9. CASE LAW

9. CASE LAW

9.1. Length of procedure upon complaint

A complaint may be filed with the Administrative Court due to the misapplication of the Law on Free Access to Information, wrongfully or incompletely established facts, violations of the rules of procedure, i.e. the silence of the administration.

Pursuant to the Law on Free Access to Information, the complaint should be dealt with urgently, while in practice it takes several months to reach a judgement.

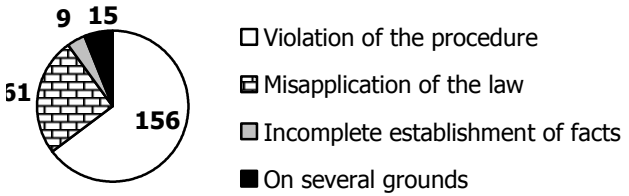
Since no law stipulates the deadline upon procedures designated as ones to be dealt with urgently, it leads to several month delays in procedure upon complaints for violations of the right to access to information.

The Law on Free Access to Information, Article 24

Any applicant presenting a request for access to the information or any other person interested therein shall be entitled to the court protection during any administrative dispute procedure. The procedure upon a suit instituted in relation to access to the information shall be **urgent**.

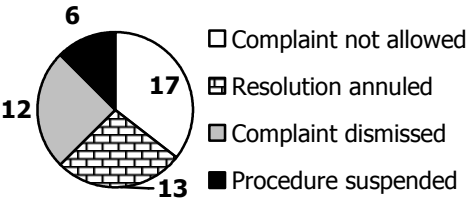
The Law on Administrative Dispute, Article 1

In an administrative dispute court shall decide on the legality of an administrative act and the legality of other individual acts when stipulated so by law.



In the given period we filed complaints following 24% of the requests for information, 65% of which relate to the violation of procedure, 25% to misapplication of the law, 4% to incompletely established facts, and 6% were filed on several grounds.

So far judgements were passed upon 96 requests for information, in 27% of the cases resolutions of the institutions were dismissed, in 13% the court proceedings were suspended because in the meantime a new resolution was passed that allowed access to information, in 25% cases the complaint was dismissed, because the court deemed the Law was not violated, while in 35% of the cases the complaint was not allowed because it was possible to file an appeal with a second instance body.



The Administrative Court interprets the **principle of urgency** in such a manner that for each complaint a separate urgency has to be written, while the President of the Administrative Court has the discretionary right to decide which cases should have the priority.

UPRAVNI SUD
REPUBLIKE CRNE GORE

Su.br IV-87/06
Podgorica, 15.03.2006.

NVO - M A N S -
BROJ 061439-440 odgovor
PODGORICA, 23.03.2006.

MREŽA ZA AFIRMACIJU NEVLADINOG SEKTORA

81 000 Podgorica,
Stari aerodrom, zgrada Čelebić II/9

PREDMET: Zahtjev za dostavljanje informacije od 15.03.2006.

Upravni sud u načelu rješava predmete po redosljedu prispijeća tužbi u sud, što znači da stariji predmeti imaju prednost u odnosu na predmete, uslovno rečeno, novijeg datuma.

Treba, naravno, imati u vidu da su svi pojedinačni predmeti koji se raspravljaju pred Upravnim sudom manje-više hitne prirode. To, međutim, po prirodi stvari nalaže da se prednost da starijim predmetima.

S druge strane, postoje predmeti koji se shodno zakonu smatraju kao hitni (npr. član 113 st. 3 Zakona o državnim službenicima i namještenicima - Sl.list RCG 27/04). Zakon nekad i izričito navodi da se odluka mora donijeti u tačno određenom roku, pa se mora dati prioritet takvim predmetima u odnosu na ostale (npr. član 14 st. 2 Zakona o upravnom sporu - Sl.list RCG 60/03).

Međutim, u određenim situacijama, i u slučaju kada zakon ne daje prioritet nekom predmetu, taj predmet se može na osnovu pismene predstavke hitno uzeti u razmatranje, što zavisi od mnogih okolnosti koje se ne mogu unaprijed predvidjeti. Te okolnosti stranka obrazlaže u podnesku koji upućuje sudu. Osim toga, predsjednik Suda prima stranke svakog utorka od 9 do 12 časova, kada mu stranke, između ostalog, mogu ukazati na razloge za hitno postupanje.

Nema posebnog akta kojim se definiše procedura podnošenja inicijative da se predmet razmatra po hitnom postupku. Međutim, s tim u vezi, u skladu sa Zakonom o slobodnom pristupu informacijama, šaljemo Vam kopiju izvoda zapisnika sa sjednice sudija Upravnog suda održane 29.08.2005. godine koji se na neki način odnosi na ono što tražite.

SEKRETAR SUDA
Srđan Žarić

„...all the cases heard before the Administrative Court are, more or less, urgent in nature...priority given to older cases..."

УПРАВНИ СУД
РЕПУБЛИКЕ ЦРНЕ ГОРЕ
Број I-63
31 08 2005 год
Подгорица

UPRAVNI SUD REPUBLIKE CRNE GORE
Su. br. I – 25/05
Podgorica, 29.08.2005. godine

ZAPISNIK (Izvodi)

sa VI Sjednice sudija Upravnog suda RCG održane dana 29.08.2005. godine.

Sjednica započeta u 10 časova.

Sjednicom predsjedava Branislav Radulović – predsjednik suda
Zapisnik vodi Mirjana Miličković - stručni saradnik

Predsjedavajući je predložio dnevni red, a kako predloga za izmjenu ili dopunu istog nije bilo, za Sjednicu je usvojen sljedeći:

Dnevni red:

1. Godišnji raspored poslova : dodjela predmeta sudijama i formiranje vijeća.

Tok sjednice:

1. *Godišnji raspored poslova : dodjela predmeta sudijama i formiranje vijeća.*

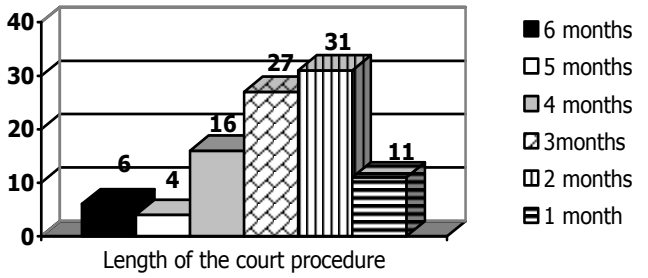
Predsjednik suda i ostale sudije su saglasne da prioriteti u riješavanju budu stariji predmeti i predmeti po urgencijama, s tim što će predsjednik suda u dogovoru sa predsjednicima vijeća utvrditi stvarne razloge za hitne postupanje, kako se ne bi zloupotrijebilo urgiranje u pojedinim predmetima, obzirom da će isti utorkom od 9 do 12 časova primati stranke i biti upoznat sa razlozima za urgenciju.

ZAPISNIČAR
Mirjana Miličković

PREDSJEDNIK SUDA
Branislav Radulović

„The President of the Court and other judges agree that priority should be given to older cases and urgencies, provided that the president of the court in agreement with the presidents of panels will establish real reasons for urgent action, in order not to abuse urgency in certain cases, considering that on Tuesdays from 9 to 12 they will be seeing parties and be informed about the reasons for urgency."

Complaint filed in	No of complaints	Judgements by months	Result
February 2006	10	Total of 10 judgements passed in 6th month	Annulled resolutions: 6 Complaint dismissed: 4
March 2006	2	Total of 2 judgements passed in 6th month	Annulled resolutions: 2
April 2006	34	Total of 21 judgements 1 in 6th month, 14 in 7th month, 6 in 10th month	Annulled resolutions: 10 Ordered to pass a resolution: 1 Procedure suspended: 1 Complaint not allowed: 9
May 2006	29	Total of 15 judgements 8 in 6th month, 1 in 7th month, 1 in 9th month, 5 in 10th month	Annulled resolutions: 1 Ordered to pass a resolution: 1 Procedure suspended: 4 Complaint not allowed: 8 Complaint dismissed: 1
June 2006	68	Total of 11 judgements 1 in 6th month, 5 in 9th month, 5 in 10th month	Ordered to pass a resolution: 4 Procedure suspended: 4 Complaint not allowed: 1 Complaint dismissed: 2
July 2006	50	Total of 19 judgements: 13 in 9th month, 6 in 10th month	Complaint dismissed: 19
August 2006	27	Total of 16 judgements: 12 in 9th month 4 in 10th month	Procedure suspended: 1 Ordered to pass a resolution: 6 Complaint dismissed: 9
September 2006	18	Total of 2 judgements in 9th month	Complaint dismissed: 2
Total	**239**	**95**	**Annulled resolutions: 19** **Ordered to pass resolution: 12** **Procedure suspended: 9** **Complaint not allowed: 18** **Complaint dismissed: 37**



The chart on the left shows that court procedures **on average take two to three months**, which obviously constitutes a significant impediment to free access to information and **is not in accordance with the Law on FAI which envisages that the procedure upon the complaint shall be urgent.**

9.2. Judgements annulling the resolutions

Example 17. State secret

In the case law insofar the most significant cases in which the court annulled the resolutions refer to **information not allowed access to being a state secret**.

The National Security Agency declared the number of employees and the number of employees per sectors a state secret. As per complaint filed by MANS, the Administrative Court held an **oral hearing**.

MINUTES OF THE MAIN HEARING (Translation)

Plaintiff: Network for the Affirmation of the Non-governmental Sector – MANS

Defendant: National Security Agency

This hearing is public.

The reporter presents the facts from the file.

The plaintiff's representative reiterates the allegations from the complaint, adding that the defendant in the very response to the complaint did not state the reasons by which it substantiates the fact that the requested information is a state secret. She furthermore underscores – quote – that in international experiences such information is public, in cases even available on the Internet, giving the example of the UK intelligence service MI5, showing they published the total number of their employees, the number of permanent staff and of those occasionally hired, the percentage of men and women, the structure of the staff and their qualifications, as well as the expenditures and the structure of the expenditures per fields, including terrorism in Northern Ireland, espionage, terrorism, etc. Considering that the National Security Agency was requested only to give the number of permanent staff, and that other countries publish much more information on the operation of intelligence services, the publication of this piece of information in no way is to constitute a threat to national security of the state of Montenegro.

In response to the complaint, the attorney of the defendant reiterates the response to the complaint given in writing, adding that the requested copy of the document contains the data on the total number of employees per sectors. This information is contained in the document on systematisation, registered in the records of the defendant as a document with the highest level of secrecy as "strictly confidential". The document, or the inspection thereof, is not allowed even to all the employees of the Agency, but just to a few of them whose work involves taking actions pursuant to the said document. Montenegro has not as yet adopted any law on protection of secrecy, and thus the defendant uses internal rules on keeping and using documents constituting official and state secret. These were the grounds for refusing the plaintiff's request, believing that the disclosure of requested information would cause harm which exceeds the public interest in publishing the information. These were the same reasons why the test of harm was not conducted. The defendant's attorney adds – quote – considering that the National Security Agency of Montenegro is a state body whose position and role in the system is highly specific we believe that jeopardising and bringing into danger the activities of the Agency, whose essence of existence is the very protection of national security, could endanger the national security of Montenegro.

As for the allegations of the plaintiff – stating examples from international practice - it is pointed out that the experiences of the countries in the region are similar to ours and that in all countries in the region the document requested by the plaintiff is designated as a state secret. The experiences are similar in the countries of the region, and all of them, except Serbia and Montenegro, have laws regulating the protection of secret data.

As for the allegations of the defendant's attorney, the plaintiff's representative claims that the allegations of the defendant's attorney are contrary to the provisions of Article 8 of the Law on Free Access to Information, and as for internal rules of the defendant, referred to by the attorney, it may not be of greater legal power than the Law itself. The fact that no test of harm was conducted, as stated by the defendant's attorney, constitutes violation of Article 9 of the same law, since test of harm is done ex officio and the burden of proof of the secrecy of data is upon the defendant. As for the allegations that the situation is identical in the region regarding the secrecy of requested data, these allegations are ungrounded since in Serbia the Constitutional Court has publicised, i.e. ordered publishing of the data of the security and information services of Serbia.

Regarding the above allegations of the plaintiff's representative, the defendant's attorney points out – quote – that full legal documents of the National Security Agency are currently being developed and great efforts are invested into harmonising these regulations with the public system of the Republic of Montenegro and security standards worldwide. Until the enactment of the said regulations, the existing ones are followed. It is also true that the Constitutional Court of Serbia ordered publishing the security data, but the fact remains these data have not been published yet. Considering that this is a document designated as a state secret and which may not be taken out of the premises of the Agency, I submit to the court the confirmation issued by the director of the Agency that the given case refers to a document being the state secret and this certificate is filed with the Court.

The court hereby adopts the following

D E C I S I O N

To inspect the certificate by reading it.

The certificate issued by the National Security Agency no. 250-02-6245-1/06 as of 10.10.2006, issued by the defendant's director, is being read.

The plaintiff's attorney objects the evidence and underscores it is a subjective assessment not grounded in any law and that it does not contain any proof that the test of harm was conducted.

The defendant's attorney points out that if the authenticity of the certificate is questioned or the allegations contained therein the defendant will enable the panel and the plaintiff to inspect the allegations within the premises of the Agency.

The plaintiff's representative says he does not contest the authenticity of the certificate but its allegations.

Asked by the reporter – the President of the Court whether there is any law in place or some other regulation which gives authority that the document on job systematisation and organisation, i.e. certain parts thereof, like the number of employees, is given certain level of secrecy – namely the state secret, i.e. in the given case pursuant to what authority was the Agency given the right to designate the document on job systematisation and organisation a state secret.

In response to the question the defendant's attorney says that as yet in Montenegro there is no law regulating the issues of secret data protection. Drafting of such a law is currently in progress and according to the government agenda it is to be completed by the end of this year. Pursuant to that law, the Agency shall enact its internal documents. Until the enactment of such a law, it will act in accordance with internal regulations, in the given case pursuant to the aforementioned rules.

Asked by the reporter pursuant to what regulations they request sanctions to be imposed, the defendant's attorney points out such instructions have been given by relevant state authorities to ask for sanctions to be imposed during the court procedure.

The litigants hereby state they have nothing to add.

FINAL PROPOSALS OF THE LITIGANTS

The plaintiff's attorney proposes the Court should abolish the disputed document and order the defendant to allow access to requested information as well as the Court to impose sanctions on the defendant pursuant to Article 27 of the Law on Free Access to Information.

The defendant's attorney proposes the Court to dismiss the complaint as ungrounded.

The hearing is hereby concluded.

The hearing ended at 10:50 AM

The court shall pass the judgement within the statutory deadline.

The minutes have been dictated aloud, the litigants have no objections and sign it.

At their request, the litigants have been given a copy of the minutes from the hearing session.

Certified by

Minute keeper:
Marina Nedovic

PRESIDENT OF THE PANEL – JUDGE:
Gordana Pot

By its judgement the Administrative Court abolished the resolution of the Agency as unlawful on several grounds and ordered to pass a new, lawful resolution within the statutory deadline of 30 days.

** "...abolishes the resolution of the National Security Agency..."*

NVO - M A N S -
BROJ 06/434-4.35
PODGORICA 17.10.2006.

UPRAVNI SUD REPUBLIKE CRNE GORE
U. broj 551/2006

U IME NARODA

Upravni sud Republike Crne Gore, u vijeću sastavljenom od sudija, Gordane Pot, kao predsjednika vijeća, i Vojina Lazovića i predsjednika suda Branislava Radulovića, kao članova vijeća, uz učešće stručnog saradnika Rosande Nikolić, i zapisničara Marine Nedović, rješavajući upravni spor po tužbi tužioca Mreže za afirmaciju nevladinog sektora - MANS iz Podgorice, koju zastupa zakonski zastupnik Vanja Ćalović, protiv rješenja tuženog Agencije za nacionalnu bezbjednost RCG - Podgorica, broj 280/02-1635/5 od 23.03.2006. godine, zastupanog po punomoćniku Katarini Vujović, nakon održane usmene javne rasprave, uz prisustvo zakonskog zastupnika tužioca i punomoćnika tuženog, dana 11.10.2006. godine, donio je

P R E S U D U

Poništava se rješenje Agencije za nacionalnu bezbjednost , broj 280/02-1635/5 od 23.03.2006. godine.

Odbacuje se zahtjev za odlučivanje o prekršajnoj odgovornosti tuženog.

O b r a z l o ž e nj e

Osporenim rješenjem odbijen je zahtjev tužioca, da mu se dostave podaci o ukupnom broju zaposlenih i broju zaposlenih po sektorima u Agenciji za nacionalnu bezbjednost.

Tužilac u tužbi i riječi na usmenoj raspravi osporava zakonitost rješenja tuženog. Smatra da je osporeno rješenje doneseno suprotno važećim propisima, jer nijednim zakonskim aktom nije propisano da se podaci o broju stalno zaposlenih, te izmirivanje poreza i doprinosa za zaposlene kod tuženog čuva kao državna tajna. Dalje ističe, da ne postoji ni jedan razlog zbog kojeg gradjani ne bi bili upoznati sa tim informacijama. Ovo s toga što sa ovim informacijama raspolažu službenici u državnim organima i bankama koji vrše kontrolu uplate poreza i doprinosa. Navodi, da tuženi nije u skladu sa članom 9. Zakona o slobodnom pristupu informacijama izvršio test štetnosti objavljivanja odredjene informacije, kako bi utvrdio da će objavljivanjem tražene informacije po odredjeni zaštićeni interes nastati šteta značajno veća od štete po javni interes zbog neobjavljivanja te informacije. Interni pravilnik tuženog, na koji

se poziva punomoćnik tuženog, ne može imati veću pravnu snagu od samog Zakona, a isti je u suprotnosti sa odredbom člana 8. pomenutog zakona, kojim je utvrdjena dužnost organa vlasti da podnosiocu zahtjeva omogući pristup informaciji ili njenom dijelu, osim u slučajevima predvidjenim zakonom. Konačno predlaže, da Sud poništi osporeni akt i naloži tuženom da omogući pristup traženim informacijama, kao i da Sud kazni tuženog u skladu sa članom 27. Zakona o slobodnom pristupu informacijama.

Tuženi organ u odgovoru na tužbu i na usmenoj raspravi preko svog punomoćnika, ističe da je osporeno rješenje zakonito, jer tuženog u pružanju informacija i davanju podataka obavezuje Zakon o agenciji za nacionalnu bezbjednost, kojim je utvrdjeno da nije dužan da daje obavještenje i podatke, ako bi obavještenje dovelo u opasnost izvršenje poslova tuženog ili ugrozilo bezbjednost lica ili ako ti podaci predstavljaju državnu, službenu ili poslovnu tajnu. Tužilac je tražio podatke o broju zaposlenih po sektorima kod tuženog, što indirektno predstavlja uvid u akt o unutrašnjoj organizaciji i sistematizaiji tuženog, koji je označen stepenom tajnosti kao "državna tajna" i zaveden u djelovodnik sa najvećim stepenom tajnosti "strogo povjerljio", a ovu činjenicu dokazuje potvrdom broj 250-02-6245-1/06 od 10.10.2006. godine. Uvid u ovaj akt je dozvoljen samo službenicima tuženog, kojima je obavljanje radnih zadataka postupanje po tom aktu. Dalje navodi da u Crnoj Gori još uvijek nije donijet zakon o zaštiti tajnih podataka pa tuženi primjenjuje interni pravilnik o čuvanju i korišćenju materijala koji predstavlja službenu i državnu tajnu. Iz tih razloga je odbijen zahtjev tužioca, smatrajući da bi objelodanjivanjem traženih informacija, nastala šteta značajno veća od javnog interesa za objavljivanjem informacije. Iz istih razloga nije sproveden ni test štetnosti objavljivanja traženih informacija.Posebno ističe, da je Agencija za nacionalnu bezbjednost Crne Gore državni organ čija je uloga u sistemu sasvim specifična, te bi kroz ugrožavanje i dovodjenje u opasnost poslova Agencije, čiji je osnov postojanja upravo zaštita nacionalne bezbjednosti, mogla biti ugrožena bezbjednost Crne Gore. Predlaže da se tužba odbije kao neosnovana.

Nakon razmatranja tužbe, odgovora na istu, pobijanog rješenja i ostalih spisa predmeta, te održane usmene javne rasprave, Sud je našao da je tužba osnovana.

Osporeno rješenje donijeto je uz povredu pravila upravnog postupka, a isto se zasniva na nepotpuno utvrdjenom činjeničnom stanju.

Naime, prema odredbi člana 202. stav 1. Zakona o opštem upravnom postupku ("Sl. list RCG" br. 60/03), propisano je da se dispozitivom rješenja odlučuje o predmetu postupka u cjelosti i o svim zahtjevima stranaka. Iz spisa predmeta se utvrdjuje, da je tužilac zahtjevom tražio pristup informacijama o ukupnom broju zaposlenih i broju zaposlenih po sektorima podacima o ukupnom bruto i neto iznosu zarada zaposlenih za mjesec decembar 2005. godine, a osporenim rješenjem je odlučeno samo da se odbija zahtjev za dostavljanje podataka o ukupnom broju zaposlenih kod tuženog, dok o ostalom dijelu zahtjeva nije odlučeno što je u suprotnosti sa naprijed citiranom odredbom zakona.

Tuženi u postupku nije u smislu člana 126. ZUP-a utvrdio odlučnu činjenicu o tome da li se traženi podaci mogu svrstati u grupu informacija iz člana 9. stav 1. tačka 1. Zakona o slobodnom pristupu informacijama ("Sl. list RCG br. 68/05), odnosno da li

** "The abolished resolution was passed violating the administrative procedure, based on the incomplete establishment of facts."*

** "The defendant…has not established the fact whether the requested data may be classified as information pursuant to Article 9…i.e. whether…"*

bi se objavljivanjem istih značajno ugrozila nacionalna bezbjednost, te nastala šteta značajno veća od javnog interesa za objavljivanje te informacije.

Osporenim rješenjem povrijedjena je i odredba člana 203. stav 2. ZUP-a, jer isto ne sadrži utvrdjeno činjenično stanje, pravne propise i razloge koji s obzirom na utvrdjeno činjenično stanje upućuju na rješenje kakvo je dato u dispozitivu. Valjano obrazloženje, po prirodi stvari predstavlja neophodnu pretpostavku za ocjenu zakonitosti osporenog rješenja u upravnom sporu. Istina, tuženi u odgovoru na tužbu i na javnoj raspravi daje bliže razloge kojima se rukovodio kod donošenja osporenog rješenja, medjutim, odgovor na tužbu i razlozi dati na raspravi, ne mogu da nadomjeste nedostatke obrazloženja osporenog rješenja, jer Sud u upravnom sporu ocjenjuje zakonitost akta koji se tužbom osporava.

Sud je cijenio predlog tužioca da meritorno odluči u ovoj stvari, ali je našao da za to nema uslova, jer raspoloživo činjenično stanje ne pruža pouzdan osnov za donošenje takve odluke.

Zahtjev tužioca da Sud odluči o prekršajnoj odgovornosti tuženog je odbačen zbog nenadležnosti Suda da postupa po istom, jer u smislu člana 27. Zakona o sudovima, ("Sl.list RCG" br. 5/02), Upravni sud odlučuje u upravnom sporu o zakonitosti konačnih upravnih akata i o vanrednim pravnim ljekovima protiv pravosnažnih rješenja donijetih u prekršajnom postupku. O postojanju prekršaja i prekršajnoj odgovornosti odlučuju nadležni organi za prekršaje.

Na osnovu naprijed izloženog osporeno rješenje je valjalo poništiti.

U ponovnom postupku tuženi organ će, postupajući po datim primjedbama Suda, otkloniti počinjene nepravilnosti i shodno članu 57. Zakona o upravnom sporu, ("Sl. list RCG" br. 60/03), donijeti novo zakonito rješenje.

Sa iznijetih razloga, a na osnovu člana 37. stav 1. u vezi člana 33. stav 2. Zakona o upravnom sporu, odlučeno je kao u dispozitivu ove presude.

UPRAVNI SUD REPUBLIKE CRNE GORE,
Podgorica, 11.10.2006. godine

Zapisničar,
Marina Nedović,s.r.

PREDSJEDNIK VIJEĆA,
Gordana Pot,s.r.

Tačnost prepisa potvrđuje
Ovlašćeni službenik suda

** "...its publication would considerably endanger national security and cause damage that exceeds considerably the public interest for publishing the information."*

** "...does not contain established facts, legal regulations and reasons that, considering the facts of the case, refer to the resolution as given above."*

** "In the repeated procedure the defendant shall, acting in accordance with the objections of the Court, remove the irregularities ... and pass a new resolution."*

The Administrative Court **abolishes the resolution** of the National Security Agency stating that this institution **"has not established the decisive fact" whether publishing the requested data would jeopardise national security and cause harm greater than the public interest in publishing the information.**

The Court deems that the resolution **"does not contain established facts, legal regulations and reasons that, considering the facts of the case, refer to the resolution as given above",** abolishes the resolution and orders the Agency to remove the irregularities and pass a new lawful resolution.

Similar is the case referring to the **number of surveilled and tapped persons by the National Security Agency which** declared **these data a state secret.**

Upon the complaint filed by MANS, the Administrative Court organised an **oral hearing** four months after the complaint had been filed.

MINUTES FROM THE MAIN HEARING (Translation)

Plaintiff: Network for the Affirmation of the Non-governmental Sector – MANS

Defendant: National Security Agency

This hearing is public.

Litigants have no objections to the composition of the panel of judges.

The reporter presents the facts from the file.

The plaintiff's representative confirms the complaint adding:

By no means could have the requested data indicate the potential and the capabilities of material resources of the NSA since the Agency was not requested to provide information regarding how many people could have been tapped and surveilled potentially which would indicate their capabilities, but how many were actually surveilled in 2005. The material resources of the Agency are defined in the Budget Law which is publicized in the Official Gazette of the Republic of Montenegro and thus our request did not either relate to that aspect and in that sense we believe that this section of the response to the complaint is irrelevant.

In its response the Agency states which institutions monitor the legality of its operation whereas in our request we never questioned the legality of its operation neither did the complaint refer to that aspect, and we have not either been assessing the democratic capacities of the National Security Agency, as is stated in the rationale, or in any other manner question whether it is lawful to perform surveillance and tapping of individuals but we asked solely for the information on the number of people surveilled last year and thus we deem that this section of the response to the complaint is also irrelevant.

The third segment of the response to the complaint is also irrelevant since there the Agency refers to Article 18 of the Law which is again not within the scope of our interest here since we do not contest the Agency's resolution regarding the inspection into secret files kept by the Agency, which is the area regulated by Article 18 of the Law on National Security, but we solely request the number of surveilled and tapped persons last year.

The last thing we find significant for the complaint is the section where the Agency states that our request was dealt with according to their free assessment which is directly conflicting Article 9 of the Law as referring to Article 3 of the Law, and the Agency has again not submitted evidence in response to the complaint regarding whether it has conducted the test of harm whether the disclosure of the requested information might endanger national security. Thus, in its response to the complaint the Agency clearly showed that it was not led by any law but states that there is no law to regulate the issues relating to protection of secret data which implies that according to own judgment, contrary to Law on Free Access to Information, it unlawfully refused our request.

It submits to the court the resolution of the Commissioner for information of public interest of Serbia dated 22.12.2005 where it is clearly explained why the information agency of Serbia has to publish data on the number of persons tapped during the year 2005, since publishing of such data is of public interest. Also the court was submitted the resolution of the Supreme Court of Serbia relating to this matter.

Responding to the complaint, the defendant's attorney confirms the written response, adding:

Deciding upon the request submitted by MANS, the Agency passed the disputed resolution pursuant to Article 9, paragraph 1, item 1 of the Law on Free Access to Information, referring to Article 16, items 1 and 2 of the Law on Free Access to Information enlisting the information with restricted access where the information possessed by the intelligence and security agencies in charge of national security is heading the list. Since Article 16 of the Law on NSA obliges the Agency to keep records and collections of data gathered pursuing the activities of the Agency, the register of data, records of the use of secret means and methods of data gathering and the documents contained therein are a state (not an official or business) secret and are classified as strictly confidential, considering that such data fall into the category of secretly gathered data, that the application of means and methods for secret data gathering is established when the required data may not be obtained otherwise and that the application of these measures needs to be approved for each individual case. Even in the case of parliamentary oversight over the operation of the Agency performed by the Parliament of Montenegro through its relevant bodies, Article 44 of the Law on NSA envisages written obligation of keeping the state, official and military secret acquired in the course of their oversight for members of the relevant body.

Clarifying the allegations stated by the plaintiff, he added:

Considering that these are the data still having operational value and as such may be abused I deem it justified to classify as confidential the request for data since through interference of the Agency in performing its tasks it directly or indirectly may lead to endangering national security which is the main task of the National Security Agency.

Considering that the Budget Law was published in the Official Gazette the data on allocated funds for the National Security Agency is publicly available, even broken down into separate items.

As for the test of harm, the Law on Free Access to Information does not recognise such a test, but this term might have been encountered only at events discussing the application of this Law, and it implies the duty of the body when acting pursuant to the Law in passing the resolution to assess whether publishing the information is in public interest, whether that requested information is subject to restrictions referred to in Article 9 of the given Law and whether it is the information referred to in Article 10 of this Law.

Considering that the requested information is state secret we thus believe they are subject to restrictions referred to in Article 9 of the Law, and not the type of information referred to in Article 10 of the Law, and thus the Agency refused the request of the plaintiff believing that publishing of the requested information would cause considerably greater harm than is the interest of the public for publicising the information.

In that sense the defendant's attorney submits the confirmation of the National Security Agency ref.no. 250-02-6322/06 as of 6 October 2006.

The Court hereby passes the following

D E C I S I O N

The confirmation provided by the National Security Agency is inspected.

The plaintiff's representative: Never requested inspection of the records of data maintained by the Agency, just the number of persons which may possibly not have any operational value, as is stated by the defendant's attorney and as such may not be abused to whatsoever purpose. Above all we contest that publicising the number could interfere with the performance of any duties of the Agency, as argued by the defendant's attorney. Also, when it comes to the requested data they are only to show the efficiency in spending of budgetary resources, and the amount of funds allocated is available in the Budget Law, but not the manner in which the funds are spent.

We contest the allegations that the term "test of harm" has not been regulated since Article 9 paragraph 2 refers expressly to this.

The plaintiff points out that they never requested the inspection of records, nor the data from the register or any other operational data of the Agency, neither the number of persons surveilled this year, but just a figure, the number of those surveilled and tapped last year which by no means may endanger national security.

The defendant's attorney points out that the register of data contains records, including secretly gathered data containing the requested information.

The plaintiff's representative points out that pursuant to the Law on Free Access to Information, Article 13, paragraphs 2, 3 and 4 the Agency was obliged to enable access to requested information after deletion of the data which are a state secret, meaning that even if this information is contained within the register of their data they could have deleted everything else and just leave the numbers in the list which would show the number of people which were surveilled and tapped, and such list numbers could by no means be the state secret, neither has the Agency proven that such list numbers are state secret.

The defendant's attorney underscores that the plaintiff takes the liberty to contest the right of the official authority to classify certain type of document as a state secret whereas in own presentation draws assessments and conclusions regarding what might and what might not be the state secret. Considering the highly specific nature of operation of the Agency, it is unable to provide more detailed explanation of the procedures it conducts to be able to explain why certain data has operational value in order not to jeopardise the ongoing actions.

The litigants have nothing to add.

FINAL PROPOSALS OF THE LITIGANTS

The plaintiff's representative propose the court to abolish the disputed act and order access to requested information, and as for the request to impose the maximum fine to the defendant the representative of the plaintiff declared they are renouncing this request.

The defendant's attorney proposes the court to dismiss the complaint as ungrounded.

The hearing ended in 10:55 AM

The court shall pass the judgement within the statutory deadline.

The minutes have been dictated aloud.

The litigants have no objections and sign the minutes.

The Administrative Court does not pronounce judgements at the oral hearing sessions, but passes them within the statutory deadline of 8 days. The judgement **abolishes the resolution of the National Security Agency and orders to pass a new, lawful resolution**.

NVO - M A N S -
BROJ: 06/441-446
PODGORICA 27.10.2006.

UPRAVNI SUD REPUBLIKE CRNE GORE
U. broj 558/2006

U IME NARODA

Upravni sud Republike Crne Gore, u vijeću sastavljenom od sudija Vladimira Radulovića, kao predsjednika vijeća, Vojina Lazovića i Biserke Bukvić, kao članova vijeća, uz učešće službenika Suda Rajke Milović, kao zapisničara, rješavajući upravni spor po tužbi tužioca Mreže za afirmaciju nevladinog sektora - MANS iz Podgorice, koju zastupa zakonski zastupnik Vanja Ćalović, protiv rješenja tuženog Agencije za nacicnalnu bezbjednost RCG - Podgorica, broj 250/02-1678/2 od 28.03.2006. godine, zastupanog po punomoćniku Katarini Vujović, nakon održane usmene javne rasprave, uz prisustvu stranaka, dana 19.10.2006. godine, donio je

P R E S U D U

Poništava se rješenje Agencije za nacionalnu bezbjednost, broj 250/02-1678/2 od 28.03.2006. godine.

O b r a z l o ž e nj e

Osporenim rješenjem odbijen je zahtjev tužioca, kojim je tražio kopiju akta koji sadrži informacije o tome nad kolikim brojem osoba je tuženi u 2005. godini, sprovodio mjere praćenja i prisluškivanja.

Tužilac u tužbi i riječi na usmenoj raspravi osporava zakonitost rješenja tuženog. Smatra da je osporeno rješenje nezakonito, jer se objavljivanjem informacije o broju osoba koje su praćene i prisluškivane ne može dovesti u opasnost izvršenje poslova Agenije, niti ugroziti bezbijednost lica i Države, kao ni otkriti potencijal funkcionisanja Agencije, pošto zahtjevom nijesu tražena imena lica koja su praćena i prisluškivana, kao ni koliko je lica Agencija u mogućnosti da prati i prisluškuje, razlozi iz kojih je to ANB radila, niti podaci c službenicima koji su vršili te poslove. Tražene informacije predstavljaju jedan od sumarnih pokazatelja rada Agencije I indikator efikasnosti i obima njenog rada, pa javnost ima pravo da zna koliki je broj

** "...abolishes the resolution of the National Security Agency..."*

prisluškivanih i praćenih lica. Takodje, nesporan je interes javnosti da zna na koji se način troši novac poreskih obveznika i da li obim aktivnosti Agencije korespondira sa ukupnim iznosom utrošenih sredstava. Tuženi je bio dužan da omogući pristup traženim informacijama čak i kada bi u dokumentu u kojem se nalaze bili podaci koji mogu ugroziti nacionalnu bezbjednost, nakon brisanje dijela dokumenta kojem je pristup ograničen. Dalje navodi da nema dokaza da je tuženi proveo test štetnosti u postupku donošenja rješenja, tj. utvrdio da li će objavljivanjem tražene informacije po odredjeni zaštićeni interes nastati šteta značajno veća od štete po javni interes zbog neobjavljivanja te informacije. Konačno predlaže, da Sud poništi osporeni akt i naloži tuženom da omogući pristup traženim informacijama.

Tuženi organ u odgovoru na tužbu i na usmenoj raspravi preko svog punomoćnika, ističe u bitnom da je osporeno rješenje zakonito, jer je zasnovano na odredbama člano 9. stav 1. tačka 1. Zakona o slobodnom pristupu informacijama u vezi sa članom 16. stav 1. i 2. Zakon o agenciji za nacionalnu bezbjednost. Evidencije primjene metoda i sredstava tajnog prikupljanja podataka predstavljaju "državnu tajnu" i zavedene su u djelovodniku najvišeg nivoa tajnosti "strogo povjerljivo", o čemu kao dokaz prilaže potvrdu br. 250-02-6322/06 od 16.10.2006. godine.Ukazuje da i u slučaju parlamentarne kontrole rada Agencije koju vrši Skupština RCG, preko nadležnog radnog tijela, njegovi članovi potpisuju pismenu izjavu o obavezi čuvanja državne tajne do koje dodju prilikom kontrole. Traženi podaci spadaju u grupu tajno prikupljenih podataka i još uvijek imaju operativnu vrijednost, pa se s toga mogu zloupotrijebiti. Smatra da se kapacitet Agencije, da se na kvalitetan i profesionalan način suprotstavi potencijalnim bezbjednosnim rizicima, izazovima i prijetnjama može tretirati kao podatak čijim bi objelodanjivanjem nastala značajno veća šteta od javnog interesa za objavljivanje te informacije. Predložio je da Sud odbije tužbu.

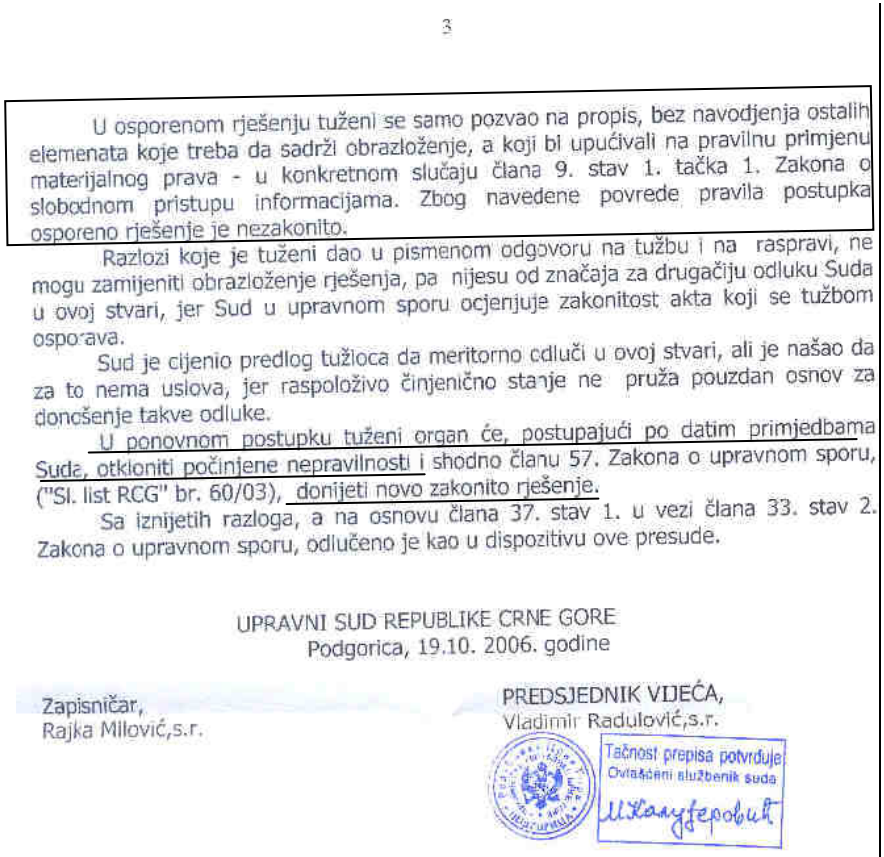
Nakon razmatranja tužbe, odgovora na istu, pobijanog rješenja i ostalih spisa predmeta, te održane usmene javne rasprave, Sud je našao da je tužba osnovana.

Odredbama člana 3. Zakona o slobodnom pristupu informacijama, ("Sl. list RCG" br. 68/05), propisano je da je objavljivanje informacija u posjedu organa vlasti u javnom interesu, a u članu 8. istog zakona da je organ vlasti dužan da omogući podnosiocu zahtjeva pristup informaciji ili njenom dijelu osim u slučajevima predvidjenim zakonom.

Osporeno rješenje se zasniva na odredbi člana 9. stav 1. tačka 1. Zakona o slobodnom pristupu informacijama, prema kojoj se pristup informacijama ograničava, ako bi se objavljivanjem informacija bezbjedonosne informativnih i obavještajnih agencija za nacionalnu bezbjednost značajno ugrozila nacionalna bezbjednost. U obrazloženju rješenja se ne navodi, niti u spisima predmeta ima dokaza za to da je u smislu stava 2. navedene odredbe, utvrdjena činjenica, da li bi po interese nacionalne bezbjednosti, objelodanjivanjem tražene informacije nastala šteta značajno veća od javnog interesa za objavljivanjem te informacije, u kojem slučaju se smatra da su ti interesi značajno ugroženi.

Odredbom člana 203. stav 2. Zakona o opštem upravnom postupku propisano je da obrazloženje, izmedju ostalog, sadrži utvrdjeno činjenično stanje, razloge zbog kojih nije uvažen koji od zahtjeva stranke, materijalne propise i razloge koji, s obzirom na utvrdjeno činjenično stanje, upućuju na rješenje kakvo je dato u dispozitivu.

** "...the rationale of the resolution does not state, neither there are proofs in the files ....that the fact has been established that the disclosure of the requested information would cause harm to national security greater than the public interest for publishing the information, in which case it would be considered that these interests are greatly threatened."*



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U osporenom rješenju tuženi se samo pozvao na propis, bez navođenja ostalih elemenata koje treba da sadrži obrazloženje, a koji bi upućivali na pravilnu primjenu materijalnog prava - u konkretnom slučaju člana 9. stav 1. tačka 1. Zakona o slobodnom pristupu informacijama. Zbog navedene povrede pravila postupka osporeno rješenje je nezakonito.

Razlozi koje je tuženi dao u pismenom odgovoru na tužbu i na raspravi, ne mogu zamijeniti obrazloženje rješenja, pa nijesu od značaja za drugačiju odluku Suda u ovoj stvari, jer Sud u upravnom sporu ocjenjuje zakonitost akta koji se tužbom osporava.

Sud je cijenio predlog tužioca da meritorno odluči u ovoj stvari, ali je našao da za to nema uslova, jer raspoloživo činjenično stanje ne pruža pouzdan osnov za donošenje takve odluke.

U ponovnom postupku tuženi organ će, postupajući po datim primjedbama Suda, otkloniti počinjene nepravilnosti i shodno članu 57. Zakona o upravnom sporu, ("Sl. list RCG" br. 60/03), donijeti novo zakonito rješenje.

Sa iznijetih razloga, a na osnovu člana 37. stav 1. u vezi člana 33. stav 2. Zakona o upravnom sporu, odlučeno je kao u dispozitivu ove presude.

UPRAVNI SUD REPUBLIKE CRNE GORE
Podgorica, 19.10. 2006. godine

Zapisničar,
Rajka Milović,s.r.

PREDSJEDNIK VIJEĆA,
Vladimir Radulović,s.r.

Tačnost prepisa potvrđuje
Ovlašćeni službenik suda

** "In the contested resolution, the defendant only referred to the regulation, without stating other elements as any rationale is supposed to contain, which would indicate proper application of the substantive law – in the given case Article 9, paragraph 1 of the Law on Free Access to Information. Due to this violation of the procedure the disputed resolution is unlawful."*

** "In the repeated procedure the defendant shall, acting in accordance with the objections of the Court, remove the irregularities … and pass a new resolution."*

The Administrative Court abolishes the resolution of the Agency as unlawful, since this institution did not conduct any test of harm and orders passing a new, lawful resolution.

"The rationale of the resolution does not state, neither there are proofs in the files that it has been established that the disclosure of the requested information would cause **harm to national security greater than the public interest** for publishing the information, in which case it would be considered that these interests are greatly threatened."

9.3. Meritory court decisions

The Administrative Court may pass a meritory decision that is to replace fully the resolution of the body.

As yet, the Court has not passed any meritory decision, and thus despite the judgements abolishing resolutions and ordering new, lawful resolutions to be made, the institutions use the same grounds to restrict access to information again.

Considering that court procedure takes several months, it is obvious that this is a considerable impediment to free access to information.

The Law on Administrative Dispute, Article 35

(1) If the Administrative Court abolishes the disputed document, and the nature of the matter allows so, it may pass a meritory decision on the given matter, if:

- it established merits of the case during the oral hearing;
- the abolition of the disputed act and repeated procedure before the relevant body would cause damage to the plaintiff that would be hard to compensate;
- according to public documents or other proofs in the file of the case, it is obvious that the merits of the case are different than those established in the administrative procedure;
- an act was already abolished in that procedure, and the relevant body failed to act pursuant to the judgement or;
- in the same dispute the act was already abolished, and the relevant body failed to pass the new act within 30 days from its abolition or in some period otherwise stipulated by the court;
- the relevant second instance body failed to pass an act within the deadline pursuant to the complaint, or the first instance body when the law does not envisage the right to complaint.

(2) In case referred to in paragraph 1, bullet points 4, 5 and 6 of this Article the Administrative Court may itself establish facts and merits of the case and pursuant to that pass the judgement.

(3) The decision referred to paragraph 1 of this Article replaces fully the abolished act.

Example 18: Privatisation agreements

The Agency for Economic Restructuring and Foreign Investments classified the privatisation agreements of the largest companies in Montenegro as a business secret whose publishing would greatly endanger commercial and other economic, private and public interests.

Request submitted	18.01.2006
Resolution passed	24.01.2006
Complaint filed	23.02.2006.
Judgement passed	13.04.2006
Resolution upon judgement	05.07.2006
New complaint filed	31.07.2006

The Administrative Court abolishes the resolution of the Agency as unlawful and orders to pass the new resolution.
The Agency passes the new resolution and restricts access to information on the same grounds.
The procedure is not over yet, and has already lasted nine months.

Republika Crna Gora
AGENCIJA CRNE GORE ZA PRESTRUKTURIRANJE PRIVREDE I STRANA ULAGANJA
Broj: 1/1
Podgorica, 24. januar 2006. godine

NVO - M
Broj 06/1126-129 od 24.01.2006
PODGORICA 24.01.2006.

Na osnovu člana 9. i 18. Zakona o slobodnom pristupu informacijama («Sl.list RCG» br. 68/05) Agencija Crne Gore za prestrukturiranje privrede i strana ulaganja donosi

RJEŠENJE

Ne dozvoljava se pristup informaciji – ugovorima o prodaji «Željezare « Nikšić, «Kap-a», «Telekom-a», «Jugopetrol-a» i svih aneksa jer bi se objelodanjivanjem ove informacije-ugovora značajno ugrozili komercijalni i drugi ekonomski, privatni i javni interesi.

Obrazloženje

Mreža za afirmaciju nevladinog sektora «MANS» iz Podgorice, podnijela je Agenciji Crne Gore za prestrukturiranje privrede istrana ulaganja dana 18. januara 2006.godine zahtjev za dostavljanje informacije kojim se traži dostava kopija ugovora o prodaji «Željezare Nikšić», «KAP-a», «Telekom-a», «Jugopetrol-a» i svih aneksa.

Odredbom člana 1. stav 2. Zakona o slobodnom pristupu informacijama predviđeno je da pravo pristupa informacijama u posjedu organa vlasti ima svako domaće i strano pravno i fizičko lice.

Gore pomenutom zahtjevu se ne može udovoljiti tj. nie dozvoljava se pristup informaciji-ugovorima sa svim aneksima jer bi se objelodanjivanjem istih značajno ugrozili komercijalni i drugi ekonomski, privatni i javni interesi, jer ove informacije – ugovori i aneksi predstavljaju poslovnu tajnu, što je eksplicitno i naznačeno u istim.

Objelodanjivanjem ove informacije - ugovora i aneksa nastupila bi značajno veća šteta po ugovorne strane nego što je to javni interes za njihovim objelodanjivanjem.

Ističemo da smo gore pomenute ugovore, po zahtjevu, dostavili Komisiji Skupštine RCG za praćenje i kontrolu postupka privatizacije.

Na osnovu izloženog odlučeno je kao u dispozitivu rješenja.

Uputstvo o pravnom sredstvu: Ovo rješenje je konačno i protiv njega se može pokrenuti upravni spor tužbom kod Upravnog suda RCG u roku od 30 dana od dana dostavljanja rješenja.

Dostavljeno:
- Mreži za afirmaciju nevladinog sektora
- U spise predmeta
- a/a

DIREKTOR
Branko Vujović

** Access to information is not allowed – to sale contracts for "Iron Plant" Niksic, KAP, Telekom, Jugopetrol and all the annexes thereof since publishing of this information, i.e. the contracts would considerably endanger commercial and other economic, private and public interests.*

** "...since this information - the contracts and their annexes are a business secret expressly stated as such..."*

** "The disclosure of such information – contracts and annexes, would cause considerably greater damage to the parties than is the public interest for their disclosure."*

UPRAVNI SUD REPUBLIKE CRNE GORE
U.br. 219/2006

NVO - M A N S -
BROJ. 06/126-129 odgovor
PODGORICA, 19.06.2006.

U IME NARODA

Upravni sud Republike Crne Gore u vijeću sastavljenom od sudija Gordane Pot, kao predsjednika vijeća, Dragana Đuretića i Ljubinke Popović – Kustudić, kao članova vijeća, uz učešće službenika Suda Rajke Milović, kao zapisničara, rješavajući upravni spor po tužbi tužioca Mreže za afirmaciju nevladinog sektora - MANS iz Podgorice, koga zastupa izvršni direktor Vanja Ćalović, protiv rješenja tužene Agencije Crne Gore za prestrukturiranje privrede i strana ulaganja br. 1/1 od 24. 01. 2006. godine, u nejavnoj sjednici održanoj dana 13.06.2006. godine, donio je

P R E S U D U

Tužba se usvaja.
Poništava se rješenje Agencije Crne Gore za prestrukturiranje privrede i strana ulaganja br. 1/1 od 24.01.2006.godine.

O b r a z l o ž e n j e

Osporenim rješenjem tužiocu nije dozvljen pristup informacjii - ugovorima o prodaji "Željezare" - Nikšić, "KAP"-a, "Telekom-a" i "Jugopetrol-a", kao i svim aneksima ugovora.

Tužilac tužbom pobija rješenje, zbog: povrede postupka, pogrešno i nepotpuno utvrdjenog činjeničnog stanja i pogrešne primjene materijalnog prava. U tužbi navodi da je tuženi organ pogrešno konstatovao da je osporeno rješenje konačno, jer je Upravni odbor Agencije za svoj rad odgovoran Vladi, što znači da ona vrši nadzor nad radom Agencije, pa bi prema tome trebalo da postoji pravo žalbe na rješenje Agencije, Vladi Republike Crne Gore. Dalje ističe da ugovori o privatizaciji državnih preduzeća ne smiju biti poslovna tajna, jer je u pitanju prodaja imovine gradjana Crne Gore. Prihvatljivo je da pojedinim djelovima ugovora bude ograničen pristup, ali djelovi ugovora kojima se definiše cijena, obaveze novih vlasnika i podaci o planiranim ulaganjima, moraju biti dostupne javnosti. Predlaže da se oporeno rješenje poništi.

Tuženi organ u odgovoru na tužbu ističe da ne stoji konstatacija tužioca da je u odnosu na Agenciju, Vlada RCG drugostepeni organ po pravu nadzora, budući da je Agencija osnovana kao specijalizovana organizacija Republike Crne Gore, sa svojstvom pravnog lica, te ista nije organ Vlade, niti ova vrši nadzor nad

** "...the resolution of the Agency for Economic Restructuring and Foreign Investments is hereby abolished..."*

Agencijom. Što se tiče navoda tužbe da predmetni ugovori ne mogu biti poslovna tajna, tuženi organ navodi da je to stvar autonomne volje ugovornih strana, koje su se u ovom slučaju tako dogovorile. Predlaže da se tužba odbije.

Sud je razmotrio tužbu, odgovor na istu, pobijano rješenje i ostale spise predmeta, pa je našao da je rješenje tuženog organa konačno u upravnom postupku i da je tužba osnovana.

Naime, prema odredbama člana 20. Zakona o slobodnom pristupu informacijama, protiv prvostepenog rješenja kojim je odlučeno o zahtjevu za pristup informacijama, može se pokrenut upravni spor, ukoliko nema organa koji vrši nadzor nad donosiocem rješenja.

U konkretnom slučaju, Zakonom o Agenciji Crne Gore za prestrukturiranje privrede i strana ulaganja, nije propisano da bilo koji organ vrši nadzor nad radom tuženog, pa je prema tome rješenje tuženog konačno u upravnom postupku.

Uvidom u osporeno rješenje utvrdjeno je da ono ne sadrži razloge na kojima se zasniva odluka tuženog, odnosno obrazloženje zbog čega predmetni ugovori o prodaji preduzeća predstavljaju poslovnu tajnu. Takodje nije objašnjen ni pojam "poslovne tajne" u konkretnom slučaju. Okolnost što su se ugovorne stranke sporazumijele da njihovi ugovori budu "zaštićeni od javnog objavljivanja", samo po sebi nije dovoljan razlog za odbijanje zahtjeva tužioca za pristup informacijama, budući da stranke ne mogu sklapati ugovore čije bi odredbe bile suprotne pozitivnim propisima.

Iz navedenih razloga Sud je tužbu prihvatio i osporeno rješenje poništio.

U ponovnom postupku tuženi organ će otkloniti nedostatke na koje je ukazano ovom presudom i donijeti novo zakonito rješenje u smislu člana 57. Zakona o upravnom sporu.

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

UPRAVNI SUD REPUBLIKE CRNE GORE
Podgorica, dana 13.06.2006.godine

ZAPISNIČAR
Rajka Milović,s.r.

PREDSJEDNIK VIJEĆA
Gordana Pot,s.r.

Tačnost prepisa potvrđuje
Ovlašćeni službenik suda

** "By the inspection of the disputed resolution it has been established that it does not state the reasons on which the defendant's decision is based, i.e. the rationale why the given contracts and their annexes constitute a business secret. They neither explained the notion of "business secret" in the specific case. The circumstance that the contracting parties agreed for their contracts to be "protected against public disclosure" in itself is not a valid reason for refusing the plaintiff's request for access to information, since the parties may not enter into agreements whose provisions would be contrary to positive regulations."*

The Court abolishes the resolution of the Agency with the explanation that the resolution **does not contain "rationale why the given contracts constitute a business secret"** and adds that **"the circumstance that the contracting parties agreed for their contracts to be "protected against public disclosure" in itself is not a valid reason for refusing the plaintiff's request** for access to information, since the **parties may not enter into agreements whose provisions would be contrary to positive regulations**".

Pursuant to this judgement, the Agency passes a **new resolution restricting access to requested information on the same grounds**.

Republika Crna Gora
AGENCIJA CRNE GORE ZA
PRESTRUKTURIRANJEPRIVREDE
I STRANA ULAGANJA
UP br. 1/5
Podgorica, 22. jun 2006. godine

Na osnovu člana 9 i 18 Zakona o slobodnom pristupu informacijama ("Sl. list RCG", br. 68/05) Agencija Crne Gore za prestrukturiranje privrede i strana ulaganja donosi

R J E Š E N J E

Ne dozvoljava se pristup informaciji-ugovorima o prodaji "Željezare" Nikšić, "KAP-a", "Telekoma", "Jugopetrola" i svih aneksa jer bi se objelodanjivanjem ove informacije-ugovora značajno ugrozili komercijalni i drugi ekonomski, privatni i javni interesi.

O b r a z l o ž e n j e

Mreža za afirmaciju nevladinog sektora "MANS" iz Podgorice, podnijela je Agenciji Crne Gore za prestrukturiranje privrede i strana ulaganja dana 18. juna 2006. godine zahtjev za dostavljanje informacije kojom se traži dostava kopija Ugovora o prodaji 'Željezare" Nikšić, "KAP-a", "Telekoma", "Jugopetrola" i svih aneksa.

Odredbom člana 1 stav 2 Zakona o slobodnom pristupu informacijama predvidjeno je da pravo pristupa informacijama u posjedu organa vlasti ima svako domaće i strano pravno i fizičko lice.

Gore pomenutom zahtjevu se ne može udovoljiti tj. ne dozvoljava se pristup informaciji-ugovorima sa svim aneksima jer bi se objelodanjivanjem istih značajno ugrozili komercijalni i drugi ekonomski, privatni i javni interesi, jer ove informacije – ugovori i aneksi predstavljaju poslovnu tajnu, što je eksplicitno i naznačeno u istim.

** Access to information is not allowed – to sale contracts for "Iron Plant" Niksic, KAP, Telekom, Jugopetrol and all the annexes thereof since publishing of this information, i.e. the contracts would considerably endanger commercial and other economic, private and public interests.*

** "...since this information - the contracts and their annexes are a business secret expressly stated as such..."*

2.

Pojam "poslovne tajne" u konkretnom slučaju predstavljaju podaci i činjenice sadržane u gore pomenutim ugovorima i aneksima koje se odnose na finansijske, monetarne, komercijalne i druge poslove čije objelodanjivanje, odnosno saopštavanje trećim licima bez saglasnosti inopartnera bi moglo prouzrokovati štetne posljedice po domaću ugovornu stranu – Vladu RCG i republičke fondove, jer bi ino partner u tom slučaju mogao raskinuti ugovore i tražiti enormno obeštećenje u vidu naknade štete i izgubljene dobiti.

Kao što je poznato ino ulagači – partneri u gore navedenim ugovorima su renomirane strane kompanije koje imaju iste ili slične ugovorne aranžmane u mnogim zemljama pa bi saopštavanje sadržine gore pomenutih ugovora (finansijskih, marketinških, komercijalnih i drugih podataka) trećim licima moglo ugroziti njihove postojeće aranžmane u tim zemljama u smislu insistiranja njihovih ugovornih partnera na reviziji postojećih aranžmana, u smislu njihovog poboljšanja (analogno ugovornom aranžmanu sa KAP-om) što bi moglo prouzrokovati velike materijalne izdatke za ino partnera.

Dakle, iz tih razloga ino partneri su i insistirali na "poslovnoj tajni" a domaći partneri (Vlada RCG i republički fondovi) uz njihovu argumentaciju i prihvatili istu kao ugovorenu obavezu, što znači da domaći partner sa svoje strane nema "šta da krije" već striktno poštuje ugovorne obaveze i štiti interese ino partnera, a time i svoje interese.

Kao što je poznato u pravu ugovor je "zakon medju ugovornim stranama", ukoliko nije u suprotnosti sa pozitivno pravnim propisima.

Gore pomenuti ugovori su zaključeni na legalan i legitiman način u skladu sa procedurama i postupcima definisanim Zakonom o privatizaciji privrede ("Službeni list RCG", br. 23/96, 6/99 i 42/04) Uredbom o prodaji akcija i imovine putem javnog tendera ("Službeni list RCG", br. 65/03) odlukama o planovima privatizacije za datu godinu, odlukama nadležnih organa gore pomenutih kompanija o prodaji akcija, uz punu stručnu pomoć i monitoring od strane savjetnika - renomiranih svjetskih kompanija iz te branše.

** "The notion the "business secret" in the given case refers to the data and facts contained in t abovementioned contracts and their annexes relating to financial, monetary, commercial ar other activities whose publishing or disclosure to third parties without the agreement of our foreign partners could cause harmful effects for the domestic contractual party – the Government o the Republic o Montenegro a the Republic funds since in that case the foreign partne could termina the agreemen and ask for exorbitant compensation for damages and lost profit*

Ističemo da smo gore pomenute ugovore po zahtjevu, dostavili Komisiji Skupštine RCG za praćenje i kontrolu postupka privatizacije, koja nije imala nikakve prigovore na javnost, transparentnost i zakonitost gore pomenutih ugovora, aneksa i kompletnih aranžmana sa ino partnerima.

Dakle, imajući gore navedeno u vidu jasno je iz kojih razloga se ne dozvoljava pristup informaciji – ugovorima jer bi objelodanjivanjem istih nastupila značajno veća šteta po ugovorne strane nego što je to javni interes za njihovim objelodanjivanjem.

Na osnovu izloženog odlučeno je kao u dispozitivu rješenja.

Uputstvo o pravnom sredstvu: Ovo rješenje je konačno i protiv njega se može pokrenuti upravni spor tužbom kod Upravnog suda RCG u rou od 30 dana od dana dostavljanja rješenja.

DIREKTOR
Branko Vujović

DOSTAVLJENO:
- Mreži za afirmaciju nevladinog sektora MANS
- U spise
- a/a

MANS **filed the complaint again** with the Administrative Court with the request to **abolish the resolution** of the Agency **again** and enable free access to requested information.

The procedure per this request for information **commenced on 18th January 2006** and **is still pending**.