the key obstacle to ensuring of free access to information on privatization process, we addressed the Minister of Finance Igor Lukšić, who is also a member of the Council for Privatization, asking him to **allocate means from the budget reserves for the purchase of a photo copier**, but we never received an answer.



Presudom Vrhovnog suda broj 83/2006 od 22. 12. 2006. godine potvrđeno je da pravo na slobodan pristup informacijama obuhvata pravo traženja, primanja i širenja informacija, kao što je to definisano u članu 19 Univerzalne deklaracija o ljudskim pravima, članu 10 Evropske konvencija o ljudskim pravima i osnovnim slobodama i članu 19 Međunarodnog pakta o građanskim i političkim pravima, član 19 definišu da pravo na pristup informacijama.

Prema navodima iz rješenja Agencije Crne Gore za prestrukturiranje privrede i strana ulaganja i Savjeta za privatizaciju, ključna prepreka za puno sprovođenje Zakona o slobodnom pristupu

„Therefore we believe that by investing modest resources amounting to a maximum of 1500 Euro, the State would achieve a disproportionately huge effect with regard to improvement of transparency, as one of the basic principles of privatization and contribute significantly to a full respect of human rights, concretely the right to have free access to information.“

Jednog od osnovnih principa privatizacije i značajno dopriniijela punom poštovanju ljudskih prava, konkretno prava na slobodan pristup informacijama.

U očekivanju Vašeg odgovora,

S poštovanjem,

Vanja Čalović, izvršni direktor



Letter to the Minister of Finance from September 19 2007

6. Manner of access to information

Then, on the occasion of the International Day of Free Access to Information, on 28 September 2007 we organized a **donor conference**, in order to provide a photo copier for the needs of institutions in charge of the privatization process.

We invited to the donor conference owners of over 20 companies, offering them an opportunity to donate funds which would make possible publishing of contracts on privatization, and thus to stop discussion on illegalities that followed the sale of those companies. Although nobody of the invited attended the conference, the photo copier was provided owing to the donation of the NGO Association of Young Journalists of Montenegro.

From the Agency for Economic Restructuring and Foreign Investments it was stated that they will not participate at the donor conference "**since MANS with its activities and work tried to discredit the Agency as an institution and its employees**", and that „**the Agency is a serious institution which has more serious things to do than participate in the scenaria of charades by which you wish to direct the public attention in a wrong manner**”.



Enactment of APPSU from 27 September 2007

The Agency refused to accept the photo copier and continued to grant access to information exclusively by means of insight with the explanation that there are no technical possibilities for photocopying.

*More detailed information on experience from having insight into documents on privatization can be found in the publication „Free Access to Information on Privatization: BEHIND THE CLOSED DOOR”
<http://www.pravodaznam.info/publikacija.htm>*