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Implementation of the Law on Free Access to Information in Montenegro

TRADE SECRETS OVER PUBLIC INTEREST

Analysys of legal framework and compilation of case studies

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Trade secrets over public interest

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ABSTRACT

Amendments to the Law on Free Access to Information prescribe that access to data may be restricted in order to protect trade secrets. However, the concept of trade secret is not prescribed by law at all, which is not in accordance with international standards and leaves room for numerous abuses.

Practice shows that many institutions and state companies severely abuse the new legal provision in order to hide data of public interest, which considerably prevents the media and NGO sector from controlling the work of state authorities, revealing corruption and violations of the law.

Many information relating to spending of public resources, including government deposits, balances of some local self-governments, public procurement and financing of election campaigns, were declared secret. The budgets of some state-owned companies, shareholder data, disposal of valuable state assets, salaries of officials who run those companies, and even statistics on lending to private companies, including a company associated with a senior public official, were declared secret.

Institutions declare as trade secrets the documents on control of implementation of the law that contain information important for detecting corruption and non-compliance with regulations, although the law requires that in such cases there is a prevailing public interest in disclosing data. Thus, all official reports and data about inspection control of the construction of the highway in the part affecting the Tara River, as well as a decade-old information about the control of banks, were declared trade secrets.

Reasoning for hiding data is usually incomprehensible or meaningless, thus, for example, public finance data are protected so as not to violate intellectual property rights, and informations about the business of monopoly companies are secret in order not to hurt the competition.

In many cases, institutions describe "apocalyptic" scenarios in case of disclosing of data. For example, disclosure of the budget of a state-owned company could negatively affect the entire electroenergetic system and investments in the stock market, while disclosing of data on the control of one bank that are more than a decade old could affect economic system of the entire state. Some institutions state that they declare data trade secrets in order to protect their own reputation, which is more important than the public's right to know in what way state resources are spent.

Institutions usually claim that there is no public interest in the information being disclosed, even when it is obvious that these data are of utmost importance for the detection of corruption. No reporting entity ever conducted a public interest test that showed that data declared trade secret should be disclosed because the public interest is prevailing.

In some cases, the institutions formally allow access to information, but delete key information from their documents, stating that they are trade secrets. Specific examples show that in this way important data are hidden from the public without properly conducted harm and public interest test.

Issues in the implementation of the law further aggravate the practice of the Agency for Free Access to Information that continuously violates the legal deadline for deciding on appeals. However, the Agency not only does not act in a timely manner, but also acts selectively, because in some cases they decide after a few months, while in others only after several years.

The Agency instructs the reporting entities to apply the new provision and allows them to declare information as trade secrets, regardless of the public interest that they be disclosed. In case of referring to this provision, the Agency does not determine whether the information was declared secret under the law, whether and how the harm test was conducted, and whether the public interest or damage that may be caused by disclosing of information is of greater importance.

A particularly significant issue in practice of the Agency is that it allows the retroactive application of the new legal provision, in proceedings initiated before the amendments to the Law. The courts did not give a ruling on the retroactive application of the new legal provision, but they are accepting it by implication.

Two years after the amendments to the Law, case law relating to the application of the new provision is still limited, due to very long deadlines in which the Agency and the Administrative Court act. The practice so far is not favourable, since the courts consider that institutions do not have to carry out a harm test when declaring information trade secret under a special law. This means that the issue of the right to access information is regulated by other laws that, according to the courts, have a greater legal force than the Law on Free Access to Information.

1. LEGAL FRAMEWORK

The amendments to the Law on Free Access to Information [1] prescribe that institutions may restrict free access to data in order to protect trade secrets. The term trade secret is not defined and because of this institutions and state-owned companies arbitrarily prescribe conditions under which they may restrict access to data. The duration of restriction is not prescribed either and as a result various data of public interest may forever remain hidden from the pubic under the shield of trade secret.

Some new restrictions to access to information are prescribed by Article 14, paragraph 1, item 6 of the Law [2]:

> „A public authority may restrict access to information or part of information if it is in the interest of the following….
> 6) if the information is either <u>trade or tax secret</u> <u>in accordance with the Law</u>".

This provision was added despite the fact that item 5 of this Article already contained a provision on trade secret which prescribes the restriction in order to "protect trade and other commercial interests from disclosure of data relating to protection of competition as well as a <u>trade secret</u> related to intellectual property right. [3]

The Law also defines the obligation of institutions to always conduct the harm test, and so Article 16 paragraph 1 of the Law prescribes the following:

> „Access to information shall be restricted if disclosure of information would significantly jeopardize interests referred to in Article 14 herein, or if there is a possibility that disclosure of information would cause harm to interest that is greater than the interest of the public to know that information, unless there is a prevailing public interest prescribed by the Article 17 of this Law".

Article 17 prescribes the situations when there is a **prevailing public interest** to disclose information:

> „Prevailing public interest for disclosure of information, or a part of it, exists when the requested information contains data that evidently refer to the following:
>
> 1) corruption, non-observance of regulations, unauthorised use of public funds, or abuse of authority in exercising public function;
> 2) reasonable suspicion that a criminal offence has been committed or existence of reasons to challenge a court decision;
> 3) illegal receiving or spending of funds originating from public revenues;
> 4) threats to public security;
> 5) threats to life;
> 6) threats to public health;
> 7) threats to the environment;

Public authority shall enable the access to information or part of information referred to in Article 14 herein in cases when there is a prevailing public interest for its disclosure."

Law on Free Access to Information does not provide a definition of trade secret but instead makes reference to particular laws which differently regulate types of information that are considered trade secret. However, given that legislation prescribed that some other, particular law defines which information is to be considered trade secret, institutions and state-owned companies do restrict access to information solely based on their internal acts where they defined the term trade secret.

Also, the difference between trade and official secret is not defined by the Law, and as a result institutions take advantage of this fact to restrict access to all information that were given any status of secret based on any piece of legislation. Such a loophole in the Law enables public authorities to restrict access to information by treating them as trade secret even if it contravenes the provision they cited in acting upon it.

Finally, there is no time limit assigned to restriction of free access to information that is declared a trade secret, unlike the fact that restrictions prescribed in Article 15 of the Law are assigned duration. This leaves limitless possibility to public authorities to misuse the indefinite protection of trade secret.

1 For more information see „Law on Free Acess to Information amended Far Away From Public Scrutiny" and „ State Secrets as a Cover-up for Corruption", June 2017 www.mans.co.me/wp-content/uploads/2017/06/AnalizaSPljun2017MNE.pdf;
2 "Official Gazette of Montenegro" No. 30 from 09.05.2017;
3 Article 14, paragraph 1, item 5 of the Law on Free Access to Information.

2. International standards

International practice shows that trade secrets are there to protect interests of legal entities, and not that of the authorities. The European Union has clear standards in defining the term trade secret, whilst it is not defined in Montenegrin legislation. Also, the harm and public interest tests that are prescribed by the Law are not in compliance with international standards and thus do not contribute to decreasement of abuses related to classifying an information as trade secrets.

In its Directive (EU) 2016/943 of the European Parliament and of the Council from 8 June 2016, the European Union defines the protection of undisclosed knowledge and experience and trade information (trade secret) from unlawful acquisition, use and disclosure, where those information have to meet the following conditions:

1) that they are not generally known and easily accessible;
2) that they have commercial value;
3) that reasonable steps were taken to keep it secret.

Comparative law and practice is clear beyond any doubt that public authorities work in public interest and as such do not have trade interest to protect. [4] Contrary to that, institutions – besides the fact that they treat a lot of information with prevailing public interest as a trade secret – they also give preference to trade interest over public interest.

The fact that authorities may not have trade interest means that there is no legitimate interest on the grounds of which public could be deprived of knowing how authorities dispose of pubic resources. Given that authorities are only to serve public interest, it is particularly concerning, given the international standards, that authorities hide information for the sake of someone's trade interest, for example of a company they cooperate with.

According to the OECD Guidelines [5], state-owned companies are obligated to keep high standards of transparency, particularly as regards to their financial operations, as well as other information pertaining to the fields of particular public interest, such as state aid, public-private partnership, employment records etc. Also, the fact that the Law on Free Access to Information recognizes them as reporting entities, i.e. that they are considered public authorities, and as such they are obligated to provide free access to information [6] , that indicates that when it comes to transparency ,they have the same status as public authorities.

Thus, trade secret of state-owned company has to be limited with the interest of the public to be informed about the information that are of prevailing public interest like, for example, financial information.

Harm test and public interest test are important instruments that should help remove dilemma pertaining to trade secret and they are prescribed by the Law on Free Access to Information. However, **neither harm test nor the public interest test, prescribed in Article 16 and 17 are in compliance with internatonal standards**. [7]

The harm test thereof is not regulated in compliance with international standards from several different aspects and thus makes room for broad interpretation. For example, harm test does not prescribe that request for information may be declined if **the harm to a certain interest is foreseeable and probable, and not only hypothetical**. [8]

Also, the list of cases that are subject to public interest test where public interest to disclose information has to prevail is much shorter than the one that is established through the case law of the European Court for Human Rights. [9]

4 Access Info Europe (2018) Analysis of the Law on Free Access to Information in Montenegro, link: http://www.mans.co.me/analiza-zakona-o-slobodnom-pristupu-informacijama-2018/
5 OECD Guidelines on Corporate Governance of State-Owned Enterprises, https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm
6 Article 9, paragraph 1 item 1 of the Law on Free Access to Information prescribes that public authority is public authority shall mean a state authority (legislative, executive, judicial, administrative), local self-government authority, local administration authority, institution, company and any other legal person founded or co-founded by the state or in majority ownership of the state or local self-government, legal person mainly financed from public resources, as well as well as a natural person, entrepreneur or legal person having public responsibilities or managing public funds;
7 Ibid
8 Ibid
9 Ibid

3. Practice in Montenegro

3.1. Secret public finances

A number of case studies provided in this chapter show that institutions abuse a new provision of the law to hide data regarding the spending of public resources, and as a result, the documents of public importance are declared as trade secrets.

Data on state deposits and account balances of some local self-governments are hidden from the eyes of the public, stating that their disclosure would undermine the reputation of institutions and violate intellectual property rights.

Institutions declare consulting contracts secret, claiming that they hide this data in order to protect their own reputation.

Even data on multi-million public procurement related to environmental protection are secret, with explanation that only those who participate in the tender can obtain documentation.

During the political crisis related to illegal donations to political parties, data on financing of election campaigns were declared secret, although a part of this information is already publicly available.

Case Study 1: Deposits of the Government and other budget users

The Central Bank of Montenegro (CBCG) rejected MANS' request to publish data on deposits of the Government and other budget users with Montenegrin banks. According to this institution, data on government deposits are confidential and are kept as a banking i.e. trade secret.

In their decision, the Central Bank referred to a number of provisions of the Banking Law, the Law on Central Bank of Montenegro, the Directive 2006/48, the Constitution of Montenegro, the Rules of Confidential Information of this body, the Law on Classified Information, as well as the provision of Article 14, Paragraph 1, Item 6 of the Law on Free Access to Information.

Article 84 of the Banking Law prescribes that information about individual deposit accounts and transactions in individual accounts of legal entities and natural persons opened in a bank shall be considered banking i.e. trade secret.

However, the requested information were about the amount of Government deposits, i.e. the use of public funds by state institutions, which certainly cannot be hidden from taxpayers.

Article 84, Paragraphs 1 and 2 of the Law on the Central Bank of Montenegro only prescribe that employees are obligated to protect confidential information and data that are considered secret, but it is not prescribed which data may be declared trade secret. [10] Thus, the aforementioned legal provision does not prescribe that the requested information is actually a trade secret, so it cannot represent a legal basis for restricting access to information

CENTRALNA BANKA
CRNE GORE

N.V.O. "... " 19/126187 13-02-2019.

Br. 12- 650-2/2019
Podgorica, 12.02.2019. godine

Na osnovu člana 30, a u vezi sa članom 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama („Sl.list CG" br. 44/12 i 30/17), i Vodičem za pristup informacijama u posjedu Centralne banke Crne Gore (br.0102-4749-1/2018 od 04.06.2018. godine), odlučujući o zahtjevu za pristup informacijama Mreže za afirmaciju nevladinog sektora - MANS, br. 19/126187 od 28.01.2019. godine po Odluci br.0102-690-2/2019 od 12.02.2019. godine, Centralna banka Crne Gore donijela je

R J E Š E N J E

Odbija se zahtjev za pristup informaciji kao neosnovan jer predstavlja poslovnu tajnu.

Troškova postupka nije bilo.

O b r a z l o ž e n j e

Mreže za afirmaciju nevladinog sektora – MANS podnijela je zahtjev za slobodan pristup informacijama, putem e-maila, br.19/126287 od 28.01.2019. godine, kojim traži da joj se dostavi kopija izvještaja o iznosu depozita Vlade i ostalih budžetskih korisnika pojedinačno kod svih registrovanih banaka u Crnoj Gori pojedinačno.

Odlučujući o zahtjevu Centralna banka Crne Gore je utvrdila da:

- Prema Zakonu o bankama član 84, podaci o vlasnicima i brojevima računa otvorenih u banci kao i podaci o pojedinačnom stanju depozita i prometu na pojedinačnim računima pravnih i fizičkih lica otvorenih u banci čine bankarsku odnosno poslovnu tajnu. Dalja obaveza čuvanja tajnih podataka je opisana u članu 85 stav 1 istog zakona, prema kom lica koja u obavljanju posla sa bankom ili za banku dođu u posjed informacija i podataka koji su ovim zakonom utvrđeni kao bankarska tajna, dužni su da čuvaju te podatke i informacije i ne smiju ih upotrebljavati u svoju ličnu korist, niti učiniti dostupnim drugim licima.

Obavezu čuvanja tajnosti informacija i podataka propisuje i Zakon o Centralnoj banci Crne Gore ("Sl. list CG", br. 40/10, 46/10, 6/13 i 70/17) u članu 84 stav 1 i 2 „(...) zaposleni u Centralnoj banci dužni su da čuvaju tajnost informacija i podataka koji, u skladu sa

Excerpt from the Central Bank's Decision declaring information on government deposits state secret

Directive 2006/48 also only prescribes the obligation to keep a professional secret, but not which information must be considered confidential. [11] Hence, the Directive also does not prescribe that the requested information represents a trade secret, but only the obligation to keep data that employees receive during work.

10 Article 84, paragraphs 1 and 2 of the Law on Central Bank of Montenegro ("Official Gazette of Montenegro, no. 40/2010, 46/2010 – amendment 6/2013 – decision US and 70/2017):
A member of the Council and employees of the Central Bank shall keep confidential the information and data which are considered secret in accordance with the law or another act. The confidentiality obligation under paragraph 1 above shall last after the termination of function and/or employment in the Central Bank.
11 Directive 2006/48, Section 2: Exchange of Information and professional secret (Articles 44 to 52)

However, even these Rules do not prescribe that the data on government deposits are secret. Namely, the Rules define that classified information is the one whose disclosing to an unauthorized person could cause damage to achieving the objectives and performing of the functions of the Central Bank, or the reputation of the CBCG may be impaired, as well as data that are in accordance with the law and/or other regulations established as secret. [12] There is no doubt that disclosing data about government deposits could not jeopardize the objectives, functions or reputation of the Central Bank, and it has already been stated that no law prescribes that this information can be classified as trade secret.

In addition to the ungrounded referring to the aforementioned regulations, the Central Bank stated that they had conducted a harm test, which established that there was no prevailing public interest in the information being published, i.e. that there were numerous reasons to keep these data as trade secret.

Thereby, CBCG does not state any of these numerous reasons, or in any way explain why the public has no right to know under what conditions, in what amount and in which banks the funds of Montenegrin taxpayers are kept.

Moreover, the requested data may indicate corruption, disregard of regulations [13], illegal use of public funds or abuse of power in the exercise of public office, as well as illegal spending of public revenues, which confirms the importance of the public's interest in knowing these data.

MANS filed an appeal against such decision which the Central Bank dismissed, instead of forwarding it to the competent authority, i.e. the Agency for Personal Data Protection and Free Access to Information, as prescribed by the law. Moreover, we were unfoundedly instructed to file a lawsuit against their decision. According to the law, MANS then forwarded the appeal by sending the motion for urgency deciding to the second instance body. However, such unlawful conduct of CBCG has further extended the process of access to information.

zakonom ili drugim aktom, predstavljaju tajnu. Obaveza čuvanja tajne (...) traje i nakon prestanka (...) radnog odnosa u Centralnoj banci."

-Vrijedi pomenuti i Direktivu 2006/48, koja u članu 44 propisuje: „Države članice propisuju da sva lica koja rade ili koja su radila za nadležna tijela (u konkretnom slučaju Centralnu banku), kao i revizori ili stručnjaci koji djeluju u ime nadležnih tijela, podliježu obavezi čuvanja profesionalne tajne. Nikakve povjerljive informacije koje oni mogu primiti u obavljanju svojih dužnosti ne smiju biti otkrivene bilo kojem licu ili tijelu, osim u sažetom ili grupnom obliku, tako da nije moguće prepoznati pojedinu kreditnu instituciju (banku), ne dovodeći u pitanje slučajeve za koje vrijedi kazneno pravo".

U skladu sa Zakonom o slobodnom pristupu informacijama prvostepeni organ ima osnov za odbijanje predmetnog zahtjeva. Naime, čl.14 st.1 tač.6 Zakona propisuje da organ vlasti može ograničiti pristup informaciji ako je informacija poslovna tajna u skladu sa zakonom.

Da su u skladu sa propisima kojima se uređuje tajnost podataka ovi podaci dobili status povjerljivih utvrđuje se nizom akata. Prvostepeni organ je Pravilnikom o tajnosti (br. 0101-4014/14-2-2010 od 30.05.2011. god, br. 0101-4014/84-3 od 25.03.2016. god. i br. 0101-8380-4/2018 od 06.11.2018. god.), donijetim postupajući u skladu sa čl.10 st.3 Zakona o tajnosti podataka („Sl.list CG", br. 14/08, 76/09, 41/10, 38/12, 44/12, 14/13, 18/14 i 48/15), kojim je propisano da ovlašćeno lice za određivanje stepena tajnosti podatka u organu u kojem u kontinuitetu nastaju i ponavljaju se istovrsni tajni podaci može posebnim aktom označiti te podatke tajnim i odrediti stepen njihove tajnosti. Odredbom čl.2 st.1 alineja 2 Pravilnika o tajnosti Centralne banke propisano je da se tajnom smatraju podaci, informacije i dokumenti koji su u skladu sa zakonom i/ili drugim propisima utvrđeni kao tajni. Ovdje još jednom naglašavamo da je Zakon o bankama u članu 84 dodijelio stepen tajnosti ovim podacima.

Imajući u vidu član 17 Zakona o slobodnom pirstupu informacijama, prema kom, preovlađujući javni interes postoji kada tražena informacija sadrži podatke koji osnovano ukazuju na korupciju, nepoštovanje propisa, nezakonito korišćenje javnih sredstava ili zloupotrebu ovlašćenja u vršenju javne funkcije; sumnju da je izvršeno krivično djelo ili postojanje razloga za pobijanje sudske odluke; nezakonito dobijanje ili trošenje sredstava iz javnih prihoda; ugrožavanje javne bezbjednosti; ugrožavanje života; ugrožavanje javnog zdravlja i ugrožavanje životne sredine, ukazujemo da traženi podaci ne sadrže ništa od prethodno navedenog, pa time ne postoji preovlađujući javni interes. Upravo je ovo dio rezultata provedenog testa štetnosti.

Osim svega prethodno navedenog, što je rezultat provedenog testa štetnosti, isti je takođe pokazao da postoje još brojni razlozi da se ovi podaci čuvaju kao poslovna tajna, kako je u konačnom i zakon propisao. Naime, objelodanjivanjem predmetnih informacija koje predstavljaju bankarsku, odnosno poslovnu tajnu, a koje se mogu učiniti dostupnim i Centralnoj banci Crne Gore, značilo bi postupanje suprotno brojinim propisima od strane

Excerpt from the decision of the Central Bank – harm and public interest test that the data on state deposits are secret

Case study 2: Accounts Balance of the Capital City

At the end of 2017, the Secretariat for finance of the Capital City of Podgorica declared a trade secret information on balance of all accounts of the Capital City of Podgorica, referring, inter alia, to a regulation protecting intellectual property.

The Secretariat noted that disclosing of such information would constitute a breach of trade secrets in the sense of Article 3 of the Law on protection of unpublished data, which prescribes that financial and trade data are also considered unpublished data.

Like the Central Bank in the previous example, the Secretariat of the Capital City also referred to the Banking Law, which prescribes that the data on the individual deposit accounts and transactions in individual accounts of legal persons and natural persons are considered banking i.e. trade secret.

12 Article 2, paragraph 1 of the Rules of Confidential Information of the Central Bank of Montenegro: "The following shall be considered secret:
- data, information and documents whose disclosing by an unauthorized person could cause damage to achieving the objectives and performing of the functions of the Central Bank (hereinafter: the Central Bank), or the reputation of the CBCG may be impaired, contained in the List of classified documents, which is given in the annex of these Rules and forms an integral part thereof;
- data, information and documents that are in accordance with the law and/or other regulations established as classified".
13 Article 13, paragraph 1, item 1 of the Law on Budget and Fiscal Responsibility stipulates: The Ministry of Finance may invest idle funds of the Treasury Consolidated Account, in accordance with the Guidelines of the Debt Management Strategy, in:
1) deposits with the Central Bank or with another bank with low credit risk in euro or in another currency".

3. Practice in Montenegro

Data on finances of a state institution cannot be intellectual property

The Law on the Protection of Unpublished Data regulates the protection of unpublished data which represent trade secret, as a special intellectual property right. [14]

According to the same law, unpublished data are considered "financial, trade, scientific, technical, economic or engineering data and which include the whole process, procedure, formula, improvement, form, plan, project, prototype, code, compilation, programme, method, technique or any phase, as well as a list of names, addresses and telephone numbers in physical or non-material form, collected or preserved physically, electronically, graphically, photographically or in writing". [15]

In the provision of Article 14, Item 5 of the Law on FAI to which the Capital City referred, it is stated that the public authority may restrict access to information or a part of It, if it is in the interest of protection of private and commercial interest from disclosure of data relating to protection of competition and trade secret in relation to intellectual property right.

However, in accordance with Montenegrin legislation, the requested information cannot be connected in any way with the intellectual property right. Also, disclosing of the financial information of the Capital City Podgorica can in no way endanger competition because it is not a legal entity doing business on the market.

Crna Gora
GLAVNI GRAD-PODGORICA
Sekretarijat za finansije
Broj:05-402/18-1845/1
Podgorica, 08.05.2018.godine

Sekretarijat za finansije Glavnog grada – Podgorice, rješavajući po zahtjevu **Mreže za afirmaciju nevladinog sektora – MANS** iz Podgorice, za pristup informacijama broj UP I 05-402/18-1845 , na osnovu člana 29 stav 1 tačka 3 i člana 30 stav 1 i 3 Zakona o slobodnom pristupu informacijama („Službeni list CG", br.44/12), donosi -

RJEŠENJE

1.Odbija se zahtjev za pristup informaciji Mreže za afirmaciju nevladinog sektora – MANS iz Podgorice, br UP I 05-402/18-1845 od 17.04.2018.godine i Žalbe br. 18/121873 od 08.05.2018.godine, kojim traži pristup informaciji – aktu koji sadrži informaciju o stanju svih računa Glavnog grada Podgorice (po izvodima računa) na kraju 2017. godine, kao neosnovan.

Obrazloženje

Mreža za afirmaciju nevladinog sektora – MANS iz Podgorice, ul. Dalmatinska br. 188, podnijela je ovom Sekretarijatu zahtjev br UP I 05-402/18-1845 od 17.04.2018.godine i Žalbu br. 18/121873 od 08.05.2018.godine, kojim traži da joj se omogući pristup informaciji – aktu koji sadrži informaciju o stanju svih računa Glavnog grada Podgorice (po izvodima računa) na kraju 2017. godine.

U postupku po zahtjevu, Sekretarijat je utvrdio da posjeduje traženu informaciju, ali da ista podliježe ograničenju propisanim članom 14 Zakona o slobodnom pristupu informacijama.

Odredbama člana 14 navedenog Zakona propisane su okolnosti i uslovi zbog kojih organ vlasti može ograničiti pristup informaciji ili dijelu informacije. Tako je stavom 1 tačka 5 i 6 navedenog člana propisano da organ vlasti može ograničiti pristup informaciji ili dijelu informacije, ako je to u intetesu zaštite, pored ostalog, ekonomskih interesa od objavljivanja podataka koji se odnose na poslovnu tajnu, kao i ako je u pitanju poslovna tajna.

Excerpt from the decision of the Secretariat, in which the data on the account balance of the Capital City were declared trade secret

In addition, this authority also referred to Item 6 of the same provision which prescribes that the public authority may restrict access to information or a part of it, if it is a trade or a tax secret in accordance with the law. In this case, however, the subject is a state institution and information regarding budget funds, which, according to all international standards in democratic societies, must be presented to the public without any restrictions.

No harm test conducted

Trade secret, as an argument for hiding information of public importance, was not proved in accordance with the Law in this case, i.e. no harm test was conducted.

Namely, in this case, the Capital City did not conduct the harm test, even thou it was obligated to do in accordance with the provision of Article 16 of the Law on Free Access to Information, before the information was declared secret.

Annulled after eight months

On May 25. 2018, MANS submitted an appeal to the Agency for Personal Data Protection and Free Access to Information. However, the Agency did not reach a decision within the legal deadline, so we submitted an urgent appeal on August 26. There was no decision after the urgent appeal, after which on October 17 we filed a lawsuit with the Administrative Court.

Although the legal deadline for reaching a decision on the appeal is 15 days, the Agency in this case decided after more than eight months, i.e. on 15 February 2019

14 Article 1 of the Law on Protection of Unpublished Data
15 Article 3 of the Law on Protection of Unpublished Data

3. Practice in Montenegro

The Agency adopted the appeal, annulled the decision of the Capital City and returned the case to a re-trial. However, the Agency did not essentially deal with the numerous illegalities of the decision, which is why it did not find it problematic that the harm test had not been conducted, it did not take into consideration the statments in the appeal which indicated to it, instead, it only instructed the Secretariat to apply a new legal provision when declaring the information secret.

Deciding in the re-trial, the Capital City delivers a decision in which they decide in the same way, adding that it conducted a harm test which determined that the information could be misused and that its disclosing would violate the trade secret.

At the same time, the Capital City is not explaining what are the conclusions of the conducted harm test, and it remains unclear how the requested information could be misused and why it was declared trade secret. Moreover, the public interest in publishing the data was not taken into consideration and it is not mentioned in the decision of the Capital City.

MANS filed a new appeal in early March this year, and two months later the Agency has not reached a decision.

Protiv ovog akta prvostepenog organa je predata žalba drugostepenom organu, a drugostepeni organ je donio rješenje br. UPII 07-30-2527-2/18 od 04.04.2019.godine, koje je u prvostepenom organu zaprimljeno pod brojem 03-04-927 od 10.04.2019.godine, kojim se žalba usvaja, i poništava se rješenje br. 03-04-1638/2 od 08.05.2018. godine i predmet se dostavlja prvostepenom organu na ponovni postupak i odlučivanje.

Drugostepeni organ je ispitujući zakonitost osporenog akta u bitnom ukazao da prvostepeni organ nije izvršio test štetnosti u skladu sa čl. 16 Zakona o slobodnom pristupu informacijama, te da time nije utvrdio da li pristup traženoj informaciji može biti ograničen u smislu čl. 14 st. 1 tačka 6 istog zakona, odnosno da li postoji preovlađujući javni interes iz čl. 17 istoga zakona. Drugostepeni organ je utvrdio da je prvostepeni organ dužan da u ponovnom postupku pravilno primijeni članove 14, 16 i 17 i na osnovu toga u ponovnom postupku riješi u ovoj stvari.

Postupajući po drugostepenom rješenju, prvostepeni organ je izvršio uvid u tražene dokumente, i utvrdio:

- Tražena informacija, s obzirom da sadrži podatke o uplatama davalaca priloga i isplatama dobavljačima usluga i roba, predstavlja bankarsku odnosno poslovnu tajnu, u skladu sa čl. 84 st. 1 tačka 1 i 2, i čl. 84 st. 2 Zakona o bankama ("Sl. list CG", br. 17/08, 40/2011, 44/10, 73/17).

Članom 14 st. 1 tačka 6 Zakona o slobodnom pristupu informacijama propisano je da organ vlasti može ograničiti pristup informaciji ako je to u interesu ako je informacija poslovna ili poreska tajna u skladu sa zakonom, a pristup informaciji će se u skladu sa čl. 16 istog zakona ograničiti ukoliko bi objelodanjivanje informacije značajno ugrozilo interes iz čl. 14 ovog zakona, odnosno ukoliko postoji mogućnost da bi objelodanjivanje informacije izazvalo štetne posljedice po interes koji je od većeg značaja od interesa javnosti da zna tu informaciju, osim ako postoji preovlađujući javni interes propisan čl. 17 ovog zakona.

Prvostepeni organ je u skladu sa čl. 16 izvršio test štetnosti i utvrdio da su povjerljivost, čuvanje i način pristupa podacima sa transakcionih računa banaka propisani sistemom zakonskih propisa i odredbi kojima su regulisani platni promet i bankarsko poslovanje (Zakon o bankama čl. 85 i čl. 86, Zakon o platnom prometu ("Sl. list CG", br. 62/13 i br. 6/14), čl. 54 st. 1 do 9, čl. 55 st. 2, čl. 56, čl. 64 st. 4 do 6, čl. 94 st. 1 i st. 3, Zakon o Centralnoj banci Crne Gore ("Sl. list CG", br. 40/10, 46/10, 6/13 i 70/17), čl. 84, čl. 87k, čl. 87l st. 3 tačka 4, čl. 35 st. 4, čl. 29. st. 3, čl. 8 st. 3, i Zakon o bankama čl. 31. st. 1 tačka 3), te bi neovlašćen pristup traženoj informaciji imao za štetnu posljedicu povredu povjerljivosti ovih podataka, odnosno povredu propisa kojima je regulisan način postupanja sa podacima o uplatama i isplatama sa transakcionih računa. "Prema odredbama člana 84. Zakona o bankama, podaci o pojedinačnom stanju depozita i prometu na pojedinačnim računima pravnih i fizičkih lica otvorenih u banci, smatraju se bankarskom tajnom, a ona je ujedno i poslovna tajna, koju je, shodno članu 84. Zakona o

Excerpt from the second decision of the Secretariat – harm test of disclosing data on the accounts balance of the Capital City

Case Study 3: Consulting contracts

The Insurance Supervision Agency declared secret consulting contracts by referring solely to the provision of its own Rulebook on Trade Secret, claiming that it hides these data in order to protect its own reputation.

Therefore, the Agency did not refer to any legal provision, by which the requested information could be declared trade secret, but to its own act.

In the decision of the Agency, there is no reasoning on what was the basis to declare the requested information trade secret, and it is obvious that the legally prescribed harm test was not conducted.

The requested information refers to spending of the financial resources of the state agency, i.e. public funds, so there is no reason to keep them hidden from the public.

On September 13, MANS filed an appeal against such decision, and the Agency for FAI annulled the decision of the Insurance Supervision Agency and returned the case for re-trial.

Postupajući po dijelu zahtjeva koji se odnosi na dostavljanje kopija svih ugovora i pripadajućih aneksa zaključenih u periodu od 2013. do jula mjeseca 2018. godine sa fizičkim i pravnim licima za konsultantske usluge, uključujući i potvrde o isplatama po tim ugovorima i aneksima, isti se odbija iz razloga što tražena dokumentacija predstavlja poslovnu tajnu, a odredbom člana 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama propisano je da „organ vlasti može ograničiti pristup informaciji ili dijelu informacije ... 6) Ako je informacija poslovna ili poreska tajna u skladu sa zakonom."
Naime, tražene informacije su kod Agencije označene oznakom »interno« u skladu sa čl. 3 i 3a Pravilnika o poslovnoj tajni Agencije za nadzor osiguranja broj 01-41/4-12, kojim je propisano da se poslovnom tajnom u smislu tog pravilnika smatraju dokumenti i podaci „...1. koje Agencija proglasi poslovnom tajnom, kao i ostali dokumenti i podaci čije bi saopštavanje neovlašćenim licima, zbog njihove prirode, značaja i karaktera bilo protivno interesima Agencije."

Agencija je određenu kategoriju dokumenata označila stepenom tajnosti »interno« iz razloga što se isti odnose na postupke nadzora i što bi dostavljanje, ili na bilo koji drugi način činjenje dostupnim, tih dokumenata i podataka iz njih moglo nanijeti štetu poslovnom interesu Agencije, kao i subjektima nadzora nad kojima je u traženom periodu vršena kontrola, a na koje se traženi ugovori odnose.

Excerpt from the decision of the Insurance Supervision Agency stating that the information is marked with a degree of secrecy

3. Practice in Montenegro

The Agency for FAI confirmed that a bylaw cannot be a basis for restricting free access to information, and that without the conducted harm test, it cannot be explained which harmful consequences would occur to the first instance body in case of disclosure of information.

However, in its decision, the Agency for FAI "instructed" the institution how to legally hide the data, referring to the amended provision of the Article 14.

In the new decision, the Insurance Supervision Agency did exactly that - it declared the requested information a trade secret, referring to Article 14 of the Law on FAI, stating that according to the Rulebook of the Agency these data were designated with the degree of secrecy "internal".

Although it did not provide evidence that they conducted harm test, the Agency stated that it had fulfilled this legal obligation and concluded that its interest to hide data was more important than the public's interest in knowing how public funds were spent. Namely, in the latest decision, the Agency states:

“Since this is information related to direct and indirect control procedures that are carried out by the Insurance Supervision Agency in accordance with the provisions of the Insurance Law, taking into account the position and reputation of the Agency and the reputation of the subjects of supervision, **it is estimated that the interest of the Agency is greater than the interest of the public to know the information requested**“.

MANS again filed an appeal against such decision in mid-January this year, but nearly four months later the Agency for FAI has not made a decision, although the legal deadline is 15 days.

Case Study 4: Tender documentation

The Agency for Nature and Environment Protection declared complete tender documentation of about € 20 million trade secret, claiming to comply with the rules of the International Bank for Reconstruction and Development.

The agency refused to deliver the requested information stating that they are protecting trade and other economic interests from disclosure of data relating to protection of competition and trade secret in relation to intellectual property right. [16] It stated that it could not publish the requested information due to the rules of the international bank which gave a loan for the job, which rules are related to the purchase of tender documents.

The Agency's decision was annulled on our appeal after more than a year. [17]

As in the previous case, the Agency for FAI instructed the Agency for Nature and Environment Protection to refer to a new clause on trade secret in a repeated procedure, while also pointing out to non-conducting the harm test.

The new decision also restricts access to information because it is a trade secret. The Agency for Nature and Environment Protection stated that the tender was conducted in cooperation with the International Bank for Reconstruction and Development, whose rules include the purchase of tender documentation.

At the same time, the Agency does not mention that the tender was terminated, and that the bidder was selected, i.e. that there was no possibility of subsequent purchase of the tender documentation. [18]

Crna Gora
Ministarstvo održivog razvoja i turizma
AGENCIJA ZA ZAŠTITU PRIRODE I ŽIVOTNE SREDINE
Broj :UPI-101/2-03-27/9
Podgorica,27.12.2018.godine.

Podgorica, 28-12-2018 god.

Agencija za zaštitu prirode i životne sredine na osnovu člana 29 stav 1 tačka 3 Zakona o slobodnom pristupu informacijama ("Sl.list CG", br.44/12,30/17), a postupajući po rješenju Agencije za zaštitu ličnih podataka i slobodan pristup informacijma br. UPII 07-30-2988-2/17 od 19.12.2018.godine, donosi

RJEŠENJE

1. Odbija se zahtjev NVO MANS br. 17/111926 od 16.05.2017 godine za slobodan pristup informacijama, odnosno dostava kopije kompletne dokumentacije vezano za međunarodni tender za izbor izvođača radova na remedijaciji tla lokacije Jadranskog brodogradilišta Bijela, koji je objavljen 17. februara 2017. godine.
2. Troškova postupka za pristup informaciji nije bilo.
3. Žalba protiv ovog rješenja ne odlaže njegovom izvršenju.

Obrazloženje

NVO MANS iz Podgorice Dalmatinska br.188 podnijela je Agenciji za zaštitu prirode i životne sredine zahtjev br. 17/111926 od 16.05.2017 kojim je tražila da joj se omogući pristup informaciji: dostava kopije kompletne dokumentacije vezano za međunarodni tender za izbor izvođača radova na remedijaciji tla lokacije Jadranskog brodogradilišta Bijela, koji je objavljen 17. februara 2017. godine. Dana 27.07.2017. godine. Agencija za zaštitu prirode i životne sredine donijela je rješenje br. 1556/1-05-27/5 na koje je Mreža za afirmaciju nevladinog sektora izjavila žalbu Agenciji za zaštitu ličnih podataka i Slobodan pristup informacijama br. 17/111926 od 17.08.2017. godine. Agencija za zaštitu ličnih podataka i slobodan pristup informacijama je usvojila žalbu i poništila rješenje Agencije za zaštitu prirode i životne sredine.

Na osnovu člana 29 stav 1 tačka 3 Zakona o slobodnom pristupu informacijama a primjenjujući član 14. stav 1 tačka 6 kojim je propisano da će organ vlasti ograničiti pristup informaciji ili dijelu informacije ako je informacija poslovna ili poreska tajna u skladu sa zakonom.Agencija je utvrdila da je Ugovor o zajmu između Crne Gore i Međunarodne banke za obnovu i razvoj za realizaciju projekta " Upravljanje industrijskim otpadom i čišćenje – IWMPC, potpisan 10.oktobra 2014. godine, zaključen je sa međunarodnom bankom, čija pravila reguliše banka, strogim procedurama, pa je između ostalog predviđen otkup tenderske dokumentacije, od strane zainteresovanih.

Excerpt from the new decision of the Agency for Nature and Environment Protection, stating that the tender documentation must be purchased

16 Article 14, Paragraph 1, item 5 of the Law on Free Access to Information
17 The appeal is filed on 15/06/2017, the decision of the Agency was adopted on December 21, 2018
18 In May 2018, the government selected the contractor, and work began in early October that year, while the Agency restricted access to information in December that year.

Also, the Agency did not apply a legal norm that allows it to delete data that represent a secret [19], and publish parts of the tender documentation related to the offered prices, which cannot be trade secret.

The Agency states that it conducted a harm test in case of the disclosure of information, although it does not provide evidence to support that claim, and states that the disclosure of the information would significantly jeopardize the interests referred to in Article 14 of the Law on Free Access to Information, while also stating that no prevailing public interest exists. In its decision, in no way does the Agency explain which interests would be endangered and in which way, nor does it take into consideration the importance of the public interest in disclosing of data.

Retroactive application of the new legal provision

The provision of Article 14, paragraph 1, item 6 of the Law on Free Access to Information, was introduced by the Law on Amendments to that Law [20], which comed into force on 17 May 2017, while the request for free access to information was **filed the day before** i.e. on 16 May 2017.

Thus, it is clear that the said legal provision cannot be applied because such action would be contrary to the constitutional principle of the prohibition of retroactive effect of the law.

An appeal against the new decision of the Agency was submitted in mid-January 2019, but almost five months later, no decision has been reached.

Case Study 5: Financing of election campaigns

The Agency for Prevention of Corruption (APC) declared trade secret information on the income and expenses of political parties from bank accounts used to finance the campaign for the Parliamentary Elections in 2016 and the 2018 Presidential Elections.

Political parties submit to APC reports on the incomes and expenses of the election campaign, that the institution posts on its website, in accordance to the Law on Financing of Political Entities.

In addition, all political entities are obligated to submit to the Agency bank account balances used for campaign financing, and these data should match the information provided in the financial statements.

Therefore, data on incomes and expenses, in the form of reports of the parties, are undoubtedly public, but the Agency has declared as a trade secret the same information contained in a bank account statement.

The Law on Financing of Political Entities prescribes that parliamentary parties are mostly financed from citizens' money [21], which is why it is undisputed that citizens should have an insight into the spending of that money. In this regard, the provision of the Law on Free Access to Information, which prescribes that the public has the right to , inter alia, access information on a legal entity whose work is mainly financed from public revenues. [22]

Crna Gora
Agencija za sprječavanje korupcije

Broj: 03-04-924/2 Podgorica, 25.04. 2019. godine

Agencija za sprječavanje korupcije (u nastavku: prvostepeni organ) postupajući u ponovnom postupku po rješenju Agencije za zaštitu ličnih podataka i slobodan pristup informacijama (u nastavku: drugostepeni organ) br. UPII 07-30-2527-2/18 od 04.04.2019.godine, koje je u prvostepenom organu zaprimljeno pod brojem 03-04-927 od 10.04.2019.godine, na osnovu čl. 18 Zakona o upravnom postupku (»Sl.list CG", br. 37/17) i čl. 29 st. 1 tačka 3 Zakona o slobodnom pristupu informacijama (»Sl.list CG", br. 44/12 i br. 30/17), u postupku po zahtjevu Janković Vuka iz NVO Mreža za afirmaciju nevladinog sektora (u nastavku: podnosilac zahtjeva) br. 18/122015-12217 od 27.04.2018. godine, koji je zaprimljen pod brojem 03-04-1637 od 27.04.2018. godine, donosi

RJEŠENJE

Odbija se pristup informaciji:

1. Svih izvoda iz banke koji pokazuju sve prihode i rashode sa žiro računa koje je otvorila Demokratska partija socijalista za potrebe Parlamentarnih izbora 2016. godine, u periodu od njihovog otvaranja do dana podnošenja izvještaja Agenciji.
2. Svih izvoda iz banke koji pokazuju sve prihode i rashode sa žiro računa koje je otvorila partija Socijaldemokrate za potrebe Parlamentarnih izbora 2016. godine, u periodu od njihovog otvaranja do dana podnošenja izvještaja Agenciji.
3. Svih izvoda iz banke koji pokazuju sve prihode i rashode sa žiro računa koje je otvorila partija Nova srpska demokratija (Demokratski front – Mi ili On) za potrebe Parlamentarnih izbora 2016. godine, u periodu od njihovog otvaranja do dana podnošenja izvještaja Agenciji.

Obrazloženje

Nakon sprovedenog postupka po zahtjevu za slobodan pristup informacijama br. 18/122015-122017 od 27.04.2018. godine, prvostepeni organ je donio rješenje br. 03-04-1638/2 od 08.05.2018. godine, kojim je odbijen zahtjev za pristup informacijama koje su navedene u gornjem dispozitivu, stav 1 tačke 1-3 (u nastavku: Tražena informacija).

Excerpt from the ruling of the Agency for the Prevention of Corruption rejecting the access to information on the income and expenses of political parties from bank accounts opened for financing the Parliamentary elections in 2016

19 Article 24 paragraph 1 of the Law on Free Access to Information prescribes "if a restriction applies to a part of information, pursuant to the provisions of the Article 14 of this Law, the public authority shall grant access to information by delivering a copy thereof to the applicant, after deleting the part of the information to which the restriction applies"
20 "Official Gazette of Montenegro", No. 30/2017 of 09/05/2017
21 Article 3 of the Law on Financing of Political Entities in Montenegro stipulates that political entities may acquire funds for regular operation and the election campaign from public and private sources, while Article 12 stipulates that the amount of funds from private sources which are raised by the political entity for regular operation in the current calendar year may amount up to 100% of the funds belonging to it from the budget funds.
22 Article 9, Paragraph 1, Item 1 of the Law on Free Access to Information

3. Practice in Montenegro

The Agency for Personal Data Protection and Free Access to Information annulled the decision of APC a year after filing the complaint, despite the fact that they had a legal deadline of 15 days to do so, and as the sole reason for annulling the decision, they stated that no harm test had been conducted.

APC also restricted access to information with their new decision because it represented a banking i.e. trade secret [23], as well as due to protection of privacy of natural persons who donated political parties.

APC states that it conducted a harm test and found that disclosing of the information would constitute "a violation of the regulations governing the method of handling payment information and payments from transaction accounts". In doing so, they refer to the trade secret prescribed by the Banking Law and the Law on the Central Bank.

APC concludes that it refuses access to information because there are detrimental consequences from its disclosing and there is no prevailing public interest to be published, and adds "since the information about amounts credited or debited to an account of a political entity in the election campaign are public data ..."

Therefore, the Agency itself does not dispute that these data, in the format that is published on their website [24], are public, but they nevertheless declare them secret.

In addition, APC claims that disclosing of data on party donations would result in a greater processing of personal data than prescribed, as these data are published on their website.

Takođe, bankarska tajna predstavlja profesionalu tajnu bankarskog poziva koja, kao i profesionalne tajne određenih drugih poziva, ima privatnopravni karakter poslovne veze banke i klijenta koja je obilježena posebnim odnosom povjerenja, i zasnovana je na načelima i odredbama Zakona o obligacionim odnosima (Sl. list CG", br. 47/08, 4/11 i 22/17), čl.3, čl. 4, čl. 6, čl.9, čl.10, čl.11 i čl. 14. Neovlašćeno otkrivanje profesionalne tajne je propisano je kao krivično djelo članom 171 Krivičnog zakonika ("Sl. list CG", br. 40/08, 25/10, 32/11, 64/11, 40/13, 56/13, 14/15, 42/15, 58/15, 44/17 i 49/18). Konačno, neovlašćena obrada ličnih podataka iz tražene informacije u suprotnosti sa Ustavom Crne Gore, jer su ograničenja ličnih podataka i privatnosti lica na koja se odnose ovi podaci propisani Zakonom o finansiranju političkih subjekata i izbornih kampanja, pa bi njihova drugačija obrada predstavljala prekoračenje ograničenja iz člana 24 Ustava Crne Gore.

Imajući u vidu štetne posljedice po zaštićene interese utvrđene u testu štetnosti, prvostepeni organ odbija pristup traženoj informaciji u skladu sa članom 29 stav 1 tačka 3 Zakona o slobodnom pristupu informacijama a u vezi sa čl. 14 stav 1 tačka 6 tog zakona, s obzirom na nepostojanje preovlađujućeg interesa iz člana 17 ovog zakona, odnosno s obzirom na to da su podaci o uplatama i isplatama političkom subjektu u izbornoj kampanji javni podaci u skladu sa čl. 39, čl. 40 i čl. 42 Zakona o finansiranju političkih subjekata i izbornih kampanja, te da su dostupni u registrima na internet stranici prvostepenog organa www.antikorupcija.me u rubrici Javni registri/Pretrage za političke subjekte, u poljima Pretraga petnaestodnevnih izvještaja o prilozima u kampanji, Pretraga privremenog izvještaja o troškovima izborne kampanje i Pretraga izvještaja o troškovima izborne kampanje.

- tražena informacija sadrži podatke o više stotina priloga odnosno uplata fizičkih lica preko bankovnih računa političkim subjektima. Navedeni podaci predstavljaju lične podatke na koje se primjenjuju odredbe Zakona o zaštiti podataka o ličnosti.

Članom 14 st. 1 tačka 1 Zakona o slobodnom pristupu informacijama je propisano da organ vlasti može ograničiti pristup informaciji ako je to u interesu zaštite privatnosti od objelodanjivanja podataka predviđenih zakonom kojim se uređuje zaštita podataka o ličnosti. Članom 2 st. 2 Zakona o zaštiti podataka o ličnosti ("Sl. list CG", br. 79/2008, 70/2009, 44/2012 i 22/2017.) propisano da se lični podaci ne mogu obrađivati u većem obimu nego što je potrebno da bi se postigla svrha obrade niti na način koji nije u skladu sa njihovom namjenom. Prvostepeni organ je utvrdio da su obim i način obrade podataka o prilozima fizičkih lica političkim subjektima propisani u čl. 39 i čl. 42 Zakona o finansiranju političkih subjekata i izbornih kampanja ("Sl. list CG", br. 52/14, 76/15, 83/16 i 92/17), a da su svrha obrade i namjena ovih podataka definisani u nazivu poglavlja VII ovog Zakona

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Excerpt from APC ruling explaining that the data on financing of election campaigns are secret because there are adverse consequences from their disclosing, and that this information is publicly available

At the same time, the Agency neglects the fact that unlawful donations to political parties are subject of investigation for the State Prosecutor's Office and court proceedings precisely on the basis of information published by NGOs and the media, not APC.

Therefore, the Agency was obligated to conduct a public interest test and establish that these data could contribute to detection of corruption and law violations. Therefore, there is a much greater right of the public to know in what way the election campaigns are funded than the possible violation of privacy of the donors due to additional processing of their data, especially because this information is publicly available in accordance with the Law on Financing of Political Entities. [25]

The appeal procedure in which MANS challenged APC's second decision started in early May this year and is still in progress.

23 As in the previous examples, the Agency also referred to Article 84 paragraph 1 item 2 and paragraph 2 of the Banking Law
24 www.antikorupcija.me in section Javni registri/Pretrage za političke subjekte
25 Articles 39, 40 and 42 of the Law on Financing Political Entities and Election Campaigns

3. Practice in Montenegro

3.2. Secret finances of the state-owned companies

State-owned companies declare important data about their finances trade secrets, with absurd reasoning, even in cases where this information is already available to the public.

Thus, one company which is majority owned by the state declared its annual budgets trade secret, stating that they contain confidential information that could negatively affect the entire electroenergetic system, as well as investing in the stock market.

Data on shareholders in state-owned companies are also declared secret, although information on ten largest shareholders is available to the public.

Contracts of the sale of assets from a state-owned bankrupt company are a trade secret, on the grounds that their disclosure could jeopardize the economic interests of those companies and its new owner.

The state fund declared the basic data trade secret, and even statistical information on lending to private companies, including a company associated with a senior public official.

Contracts for the leasing of assets of state monopolists who claim to be thus protected from competition are also secret.

In the end, even data on the earnings of public officials who run state-owned companies are secret, as their disclosure would allegedly violate the company's business policy.

Case Study 6: Budget

Montenegrin Electric Transmission System J.S.C. (CGES) declared its budget in 2017 and 2018 trade secret because they contain confidential information that could negatively affect the entire electroenergetic system, as well as investing in the stock market.

CGES noted that it refused to publish this information in order to protect trade and other economic interests.

They state that the budget contains confidential information whose disclosure would create conditions for the third parties to have privileged information in their possession, by which the applicant would be given advantage over other potential investors. Therefore, according to them, the budget is submitted only to the Board of Directors, i.e. the main shareholders.

Additionally, CGES refers to an intergovernmental agreement between Montenegro and Italy, and a provision of the Contract stipulating that the business plan and annual budget shall be the basis for managing the Company.

Based on this, CGES concludes that disclosing of their budget "could have a negative impact not only on CGES's economic performance, but also on the overall electroenergetic system."

It further mentions the confidentiality of all information related to the implementation of the project for the construction of undersea electro-energy interconnection, and points out that there is no public interest in disclosing of data, while on the other hand it could "significantly influence potential investment, i.e. disinvestment on Montenegrin Stock Exchange ".

Naime, ovaj organ posebno ukazuje na činjenicu da budžet Crnogorskog elektroprenosnog sistema AD Podgorica nije javno dostupan dokument, iz razloga što isti sadrži povjerljive informacije koje se kao takve dostavljaju samo Odboru direktora, odnosno glavnim akcionarima.

Objavljivanjem zahtjevom traženih informacija, ugroženost ekonomskih i trgovinskih interesa je i više nego nesporna, posebno ako se uzme u obzir da bi se dostavljanjem tražene dokumetacije stvorili uslovi trećim licima da posjeduju privilegovane informacije, a koje im kao takve mogu poslužiti za donošenje odluka o investiranju ili deinvestiranju na crnogorskoj berzi. Imajući u vidu naprijed iznijeto, dostavljanjem zahtjevom traženih infomacija ovaj Organ bi podnosiocu zahtjeva, odnosno bilo kojem trećem licu, dao značajnu prednost u odnosu na druge potencijalne investitore, te je iz ovog razloga nesporno da su pomenuti ekonomski i trgovinski interesi od većeg značaja od interesa javnosti da zna za ovu informaciju.

Naprijed iznijeto ukazuje takođe i na ispunjenost uslova iz člana 14, stav 1, tačka 6 Zakona o slobodnom pristupu informacijama kojim je propisano da organ vlasti može ograničiti pristup informaciji ili dijelu informacije ako je informacija poslovna ili poreska tajna u skladu sa zakonom.

Navedeni trgovinski i drugi ekonomski interesi koji mogu biti ugroženi dostavljanjem traženih informacija su od velikog značaja i kada je u pitanju realizacija međudržavnog sporazuma između Crne Gore i Republike Italije o Projektu izgradnje podmorske elektro - energetske interkonekcije između prenosnih mreža Crne Gore i Italije, a koji je potvrđen od strane Skupštine Crne Gore, donošenjem Zakona o potvrđivanju sporazuma između Crne Gore i Republike Italije o izgradnji podmorske elektro-energetske interkonekcije između prenosnih mreža Crne Gore i Italije sa realizacijom strateškog partnerstva operatora prenosnog sistema.

Posebno ukazujemo, da kada je u pitanju pomenuti Projekat da je članom III, odjeljak 3.1., tačka a. Strateškog i Akcionarskog Ugovora, br. 01-40/12 od 15.01.2011. godine, koji je zaključen između Države Crne Gore, Terna Rete Elettrica Nazionale s.p.a i Crnogorskog elektroprenosnog elektroprenosnog sistema AD Podgorica propisano da će,. Poslovni plan i godišnji budžet biti osnova za upravljanjem Društvom, a poslovanje Društva će tokom cijelog trajanja Ugovora biti vođeno i razvijano u skladu sa godisnjim budžetom". Iz ovoga se jasno da zaključiti da bi objelodoanjivanjem nečeg što je osnov za vođenje i razvijanje poslovanja samog Društva, moglo imati negativan odraz ne samo na ekonomsko poslovanje Cges-a već i na cjelokupni elektroenergetski sistem, a posebno kod činjenice ako se ima u

Excerpt from the decision of CGES by which it declares its budget secret and concludes that its disclosure could affect the country's electroenergetic system

3. Practice in Montenegro

Data regarding the budget of the company that is in majority state ownership should not be secret. Moreover, even those joint stock companies in which the state does not have ownership are obligated to publish their finances. This was eventually done by CGES, whose financial statements can be found on the website of the Tax Administration [26].

Nine months after filing the appeal, the Agency for Free Access to Information annulled CGES' decision.

At the same time, as in several previous cases, the Agency "instructed" CGES how to hide this information from the public and referred it to the application of a new legal provision relating to trade secret. [27] In addition, the Agency did not find it problematic that neither the harm test nor the public interest test had been conducted, so it did not instruct CGES to do so in renewed proceedings.

CGES then again refused the access to information by delivering new decision with exactly same reasoning as the first time, only referring to the provision that the Agency had suggested.

Thus, in that decision as well, CGES did not conduct harm or public interest test. It also did not refer to any specific regulation on the basis of which it declared its own budget trade secret.

Almost five months after filing a complaint against second CGES' decision, the Agency has not made a decision, although the Law stipulates a deadline of 15 days to decide.

Case Study 7: Other shareholders

Data on shareholders of 13. jul Plantaže L.L.C, one of the largest state-owned companies, declared trade secret.

Central Securities Depository and Clearing Company L.L.C. Podgorica declared information about the 30 largest shareholders of "Plantaže" trade secret, based on Article 386 of the Law on Capital Market. [28]

However, this article stipulates that the information about accounts of the shareholders are secret, but not information on who owns the company.

After all, this institution already publishes information about ten biggest shareholders of all joint-stock companies [29] on its website, so there is no reason for the information on the remaining 20 to be classified.

When making a decision, no harm test was conducted, so it was not determined whether and what interest and in which way would be jeopardized by disclosing the requested information.

Also, the existence and significance of the public interest was not established, instead, the access to information was rejected by vague referring to trade secret.

"CENTRALNO KLIRINŠKO DEP. DRUŠTVO" A.D.
Broj 06-131
Podgorica, 08.04. 20

N.V.O. "MANS
19/127604
Podgorica, 11. 04. 2019.

Centralno klirinško depozitarno društvo a.d. Podgorica, na osnovu člana 30 stav 1 Zakona o slobodnom pristupu informacijama ("SL.list CG", br.44/12 i 30/17), postupajući po zahtjevu Mreže za afirmaciju nevladinog sektora - MANS , br.19/127604 od 27.03.2019. godine, donosi

RJEŠENJE

Odbija se Zahtjev Mreže za afirmaciju nevladinog sektora - MANS , br.19/127604 od 27.03.2019. godine, kojim se traži lista 30 najvećih akcionara AD 13 JUL - PLANTAŽE na dan 19, 20, 21. 22, 25, 26 i 27 mart 2019. godine.

Obrazloženje

Mreža za afirmaciju nevladinog sektora - MANS podnijela je Centralnom klirinškom depozitarnom društvu a.d. zahtjev br.19/127604 od 27.03.2019. godine, kojim se traži lista 30 najvećih akcionara AD 13 JUL - PLANTAŽE na dan 19, 20, 21, 22, 25, 26 i 27 mart 2019. godine, na način što će im se dostaviti ista putem pošte, na adresu Dalmatinska ulica br.188, Podgorica.

U postupku po zahtjevu, Centralno klirinško depozitarno društvo a.d. je utvrdilo da posjeduje tražene informacije, te da se istim ograničava pristup u skladu sa čl.14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama, jer se radi o podacima koji su prema čl.386 Zakona o tržištu kapitala tajni i mogu se saopštiti samo pod uslovima i na način utvrđen ovim zakonom, po nalogu suda, na zahtjev Komisije za tržište kapitala ili drugog nadležnog organa, pa nalazi da zahtjev treba odbiti kao neosnovan.

Prema Pravilima o pravu na dobijanje informacija o hartijama od vrijednosti upisanim u Centralni registar Centralne Depozitarne Agencije ("Sl.list CG", br.30/15), koja je donijela Komisija za hartije od vrijednosti, samo registrovani akcionar ima pravo da dobije informacije iz Registra o svim drugim vlasnicima akcija emitenta čije akcije posjeduje. Pravo na dobijanje ovih informacija ima i Komisija za hartije od vrijednosti u postupku kontrole poslovanja CDA i nadležni sud u sprovođenju određenih postupaka .

Excerpt from the decision declaring information about the shareholders of one of the largest state-owned companies classified

26 Website of the Tax Administration https://eprijava.tax.gov.me/TaxisPortal
27 Article 14, Paragraph 1, Item 6 of the Law on Free Access to Information
28 It refers to the provision of Article 14, Paragraph 1, Item 6 of the Law on Free Access to Information
29 http://app.cda.me:81/CDA/Home/Data/165?reportViewer=pdf

3. Practice in Montenegro

Case Study 8: Sale during bankruptcy proceedings

During bankruptcy proceedings, the Commercial Court declared secret annex to the agreement on the sale of the property of the Aluminium Plant Podgorica (KAP) to a private company Uniprom, although some of its content had already been published in a press release.

The Commercial Court noted that "in this case, it is a matter of private documents - contracts concluded between the two companies", which are not court documents, although they are in its possession. That is why the court decided to reject the request "because of the danger that disclosing of these data would result in a violation of trade and other economic interests of companies that are parties to the contract, and they represent a trade secret."

It is obvious that the Commercial Court did not conduct a harm test in order to determine which interests would be jeopardized and in what way.

There is no doubt that at least part of the information from the signed annexes to the contracts that were published by the Commercial Court in its press release is public information. [30] Thus, the court could have published part of the information requested, and delete those that represent a trade secret. [31]

The court also did not conduct a public interest test to assess whether the disclosing of information on bankruptcy of the largest public company is in the public interest.

This is especially due to the fact that the work of KAP has been followed by corruption scandals for decades, and this company has returned to a majority state ownership after the termination of the privatization contract with the previous owner. Immediately after the state's return to the ownership structure, the company entered bankruptcy and during the proceedings, it is represented by an insolvency practitioner appointed by the Commercial Court.

CRNA GORA
PRIVREDNI SUD
V- Su.br.37/18
Podgorica, 16.11.2018.godine

PRIVREDNI SUD CRNE GORE, odlučujući po zahtjevu za pristup informacijama **NVO Mreža za afirmaciju nevladinog sektora – MANS,** Dalmatinska 188, na osnovu člana 30 st.1. Zakona o slobodnom pristupu informacijama („Sl.list CG", br.44/2012), dana 16.11.2018.godine, donio je

RJEŠENJE

I ODBIJA SE zahtjev NVO Mreža za afirmaciju nevladinog sektora – MANS od 13.11.2018.godine, kojim je tražen pristup informaciji dostavljanjem kopije Aneksa II i Aneksa III Ugovora o prodaji imovine KAP-a u stečaju preduzeću Uniprom.

Obrazloženje

Dana 13.11.2018.godine, **NVO Mreža za afirmaciju nevladinog sektora – MANS,** obratila se ovom sudu elektronskim putem (neautorizovanim e-mailom) sa zahtjevom, da joj se odobri pristup informaciji i dostave kopije Aneksa II i Aneksa III Ugovora o prodaji imovine KAP-a u stečaju preduzeću Uniprom.

U postupku po zahtjevu Privredni sud Crne Gore je utvrdio da posjeduje traženu informaciju.

Međutim, predmetni zahtjev je odbijen shodno odredbi člana 14 stav 1 tačka 5 i tačka 6 Zakona o slobodnom pristupu informacijama.

Naime, u konkretnom slučaju radi se o privatnim ispravama – ugovorima zaključenim između dva privredna društva, od kojih je nad jednim otvoren stečajni postupak, a koje se nalaze u posjedu ovog organa kao nadležnog za sprovodjenje stečajnog postupka. Kako se radi o privatnim ispravama koje nijesu akti ovog organa – sudski akt, to je ovaj organ odbio predmetni zahtjev, zbog opasnosti da bi objavljivanjem tih podataka došlo do povrede trgovinskih i drugih ekonomskih interesa privrednih društava koje su strane ugovornice, i isti predstavljaju njihovu poslovnu tajnu.

Na osnovu izloženog odlučeno je kao u dispozitivu rješenja.

OVLAŠĆENO LICE ZA PRISTUP INFORMACIJAMA
Vladan Nikolić,s.r.

Decision of the Commercial Court which declared secret data on the sale of KAP with vague reasoning

MANS filed an appeal against this decision of the Commercial Court, but the Agency for Personal Data Protection and Free Access to Information has not made a decision even after six months.

Case Study 9: State loans

On the basis of its own Rulebook, the Investment and Development Fund (IDF) [32] declared basic information about the control of the use of loans from the Abu Dhabi Fund trade secret, two days before the State Prosecutor's Office started investigating spending of that money. [33]

Even information on the number of conducted controls of the use of loans, as well as reports that were made on that basis are declared trade secret. [34]

30 Commercial court: Press release regarding the conclusion of the Annex of the Agreement on sale of the property of the Aluminium Plant Podgorica L.L.C. Podgorica during bankruptcy proceedings https://sudovi.me/pscg/aktuelnosti/b-saopstenje-za-javnost-povodom-zakljucenja-aneksa-ugovora-o-prodaji-imovine-kombinata-aluminujuma-podgorica-ad-podgorica-u-stecaju-b-5626
31 Pursuant to Article 24 paragraph 1 of the Law on Free Access to Information
32 The Investment and Development Fund was established by the Government of Montenegro by adopting the Law on Investment and Development Fund of Montenegro L.L.C. ("Official Gazette of Montenegro No. 88" of December 31, 2009).
33 Information was requested for the entire 2018, as well as January and February 2019
34 Information was requested for the entire 2018, as well as January and February 2019

3. Practice in Montenegro

IDF declared statistic information on loan control trade secret, stating that this is prescribed by the Banking Law, the Law on Financial Leasing, Factoring, Purchase of Receivables, Micro-Lending and Credit-Guarantee Operations, as well as the Law on Protection of Unpublished Data.

The Fund claims that the requested information is confidential and in accordance with their Statute and the Rulebook on state secret, as well as loan agreements concluded with the companies.

Finally, IDF states that disclosure of the requested information would compromise market competitiveness, cause adverse consequences for the commercial and other economic interests of the contracting parties, which was allegedly established by the harm test.

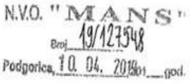
Such response was submitted by IDF on April 10, two days before the Special State Prosecutor's Office began to investigate the use of funds from the Abu Dhabi Fund on suspicion of misuse. [35]

However, the first two laws do not prescribe in any article that statistical data can be declared secret, while the Law on Protection of Unpublished Data refers to protection of intellectual property.

On the other hand, IDF Statute and Rulebook are bylaws, and the requirement that the data be declared trade secret is that it is prescribed by a specific legal provision. Moreover, the Rulebook on trade secret is not publicly available. [36]

IDF claims that it conducted a harm test, however, it did not explain in its decision in what way would the disclosure of control statistics jeopardized any interest.

INVESTICIONO-RAZVOJNI FOND
CRNE GORE A.D.
Broj: 05-17020-2392-19/2
Podgorica 09.04.2019. godine



Na osnovu člana 14 stav 1 tačka 6, člana 29 stav 1 tačka 3, člana 30 stav 1 i 5 Zakona o slobodnom pristupu informacijama („Službeni list CG", br. 44/12 i 30/17), člana 3, 4 i 8 Zakona o zaštiti neobjavljenih podataka („Službeni list CG", br. 16/07 i 73/08), člana 84 i 85 stav 1 Zakona o bankama ("Službeni list Crne Gore", br. 17/08, 44/10, 40/11 i 73/17), člana 125, 126 i 127 Zakona o finansijskom lizingu, faktoringu, otkupu potraživanja, mikrokreditiranju i kreditno-garantnim poslovima („Službeni list CG", br. 73/17), člana 28 i 45 Statuta Investiciono-razvojnog fonda Crne Gore A.D ("Sl. list Crne Gore", br. 25/10, 26/11, 03/12, 6/12, 51/13, 10/14, 34/14, 50/14, 57/15, 43/16, 80/17) i odredaba Pravilnika o poslovnoj tajni Investiciono-razvojnog fonda Crne Gore A.D., Investiciono-razvojni fond Crne Gore A.D. u postupku po Zahtjevu Mreže za afirmaciju nevladinog sektora – MANS iz Podgorice, Dalmatinska 188, br. 19/127548 od 25.03.2019. godine, donosi

RJEŠENJE

Odbija se Zahtjev za pristup informaciji Mreže za afirmaciju nevladinog sektora – MANS br. 19/127548 od 25.03.2019. godine.

Obrazloženje

Mreža za afirmaciju nevladinog sektora - MANS, sa adresom Dalmatinska 188 Podgorica, podnijela je dana 25.03.2019. godine, Zahtjev za slobodan pristup informaciji br. 19/127548, kojim se traži dostavljanje:

- Informacija o broju izvršenih kontrola i analiza dodijeljenih kredita iz Abu Dabi fonda, kao i izrađenih izvještaja po tom osnovu u 2018. godini, kao i u januaru i februaru 2019. godine.

Rješavajući po predmetnom zahtjevu, Investiciono-razvojni fond Crne Gore A.D. je zahtjev za dostavljanje traženih informacija odbio iz sljedećih razloga:

U postupku po predmetnom Zahtjevu, Investiciono-razvojni fond Crne Gore A.D. je shodno članu 16, a u vezi sa članom 14 Zakona o slobodnom pristupu informacijama („Službeni list CG", br. 44/12 i 30/17) proveo test štetnosti, odnosno utvrdio potencijalnu štetu koja bi mogla nastati objavljivanjem traženih informacija i utvrdio da bi se njihovim objelodanjivanjem značajno ugrozio interes iz člana 14 Zakona, odnosno izazvale štetne posljedice po interes koji je od većeg značaja od interesa javnosti da bude upoznata sa sadržinom traženih informacija. Naime, odredbama člana 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama određeno je da se pristup informaciji može ograničiti ako je informacija poslovna ili poreska tajna u skladu sa zakonom. S tim u vezi, IRF CG A.D. je razmatrajući konkretni zahtjev za slobodan pristup informacijama u skladu sa članom 16 stav 1 Zakona o slobodnom pristupu informacijama izvršio test štetnosti objelodanjivanja tražene informacije, ocjenjujući da bi u konkretnom slučaju davanje traženih informacija ugrozilo konkurentnost na tržištu, izazvalo štetne posljedice po komercijalne i druge ekonomske interese ugovornih strana, koji su po procjeni Fonda od većeg značaja od interesa koji bi bio zadovoljen davanjem tih informacija.
Saglasno članu 29 stav 1 tačka 3 Zakona o slobodnom pristupu informacijama („Službeni list Crne Gore", br. 044/12 i 30/17) organ vlasti odbiće zahtjev za pristup informaciji, ako postoji razlog iz člana 14 ovog zakona za ograničavanje pristupa traženoj informaciji. Shodno članu 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama („Službeni list CG", br. 044/12 i 30/17) organ vlasti može ograničiti pristup informaciji ili dijelu informacije, ako je informacija poslovna ili poreska tajna u skladu sa zakonom.

Decision of the Commercial Court which declared secret data on the sale of KAP with vague reasoning

In its decision, IDF did not consider the public interest in disclosing information, especially bearing in mind it could point to corruption. This is also evidenced by the fact that the State Prosecutor's Office launched an investigation in connection with the improper spending of these funds.

Secret according to the pattern

This Fund responded in the same manner to the request to publish control reports, although in the first case it is only about a number and in the second a much more detailed document, and disclosure of a different type of information cannot have the same impact on the protected interest.

Thus, IDF apparently did not carry out an adequate harm test, nor did it conduct a public interest test, but had already taken a stance that data on the use of funds from the Abu Dhabi fund should be declared trade secret.

Secret state loans for the son of a high official

IDF also declared secret data on individual loans given to companies, including the company BB Hidro, owned by the son of the state president, Milo Đukanović.

35 Daily "Vijesti": SDT provjerava kako je trošen novac iz Abu Dabi fonda, April 12, 2019 https://www.vijesti.me/vijesti/ekonomija/sdt-provjerava-kako-je-trosen-novac-iz-abu-dabi-fonda
36 The said Rulebook was not published in the Official Gazette, or on the IDF website, https://www.irfcg.me/me/

3. Practice in Montenegro

In their decision, IDF refers to a provision that prescribes a trade secret, while as the protected interest it lists the commercial and other economic interests of the contracting parties, i.e. the Fund and BB Hidro.

It further states that the requested contract is signed by the Fund and the Bank, in accordance with which it applies the provision of the Law on Banks on banking secret.

Instead of harm test and the assessment of the public interest, the Fund "arbitrary" concludes that the commercial and economic interests of the contract parties are of greater importance than the public interest.

At the same time, the Fund did not consider the interest of the public to gain access to information about the state loan given to the company of the son of the highest state official.

INVESTICIONO-RAZVOJNI FOND
CRNE GORE A.D.
Broj 05-17020-2859-19/1
Podgorica, 25.04.2019. godine

N.V.O. "MANS"
Broj 19/127664-127666
Podgorica, 06.05.2019. god.

Na osnovu člana 14 stav 1 tačka 6, člana 29 stav 1 tačka 3, člana 30 stav 1 i 5 Zakona o slobodnom pristupu informacijama („Službeni list CG", br. 44/12 i 30/17), člana 84, 85 i 86 Zakona o bankama ("Službeni list Crne Gore", br. 17/08, 44/10, 40/11 i 73/17) i člana 28 Statuta Investiciono-razvojnog fonda Crne Gore A.D ("Sl. list Crne Gore", br. 25/10, 26/11, 03/12, 6/12, 51/13, 10/14, 34/14, 50/14, 57/15, 43/16, 80/17), Investiciono-razvojni fond Crne Gore A.D. u postupku po Zahtjevu Mreže za afirmaciju nevladinog sektora – MANS iz Podgorice, Dalmatinska 188, br. 19/127664-127666 od 18.04.2019. godine, donosi

RJEŠENJE

Odbija se Zahtjev za pristup informaciji Mreže za afirmaciju nevladinog sektora – MANS br. 19/127664-127666 od 18.04.2019. godine.

Obrazloženje

Mreža za afirmaciju nevladinog sektora - MANS, sa adresom Dalmatinska 188 Podgorica, podnijela je dana 18.04.2019. godine, putem mejla, Zahtjev za slobodan pristup informaciji br. 19/127664-127666, kojim se traži dostavljanje kopija:

- Ugovora o kreditu broj 02-18097 od dana 25. decembra 2018. godine, koji je zaključen između Investiciono razvojnog fonda Crne Gore i Hipotekarne banke AD Podgorica, a u vezi investicionog projekta "Izgradnja mini hidroelektrane Bistrica" privrednog društva "BB Hidro" Podgorica,
- Investicionog projekta "Izgradnja mini hidroelektrane Bistrica" privrednog društva "BB Hidro" Podgorica, a za koji je Investiciono razvojni fond Crne Gore odobrio kredit posredstvom Hipotekarne banke AD Podgorica,
- Kompletne dokumentacije dostavljene za investicioni projekat projekta "Izgradnja mini hidroelektrane Bistrica" privrednog društva "BB Hidro" Podgorica, a za koji je Investiciono razvojni fond Crne Gore odobrio kredit posredstvom Hipotekarne banke AD Podgorica

Rješavajući po predmetnom zahtjevu, Investiciono-razvojni fond Crne Gore A.D. je zahtjev za dostavljanje traženih informacija odbio iz sljedećih razloga:

U postupku po predmetnom Zahtjevu, Investiciono-razvojni fond Crne Gore A.D. je shodno članu 16, a u vezi sa članom 14 Zakona o slobodnom pristupu informacijama („Službeni list CG", br. 44/12 i 30/17) proveo test štetnosti, odnosno utvrdio potencijalnu štetu koja bi mogla nastati objavljivanjem traženih informacija i utvrdio da bi se njihovim objelodanjivanjem značajno ugrozio interes iz člana 14 Zakona, odnosno izazvale štetne posledice po interes koji je od većeg značaja od interesa javnosti da bude upoznata sa sadržinom traženih informacija.

Naime, odredbama člana 14 tačka 6 Zakona o slobodnom pristupu informacijama određeno je da se pristup informaciji može ograničiti ako je informacija poslovna ili poreska tajna u skladu sa zakonom. S tim u vezi, IRF CG A.D. je razmatrajući konkretni zahtjev za slobodan pristup informacijama u skladu sa članom 16 stav 1 Zakona o slobodnom pristupu informacijama izvršio test štetnosti objelodanjivanja tražene informacije, ocjenjujući da bi u konkretnom slučaju davanje traženog ugovora sa pratećom dokumentacijom izazvalo štetne posljedice po komercijalne i druge ekonomske interese ugovornih strana, koji su po procjeni Fonda od većeg značaja od interesa koji bi bio zadovoljen davanjem tih informacija.

Excerpt from the IDF decision by which state loan to BB Hidro, owned by Milo Đukanović's son, was declared secret in order not to jeopardize his business interests

Case Study 10: Contracts on the leasing of state-owned companies

"Port of Bar" L.L.C. Bar declared secret the contracts on leasing of warehouses and facilities owned by the company, claiming that this would protect competition.

The Port of Bar claims that the data are confidential and refer to the Law on Free Zones of Montenegro and its own Rulebook on Trade Secrets.

However, no article of the Law on Free Zones stipulates the secrecy of data, while the Law on FAI requires that the authorities to refer to the provisions of the Law in the case of trade secrets, rather than internal regulations.
In addition, they claim that they are protecting the interest of competition and trade secret, while not explaining in what way those interests would be affected by the disclosure of the information requested.
As no harm test is mentioned, it is clear that it was not conducted, instead the protected interest and its significance were arbitrarily determined.

The issue of the public interest in disclosing the data was not considered at all, despite the numerous accusations that smuggled cigarettes are stored in the leased warehouses of the Port of Bar. [37]

N.V.O. "MANS"
18/124974
13-12-2018 god.

Na osnovu čl. 14, 29 i 30 Zakona o slobodnom pristupu informacijama (Sl. list CG 44/12), postupajući po zahtjevu NVO MANS iz Podgorice br. 18/124974 od 27.11.2018. g. „Luka Bar" AD Bar donosi

Akcionarsko Društvo „LUKA BAR" – Bar
Broj: 1886
11.12.2018 god

RJEŠENJE

ODBIJA SE KAO NEOSNOVAN zahtjev NVO MANS br. 18/124974 od 27.11.2018. godine.

OBRAZLOŽENJE

NVO "MANS" iz Podgorice obratila se "LUKA BAR" AD zahtjevom br. 18/124794 od 27.11.2018, primljenim 28.11.2018., arh. broj 7612, kojim je tražen pristup informacijama i to: "kopijama svih važećih ugovora o davanju u zakup skladišta i objekata u vlasništvu AD Luka Bar".

Postupajući po predmetnom zahtjevu, „Luka Bar" AD nalazi da pristup traženim informacijama, u smislu čl. 14 st. 1 t. 5 Zakona o slobodnom pristupu informacijama i Pravilnika o poslovnoj tajni Luka Bar AD treba ograničiti, u interesu zaštite konkurencije i poslovne tajne, pa je predmetni zahtjev odbijen kao neosnovan.

Pristup traženim informacijama ima se odbiti i po osnovu posebnog statusa "Luka Bar" AD kao osnivača i operatora Slobodne zone Luka Bar, koja uživa privrednu eksteritorijalnost, shodno Zakonu o slobodnim zonama Crne Gore, kao specijalnom zakonu (lex specialis), koji obezbjeđuje poseban status i zaštitu korisnicima i operatoru slobodne zone.

PRAVNA POUKA: Protiv ovog rješenja može se izjaviti žalba Agenciji za zaštitu ličnih podataka i slobodnom pristupu informacijama u roku od 15 dana od dana prijema istog .

"LUKA BAR " AD BAR

Direktor Sektora administracije
Mr Pavle Milanić, dipl. pravnik

LUKA BAR A.D. PORT OF BAR

V.D. Izvršnog direktora
Dragan Nikezić, dipl. pravnik

Decision of the Port of Bar by which contracts for renting its warehouses are declared secret in order to protect the competition

37 According to the Global Initiative against Transnational Organized Crime report, there are allegedly warehouses in the port that are solely used for storing smuggled cigarettes, while private companies are engaged in filling and discharging containers https://www.vijesti.me/vijesti/crna-hronika/rat-klanova-u-svercu-cigareta-i-droge

3. Practice in Montenegro

Three months later, the Agency for Free Access to Information annulled the decision of the Port of Bar and suggested that in the repeated proceedings, the Port of Bar declare the information secret under the new legal provision, while it did not find it problematic that neither the harm test nor the public interest test had been conducted. [38]

Even two months later, the Port of Bar has not provided any answer. MANS has submitted a motion to implement the Agency's decision, but without results because the procedure is not precisely prescribed by law.

Case Study 11: Consulting services

Montenegro Airlines declared consulting contracts as trade secret, including services of legal representation, because their disclosing would cause damage to both contracting parties.

According to this state-owned company, the information is secret because the contracts contain a confidentiality clause. They state that they had carried out a harm test and found that disclosure of the information would have adverse effects on both parties. According to Montenegro Airlines, this could significantly impair their business relations and damage the company.

Therefore, they conclude that disclosure of information would cause "harmful consequences to the interest of Montenegro Airlines, which is more important than the public's interest in knowing the content of the contracts, thus, there is no prevailing public interest."

Montenegro Airlines does not refer to any regulation based on which they would restrict access to information, instead they only qoute the harm test, without providing evidence on its conducting.

At the same time, in addition to general conclusion, there is no evidence that the public interest to publish information about the company which has repeatedly received state aid was sufficiently taken into consideration.

Normally, disclosure of these contracts is the obligation of Montenegro Airlines as a state-owned company, prescribed by the Law on FAI, which states that reporting entities shall publish "single acts and contracts on use of financial resources originating from public revenues and of state-owned property" [39] on their website.

»Montenegro Airlines« AD
Broj: 4826
Podgorica, 13.09. 2018.godine.

»Montenegro Airlines« AD Podgorica, postupajući po zahtjevu Mreže za afirmaciju nevladinog sektora-MANS br. 18/12448 od 02.08. 2018. godine, na osnovu člana 30 Zakona o slobodnom pristupu informacijama ("Sl.list RCG", br. 44/12 od 09.08.2012 i 030/17 od 09.05.2017. godine), donosi:

RJEŠENJE

Odbija se zahtjev Mreže za afirmaciju nevladinog sektora-MANS br. 18/12448 od 02.08.2018. godine kojim je traženo da se dostave:

- kopije svih ugovora i pripadajućih aneksa zaključenih u periodu od 2010. godine do jula mjeseca 2018. godine sa fizičkim ili pravnim licima za konsultantske usluge i usluge pravnog zastupanja, uključujući i potvrde o isplatama po tim ugovorima i aneksima.

Obrazloženje

Mreže za afirmaciju nevladinog sektora-MANS podnijela je „Montenegro Airlines"-u AD Podgorica zahtjev za slobodan pristup Informaciji br. 18/12448 od 02.08.2018. godine, kojim je traženo da se dostave kopije svih ugovora i pripadajućih aneksa zaključenih u periodu od 2010. godine do jula mjeseca 2018. godine sa fizičkim ili pravnim licima za konsultantske usluge i usluge pravnog zastupanja, uključujući i potvrde o isplatama po tim ugovorima i aneksima.

Članom 30 Zakon o slobodnom pristupu informacijama, propisano je da o zahtjevu za pristup informaciji, osim u slučaju iz člana 22 ovog Zakona, organ vlasti odlučuje rješenjem, kojim dozvoljava pristup traženoj informaciji ili njenom dijelu ili zahtjev odbija. Rješenjem kojim se dozvoljava pristup traženoj informaciji i njenom dijelu određuje se: način na koji se dozvoljava pristup informaciji, rok za ostvarivanje pristupa i troškovi postupka. Rješenje kojim se odbija zahtjev za pristup informaciji sadrži detaljno obrazloženje razloga zbog kojih se ne dozvoljava pristup traženoj informaciji.

Postupajući po zahtjevu podnosioca, organ vlasti je utvrdio da tražene informacije sadrže klauzule poverljivosti. Organ vlasti je, u skladu sa članom 16 stav 1 Zakona o slobodnom pristupu informacijama, sproveo test štetnosti u cilju utvrđivanja potencijalne štete koja bi mogla nastati objavljivanjem predmetne informacije, i utvrdio da bi objelodanjivanje predmetne informacije imalo štetne posljedice po obije ugovorne strane. Prednje, imajući u vidu da bi otkrivanje podatka koji su označeni u ugovoru kao poverljivi, moglo značajno narušiti poslovne odnose ugovornih strana i nanijeti štetu ekonomskim interesima nacionalnog avio prevoznika. Obelodanjivanje traženih informacija izazvalo bi štetne posljedice po interes Montenegro Airlines-a, koji je pretežniji od interesa javnosti da bude upoznata sa sadržajem predmetnih ugovora iz kog razloga ne postoji preovlađujući javni interes propisan članom 17 Zakona o slobodnom pristupu informacijama

Organ vlasti je odlučio da odbije pristup traženim informacijama radi zaštite trgovinskih i drugih ekonomskih interesa ugovornih strana, u vezi sa poslovnom tajnom na osnovu člana 29 stav 1 tačka 3 i člana 30, a shodno odredbama člana 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama.

Pravna pouka: Protiv ovog Rješenja može se izjaviti žalba Agenciji za zaštitu podataka o ličnosti i pristupu informacijama, preko ovog organa, u roku od 15 dana od dana prijema istog.

Izvršni direktor
Živko Banjević

Rješenje obradila/o:

Montenegro Airlines' decision declaring consulting contracts secret, as it would cause more harmful consequences for the company than the public's interest in obtaining information

MANS filed an appeal against such decision by Montenegro Airlines, and the Agency for FAI rejected it, stating that the substantive law was correctly applied because it referred to a new provision of the Law. The Agency does not take into consideration the statements from the appeals pointing out that Montenegro Airlines did not refer to a special law that prescribes information as trade secret, but rather referred to confidentiality clause, which cannot be the basis for the implementation of the aforementioned legal provision.

38 Article 14 of the Law on Free Access to Information
39 Article 12, Paragraph 1, Item 7 of the Law on Free Access to Information.

Case Study 12: Earnings of the directors

The state-owned company Barska plovidba declared trade secret information on the earnings of its former executive director, which it was obligated to proactively publish on its website.

The company said that the contract with the previous executive director was adopted and implemented as a document that represents a trade secret, and that its public disclosure or publication would violate the business policy of the company.

They state that the harm test established that disclosing of the data would have distorted competition in the market and that the public's interest in knowing the requested information could not be more significant than the evident damage that would have occurred by endangering protected interests.

According to the Law on FAI, all companies that are majority owned by the state [40], such as Barska Plovidba, are obliged to proactively publish numerous information about their business, including a "list of public officials and pay lists for them, as well as list of other incomes related to exercise of public function". [41]

Ugovor o radu sa prethodnim Izvršnim direktorom je usvojen i sproveden kao dokument koji predstavlja poslovnu tajnu, te bi njegovim javnim objavljivanjem ili publikovanjem bila narušena poslovna politika Kompanije. Isto se odnosi i na delikatnu i složenu proceduru pregovaranja sa inostarnim poslovnim partnerima. Objelodanjivanjem i dostavljanjem traženih podataka bila bi ugrožena poslovna politika Kompanije u skladu sa članom 14 tačka 5 Zakona o slobodnom pristupu informacijama te je Barska plovidba utvrdila da pristup traženoj informaciji treba ograničiti i iz razloga navedenih u članu 16 stav 1 pomenutog Zakona.
Na osnovu izloženog, riješeno je kao u dispozitivu Rješenja.

Dostavljeno:
-podnosiocu zahtjeva
-A/a

Obrađivač
Vladimir Marvučić

V. d. Izvršni direktor
Tihomir Mirković

BARSKA PLOVIDBA BAR

Excerpt from the decision of "Barska plovidba" by which a contract with the previous executive director is declared secret because it would violate the business policy of the company

Therefore, "Barska plovidba", according to the law, was obligated to publish the information about its executive director on its website, but they declared it trade secret.

Also, data about the earnings of the former executive director of the company cannot be secret under the Law on Prevention of Corruption, because he is a public official who is obligated to submit a report on income and property. [42]

Only a year after the appeal was filed, in October 2018, the Agency for Personal Data Protection and Free Access to Information annulled the decision of "Barska plovidba". However, seven months later, "Barska plovidba" has not delivered a new decision. MANS initiated the procedure for implementing the Agency's decision, but imprecise legislation allows institutions to avoid the implementation of the law. [43]

40 Article 9, paragraph 1, Item 1 of the Law on Free Access to Information: " **public authority** shall mean a state authority (legislative, executive, judicial, administrative), local self-government authority, local administration authority, institution, company and any other legal person founded or co-founded by the state or in majority ownership of the state or local self-government, legal person mainly financed from public resources, as well as well as a natural person, entrepreneur or legal person having public responsibilities or managing public funds"
41 Article 12, Paragraph 1, Item 9 of the Law on Free Access to Information
42 Data on income and property from the Agency for the Prevention of Corruption website,https://portal.antikorupcija.me:9343/acamPublic/izvestajDetails.htm?parent=pretragaIzvestaja&izvestajId=24079
43 The issue of implementing the Agency's decision will be further discussed in a separate case study that will be published by MANS in the forthcoming period. The essence of the issue is in imprecise legislation in the area of implementation of decisions

3. Practice in Montenegro

3.3. Secret controls of law implementation

Institutions declare documents on control of implementation of the law as trade secrets, which contain information important for detecting corruption and non-compliance with regulations, although the law requires that in such cases there is a prevailing public interest in disclosing of data.

All official reports on the construction of the highway, the largest infrastructure project in the history of the state, were declared trade secret, and the public's interest in obtaining this information was not considered at all.

Data about the control of the construction of the highway in the part affecting the Tara River, protected by international conventions and by the Resolution of the Montenegrin Parliament, were also declared trade secret. The Inspection claims that disclosure of these data would cause greater damage to that institution than to the public's interest in obtaining information about violation of the law.

Central Bank of Montenegro declared data on control of the Prva Bank trade secret, ten years after it was conducted, claiming that this could affect the economic system of the state and the growth of cybercrime.

Public interest in publishing data was not discussed at all, although the state had given multi-million dollar aid to this bank, and parts of the control reports which leaked to the public indicate numerous abuses, including suspicions of laundering of money acquired by narcotics trafficking.

Case Study 13: Reports on the construction of the highway

The Ministry of Sustainable Development and Tourism declared all reports related to the construction of the Bar-Boljare highway, Smokovac Mateševo section, trade secret, because the work of the Commission that drafts these reports was declared trade secret by the Government.

The Ministry referred to the Decision on the appointment of the State Commission for Technical Inspection of Works, which was adopted by the Government, stating that the work of this Commission is considered trade secret.

Statements on the harm tests are reduced to general referring of legal provisions, without explanation which interests would be jeopardized by disclosing information and in what way.

The Ministry did not conduct public interest test, that is, it did not determine whether the public's interest in obtaining information was greater than the interests protected by this institution by hiding data. Although the construction of the highway is the largest infrastructure project in the history of the state, the Ministry did not in any way address the public's interest in disclosing the requested information.

MANS filed an appeal against this decision, but even after more than a month, the Agency for FAI has not reached a decision.

VLADA CRNE GORE
Ministarstvo održivog razvoja i turizma
Direktorat za građevinarstvo
Broj: UP I 117/5-45/2
Podgorica, 25.03.2019.godine

Ministarstvo održivog razvoja i turizma, rješavajući po zahtjevu Mreže za afirmaciju nevladinog sektora – MANS iz Podgorice, za slobodni pristup informacijama, na osnovu člana 30 Zakona o slobodnom pristupu informacijama („Sl. list Crne Gore", br.44/12 i 30/17) i članova 18 i 46 Zakona o upravnom postupku, donosi

R J E Š E NJ E

Odbija se zahtjev Mreže za afirmaciju nevladinog sektora – MANS iz Podgorice, UP I 117/5-45/1 od 11.03.2019.godine, za slobodan pristup informacijama, koji se odnosi na dostavljanje kopije svih Izvještaja koje posjeduje Ministarstvo održivog razvoja i turizma u vezi realizacije projekta autoputa Bar-Boljare, dionica Smokovac-Mateševo.

O b r a z l o ž e nj e

Mreža za afirmaciju nevladinog sektora – MANS iz Podgorice, podnijela je ovom ministarstvu zahtjev, broj UP I 117/5-45/1 od 11.03.2019.godine, za slobodan pristup informacijama, za dostavljanje kopije svih Izvještaja koje posjeduje Ministarstvo održivog razvoja i turizma u vezi realizacije projekta autoputa Bar-Boljare, dionica Smokovac-Mateševo.

Članom 30 Zakona o slobodnom pristupu informacijama, propisano je da o zahtjevu za pristup informaciji ili ponovnu upotrebu informacija, osim u slučaju iz člana 22 ovog zakona, organ vlasti odlučuje rješenjem, kojim dozvoljava pristup traženoj informaciji odnosno ponovnu upotrebu informacija ili njenom dijelu ili zahtjev odbija. Rješenje kojim se odbija zahtjev za pristup informaciji, odnosno ponovnu upotrebu informacija sadrži detaljno obrazloženje razloga zbog kojih se ne dozvoljava pristup traženoj informaciji, odnosno ponovna upotreba informacija.

Postupajući po zahtjevu, ovaj organ je našao da se informacija iz dispozitiva ovog rješenja nalazi u njegovom posjedu, ali je ovo ministarstvo odbilo zahtjev, shodno članu 29 stav 1 tačka 3 citiranog zakona, kojim je propisano da će organ vlasti odbiti zahtjev za pristup informaciji ako postoji razlog iz člana 14 ovog zakona za ograničavanje pristupa traženoj informaciji.

Naime, tehnički pregled radova na izgradnji autoputa Bar-Boljare, prioritetne dionice Smokovac-Uvač-Mateševo, vrši Državna komisija za tehnički pregled u skladu sa Odlukom o imenovanju Državne komisije za tehnički pregled radova na izgradnji autoputa Bar-Boljare, pripritetne dionice Smokovac-Mateševo („Sl.list Crne Gore", br.30/15 i 44/17). U članu 7 Odluke utvrđeno je da se rad Komisije smatra poslovnom tajnom.

Prije odlučivanja o odbijanju zahtjeva Ministarstvo je u skladu sa članom 16 Zakona o slobodnom pristupu informacijama izvršilo "test štetnosti objelodanjivanja informacija" kojim je utvrđeno da bi objelodanjivanje traženih informacija značajno ugrozilo interese iz člana 14 stav 1 tačka 5 Zakona, odnosno interes javnosti da sazna navedenu informaciju ne može biti značajniji od evidentne štete koja bi nastala na interesima koji se štite, ukoliko bi se tražene informacije objelodanile.

Shodno navedenom, odlučeno je kao u dispozitivu ovog rješenja.

Pravna pouka: Protiv ovog rješenja može se izjaviti žalba Savjetu Agencije za zaštitu podataka o ličnosti i pristup informacijama, preko ovog organa u roku od 15 dana od dana prijema istog.

Ovlašćeno lice
za slobodan pristup informacijama
Nevenka Mugoša

Excerpt from the decision of the Administration for Inspection Affairs, declaring information on the control of the construction of the highway secret

3. Practice in Montenegro

Case Study 14: Inspection control of the construction of the highway

The Administration for Inspection Affairs declared trade secret information on the control of the construction of the highway in section that affects the protected Tara River.

The Administration assessed that disclosing inspection data prior to the completion of the project "would not be in accordance with the applicable regulations and laws that designated the project as trade secret."

In their short reasoning for the decision, the Administration stated that if these information were disclosed, the harmful consequences for that institution would occur, "and that disclosing the requested information before the completion of the procedure and taking of legal measures would cause **harmful consequences that are greater than the public interest to know,** in terms of Article 17 Law on Free Access to Information".

In doing so, the Administration does not explain what the consequences would be, to what specific interests, and how they might occur.

At the same time, the Administration did not address the public's interest in obtaining information on the findings of inspections in connection with the construction of the largest project in the history of the state, which obviously has a negative impact on the Tara River.

At the end of last year, MANS published footage showing the devastation of the Tara River basin during the construction of the highway. [44] The river basin is under international protection of UNESCO, and Tara is protected by the Resolution of the Montenegrin Parliament.

Uprava za inspekcijske poslove rješavajući po zahtjevu za slobodan pristup informacijama NVO MANS br.18/124986 od 26.10.2018. godine, na osnovu člana 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama („Sl.list Crne Gore", br.44/12 i 030/17), donosi:

RJEŠENJE

Odbija se zahtjev za slobodan pristup informacijama NVO MANS br. 18/124986 od 26.10.2018. godine kao neosnovan.

Obrazloženje

Dana 26.10.2018. godine NVO Mreža za afirmaciju nevladinog sektora – MANS podnijela je Upravi za inspekcijske poslove zahtjev br. 18/124986 u kojem je tražen pristup:

- Kopijama svih akata koje su inspekcije u okviru Uprave za inspekcijske poslove donijele u vezi sa izgradnjom poddionice 4.4.1 autoputa Bar – Boljare, dionica Smokovac – Uvac –Mateševo, na području KO Jabuka i KO Matševo, Opština Kolašin, a sve po građevinskoj dozvoli br. 1054-431/10 od 23.06.2017. godine

Uprava za inspekcijske poslove je postupajući po zahtjevu našla da njihovo objavljivanje prije završetka projekta ne bi bilo u skladu sa važećim propisima i zakonima kojima je projekat proglašen za poslovnu tajnu.

Uprava za inspekcijske poslove je u smislu člana 16 Zakona o slobodnom pristupu informacijama utvrdila da bi za prvostepeni organ nastupile štetne posledice te da bi prije okončanja postupka i preduzimanja zakonskih mjera objava tražene informacije prouzrokovala štetne posledice koje su veće nego interes javnosti da zna u smislu člana 17 Zakona o slobodnom pristupu informacijama.

Excerpt from the decision of the Administration for Inspection Affairs, declaring information on the control of the construction of the highway secret

Therefore, the public interest in obtaining information on law violations and endangering the Tara River was not considered at all by the Administration for Inspection Affairs. Also, the Administration did not take into consideration the importance of the provision of the Constitution, which guarantees that "everyone shall have the right to receive timely and full information about the status of the environment, to influence the decision-making regarding the issues of importance for the environment, and to a legal protection of these rights". [45] Also, Montenegro ratified the Aarhus Convention which guarantees citizens the right to access information on the environment.

In addition, according to the Law on Inspection Control, inspection control is public [46], which the Administration does not mention in its decision.

MANS filed an appeal against such decision, but the Agency for Personal Data Protection and Free Access to Information has not reached a decision even six months later.

44 Bridges Tara 1 and Tara 2, tunnel Mateševo and Mateševo loop, www.youtube.com/watch?v=MfAwRSCjaQI&feature=youtu.be
www.mans.co.me/zasto-se-i-dalje-kriju-kljucne-informacije-o-izgradnji-autoputa/
45 Article 23, Paragraph 2 of the Constitution of Montenegro, "Official Gazette of Montenegro" no. 1/07 of 25/10/2007.
46 Article 8, Paragraph 1 of the Law on Inspection Control "Official Gazette of Montenegro" no. 52/16 of 09/08/2016.

3. Practice in Montenegro

Case Study 15: A decade-old bank control report

Central Bank of Montenegro (CBCG) declared trade secret data on control of the controversial bank *Prva banka*, ten years after it was conducted, arguing that this could affect the country's economic system and influence the growth of cyber crime.

CBCG concluded that it had two legal basis for keeping reports on the control of Prva Banka in 2008 and 2009 hidden from the public. [47]

First, they state that the data on individual balance of deposits and turnover on individual accounts of legal entities and natural persons opened in the bank are banking secret i.e. trade secret, in accordance with the Law on Banks. [48] They further state that the information was declared confidential in order to protect Montenegro's economic policy.

In addition, CBCG claims that by disclosing the Reports from ten years ago, vulnerable areas of banks would be revealed, which would allow the competition to use that to their advantage and take on a dominant position in the banking market, which would violate competitiveness and potentially establish the monopolistic position of some of the banks.

Statements about the harm test are reduced to vague statement that it was conducted and it showed that there are numerous reasons that these data are kept trade secret, among other things, due to possibility of committing criminal offenses in the field of “cyber crime“ if the bank account numbers were disclosed.

konačnom o stanju na računu, izvršenim uplatama, isplatama, kreditnim zaduženjima ali i stanju njihovih depozita sa navedenim iznosima za sve prethodno. Dakle, nesumljivo je da se radi o krajnje osjetljivom dokumentu koji je upravo iz ovih razloga Zakonom o bankama i označen kao povjerljiv. Pristup ovom izvještaju imaju samo lica koja vrše kontrolu, jer ga po prirodi posla sačinjavaju, i njihov neposredni rukovodilac, dok pravo uvida u ovaj dokument nemaju čak ni ostali zaposleni u Centralnoj banci, a još manje neko ko je izvan ove institucije.

- Prema Zakonu o bankama član 84, podaci o vlasnicima i brojevima računa otvorenih u banci kao i podaci o pojedinačnom stanju depozita i prometu na pojedinačnim računima pravnih i fizičkih lica otvorenih u banci čine bankarsku odnosno poslovnu tajnu. Dalja obaveza čuvanja tajnih podataka je opisana u članu 85 stav 1 istog zakona, prema kom lica koja u obavljanju posla sa bankom ili za banku dođu u posjed informacija i podataka koji su ovim zakonom utvrđeni kao bankarska tajna, dužni su da čuvaju te podatke i informacije i ne smiju ih upotrebljavati u svoju ličnu korist, niti učiniti dostupnim drugim licima.

Obavezu čuvanja tajnosti informacija i podataka propisuje i Zakon o Centralnoj banci Crne Gore ("Sl. list CG", br. 40/10, 46/10, 6/13 i 70/17) u članu 84 stav 1 i 2 „(...) zaposleni u Centralnoj banci dužni su da čuvaju tajnost informacija i podataka koji, u skladu sa zakonom ili drugim aktom, predstavljaju tajnu. Obaveza čuvanja tajne (...) traje i nakon prestanka (...) radnog odnosa u Centralnoj banci."

- Dostavljanjem ovih podataka prekršile bi se i ustavne norme. Ustav Crne Gore („Sl. list CG“ br. 01/07) u članu 43 propisuje da je svakom zajemčena zaštita podataka o ličnosti i da je zabranjena njihova upotreba van namjene za koju su prikupljeni.

Shodno Zakonu o slobodnom pristupu informacijama prvostepeni organ ima čak dva osnova za odbijanje predmetnih zahtjeva, čl.14 st.1 tač.2 i 6, jer je ograničenje pristupa informaciji u interesu ekonomske politike Crne Gore u skladu sa propisima kojima se uređuje tajnost podataka, označeni stepenom tajnosti, odnosno jer je tražena informacija poslovna tajna u skladu sa zakonom.

Da se izvještaji o kontroli banaka ne daju na uvid trećim licima je svakako interes ekonomske politike Crne Gore. Ukoliko bi se Izvještaji o kontroli javno objavili, imajući u vidu sadržaj, onda bi se otkrile ranjive zone banaka, što bi dalo mogućnost konkurentskim bankama da to iskoriste i zauzmu na bankarskom tržištu dominantan položaj, čime bi se narušila i konkurentnost i potencijalno uspostavio monopolistički položaj neke od banaka. Ovo bi svakako bilo od neposrednog uticaja i na ekonomski sistem Crne Gore, jer je bankarski sistem ključni segment svake ekonomije.

Da je u skladu sa propisima kojima se uređuje tajnost podataka ovaj izvještaj dobio status povjerljivog utvrđuje se nizom akata. Prvostepeni organ ima Pravilnik o tajnosti (br. 0101-

Excerpt from the CBCG's decision explaining that publishing (disclosing) a decade-old report on the control of the controversial bank could jeopardize economic system of the state

At the same time, the Central Bank did not consider making available the requested reports after they had deleted personal data from them, which is one of the possibilities prescribed by the Law on FAI. [49]

Prva banka is the only bank that once received state aid in the amount of 42 million, and its largest owner is the brother of the then Prime Minister, Milo Đukanović, who also did business with the bank in the controversial period. According to numerous documents published by investigative journalists, the control of Prva Banka revealed numerous violations, including the laundering of money acquired by narcotics smuggling. [50]

In spite of all, CBCG did not conduct public interest test, and in no way did it take into consideration the public's interest in publishing the data.

47 Article 14, Paragraph 1, Items 2 and 6 of the Law on Free Access to Information
48 Article 84 of the Law on Banks
49 Article 24 Paragraph 1 of the Law on Free Access to Information prescribes "if access is restricted to a part of information, in accordance with Article 14 of this Law, the authority shall provide access to information by submitting a copy thereof to the applicant after deleting the part of the information to which access is restricted"
50 OCCRP: First Bank, First Family https://www.reportingproject.net/firstbank/en/

3.4 Deleting of trade secrets

In some cases, the institutions formally allow access to information, but delete data from their documents, stating that they are trade secrets. Specific examples show that in this way important data are hidden from the public without adequately conducted harm and public interest tests.

A concrete example shows that the Central Bank (CBCG) censored statistical data on the inflow of foreign investments and capital outflow from the country, arguing that in case of disclosing of data from some countries, individual companies could be identified. There is no reasoning why disclosing of this information could jeopardize companies, in whose financial statements, which are publicly available, these data are listed, nevertheless, the Central Bank states that the protection of its own reputation as (is) the only detrimental effect of disclosing of data.

In second example,Montenegrin Electric Enterprise AD Niksic (EPCG) formally published a contract on import of electricity from a private company, but it deleted basic information from it, such as price and quantity of electricity purchased. They are explaining that disclosing of these data could distort trade and other economic interests of these companies, although ten years have passed since the contract was concluded, as well as that there is no public interest in knowing at what prices the state energy company imported electricity.

Case Study 16: Foreign direct investments

The Central Bank censored statistical data on the inflow of foreign investments and capital outflow from the country, because if the data from some countries were disclosed, individual companies could be identified.

CBCG allowed MANS access to information on inflows and outflows of foreign investments during 2017 and 2018, and at the same time decided to delete the information from the submitted response which constitutes trade secret. [51]

This time, they refer to the Law on Official Statistics and System of Official Statistics, stating that the data collected, processed and preserved for the purposes of official statistics are considered confidential if it is possible to identify, directly or indirectly, the reporting units, based on those data [52], and that individual data are confidential and they constitute an official secret. They also state that the obligation to keep the confidentiality of information and data is prescribed by the Law on the Central Bank of Montenegro, and that they are marked as trade secret in accordance with the Rulebook of that institution.

The Central Bank claims that it conducted a harm test that showed that disclosing of protected data would lead to the identification of reporting units i.e. companies, which would reveal individual data. They state that disclosing of data would undermine the credibility and reputation of the Central Bank, and there is no reasoning that any other interest might be violated.

At the same time, CBCG concludes that it determined that the public has no interest in obtaining this information, because they cannot point to corruption, violation of the law or any other justified interest prescribed by the Law on FAI.

In its response, the Central Bank deleted part of the data stating that they were confidential data relating to a maximum of three companies.

odluke; nezakonito dobijanje ili trošenje sredstava iz javnih prihoda; ugrožavanje javne bezbjednosti; ugrožavanje života; ugrožavanje javnog zdravlja i ugrožavanje životne sredine, ukazujemo da individualni podaci o izvještajnim jedinicama, ne sadrže ništa od prethodno navedenog, pa time ne postoji preovlađujući javni interes. Upravo je ovo dio rezultata provedenog testa štetnosti.

Test štetnosti je takođe pokazao da postoje brojni razlozi da se ovi podaci čuvaju kao poslovna tajna, kako je na kraju i zakon propisao. Naime, objelodanjivanje podataka koji su prikupljeni, obrađeni i sačuvani za potrebe zvanične statistike dovelo bi do identifikovanja izvještajnih jedinica, čime bi se otkrili individulani podaci (ime, naziv, adresa, identifikacioni broj izvještajnih jedinica). Na taj način bi se narušila kredibilnost i reputacija Centralne banke kao proizvođača zvanične statistike, koja je dužna da preduzme sve mjere administrativne, tehničke ili organizacione prirode u cilju zaštite povjerljivih podataka od neovlašćenog pristupa podacima, njihovog otkrivanja ili upotrebe. Osim toga, za ukazati je da Centralna banka kao proizvođač zvanične statistike ne smije koristiti podatke i informacije prikupljene u okviru zvanične statistike u svrhu utrđivanja prava i obaveza za izvještajnu jedinicu na koju se ti podaci i informacije odnose.

Prvostepeni organ je u smislu člana 24 Zakona o slobodnom pristupu informacijama omogućio pristup informaciji dostavljanjem kopija nakon brisanja dijela informacije kojem je pristup ograničen.

Budući da dokumentacija kojoj se pristup omogućava ima ukupno 5 strana, odluka o troškovima postupka na ime kopiranja, zasniva se na čl.33 st.2 Zakona o slobodnom pristupu informacijama i Uredbi o naknadi troškova u postupku za pristup informacijama („Sl. list CG“ br.66/16).

Na osnovu izloženog odlučeno je kao u izreci.

VICEGUVERNER,

dr Nikola Fabris

Excerpt from the decision of CBCG which establishes that disclosing of some statistical data on the inflow and outflow of capital in the state would violate the credibility and reputation of the Central Bank

51 In terms of Article 24 of the Law on Free Access to Information
52 Article 54 of the Law on Official Statistics and System of Official Statistics

3. Practice in Montenegro

Ukupan priliv stranih direktnih investicija u Crnoj Gori po zemljama u periodu 01.01. - 31.08.2018. godine, u 000 eura*

Zemlja**	Ukupno	Priliv po osnovu ulaganja nerezidenata u Crnu Goru			Priliv po osnovu ulaganja rezidenata u inostranstvo		
		Vlasnička ulaganja		*Dužnička ulaganja*	*Vlasnička ulaganja*		*Dužnička ulaganja*
		Investicije u domaća preduzeća i banke	Prodaja nepokretnosti u Crnoj Gori	Interkompanijski dug	Smanjenje kapitala u stranim bankama i preduzećima	Prodaja nepokretnosti u inostranstvu	Povraćaj domaćeg kapitala koji ne povećava osnovni kapital (interkompanijski dug)
	1(2+3+4+5+6+7)	2	3	4	5	6	7
Albanija	330.23	C***	C	21.01	0.00	0.00	0.00
Australija	915.76	C	871.67	C	0.00	0.00	0.00
Austrija	7,253.37	C	5,465.92	C	0.00	0.00	0.00
Belgija	15,749.80	C	1,430.99	C	0.00	C	0.00
Bjelorusija	368.02	0.00	76.30	291.72	0.00	0.00	0.00
Bosna i Hercegovina	7,148.25	C	2,326.76	3,173.03	0.00	C	C
Češka	3,120.12	C	704.93	C	0.00	0.00	0.00
Danska	5,593.09	C	C	C	0.00	0.00	0.00
Djevičanska Ostrva(GBR)	16,050.48	C	C	13,685.45	0.00	0.00	0.00
Estonija	528.66	0.00	C	C	0.00	0.00	0.00
Francuska	3,101.39	105.75	2,057.02	938.62	0.00	0.00	0.00
Grčka	431.71	C	0.00	C	0.00	0.00	C
Gruzija	1,002.50	0.00	C	C	0.00	0.00	0.00
Holandija	7,282.47	C	1,415.73	828.16	0.00	0.00	C
Hong Kong	2,959.40	C	156.90	C	0.00	0.00	0.00
Hrvatska	1,993.52	339.68	954.60	654.80	C	C	C
Italija	77,495.34	32,127.22	591.96	44,776.16	0.00	0.00	0.00
Izrael	346.53	C	C	60.11	0.00	0.00	0.00
Kanada	1,946.76	C	847.65	C	0.00	0.00	0.00
Katar	1,212.13	C	158.18	C	0.00	0.00	0.00
Kipar	8,856.43	6,622.44	C	1,930.85	0.00	C	0.00
Kosovo	2,463.54	696.55	1,363.92	C	0.00	C	0.00
Letonija	3,712.15	C	C	2,991.83	0.00	0.00	0.00
Luksemburg	6,769.11	C	561.05	C	0.00	C	0.00
Mađarska	66,147.87	C	C	4,616.70	0.00	0.00	0.00
Malta	19,558.94	10,121.42	988.48	8,449.04	0.00	0.00	0.00
Monako	1,999.75	0.00	1,999.75	0.00	0.00	0.00	0.00
Njemačka	8,911.49	C	4,541.25	3,688.61	0.00	0.00	C
Norveška	5,254.57	0.00	413.32	C	C	0.00	0.00
Panama	7,490.13	C	0.00	C	0.00	0.00	0.00
Poljska	922.37	C	514.94	C	0.00	0.00	0.00
Ruska Federacija	39,886.75	777.93	23,380.65	15,728.17	0.00	0.00	0.00
SAD	5,528.23	C	5,070.26	300.50	0.00	C	0.00
Saudijska Arabija	375.57	0.00	C	C	0.00	0.00	0.00
Singapur	350.30	C	C	0.00	0.00	0.00	0.00
Slovenija	4,183.68	C	2,074.69	1,815.99	C	0.00	C
Španija	5,664.60	C	C	5,608.42	0.00	0.00	0.00
Srbija	21,221.14	2,831.40	10,132.63	7,759.16	C	C	C
Švajcarska	28,678.25	258.12	8,859.85	19,560.28	0.00	0.00	0.00
Švedska	7,967.00	1,643.02	5,908.44	415.54	0.00	0.00	0.00
Turska	39,300.12	11,576.02	17,100.94	C	0.00	0.00	C
Ujedinjeni Arapski Emirati	26,933.78	9,382.02	3,239.77	9,191.99	C	0.00	C
Ukrajina	2,771.64	C	C	2,013.62	0.00	0.00	0.00
Velika Britanija	6,584.69	C	4,112.17	1,640.47	0.00	C	C
Ostale zemlje	*79,287.76*	*73,804.25*	*2,331.65*	*2,876.95*	*274.91*	*0.00*	*0.00*
U k u p n o	**545,745.38**	**217,258.91**	**117,139.54**	**198,137.75**	**5,807.13**	**614.54**	**6,787.51**

Izvor: CBCG
**Preliminarni podaci*
***Izvor podataka je platni promet sa inostranstvom (ITRS) i podaci su dati prema zemljama plaćanja.*
**** C - povjerljivi podaci koji se odnose na najviše tri kompanije*

Excerpt from the censored response of the Central Bank on the inflow of foreign direct investments in 2018

Provisions of the Law on the Central Bank only define in general terms that the employees of this institutions are obligated to keep data that have been declared secret. Referring to the internal Rulebook, as it has been mentioned several times, is not sufficient legal basis for the data to be declared trade secret.

The Law on Statistics, which the Central Bank refers to, states that classified information can only relate to natural persons or legal entities, which are collected for statistical purposes. However, specific information about companies are contained in their financial statements published by the Tax Administration. [53] Also, within the framework of the harm test, CBCG did not say that any interest of a company would be compromised by disclosure of information.

On the contrary, the only consequence of disclosing the information stated by the Central Bank is protection of its own reputation, which does not represent a legitimate interest whose protection allows restricting access to information or part of the information.

Finally, in addition to failing to provide a valid basis for this, deleting of data was done illegally by placing letters and other characters whose explanation was given at the bottom of each table, which is not prescribed by the law. [54]

CBCG did not explain why they decided to censor the data relating to three companies, and this because in the case of two companies, the information would be given in aggregate form, so it would not be possible to determine precisely to which it relates.

53 Financial statements of the companies are available on the website of the Tax Administration, https://eprijava.tax.gov.me/TaxisPortal
54 Article 24 paragraph 2 of the Law on Free Access to Information prescribes that in the case referred in paragraph 1 of this Article, the part of the information to which the restriction applies shall be marked with a note "information deleted" and a notification of the extent to which the information was deleted (lines, paragraphs, and pages)

3. Practice in Montenegro

Case Study 17: Import of the electricity

Montenegrin Electric Enterprise AD Niksic (EPCG) formally published an agreement on importing electricity from a private company, but deleted basic information from it, such as price and quantity of electricity purchased.

EPCG partially adopted a request for submitting a copy of the electricity supply contract with EFT company from 2009, but it decided to previously delete data on the price and quantity of electricity, the amount of the bank guarantee, as well as the amount of the interest rate.

As a reason for such behaviour, it is stated that the requested information contains commercially sensitive data whose disclosing could result in unfavourable position for the contracting parties, which would lead to a distortion of their trade and other economic interests.

They also state that this is done in the interest of protecting the privacy from disclosing of information provided by the law, which regulate the protection of personal data, but does not indicate what kind of information it is.

They state that the harm test was performed, and that there is no public interest for this information to be published.

EPCG did not refer to any law when determining that the requested information was secret. Instead, they explained that information about the price and quantity of electricity purchased from EFT is a trade secret, because eight years after the contract was concluded, its disclosing could endanger the economic interests of both EPCG and EFT.

Apart from that, EFT was subject to several investigations due to suspicions of corruption in electricity trading [55], but the state-owned EPCG did not consider this when assessing the public interest in disclosing information.

The Agency for Personal Data Protection and Free Access to Information accepted the appeal against this decision after 20 months, substituted appealed decision with its own and allowed access to information in its entirety, concluding that there is no basis for the data to be deleted.

Elektroprivreda Crne Gore AD Nikšić je svoju odluku zasnovala na sljedećim činjenicama:

Članom 14 Zakona o slobodnom pristupu informacijama („Sl.List CG br.44/12") utvrđeno je da organ vlasti može ograničiti pristup informaciji ili dijelu informacije, izmedju ostalog, ako je to u interesu zaštite privatnosti od objelodanjivanja podataka predviđenih zakonom kojim se uređuje zaštita podataka o ličnosti, kao i radi zaštite trgovinskih i drugih ekonomskih intresa od objelodanjivanja podataka koji se odnose na zaštitu konkurencije i poslovnu tajnu.

Ovaj organ je u skladu sa članom 16 Zakona o slobodnom pristupu informacijama, sproveo test štetnosti objelodanjivanja tražene informacije i utvrdio da dio predmetne informacije, koji se odnosi na cijenu i količinu električne energije, iznos bankarske garancije, iznosu kamatne stope, sadrži komercijalno osjetljive podatke, čijim bi objavljivanjem ugovorne strane mogle biti dovedene u nepovoljan položaj, što bi dovelo do narušavanja trgovinskih i drugih ekonomskih interesa ugovornih strana, kao i da ne postoji javni interes zbog kojeg bi ova informacija trebala biti objavljena.

U skladu sa svim naprijed navedenim, Elektroprivreda Crne Gore AD Nikšić je utvrdila da je shodno članu 14 Zakona o slobodnom pristupu informacijama („Sl.List CG br.44/12"), potrebno ograničiti pristup traženoj informaciji u dijelu koji se odnosi na podatke o cijeni, količini električne energije, iznosu bankarske garancije.

U smislu prethodnog stava, a u skladu sa članom 24 Zakona o slobodnom pristupu informacijama („Sl.List CG br.44/12"), pristup dijelu informacije iz I tačke dispozitiva biće ograničen brisanjem podataka iz tačke II dispozitiva ovog Rješenja, na način da nije oštećen izvornik informacije, i to:

- u članu 3 brišu se sljedeći podaci: iznos ukupne količine električne energije , cijene kao tabelarni prikaz isporuke električne energije po mjesecima i tarifama;
- u članu 8 brišu se sljedeći podaci: iznos kamatne stope
- u članu 10 brišu se sljedeći podaci:iznos bankarske garancije.

Članom 30 stav 2 Zakona o slobodnom pristupu informacijama propisano je da se Rješenjem kojim se dozvoljava pristup informacijama rješava između ostalog, i o troškovima postupka, dok je članom 33 u stavu 2 utvrđeno da podnosilac zahtjeva snosi troškove postupka koji se odnose na stvarne troškove radi kopiranja i dostavljanje informacije, a stavom 5 istog člana da se troškovi plaćaju prije omogućavanja pristupa informaciji, u skladu sa čime je riješeno kao u tačkama III i IV dispozitiva Rješenja.

Visina troškova je određena na osnovu Uredbe o naknadi troškova za pristup informacijama („Sl.List CG br.2/07")

Imajući u vidu sve navedeno odlučeno je kao u dispozitivu Rješenja.

PRAVNA POUKA: Protiv ovog Rješenja, podnosilac zahtjeva može izjaviti žalbu Agenciji za zaštitu ličnih podataka i slobodan pristup informacijama u roku od 15 dana od dana dostavljanja Rješenja.

IZVRŠNI DIREKTOR
Stefano Pastori

Excerpt from the EPCG decision by which deleting of data was determined

However, EPCG did not deliver the requested information, instead they reached a new decision which was same in every aspect, only referring to another legal provision. Neither in this decision, EPCG did not specify which law was the basis for concluding that the requested data represent a trade secret, nor did it explain which protected interest is thus protected and from what consequences.

Four months after filing an appeal against this decision, the Agency has not yet reached a decision, despite the legal deadline of 15 days.

55 Center for Investigative Reporting, British, American and Balkan authorities look at EFT https://www.reportingproject.net/powerbrokers/sub_country04.html

3.5. Decisions on appeals and lawsuits

The Agency for Personal Data Protection and Free Access to Information is selective and constantly violates the legal deadline for deciding on appeals [56], and in some cases acts after a few months, while in others after a few years.

The Agency directs the reporting entities to apply the new provision and allows them to declare information trade secrets, regardless of the public interest that they be published. In such cases, the Agency does not evaluate whether the data had been declared secret based on the law, how the harm test had been carried out, and whether there was a greater public interest or damage that may arise from disclosure of information.

The Agency also allows retroactive application of the new legal provision in proceedings initiated before the amendments to the Law.

The Administrative and Supreme Court concluded that institutions are not obligated to conduct a harm test when information was declared trade secret under a special law. This means that the issue of the right to access information is regulated by other laws which, according to courts, have a greater legal force than the Law on Free Access to Information.

Case Study 18: Trade secrets without control

This case study shows that the Agency for FAI first instructs the authorities to hide information based on the new provision, then in repeated procedures does not at all take into consideration the legality of declaring data trade secrets.

Montenegrin Electric Enterprise AD Niksic (EPCG) declared secret consortium reports that estimated the value of shares of Coal Mine Pljevlja. Based on their assessment, most shares of Coal Mine were sold to EPCG by Aco Đukanović, brother of the President of the state, and because of that, minority shareholders initiated legal proceedings before the court [57].

EPCG states that it refused access to information since the harm test established that these were "commercially sensitive data in technical, legal and financial terms ...". According to the state-owned company, by disclosing the information, "the other contracting party could have been disadvantaged and damage would be cause to it."

In addition, they concluded that there was no public interest because of which the information should be published, without any reasoning.

The Agency for FAI annulled this decision and concluded that the harm test did not prove that disclosing of the requested information would result in harmful consequences.

However, at the same time, the Agency instructed the EPCG to implement the new legal provision on trade secret in the repeated procedure.

EPCG did so, and in the second decision it again denied access to information and declared them trade secrets, but this time based on the new law provision.

In the reasoning of the decision, EPCG gives an identical description of the harm and public interest test, like they did in the first decision that the Agency annulled.

položaj. Savjet Agencije je utvrdio da testom štetnosti koji je sproveo prvostepeni organ u skladu sa članom 16 Zakona o slobodnom pristupu informacijama, nije dokazano da bi objelodanjivanjem traženih informacija nastale štetne posledice za drugu ugovornu stranu čime bi mogla biti dovedena u nepovoljan položaj. Prvostepeni organ je obavezi u odnosu na tražene informacije u ponovnom postupku pozvati se na član 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama kojim je propisano: organ vlasti može ograničiti pristup informaciji ili dijelu informacije, ako je to u interesu: 6)ako je informacija poslovna ili poreska tajna u skladu sa zakonom.Kako je tražena informacija u posjedu Elektroprivrede Crne Gore Savjet Agencije je utvrdio da je prvostepeni organ povrijedio odredbu člana 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama te je prvostepeni organ dužan u ponovnom postupku u roku od 15 dana od prijema rješenja na osnovu pravilno utvrđenog činjeničnog stanja pravilno primjeniti odrebu člana 14 stav 1 tačka 6 i član 16 Zakona o slobodnom pristupu informacijama, te da je žalba osnovana, pa ista usvojena. Na osnovu člana 126 stav 7 Zakona o upravnom postupku je poništeno prvostepeno rješenje, a predmet se zbog prirode upravne stvari dostavlja na ponovni postupak prvostepenom organu.

AGENCIJA ZA ZAŠTITU LIČNIH PODATAKA I SLOBODAN PRISTUP INFORMACIJAMA, adresa: Bulevar Svetog Petra Cetinjskog br. 147

Excerpt from the Agency's decision stating that the harm test did not prove that disclosing of the information would result in adverse consequences, and instructs EPCG to apply the new provision on trade secret

56 The Agency shall make a decision upon the complaint against a decision on the request for access to information and to deliver it to the complainant within 15 working days as of the day on which the complaint is submitted. Article 38 paragraph 1 of the Law on Free Access to Information

57 Daily "Vijesti": Aco Đukanović I A2A će morati da čekaju milione, https://www.vijesti.me/vijesti/ekonomija/aco-dukanovic-i-a2a-ce-morati-da-cekaju-milione

3. Practice in Montenegro

23 -03- 2018

epcg

ELEKTROPRIVREDA CRNE GORE AD NIKŠIĆ
IZVRŠNI DIREKTOR
Broj: 10-00- 6209/3
Nikšić, 21. 03. 2018 godine.

Na osnovu člana 30 Zakona o slobodnom pristupu informacijama („Sl.list CG " br.44/12 i 30/17), člana 18 Zakona o upravnom postupku („S.list CG" br. 56/14, 20/15, 40/16 i 37/17), u vezi sa članom 62 Statuta Elektroprivrede Crne Gore AD Nikšić, a shodno Vodiču za pristup informacija u posjedu Elektroprivrede Crne Gore AD Nikšić br.10-00-56237 od 25.09.2014.godine, postupajući po Zahtjevu Mreže za afirmaciju nevladinog sektora - MANS br.18/118157 od 05.02.2018.godine, **d o n o s i m**

RJEŠENJE

Odbija se Zahtjev za pristup informaciji podnijet od strane Mreže za afirmaciju nevladinog sektora - MANS br. 18/118157 od 05.02.2018. godine.

Obrazloženje

Mreža za afirmaciju nevladinog sektora - MANS obratio se Elektroprivredi Crne Gore AD Nikšić Zahtjevom br. 18/118157 od 05.02.2018.godine. Predmetnim zahtjevom Mreža za afirmaciju nevladinog sektora - MANS traži od EPCG dostavljanje kopije:

"svih izvještaja koje je Konzorcijum " Deloitte MVP OAD " dostavio Elektroprivredi Crne Gore AD Nikšić u vezi Ugovora o pružanju usluga (pravne i finansijske usluge) a koji je zaključen dana 13.maja 2016.godine."

Rješavajući po predmetnom zahtjevu za slobodan pristup informacijama, ovaj organ je sproveo upravni postupak, utvrdio sve odlučne činjenice i okolnosti koje su od značaja za odlučivanje.

Članom 14 Zakona o slobodnom pristupu informacijama („Sl.List CG br.44/12 i 30/17") utvrđeno je da organ vlasti može ograničiti pristup informaciji ili dijelu informacije, između ostalog, ako je to u interesu zaštite trgovinskih i drugih ekonomskih interesa od objelodanjivanja podataka koji se odnose na zaštitu konkurencije i poslovnu tajnu.

Ovaj organ je u skladu sa članom 16 Zakona o slobodnom pristupu informacijama, sproveo test štetnosti objelodanjivanja tražene informacije i utvrdio da se predmetne informacije odnose na podatke koji su komercijalno osjetljivi, u tehničkom, pravnom i finansijskom smislu u skladu sa članom 14 Zakona o slobodnom pristupu informacijama, čijim bi objavljivanjem druga ugovorna strana mogla biti dovedena u nepovoljan položaj i došlo bi do nanošenja štete istoj, a i ne postoji javni interes zbog kojeg bi ove informacije trebale biti objavljene. Takođe, za dostavljanje tražene informacije potrebna je prethodna saglasnost druge ugovorne strana, a koju saglasnost EPCG nije dobila.

Imajući u vidu sve navedeno odlučeno je kao u dispozitivu Rješenja.

First decision of EPCG declaring the information secret with the harm test for which the Agency established that it failed to prove adverse effects

epcg

ELEKTROPRIVREDA CRNE GORE AD NIKŠIĆ
IZVRŠNI DIREKTOR
Broj: 10-00- 6209/10
Nikšić, 06.06. 2018 godine.

Na osnovu člana 30 Zakona o slobodnom pristupu informacijama („Sl.list CG" br.44/12 i 30/17), člana 62 Statuta Elektroprivrede Crne Gore AD Nikšić,a shodno Vodiču za pristup informacija u posjedu Elektroprivrede Crne Gore AD Nikšić br.10-00-56237 od 25.09.2014.godine, postupajući po Rješenju Agencije za zaštitu ličnih podataka i slobodan pristup informacijama br. UP II 07-30-1834-2/18 od 29.05.2018. godine. godine, a u vezi sa zahtjevom Mreže za afirmaciju nevladinog sektora -MANS broj 18/118157 od 05.02.2018. godine, **d o n o s i m**

RJEŠENJE

Odbija se Zahtjev za pristup informaciji podnijet od strane Mreže za afirmaciju nevladinog sektora - MANS br. 18/118157 od 05.02.2018. godine.

Obrazloženje

Mreža za afirmaciju nevladinog sektora - MANS obratio se Elektroprivredi Crne Gore AD Nikšić Zahtjevom br. 18/118157 od 05.02.2018.godine. Predmetnim zahtjevom Mreža za afirmaciju nevladinog sektora - MANS traži od EPCG dostavljanje kopije:

"svih izvještaja koje je Konzorcijum " Deloitte MVP OAD " dostavio Elektroprivredi Crne Gore AD Nikšić u vezi Ugovora o pružanju usluga (pravne i finansijske usluge) a koji je zaključen dana 13.maja 2016.godine."

Rješavajući po predmetnom zahtjevu za pristup informaciji, Elektroprivreda Crne Gore AD Nikšić sprovela je upravni postupak i utvrdila sve odlučne činjenice i okolnosti koje su od značaja za odlučivanje.

Članom 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama („Sl.List CG br.44/12 i 30/17") utvrđeno je da organ vlasti može ograničiti pristup informaciji ili dijelu informacije, ako je informacija poslovna ili poreska tajna u skladu sa zakonom.

Ovaj organ je u skladu sa članom 16 Zakona o slobodnom pristupu informacijama, sproveo test štetnosti objelodanjivanja tražene informacije i utvrdio da se predmetne informacije odnose na podatke koji su komercijalno osjetljivi, u tehničkom, pravnom i i došlo bi do nanošenja štete istoj, a i ne postoji javni interes zbog kojeg bi ove informacije trebale biti objavljene. Takođe, za dostavljanje tražene informacije potrebna je prethodna saglasnost druge ugovorne strana, a koju saglasnost EPCG nije dobila.

Kako je članom 29 stav 1 tačka 3 Zakona o slobodnom pristupu informacijama („Sl.List CG br.44/12 i 30/17") predviđeno da će organ vlasti odbiti zahtjev za pristup informaciji, ako postoji razlog iz člana 14 istog zakona za ograničavanje pristupa traženoj informaciji,to je na ovaj način prvostepeni organ i postupio u konkretnoj upravno pravnoj stvari.

Imajući u vidu sve navedeno kao i činjenicu da dokumentacija tražena predmetnim zahtjevom predstavlja akt privrednog društva koji shodno Zakonu o slobodnom preistupu informacijama je poslovna tajna i koji ne sadrži podatke, za koje, u smislu člana 17 stav 1 Zakona o slobodnom pristupu informacijama, postoji preovlađujući interes za objelodanjivanjem tražene informacije.

Imajući u vidu sve navedeno odlučeno je kao u dispozitivu Rješenja.

Second decision of EPCG, issued after the Agency's decision on appeal with an identical harm test that the Agency for FAI did not take into consideration

The Agency for FAI rejected the appeal as unfounded and concluded that EPCG lawfully refused access to information because it was a trade secret.

(Il)legal harm test

The Agency concluded that EPCG conducted a harm test in accordance with the provisions of the law.

For an identical description of the harm test, which is stated in the first EPCG decision as well, the Agency established that:

"The Agency Council found that the harm test, which was conducted by the first instance authority in accordance with the Article 16 of the Law on Free Access to Information did not prove that the disclosure of the requested information would result in adverse consequences for the other contracting party, which could place it at disadvantage."

Legal basis is not determined

In its decision, EPCG does not refer to the law that prescribes that the requested information is a trade secret [58], but states that the prior consent of the other contracting party, which it did not obtain, is required for delivering information.

The Agency does not deal with determining the legal basis for declaring the information secret, but only repeats the statements made by EPCG.

Public interest not considered

Vague statement that there is no public interest is acceptable for the Agency, without reasoning and the assessment of the importance of the public interest that the data be published compared to the protected interest.

Nakon razmatranja spisa predmeta, žalbenih navoda i odgovora na žalbu Savjet Agencije nalazi da je žalba neosnovana.

Član 126 stav 4 Zakona o opštem upravnom postupku propisuje da će drugostepeni organ odbiti žalbu kad utvrdi da je prvostepeni postupak pravilno sproveden i da je rješenje pravilno i na zakonu zasnovano, a žalba neosnovana. Savjet Agencije, ispitujući zakonitost osporenog rješenja je utvrdio da je prvostepeni organ pravilno primjenio materijalno pravo kada je ograničio pristup informacijama pozivajući se na odredbu člana 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama jer je propisano da organ vlasti može ograničiti pristup informaciji ili dijelu informacije,: ako je informacija poslovna ili poreska tajna u skladu sa zakonom. Elektroprivreda Crne Gore AD Nikšić je sprovela test štetnosti objavljivanja ove informacije, u skladu sa odredbama člana 16 stav 1 Zakona o slobodnom pristupu i utvrdila da dokumetacija tražena predmetnim zahtjevom sadrži komercijalno osjetljive podatkeu tehničkom, pravnom i finansijskom smislu u skladu sa članom 14 Zakona o slobodnom pristupu informacijama, čijim bi objavljivanjem druga ugovorna strana mogla biti dovedena u nepovoljan položaj i došlo bi do nanošenja štete istoj, a i ne postoji javni interes zbog kojeg bi ove informacije trebale biti objavljene. Prvostepeni organ navodi da za dostavljanje tražene informacije potrebna je prethodna saglasnost druge ugovorne strana, a koju saglasnost EPCG nije dobila. Kako je članom 29 stav 1 tačka 3 Zakona o slobodnom pristupu informacijama („Sl.List CG br.44/12 i 30/17") predviđeno da će organ vlasti odbiti zahtjev za pristup informaciji, ako postoji razlog iz člana 14 istog zakona za ograničavanje pristupa traženoj informaciji, to je na ovaj način prvostepeni organ i postupio u konkretnoj upravno pravnoj stvari. Imajući u vidu sve navedeno kao i činjenicu da dokumentacija tražena predmetnim zahtjevom predstavlja akt privrednog društva koji shodno Zakonu o slobodnom preistupu informacijama je poslovna tajna i koji ne sadrži podatke, za koje, u smislu člana 17 stav 1 Zakona o slobodnom pristupu informacijama, postoji preovlađujući interes za objelodanjivanjem tražene informacije.Savjet Agencije nalazi u postupku preispitivanja zakonitosti osporenog rješenja da istim nijesu povrijeđene odredbe Zakona o upravnom postupku niti odredbe Zakona o slobodnom pristupu informacijama na štetu podnosica žalbe.

Savjet Agencije je cijenio i ostale navode iz žalbe, pa je našao da nijesu od uticaja za drugačije rješavanje u ovoj pravnoj stvari.

Sa iznjetih razloga, shodno članu 38 Zakona o slobodnom pristupu informacijama i člana 126 stav 4 Zakona o upravnom postupku, odlučeno je kao u izreci.

Pravna pouka: Protiv ovog Rješenja može se pokrenuti Upravni spor u roku od 20 dana od dana prijema.

SAVJET AGENCIJE:

Predsjednik, Muhamed Gjokaj

Excerpt from the Agency's decision rejecting MANS's appeal to EPCG's second decision, without mentioning the harm test

Case Study 19: The Agency retroactively applies the law

The Agency allows the reporting entities to retroactively apply the new provision in cases where the proceedings are initiated before the amendments to the Law.

Back at the beginning of April 2015, we asked Montenegro Airlines to publish a Loan Agreement with the First Bank of Montenegro (Prva Banka), whose return was guaranteed by the Government. The largest single shareholder of this bank is Aco Đukanović, brother of the then Prime Minister, Milo Đukanović.

In May 2015, Montenegro Airlines declined to publish the requested information, as the contract with the bank contained a confidentiality clause.

Only after three years, in July 2018, the Agency acted on the appeal and annulled the decision of Montenegro Airlines, although it had a legal deadline of 15 days to decide.

58 According to Article 14, paragraph 1, item 6 of the Law on FAI, the access may be restricted "If the information is a trade or tax secret in accordance with the law".

After that, Montenegro Airlines reached a new decision, again restricting access to information, but referred to the new legal provision. In this decision, the state-owned company stated that the data is trade secret because the contract with the bank contains a confidentiality clause.

CRNA GORA
AGENCIJA ZA ZAŠTITU LIČNIH PODATAKA
I SLOBODAN PRISTUP INFORMACIJAMA

N.V.O. "MANS"
15/73632-73633
Podgorica, 20-03-2019 god.

Br. UP II 07-30-3638-2/18
Podgorica, 19.03.2019.godine

Agencija za zaštitu ličnih podataka i slobodan pristup informacijama - Savjet Agencije, rješavajući po žalbi NVO Mans br. 18/73632-73639 od 03.10.2018.godine, kojeg zastupa Veselin Radulović advokat iz Podgorice, izjavljene protiv rješenja „Montenegro Airlines" AD br. 4873 od 14.09.2018.godine, na osnovu člana 38 Zakona o slobodnom pristupu informacijama ("Sl.list Crne Gore", br.44/12 i 030/17) i člana 126 stav 4 Zakona o upravnom postupku ("Službeni list Crne Gore", br. 056/14 od 24.12.2014, 020/15 od 14.09.2015, 040/16 od 07.08.2016, 037/17 od 14.06.2017) je na sjednici održanoj dana 02.02.2019.godine donio:

RJEŠENJE

Žalba se odbija kao neosnovana.

Obrazloženje

Prvostepeni organ je, postupajući po zahtjevu NVO Mans br. 15/73632-73639 od 08.04.2015.godine, donio rješenje br. 4873 od 14.09.2018.godine u kome se navodi sledeće: „Odbija se zahtjev Mreže za afirmaciju nevladinog sektora-MANS br. 15/73632-73639 od 08.04.2015.godine kojim je traženo da se dostavi: Kopija ugovora o kreditu između „Montenegro Airlines" AD Podgorica i Prve banke Crne Gore AD Podgorica, po osnovu kojeg je Vlada Crne Gore-Ministarstvo finansija izdala garanciju

Nakon razmatranja spisa predmeta i žalbenih navoda Savjet Agencije nalazi da je žalba neosnovana.

Član 126 stav 4 Zakona o upravnom postupku propisuje da drugostepeni organ će odbiti žalbu kada utvrdi da je postupak koji je rješenju prethodio pravilno sproveden i da je rješenje pravilno i na zakonu zasnovano, a žalba neosnovana. Savjet Agencije, ispitujući zakonitost osporenog rješenja je utvrdio da je prvostepeni organ pravilno primjenio materijalno pravo kada se pozvao na član 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama kojim je propisano da se dozvoljava ograničenje pristupu informacijama ili dijelu informacije kada organ vlasti utvdi da se radi o poslovnoj ili poreskoj tajni u skladu sa zakonom. U dijelu zahtjeva kojim je traženo dostavljanje kopije ugovora o kreditu između „Montenegro Airlines" AD Podgorica i Prve banke Crne Gore AD Podgorica, po osnovu kojeg je Vlada Crne Gore - Ministarstvo finansija izdala garanciju 20.02.2013.godine, organ vlasti je utvrdio da ugovor sadrži klauzulu poverljivosti. Organ vlasti je, u skladu sa članom 16 stav 1 Zakona o slobodnom pristupu informacijama utvrđivao potencijalnu štetu koja bi mogla nastati objavljivanjem ove informacije, i utvrdio da bi objelodanjivanje predmetne informacije imalo štetne posljedice po obije ugovorne strane, te je ocijenjeno da se ne može dozvoliti pristup podacima sadržanim u ugovoru, imajući u vidu da bi otkrivanje podataka, koji su označeni kao povjerljivi, moglo značajno narušiti poslovne odnose ugovornih strana. Organ vlasti je utvrdio da bi objelodanjivanje tražene informacije izazvalo štetene

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Excerpts from the Agency's decision on the appeal regarding the request submitted to Montenegro Airlines in 2015.

Only after six months, the Agency reached a decision and assessed that the appeal was not grounded, that Montenegro Airlines, in accordance with the law, restricted access to information which represent trade secret in accordance with the new legal provision.

The new legal provision was adopted in mid-2017, two years after the initiation of this procedure, i.e. after submitting a request to Montenegro Airlines. [59]

Case Study 20: Incomprehensible verdicts on retroactivity

The Courts did not give a ruling on the retroactive application of the new legal provision, but they are accepting it by implication in cases where institutions are referring to the provisions of another law that prescribes secrecy of data.

At the end of 2015, the Statistical Office of Montenegro declared secret the monthly reports on the prices of electricity producers, referring to the Law on Official Statistics and System of Official Statistics.

Since the Agency for FAI has not yet decided on the appeal, even after more than a year has passed, MANS filed a lawsuit in the Administrative Court. The court did not reach a decision for nearly a year, although it could have acted immediately, since in the case of "silence of administration" the law is always undisputedly violated .

Only after the Agency finally decided on the appeal, the court reacted and asked us to declare whether we would expand the lawsuit.

In its decision, the Agency found that the Statistical Office "correctly applied the substantive law when it restricted the access to information, referring to the provision of Article 14, paragraph 1, item 6 of the Law".

Član 235 Zakona o opštem upravnom postupku propisuje da drugostepeni organ će odbiti žalbu kada utvrdi da je postupak koji je rješenju prethodio pravilno sproveden i da je rješenje pravilno i na zakonu zasnovano, a žalba neosnovana. Savjet Agencije, ispitujući zakonitost osporenog rješenja je utvrdio da je prvostepeni organ pravilno primjenio materijalno pravo kada je ograničio pristup informacijama pozivajući se na odredbu člana 14 stav 1 tačka 6 Zakona o slobodnom pristupu informacijama jer je propisano da organ vlasti može ograničiti pristup informaciji ili dijelu informacije: ako je informacija poslovna ili poreska tajna u skladu sa zakonom. Članom 30 stav 5 Zakona o slobodnom pristupu informacijama je propisano da rješenje kojim se odbija zahtjev za pristup informaciji, odnosno ponovnu upotrebu informacija sadrži detaljno

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Excerpt from the Agency's decision in which it claims that the Statistical Office referred to the legal provision adopted two years after the Office refused access to information

59 The new provision was adopted within the Amendments to the Law on Free Access to Information, which were published in the Official Gazette of Montenegro, No. 30/2017 of 09 May 2017. Amendments entered into force on the eighth day following the date of publication in the Official Gazette.

However, at the end of 2015, the Statistical Office refused access to information, so it was not possible to refer to the provision of a law that was adopted only just in 2017.

Moreover, in its decision, the Agency Council conducted a harm test from disclosing of information instead of the Statistical Office, and concluded that the data should be secret because their disclosure would "create distrust of partners and citizens".

Although the Constitution of Montenegro prescribes prohibition of retroactive application of the Law, both the Administrative and the Supreme Court rejected MANS' lawsuits.

The Administrative Court concluded that "relevant regulations were properly applied", and did not explicitly comment on the statements in the lawsuit that the Agency for FAI retroactively applied the legal provision relating to trade secrets.

Instead, the court established that the data were lawfully hidden from the public because the Law on Official Statistics and System of Official Statistics prescribes it.

The Supreme Court also does not deal with the issue of retroactive application of the new provision, but finds that the Administrative Court provided "sufficient and clear reasons" in its verdict. The Supreme Court also only confirms that the substantive law was properly applied, despite the fact that the provision, to which the first instance body did not refer and which did not exist at the time of the adoption of the decision, was applied.

individualni podaci o fizičkim ili pravnim licima i domaćinstvima povjerljivi i predstavljaju službenu tajnu. Savjet Agencije za zaštitu ličnih podataka i slobodan pristup informacijama je sproveo test štetnosti objavljivanja ove informacije, u skladu sa odredbama člana 16 stav 1 Zakona o slobodnom pristupu i utvrdio da bi objelodanjivanje ove informacije predstavljalo kršenje pozitivnih propisa - konkretno Zakona o zvaničnoj statistici i sistemu zvanične statistike kojim se uređuju prava i obaveze prvostepenog organa, pri čemu bi objavljivanje podataka koji su zaštićeni ovim zakonom proizvelo nepovjerenje partnera i građana čiji se podaci obrađuju u prvostepenom organu prema organima državne uprave, konkretno prema Zavodu za statistiku Crne Gore, što je procijenjeno kao veća šteta od javnog interesa za objavljivanje navedenih informacija. Kako se u konkretnom slučaju radi o poslovnoj tajni, pri čemu, obveznik na koga se odnose traženi podaci, nije dao pisano odobrenje za objavljivanje navedenih podataka, niti je riječ o podacima za koje postoji preovlađujući javni interes za njihovim objavljivanjem, to je prvostepeni organ je pravno valjano odbio zahtjev za slobodan pristup informacijama. Savjet Agencije nalazi u postupku preispitivanja zakonitosti osporenog rješenja da istim nijesu povrijeđene odredbe Zakona o opštem upravnom postupku niti odredbe Zakona o slobodnom pristupu informacijama na štetu podnosica žalbe.

Savjet Agencije je cijenio i ostale navode iz žalbe, pa je našao da nijesu od uticaja za drugačije rješavanje u ovoj pravnoj stvari.

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Excerpt from the decision of the Agency by which the Council conducts the harm test instead of the Statistical Office

Po ocjeni Suda, imajući u vidu činjenično stanje, razlozi dati u osporenom rješenju upućuju na odluku datu u dispozitivu. Iz stanja u spisima predmeta nesumnjivo se utvrđuje da su na pravilno utvrđeno činjenično stanje pravilno primijenjeni relevantni propisi. Naime, imajući u vidu citirane odredbe Zakona o zvaničnoj statistici i sistemu zvanične statistike, ovaj Sud nalazi da tužena nije povrijedila Zakon na štetu tužioca kada je odbila njegovu žalbu, s obzirom da nije bilo razloga da se, cijeneći sadržinu traženih informacija, dovede u sumnju tvrdnja prvostepenog organa da se, radi o povjerljivim statističkim podacima, to je po ocjeni Suda, pravilan zaključak prvostepenog i drugostepenog organa da nije bilo uslova da se dozvoli pristup traženoj informaciji, u skladu sa članom 14 Zakona o slobodnom pristupu informacijama.

Sud je cijenio i ostale navode tužbe, a posebno one koji se odnose na povredu odredbe člana 6 stav 1 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, ali je našao da su bez uticaj na drugačiju odluku u ovoj upravnoj stvari, jer postupanje tuženog nije suprotno Zakonu, niti principima navedenog međunarodnog akta. Ovome u prilog ide i Uredba (ek) br.223/2009 o evropskoj statistici koja garantuje zaštitu povjerljivih podataka u okviru člana 20 i ustanovljava osnovni princip da statistički podaci treba isključivo da se koriste u statističke svrhe. Evropski statistički kodeks prakse u okviru načela 5 - Statistička povjerljivost propisuje da je privatnost pružaoca podataka (domaćinstva, preduzeća, upravnih organa i drugih ispitanika), odnosno povjerljivost informacija koje pružaju i njihovu upotrebu isključivo u statističke svrhe apsolutno zagarantovana.

Odluka o troškovima spora zasnovana je na odredbi člana 152 Zakona o parničnom postupku, u vezi člana 39 stav 2 Zakona o upravnom sporu, a ovo budući da tužilac nije uspio u sporu.

Iz iznijetih razloga, a na osnovu odredbe člana 35 stav 1 Zakona o upravnom sporu, riješeno je kao u izreci.

UPRAVNI SUD CRNE GORE
Podgorica, 14.03.2018. godine

Zapisničarka,
Dragana Paunović,s.r.

PREDSJEDNIK VIJEĆA,
Dragan Đuretić,s.r.

Excerpt from the verdict of the Administrative Court rejecting the complaint, although the proceedings were initiated two years before the entry into force of the new provision

Ocjenjujući zakonitost osporenog rješenja po ocjeni ovoga suda, pravilno je Upravni sud našao da je isto zakonito i da je na pravilno i potpuno utvrdjeno činjenično stanje pravilno primijenjeno materijalno pravo, i za takav zaključak daje dovoljne i jasne razloge, koji navodima podnijetog zahtjeva nijesu dovedeni u sumnju. Prema tome, neosnovani su navodi zahtjeva kojim se ukazuje da su prekršene odredbe čl.6 st.1 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda jer, kako je to naprijed rečeno, osporena presuda sadrži valjane razloge, naročito u pogledu odlučnih činjenica i odgovoreno je na bitne navode tužbe, te je, po ocjeni ovoga suda, materijalno pravo pravilno primijenjeno.

Kod svega naprijed navedenog, a kako u konkretnom slučaju nije ispunjen ni jedan od uslova propisanih zakonom za pristup traženim informacijama, to je pravilno Upravni sud odbio tužbu kao neosnovanu nalazeći da je prvostepeni organ pravilno odbio zahtjev, a tuženi organ pravilno odbio žalbu tužilje kao neosnovanu.

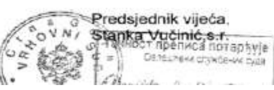
Sud je cijenio i druge navode iz podnijetog zahtjeva, ali je našao da su isti bez uticaja na drugačije presudjenje.

Sa iznijetih razloga i navedenih zakonskih odredbi, a s pozivom na čl.47 st.1 Zakona o upravnom sporu odlučeno je kao u izreci.

VRHOVNI SUD CRNE GORE
Podgorica, 05.10.2018.godine

Zapisničar,
Indira Muratović,s.r.

Predsjednik vijeća,
Stanka Vučinić,s.r.



Excerpt from the verdict of the Supreme Court confirming the verdict of the Administrative Court

3. Practice in Montenegro

Case Study 21: Harm test suspended by other laws

The Administrative and Supreme Court found that institutions are not obligated to conduct a harm test when information was declared trade secret under a special law. This means that the issue of the right to access information is regulated by other laws which, according to courts, have a greater legal force than the Law on Free Access to Information.

The Customs Administration denied access to information, referring to the new legal provision and the Customs Law, which prescribes that the requested information represents an official secret. [60] The Administration states that they have performed the harm test, but do not state any specific interest that would be endangered, instead, they conclude that the disclosure of the requested information would represent a violation of the existing legal provisions . At the same time, the Customs Administration did not address the issue of public interest in the information being published.

The Agency for FAI rejected the appeal and concluded that the information was lawfully declared a secret, without addressing the harm test or the public interest test.

Such decision by the Agency was confirmed by the Administrative Court which concluded that the Customs Law is a *lex specialis* which obliges customs officials to keep an official secret.

The Administrative Court concludes that the damage from disclosing of data, obtained by the customs authorities in accordance with the Customs Law, was assessed according to provisions of that law, and that **"referring to a harm test is irrelevant".**

At the same time, the Administrative Court did not evaluate the legality of applying a legal provision, by the Customs Administration, which provides protection for trade secrets in order to protect an official secret. [61]

Such verdict is also upheld by the Supreme Court which states that the damage from publishing data had already been assessed by the provisions of the Customs Service Act.

The Supreme Court concludes that because of that, harm test prescribed by the Law on Free Access to Information is irrelevant.

Odredbom člana 101 stav 4 Zakona o carinskoj službi, koji predstavlja *lex specialis* za postupanje carinskih organa, propisano je da se pojedinačni podaci o fizičkim i pravnim licima sadržani u carinskim deklaracijama, kao i podaci potrebni za utvrđivanje i provjeru carinske vrijednosti robe, u skladu sa odredbama zakona kojim se uređuju carinski poslovi i odredbama zakona kojim se uređuje zvanična statistika i sistem zvanične statistike, smatraju službenom tajnom i ne smiju se od strane carinskog organa dalje saopštavati bez izričite saglasnost lica ili ovlašćenih organa koji su ih dali. U članu 15 Carinskog zakona, određeno je da su lica koja, neposredno ili posredno, učestvuju u tokovima robnog prometa dužna na zahtjev carinskog organa staviti na raspolaganje sva potrebna dokumenta i podatke i pružiti svaku drugu pomoć potrebnu za primjenu carinskih propisa, dok je u članu 16 Zakona, normirana zaštita tih lica od obrade njihovih podataka, na način da je propisano da se podaci koji su po svojoj prirodi povjerljivi ili su pribavljeni na takav način smatraju službenom tajnom i ne smiju se od strane carinskog organa dalje saopštavati bez izričite saglasnosti lica ili ovlašćenih organa koji su ih dali. Saopštavanje povjerljivih podataka dozvoljeno je u slučajevima kada je carinski organ dužan ili ovlašćen da to učini u skladu sa propisima. Činjenica da je poseban propis koji daje ovlašćenje carinskim organima da drugačije postupaju i omoguće pristup informacijama odredba člana 17 Zakona o slobodnom pristupu informacijama, koja za takvo ovlašćenje pretpostavlja postojanje indicije na protivpravna ponašanja taksativno navedena u toj odredbi. Kako u konkretnom slučaju tužilac ne ukazuje šta bi deklaracije o izvozu „Uniprom KAP" doo Podgorica, mogle da sadrže, a što bi upućivalo na korupciju, nepoštovanje propisa, nezakonito korišćenje javnih sredstava ili na sumnju da je izvršeno krivično djelo, da se nezakonito dobijaju i troše sredstava javnih prihoda i dr., to i po nalaženju ovog suda prvostepeni i tuženi organ nijesu mogli postupati suprotno pomenutim odredbama Carinskog zakona koji ih obavezuju na čuvanje službene tajne. Takođe, po mišljenju ovog suda, šteta od objavljivanja podataka koje su carinski organi pribavili u skladu sa članom 15 Carinskog zakona, procijenjena je pomenutim odredbama čl.16 i 17 istog zakona, zbog čega pozivanje tužioca na test štetnosti irelevantno.

Sud je cijenio i ostale prigovore iznijete od strane tužioca, ali je našao da su bez uticaja na drugačiju odluku u ovoj upravnoj stvari.

Excerpt from the verdict of the Administrative Court that establishes that the issue of the harm test is irrelevant since the damage had already been established by the law

Pravilno Upravni sud nalazi da je šteta od objavljivanja podataka koje su carinski organi pribavili u vezi sa čl.15 Carinskog zakona, procijenjena pomenutim odredbama čl.16 istog zakona i čl.101 st.4 Zakona o carinskoj službi, zbog čega je pozivanje tužioca i u zahtjevu na test štetnosti irelevantan (i pored tvrdnje tužene da je sproveden test štetnosti).

Odluka o troškovima pravilno je zasnovana na odredbi čl.152 ZPP-a u vezi čl.39 st.2 ZUS-a.

Sud je cijenio i druge navode iz podnesenog zahtjeva pa je našao da su isti bez uticaja na drugačije presudjenje.

Sa iznijetih razloga i navedenih zakonskih odredbi, a s pozivom na čl.41 st.1 Zakona o upravnom sporu odlučeno je kao u izreci.

VRHOVNI SUD CRNE GORE
Podgorica, 08.11.2018.godine

Zapisničar,
Indira Muratović,s.r.

Predsjednica vijeća,
Stanka Vučinić,s.r.

Excerpt from the verdict of the Supreme Court that establishes that institutions do not have to conduct harm test when it is stipulated by a special law that the information is secret

60 Article 16 of the Customs Law
61 Official secrets protect the interests of the state and official duties, pursuant to the Law on Classified Information and access is restricted to them in accordance with Article 14, paragraph 1, item 2 of the Law on Free Access to Information. Contrary to that, trade secret are considered data and documents that are according to a law, another regulation or a decision of the competent authority adopted based on the law, declared trade secret, whose disclosure would cause or could cause harmful consequences for a company or other economic entity.

4. CONCLUSIONS

A new legal provision that prescribes that trade secrets may be hidden from the public is not in accordance with international standards. The practice shows that reporting entities, without valid reasoning, declare data trade secrets, and such conduct is supported by the Agency and courts.

Key issues of the Law on Free Access to Information relating to a new provision protecting trade secrets:

- The concept of trade secret is not prescribed by the law, although there are clear international standards, which leaves room for wide interpretation and abuse in practice.
- Duration of restriction based on trade secret is not prescribed, and as a result the data of public importance can remain hidden forever.
- Legally prescribed harm and public interest test are not in accordance with international standards, and therefore do not contribute to the reduction of misuse in declaring the information trade secrets.

The most important issues related to the application of this legal provision concern the basis for declaring data secret, (non) conducting of harm and public interest tests, as well as the bad practices of the Agency and courts.

Basis for declaring data trade secret

- As a rule, while referring to the new provision, reporting entities do not refer to a **specific provision of another law which** prescribes the requested information as trade secret, although this is a condition for the application of this exception.
- Reporting entities often refer to **internal acts** that declare information trade secret, although it is stipulated that information shall be trade secret "in accordance with the law".
- The authorities also refer to **official, banking and many other secrets**, while not making the difference between trade and the abovementioned secrets, despite the fact that these are different types of secrets for which there are different international standards.
- Information is often declared trade secret, and at the same time it is determined by a **degree of secrecy** stipulated by the Law on Classified Information, that does not prescribe the concept of trade secret.

Harm and public interest test

- Almost **no institution delivers a harm** test with a decision declaring the information trade secret, and only some state the information on the basis of which the document in which the test is contained can be identified.
- Most institutions **do not conduct** a harm test or only state vague assessments, without explanation which interests are threatened by disclosing of information and in what way.
- Some reporting entities respond to completely different requests for information **in an identical way**, with exactly the same reasons for which different categories of data should be hidden from the public.
- As a rule, institutions **do not assess whether there is a prevailing public interest** in the information being disclosed, but only generally state that it does not exist, even when it is obvious that the requested information falls into the category of data that is required to be published. In practice, there has not been a case that the public authority concluded what constitutes a public interest, and then assessed that the protected interest is more significant and gave a reasoning for it.
- **No reporting entity ever conducted a public interest test that showed that data that had been declared trade secret should nevertheless be disclosed because the public interest is prevailing.**

4. CONCLUSIONS

Practice of the Agency for FAI and courts

- **The Agency drastically violates the legal obligation to decide within 15 days**, and decides only after several months or years. The practice shows that the Agency selectively acts on complaints, because in some cases it acts more efficiently, while in some cases it takes them years to reach a decision.
- The Agency instructs reporting entities to apply the new legal provision, even in cases where it establishes that the harm test did not provide compelling reasons for the information to be hidden from the public.
- According to the Agency's interpretation, a new legal provision can be applied **retroactively**, i.e. in proceedings initiated before the amendments to the law. The Courts did not give a ruling on the retroactive application of the new legal provision, but they are accepting it by implication in cases where institutions are referring to the provisions of another law that prescribes secrecy of data.
- The Agency concludes that decisions, in which the reporting entities declare the information secret **without referring to a specific legal provision** that prescribes such information as trade secrets, are in accordance with the law
- The Agency, as well as the Administrative and Supreme Court, consider that **institutions are not obligated to conduct a harm test if other law prescribes that the information is secret.**

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