



CASE STUDY

Citizens do not have the right to know in what way their money is spent

HIGHWAY PROJECT UNDER THE VEIL OF SECRET

Podgorica, 2018



This publication was produced with the financial support of the European Union. Its content are the sole responsibility of author and do not necessarily reflect the views of the European Union.

Most data on the construction of the Bar-Boljare highway, the largest infrastructure facility in Montenegro, has been declared secret in advance.

Even the very route of the highway passing through the area of Tara River, protected by the UNESCO Convention as a world natural heritage, is secret. Data on finances, control of the implementation of works, disputes, and even numerous administrative acts of state bodies, which are otherwise public, have been declared secret by the Ministry of Transport.

Experts hired by the Government, within commissions in charge of audit of plans and technical inspection, may not share with the public all the information they receive as a part of their work.

1. WHAT IS DECLARED AS SECRET IN ADVANCE?

The Ministry of Transport has in advance declared information on the highway that includes finances, data on control of the implementation of the project and disputes, as well as technical documentation and other acts¹ as secret, as well as several documents that can be categorised as administrative acts. The data designated by the Ministry as a secret by classifying them as “internal” are presented in the table below².

| TYPE OF ACTS | DESCRIPTION OF DOCUMENTS |
|--|---|
| FINANCES | Notice of claims of the Constructor |
| | Notice of claims of the Investor |
| | Payment schedule of the Constructor |
| | Interim Payment Certificate and Interim Payment Statements |
| | Requests for issuing final certificate |
| CONTROL | The Contractor's report on the progress of works |
| | Determinations and Engineer Reports |
| | Monthly report of the Project Manager |
| | Audit reports on the technical documentation which are not final |
| DISPUTES | Criteria for measurement and assessment of subsequent and unforeseen works |
| | Notices on initiating a dispute before the Dispute Resolution Commission |
| | Decisions of the Dispute Resolution Commission |
| TECHNICAL DOCUMENTATION AND OTHER ACTS | Programme of works |
| | Audit plan for technical documentation |
| | Textual and graphical documentation of a technical nature |
| | Documentation of the as-built drawings |
| | Minutes from the meetings |
| | Proposals by the Contractors, Engineer, Project Managers and Government representatives, which are variable categories and affect current contractual positions |
| ADMINISTRATIVE ACTS | Approvals, consents, opinions, decisions, confirmations, instructions, notices, requests / orders |

Table 1: Types of data on the highway that have been declared secret

¹ Decision of the Ministry of Transport and Maritime Affairs No. 34-451 / 2016-1 of 1 August 2016; given in Annex 1, and the Decision of the Ministry of Transport and Maritime Affairs No. 34 / 17-01-2229/ 1 of 7 April 2017; given in Annex 2.
² Ibid.

2. WHY IS IT SECRET?

In its explanation, the Ministry generally lists several reasons for declaring the data secret and no reason for any of these documents to become public under certain conditions. The table below presents key arguments of the Ministry.

| CATEGORY | EXPLANATION OF SECRECY | TO WHICH INFORMATION IT REFERS TO |
|--|---|---|
| Business secret | They influence the implementation of the plans of the Government regarding the im-plementation of this section and future sections of the highway. | All documents |
| Protection of competition | Information can be used as an input and comparative parameters for a comprehensive due diligence analysis related to the preparation, implementation, management, maintenance of other sections, in order to define optimal investment conditions (requests) towards all potential stakeholders, by applying the principle of equal treatment, free competition and non-discrimination and in order to best protect the Government. | All documents |
| Economic interests | They can have a negative impact on the project management and jeopardize the interests of the Government if CRBC were familiar with it because they contain opinions, views, recommendations for dealing with possible changes and corrections. | Criteria for measurement and assessment of subsequent and unforeseen works. Notice of Claims of the Contractor and the Investor. Notice of initiating a dispute before the Dispute Resolution Commission. Determining of Engineers. Reports of entities involved in monitoring the implementation of the Project. |
| Intellectual property of the Government | "By their nature, certain types of documents represent intellectual property." | All documents |
| Variable data and misinterpretation of information content | Information obtained in the process of preparing and harmonization of views and opinions within one or more of the entities on the side of the Government and its publishing before the final form could lead to misinterpretation of the content of the information. | Decisions of the Dispute Resolution Commission. Audit reports on the technical documentation and reports on its audit. Requests for issuing Interim Payment Certificate and Interim Payment Statements. Programme of works. Payment schedule. |
| Security | Ensuring optimal security aspects of the use of the highway. | Textual and graphical documentation of a technical nature |

Table 2: Explanation of reasons why data are declared secret

The decision of the Ministry states exclusively the reasons for declaring the information secret, and at the very end it is stated:

"it has been unequivocally established that the disclosure of any document ... would lead to adverse consequences for an interest that is greater than the importance of the public to know this information".

3. WHAT IS PRESCRIBED BY LAW?

According to the Information Secrecy Act, the data whose detection would lead to adverse consequences for Montenegro's security, foreign, monetary and economic policies are classified information,³ while the "internal" designation is determined if disclosure of data would lead to adverse consequences for the exercise of the office of an authority.⁴ Secrecy of data which are marked with the degree "internal", stops at the expiration of a two-year deadline,⁵ and this deadline can be extended for another two years.

According to the same Law, the information can be designated classified if such is necessary in a democratic society and if interest for the information to be declared secret is prevailing over the interest for free access to the information.⁶ Authorised person for designating of level of classification by explained decision designates information classified and decides on the level of classification⁷

Therefore, the decision by which the information is classified must contain the reasons why the document is declared classified, but also the **reasons why the interest protected by the degree of secrecy is more significant than the public's interest to know**.

³ Article 3 of the Information Secrecy Act (Official Gazette of Montenegro 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14, 48/15)

⁴ Article 12 of the Information Secrecy Act (Official Gazette of Montenegro 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14, 48/15)

⁵ Article 19a of the Information Secrecy Act (Official Gazette of Montenegro 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14, 48/15)

⁶ Article 10 Paragraph 1 of the Information Secrecy Act (Official Gazette of Montenegro 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14, 48/15)

⁷ Article 10 Paragraph 2 of the Information Secrecy Act (Official Gazette of Montenegro 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14, 48/15)

4. SHOULD IT BE SECRET?

4.1. General ban

In determining the degree of secrecy, the Ministry has vaguely referred to the general need to prevent adverse consequences for exercising its function in order to limit the public's right to access data from the procedure of the highway construction. Such interference with citizens' rights is arbitrary and does not even nearly meet the standard that it is necessary in a democratic society. The Ministry was obliged to provide an explanation that there was an urgent need to limit the public's right to know this information.

In decisions where the information on the construction of the highway is classified as secret, **there are no explanations and reasoning** why it is necessary, in a democratic society, to designate the information from the public procedure for the construction of the highway classified.

Hiding of these data is contrary to the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the views of the European Court of Human Rights in which the Convention is interpreted. In terms of determining whether, in a democratic society, it is necessary to designate the information from the procedure for the highway construction classified, it should be noted that the European Court of Human Rights has determined that:

"states must link the standard 'necessary in a democratic society' with one of the specific grounds for limitation, which are listed in the relevant article: a state cannot legitimately refer to the general need to justify the restriction of the rights and freedoms of an individual... The notion of 'necessity' means that any interference with the exercise of a protected right must correspond to the urgent social need, and in particular, it must be proportionate to the goal that is to be achieved. In assessing whether the interference was 'necessary', the Court takes into account the degree of free assessment that the authorities have. However, the Court considers that it is the duty of the responsible state to show that such an urgent need exists in the case of concrete interference (McLeod v. The United Kingdom (1998) and Klamecki v. Poland (No. 2) (2003))."

In this specific case, it is precisely about the general ban and the Ministry's referring to a general need to limit access to information regarding the construction of the highway to justify the restriction of the right to free access to information. It is a general ban on access to data, because all administrative acts, all information on finances, plans and programmes, all data on control and supervision, disputes, technical documentation are designated as secret.

Also, determining the degree of secrecy for all the above information violates the right to freedom of expression prescribed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the views of the European Court of Human Rights (*Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05, Judgment of 14 April 2009), Article 10 of the Convention protects the right to have access to information and the arbitrary limitation of access to information is a form of indirect censorship, i.e. violation of the right to freedom of expression.

4.2. Trade secret

The government claims that all the documents listed are a trade secret, as they influence its plans regarding implementation of this and the future sections of the highway. International standards show that this information in the possession of state authorities cannot be considered a trade secret.

In this specific case, the Government is the contracting authority, not a commercial company with trade secrets that it wishes to protect. Also, the implementation of the plan is the subject of a public procedure that is financed from public funds. Conditions and time of implementation of any section of the highway must be publicly announced since based on them, interested bidders submit their bids. The selected contractor must comply with these terms and deadlines, and their violation cannot represent a trade secret of the Government as the contracting authority, because the Government cannot have trade secrets. Therefore, the Government is not a commercial company that runs business and which, for the protection of this business, has the interest to protect certain information as a trade secret. The government is obliged to work in the public interest and its work must be completely transparent when it comes to spending of public funds.

In Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016, the European Union defines the protection of undisclosed know-how and experience, and business information (trade secret) against unlawful acquisition, use and disclosure, and this information must meet **all of the following requirements**:

a. it is secret in the sense that **it is not**, as a body or in the precise configuration and assembly of its components, **generally known** among or readily accessible to persons within the circles that normally deal with the kind of information in question;

b. it has commercial value because it is secret;

c. it has been subject to **reasonable steps** under the circumstances, by the person lawfully in control of the information, **to keep it secret.**

The analysis of the international organization Access Info states that it is clear from comparative law and practice that “state authorities cannot declare business or commercial secrets in order to protect their alleged interests”, since “by definition, state authorities work in the public interest and do not have business interest that needs to be protected”⁸.

4.3. Competition and economic interests

The ministry said that the publication of data could have a negative impact on the competition and government's plans, not only in connection with the implementation of this section of the highway, but also the preparation of the following ones. Most of these documents were produced by the Chinese company or it is in its possession.

However, as a contracting authority, the Government ensures the protection of competition by publicly announcing the conditions that must be available to all potential bidders. Competition cannot be protected by hiding data on the implementation of work financed from public funds.

⁸ Analysis: Montenegro's Law on Free Access to Information, Helen Darbishire, Access Info

In addition, the existing section of the highway is being built on the basis of the Main Project, done by CRBC, as well as the vast majority of documents, classified by the Government as secret, already owned or produced by the Chinese company. If these data are really significant for competition and declared secret, this means that CRBC is in a much more favourable position than any other company to be hired for the construction of other parts of the highway.

The Ministry also stated that disclosing these data could jeopardize the interest of the Government as an investor if CRBC were familiar with the information containing opinions or views, which would have a negative impact in case of an arbitration dispute.

However, such **justification is completely unfounded**, bearing in mind that the **FIDIC agreement contains a clear procedure for mutual notifying of the parties which submit to each other all requests for claims or initiating of disputes.**

The Ministry states that it must not publish Criteria for measurement and assessment of subsequent and unforeseen works, so that CRBC would not find out about them because they contain opinions, views, recommendations for dealing with possible changes and corrections.

These allegations of the Ministry are completely absurd because the contractor must be aware of how the subsequent and unforeseen works are assessed, what are its claims, and what are the government's claims towards its, and must be familiar with the reports of the commission that monitors the implementation of the project.

Additionally, the criteria for measurement and assessment of subsequent and unforeseen works are a type of a general regulation and the way the state money will be spent depends on them. These rules must be made available to the public, as citizens have the right to know in what way it is determined how much of their money should be paid to the contractor. Namely, these criteria directly affect the value of the contract, and therefore the amount that citizens will pay, taking into account unforeseen works that are estimated to cost up to 115 million Euros.⁹

⁹ Read more in Report on construction of Bar-Boljare Highway – „Secret money paths“, link <http://www.mans.co.me/en/secret-money-paths/>

4.4. Protection of intellectual property

The Government does not explain in more detail the reasons why for all the listed documents it states that “by their nature” they represent its intellectual property. Intellectual property may limit the reuse of information, but not the access to information content, especially if there is a public interest in it.

Pursuant to Article 4, paragraph 1, item 4 of the Law on the Enforcement of Legislation regulating the protection of intellectual property rights, **intellectual property rights** are copyright and related rights, stamps, geographical indications of origin, design, patent and topography of integrated circuits.

It is not clear which information from the implementation of the project for the construction of the highway could be the intellectual property of the investor - the Government, i.e. which information from this project is a copyright work or, for example, a patent, or an invention of the Government of Montenegro, and as such should be protected by designating it secret. Intellectual property is a creation of the mind, so it is unclear what could be the Government's invention in this project which would represent an intellectual property. In addition, the protection of intellectual property does not imply it being designated secret, but preventing of other persons exploiting it without the permission of the owner.

According to the analysis by one of the leading international experts on free access to information, “when it comes to intellectual property, there is no “per se” basis for denial of access, and therefore it is not included as an exception to the Council of Europe Convention on Access to Official Documents”¹⁰

“While intellectual property may limit the reuse of information, it cannot be a basis for not providing information,” but there should be restrictions on their use.¹¹ “The only basis for refusing to provide information should exist in case of harm to economic (business) or some other legitimate interest, and when there is no public interest in publishing this information”.¹²

¹⁰ Analysis: Montenegro's Law on Free Access to Information, Helen Darbishire, Access Info

¹¹ Ibid

¹² Ibid

However, “monitoring the activities of state authorities and their connections (financial and other) with private entities is a clear public interest,” and “the public’s right to know what is contained in the information that was part of the decision-making process does not violate copyrights”.¹³

4.5. Suspension of other laws

The Ministry has practically suspended the implementation of the Law on Inspection Control and the Law on Free Access to Information in the public part in relation to the Highway Construction Project.

The first law prescribes that the inspection control is public¹⁴, while the second prescribes that all state bodies proactively publish on their websites decisions and other single acts that are of importance for the rights, obligations and interests of third parties¹⁵.

On the other hand, the Ministry in advance declared a set of administrative acts, primarily decisions, approvals, consents and opinions as secret.

The Ministry argues that these acts are variable categories that do not have a binding form for the contractual parties, and that **their publishing could lead to misinterpretation of the content of the information and seriously jeopardize the decision-making process itself**, especially if CRBC were familiar with them.

However, CRBC must be familiar with any such act relating to the highway, as the institutions are obliged to provide this information to it as a party in an administrative or inspection procedure. Accordingly, the explanation of the Ministry is completely unfounded.

¹³ Ibid

¹⁴ Article 8 of the Law on Inspection Control (Official Gazette of Montenegro 39/03, 76/09, 57/11, 18/14, 11/15, 52/16)

¹⁵ Article 12 Paragraph 1 Item 10 of the Law on Free Access to Information

4.6. Variable data and misinterpretation of the public

The Ministry of Transport stated that numerous documents on the highway were declared secret because they were not final, instead, they “represent variable contracting categories”, thus, “their publication before the final form of the decision could lead to misinterpretation of the content of the information”. That is exactly how the Ministry explained even hiding of documentation on the dynamics of the payment for the highway.

In this way, the Ministry disables public debate and public participation in decision-making, as well as determining responsibilities in the work of public officials.

Regarding the ongoing processes, the Court of Justice of the European Union is clear that the process does not have to be completed nor the documents have to become “official” before the introduction of the public interest. Even if documents were changed during the course of the process, the Court has repeatedly confirmed that “it is clear to the public that the author of the proposal will subsequently probably change its content”¹⁶.

The Ministry has declared “timetable for payments”¹⁷ that shows the **deadlines for payments to the Chinese company** as secret, as well as requests for issuing of Interim Payment Certificate and Interim Payment Statements, containing **information on the prices of works carried out monthly or additional labour costs**.¹⁸

¹⁶ Access Info Europe v Council, T 233/09, EU:T:2011:105, Paragraph 69, and De Capitani v European Parliament, Case T 540/15, ECLI:EU:T:2018:167

¹⁷ Article 14.4 of the FIDIC Agreement on the design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševo, reads: “The Parties shall define, within 14 days of the adoption of the work programme, and coordinate with each other and with the Engineer the payment schedule. The Contractor will be paid in accordance with the agreed payment schedule.”

¹⁸ Articles 14.3 and 14.6 of the FIDIC Agreement on the design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševo, which specify in detail what the Interim Payment Statement and the Interim Payment Certificate should contain. Regarding the “Timetable of Payments” document, the Ministry of Transport and Maritime Affairs stated that “the schedule of work and the Timetable of payments based on it are variable contract categories until the end of the Project implementation, because they represent the Contractor’s plan (assessment) of organisational, work and resource structure and all relevant activities related to design, production, procurement, on-site works until the completion of the Project, and as such, these documents may be subject to further revisions and corrections until the end of implementation of the Project”; in connection with the

The Ministry claimed that these were documents that were variable contracting categories, and their publishing before the completion of works could lead to misinterpretation of information.¹⁹

However, it is **undisputed that these are documents that are independent and final**, and since they contain data on cost prices and payment deadlines, citizens have the right to know how their money is spent.

5. CONTEMPT OF COURT RULINGS

The fact that decisions by which the data were declared secret were illegal and that the data is illegally hidden from the public is also indicated by the practice of the Administrative Court of Montenegro. However, the executive authority does not give consent to submit the requested data and act according to the final ruling of the Administrative Court, which severely undermines the principle of the rule of law.

According to the decision of the Government of Montenegro, "Monteput" LLC is in charge of managing the project for the construction of the Bar Boljare highway.²⁰

documents "requests for Interim Payment Statement" and "Interim Payment Certificate", the Ministry of Transport and Maritime Affairs stated that these were "variable categories (current and contractual administration) up to the moment of confirmation by the Engineer (Supervising Authority) and payment by the Investor"

¹⁹ Regarding the "Payment Schedule" document, the Ministry of Transport and Maritime Affairs stated that "the schedule of work is based on the Payment Schedule of a variable contract category until the completion of the Project, since they represent the Contractor's Plan (assessment) of organizational, work and resource structure of all relevant activities related to design, production, procurement, on-site works until the completion of the Project, and as such, these documents may be subject to further revisions and corrections to the end of the implementation of the Project"; in connection with documents "requests for Interim Payment Certificate" and "Interim Payment Statements", the Ministry of Transport and Maritime Affairs stated that these are "variable categories (current and contractual work administration) until the moment of confirmation by the Engineer (supervisory authority) and payment by the Investor"

²⁰ Article 6, paragraph 1, item 3 of the Decision on the Establishment of a Limited Liability Company "Monteput" Podgorica, ("Official Gazette of the Republic of Montenegro", No. 76/2005 and "Official Gazette of Montenegro", No. 68/2009 and 33/2014)

On March 24, 2016, MANS requested Monteput to publish, on the basis of the Law on Free Access to Information, CRBC's Work Programme for the construction of the highway, as well as the company's reports on the implementation of the works, i.e. the Initial Report for the period December 2014 - 31 July 2015 and Monthly Reports for August, September, October, November and December 2015.

First decision

On April 4, 2016, "Monteput" LLC from Podgorica rejected MANS's request for access to information²¹. According to the reasoning of Monteput, the Request was rejected because the Ministry of Transport and Maritime Affairs classified the requested information as INTERNAL.

FIRST RULING

Acting on the complaint of the NGO MANS, on 17 February 2017, the Administrative Court of Montenegro issued a ruling annulling the decision of "Monteput" LLC.

The Administrative Court found that the **decision** rejecting the request of the NGO MANS **does not contain the rule on which it was based all, nor the reasons why the Ministry of Transport and Maritime Affairs** classified the requested information as INTERNAL.²²

²¹ Information on programme of works (first version) of 8 June 2015, as well as later updated versions, submitted by CRBS regarding the construction of the Bar - Boljare highway, section Smokovac-Mateševo; Initial report for the period 2014 - 31 July 2015, submitted to the Ministry of Transport and Maritime Affairs by the Business Unit for the project management of the construction of the Bar Boljare highway; Monthly reports for August, September, October, November and December 2015, which the Business Unit for managing the project for the construction of the Bar Boljare highway delivered to the Ministry of Transport and Maritime Affairs

²² Ruling of the Administrative Court U.no.1568/16

Second decision

On April 24, 2017, after the court rulings, “Monteput” issued a new decision, **once gain denying** the request to the requested data.

The new decision states that the Ministry of Transport and Maritime Affairs carried out a harm test on 23 February 2017 and on 7 April 2017, that is, only after the ruling of the court. Thus, it was confirmed that the request of the NGO MANS had been rejected in the preliminary proceeding, and that no harm test was performed, and that it was not checked at all whether the interest protected by hiding of these data is more significant than the interest in free access to information.

However, even subsequent harm tests do not show the reasons for declaring the requested information secret.

Along with a new solution, Monteput also submitted **three decisions of the Ministry of Transport and Maritime Affairs on determining the degree of secrecy:**

- First decision of 25 December 2015 stipulates that the procedure regarding the implementation of the Bar-Boljare highway project is classified with the degree of secrecy “INTERNAL”. Thus, a general ban on access to all data from the procedure for the construction of the highway was introduced. This decision has no reasoning, only an arbitrary finding that this procedure contains classified information and that it is not public. Contrary to Article 10 of the Information Secrecy Act, there is no reason why classifying of these data as secret is necessary and why the interest protected by the degree of secrecy is more significant than the public’s interest in knowing this information.

- Second decision of August 1, 2016, lists individually 20 types of documents classified as secret. This decision also has no reasoning, only an arbitrary finding that this procedure contains classified information and that that it is not public. There are also no reasons listed for classifying of these data as secret and why the interest protected by the degree of secrecy is more significant than the public’s interest in knowing this information.

- Third decision of 7 April 2017 annulled the previous decision, but again, same types of documents were again classified as secret, and the secrecy was extended to the information related to the notifying of the parties to initiate the dispute before the Dispute Resolution Commission. In this solution, in general, there are several reasons for classifying information as secret: trade secrets, protection of competition, economic interests, intellectual property of the Government, data variability and the possibility of misinterpretation of information and protection of security.

In addition to this solution **two harm tests** of 23 February 2017 and 7 April 2017 were submitted, which **in fact do not constitute a harm tests in terms of the law.**

Namely, the purpose of the harm test is to give reasons why the interest that is protected (in the specific case - exercise of the function of an authority) is more significant than the interest for free access to information. Therefore, the harm test should present two interests, the interest that the information is classified as secret and the public’s interest in knowing that information, and then to give reasons why one of those interests is more significant.

Contrary to this, the two harm tests refer only to the interest of the data to be classified as secret in an arbitrary way, while **there is no talk of the public’s interest in knowing the information so that it would be possible to give an explanation of why the first interest is more significant.** Instead, it is arbitrarily concluded in the harm tests that there is an **evident possibility** that the disclosure of information would cause adverse consequences and that it is undisputed that there is no prevalent public interest. The reasons for such conclusion are not given.

SECOND RULING

Acting on a new complaint filed by NGO MANS, on December 15, 2017, the Administrative Court issued another ruling²³ annulling the second solution of “Monteput”.

The Administrative Court found that the **decision** rejecting the request of the NGO MANS **did not contain an explanation that would lead to the refusal of requests for access to information, or acceptable arguments that the access to the requested information could jeopardize the interests allegedly protected, i.e. that there is no prevailing public interest to provide information.**

Also, the Administrative Court also stated that the **defendant authority did not comply with the legal obligation under which it is bound by the legal concept and remarks of the court.**

New lawsuit

On March 20, 2018, against this decision as well, NGO MANS submitted a new, third complaint to the Administrative Court of Montenegro. The new court proceeding is in progress.

Let us remind that this procedure started in March 2016, before the entry into force of amendments to the Law on Free Access to Information, in May 2017, which enabled the executive power to declare the information secret without adequate judicial protection.

Third decision

Despite the two court decisions, on February 20, 2018, “Monteput” issued **the third decision rejecting the request for access to the requested data.**

The new decision repeats the same reasons from the ruling that the court annulled and despite the court’s rulings it is added that the **Ministry of Transport and Maritime Affairs submitted a letter by which it did not approve access to the requested data.** Thus, the executive power openly showed that it did not respect the legally valid court rulings and that it would not act on them.

²³ Ruling of the Administrative Court U.no.3675/17

ANNEX 1

Montenegro Ministry of Transport and Maritime Affairs

Number: 34-451/2016-1

Podgorica August 1, 2016

Pursuant to Article 10 Paragraph 2 of the Law on Secrecy of Data (Official Gazette of Montenegro 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15) I adopt

DECISION

In accordance with Article 12, Paragraph 5 of the Law on Secrecy of Data (Official Gazette of Montenegro, no. 14/08, 76/09, 41 / 10, 40 / 11, 38 / 12, 44 / 12, 14/13, 18 / 14 and 48/15), the following documents related to the implementation of Bar-Boljare highway project, the Smokovac-Uvač-Matešev section, are confidential and designated as INTERNAL and their disclosure would result in the harmful consequences for the exercise of the office of the bodies:

1. Approvals, consents, opinions, resolutions, certificates, instructions, notices, announcements, requests/orders, proposals of the Contractor. Engineer (Supervising Authority), Representative of the Investor (Project Manager) and the Investor, which are a variable category and affect the current contractual positions of the Contracting Parties regarding the implementation of the Contract on the Design and Construction of the Bar-Boljare Highway, Smokovac-Uvač-Matešev section (Official Gazette of Montenegro No. 54/14), the Contract on providing consulting services with the elected Supervising Authority in connection with the implementation of the Project (No. 01-4683/2, 11.09.2014) and the Project Management Contract with the Project Manager/Representative of the Investor (No. 016099/1 of 12 November 2014);
2. Technical documentation (textual and graphic) required for design, execution of works, completion and elimination of deficiencies in order to ensure adequacy, stability and safety of all works on the site and all methods of execution of works in accordance with sub-clause 5.2 of the Contract on design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Matešev ("Official Gazette of Montenegro" No. 54/14);
3. Data on the construction site in accordance with sub-clause 4.10 of the Contract on the design and construction of the Bar-Boljare Highway, section Smokovac-Uvač-Matešev ("Official Gazette of Montenegro" No. 54/14);
4. As-built documentation state according to the sub-clause 5.6 of the Contract on the design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Matešev ("Official Gazette of Montenegro" No. 54/14);
5. Information on the claims of the contractor in accordance with the sub-clause. 20.1 Contract on the design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Matešev ("Official Gazette of Montenegro" No. 54/14);

6. Notice of claims of the Investor in accordance with sub-clause 2.5 of the Contract on the Design and Construction of the Bar-Boljare Highway, Smokovac-Uvač-Mateševu (Official Gazette of Montenegro 54/14);
7. Findings of the Engineer in accordance with sub-clause 3.5 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);
8. Programme of works in accordance with sub-clause 8.3 of the Contract on the design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);
9. Time schedule of payment of the Contractor in accordance with sub-clause 14.4 of the Contract on design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);
10. Requests of the Contractor for issuing the Interim Payment Statement in accordance with sub-clause 14.3 and Interim Payment Certificate in accordance with sub-clause 14.6 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);
11. Requests of the Contractor for issuing the Final Payment Statement in accordance with sub-clause 14.11 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);
12. Decisions of the Dispute Resolution Commission in accordance with sub-clause 20.4 of the Contract on the Design and Construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);
13. Report by the Contractor on the progress of works in accordance with sub-clause 4.21 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);
14. Monthly Report of the Engineer on the services provided in accordance with Article 1.6.1 of the Project Task for the Engineer;
15. Monthly Report of the Project Manager on project progress in accordance with Annex 1 of the Project Management Contract;
16. Audit plan for technical documentation;
17. Plans for control of examination of Works;
18. Criteria for measurement and assessment of subsequent and unforeseen works;
19. Minutes of meetings;
20. Reports on the audit of the State Commission for the audit of technical documentation that are not final.

The information referred to in paragraph 1 of this Decision shall cease to be classified at the expiration of a period of two years from the date of the adoption of this Decision, in accordance with the Article 19a Paragraph 1 Item 4 of the Law on Secrecy of Data ("Official Gazette of Montenegro" No. 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15).

Changing or abolishing of the degree of confidentiality of data will be carried out in accordance with Article 19b Paragraph 2 of the Law.

Reasoning

Article 10 Paragraph 2 of the Law on Secrecy of Data ("Official Gazette of Montenegro" No. 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15) stipulates that an authorized person for determining the level of secrecy of the information shall by a reasoned decision declare and information secret and determine the degree of its secrecy.

As the process of implementation of the project for the construction of the Bar-Boljare highway, the priority section Smokovac-Uvač-Mateševo, contains information that is confidential and from which the public is excluded, because its publication could jeopardize the contractual position of the authorities and the legal procedures that are ahead regarding the implementation of the Contract on the Design and Construction of the Bar-Boljare Highway ("Official Gazette of Montenegro" No. 54/14), it is necessary that these data be considered within the limited number of authorized entities, exclusively for the needs of the Project and for the purposes for which they are foreseen.

Based on the aforementioned, it was decided as in the text of the Decision.

Legal Remedy: Against this decision, an appeal may be filed to the Complaints Commission of the Government of Montenegro, within 8 days of the receipt of the Decision, through this Ministry.

MINISTER
Ivan Brajović

ANNEX 2

Montenegro
Ministry of Transport and Maritime Affairs

Number: 34/17-01-2229/1

Podgorica, April 7, 2017

Pursuant to Article 10 Paragraph 2 of the Law on Secrecy of Data (Official Gazette of Montenegro 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15) I adopt

DECISION

In accordance with Article 12, Paragraph 5 of the Law on Secrecy of Data (Official Gazette of Montenegro, no. 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15), the following documents related to the implementation of Bar-Boljare highway project, the Smokovac-Uvač-Mateševu section, are confidential and designated as INTERNAL and their disclosure would result in the harmful consequences for the exercise of the office of the bodies:

Approvals, consents, opinions, resolutions, certificates, instructions, notices, announcements, requests/orders, proposals of the Contractor, Engineer (Supervising Authority), Representative of the Investor (Project Manager) and the Investor, which are a variable category and affect the current contractual positions of the Contracting Parties regarding the implementation of the Contract on the Design and Construction of the Bar-Boljare Highway, Smokovac-Uvač-Mateševu section (Official Gazette of Montenegro No. 54/14), the Contract on providing consulting services with the elected Supervising Authority in connection with the implementation of the Project (No. 01-4683/2, of 11.09.2014) and the Project Management Contract with the Project Manager/Representative of the Investor (No. 016099/1 of 12 November 2014);

Technical documentation (textual and graphic) required for design, execution of works, completion and elimination of deficiencies in order to ensure adequacy, stability and safety of all works on the site and all methods of execution of works in accordance with sub-clause 5.2 of the Contract on design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

As-built documentation state according to the sub-clause 5.6 of the Contract on the design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Information on the claims of the Contractor in accordance with sub-clause. 20.1 Contract on the design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Notice of claims of the Investor in accordance with sub-clause 3.5 of the Contract on the Design and Construction of the Bar-Boljare Highway, Smokovac-Uvač-Mateševu (Official Gazette of Montenegro 54/14);

Findings of the Engineer in accordance with sub-clause 3.5 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Programme of works in accordance with sub-clause 8.3 of the Contract on the design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Time schedule of payment of the Contractor in accordance with sub-clause 14.4 of the Contract on design and construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Requests of the Contractor for issuing the Interim Payment Statement in accordance with sub-clause 14.3 and Interim Payment Certificate in accordance with sub-clause 14.6 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Requests of the Contractor for issuing the Final Payment Statement in accordance with sub-clause 14.11 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Notices of the contractual parties on initiating a dispute before the Dispute Settlement Commission in accordance with sub-clause 20.4 of the Contract on design and construction of Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Decisions of the Dispute Resolution Commission in accordance with sub-clause 20.4 of the Contract on the Design and Construction of the Bar-Boljare highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Report by the Contractor on the progress of works in accordance with sub-clause 4.21 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševu ("Official Gazette of Montenegro" No. 54/14);

Reports of the Engineer (Supervising Authority) in accordance with Article 1.6.1 of the Project Task for the Engineer;

Monthly Report of the Project Manager on project progress in accordance with Annex 1 of the Project Management Contract (No. 01-6099/1 of November 12, 2014);

Audit plan for technical documentation;

Reports on the audit of the State Commission for the audit of technical documentation that are not final;

Criteria for measurement and assessment of subsequent and unforeseen works;

Minutes of meetings.

Changing or abolishing of the degree of confidentiality of data will be carried out in accordance with Article 19b Paragraph 2 of the Law on Secrecy of Data ("Official Gazette of Montenegro" No. 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15).

On the day of the entry into force of this Decision, the Decision on determining the degree of secrecy of data "INTERNAL" no. 34-451 / 2016-1 from August 1, 2016 shall cease.

Reasoning

Article 10 Paragraph 2 of the Law on Secrecy of Data ("Official Gazette of Montenegro" No. 14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15) stipulates that an authorized person for determining the level of secrecy of the information shall by a reasoned decision declare the information secret and determine the degree of its secrecy.

In accordance with the prescribed procedure in the proceeding for issuing this Decision, a harm test for disclosure of information no. 34/17-01- 2229/2 of April 07, 2017 was performed.

Bearing in mind that the process of implementation of the project for the construction of Bar-Boljare highway, priority section Smokovac-Uvač-Mateševo, contains information that is confidential and from which the public is excluded, since its disclosure could endanger the contractual position of the bodies and legal procedures that are in connection with the implementation of the Contract on design of Bar-Boljare Highway, Smokovac-Uvač-Mateševo section no. 01-827/1 from 26.02.2014. ("Official Gazette of Montenegro" No. 54/14) it is necessary that these data be considered within a limited number of authorized entities, exclusively for the needs of the Project and for the purpose for which they are foreseen, all in the interest of economic policy of Montenegro. protection of economic interests of the Investor (the Government of Montenegro represented by the Ministry of Transport and Maritime Affairs) related to the protection of competition and trade secret regarding the intellectual property right, as well as in the interests of performing official duties, especially in connection with consultations within and between the authorities regarding defining of opinions, creating official documents and proposing the solution of a case, as well as in relation to the work and decision-making of collegial bodies.

The data contained in documents precisely listed by type in points 1 - 19 in the text of this Decision, arising from daily activities related to the implementation of the Contract on the design and construction of Bar-Boljare highway, Smokovac-Uvač-Mateševo section No. 01 -827/1 of February 26, 2014 ("Official Gazette of Montenegro" No. 54/14) are confidential and they represent a trade secret, as they influence the implementation of the Investor's plans regarding the project, both in connection with implementation of this stage (sub-section), as well as in connection with preparatory activities for implementation of the following stages (sub-sections).

By their nature, defined types of documents represent the intellectual property of the Investor, or trade secret, and contain data that could be used as input and comparative parameters for a comprehensive due diligence analysis related to the preparation, implementation, management, maintenance of other stages (sub-sections) of the Project, due to defining of optimal investment conditions (requirements) to all future potential interested partners, by applying the principle of equal treatment, free competition and non-discrimination and in order to best protect the interests of the Investor (the Government of Montenegro represented by the Ministry of Transport and Maritime Affairs).

According to sub-clause 1.12 of the Contract on the Design and Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševo no. 01-827/1 of February 26, 2014 ("Official Gazette of Montenegro 54/14), the Contractor is obliged to keep the information from the Contract private and confidential and must not publish or reveal it, as well as any details of the Contract in any commercial or technical document, or in communication with media representatives or elsewhere, without the prior written consent of the Investor, while under sub-clause 1.8 of the Contract on the Design and Construction of the Bar-Boljare Highway, Smokovac-Uvač-Mateševo section no. 01-827/1 of February 26, 2014 ("Official Gazette of Montenegro" No. 54/14) it is defined that the Contractor is obliged to issue at the construction site one copy of all communications issued pursuant to the Contract, and the Investor's staff has the right to access this documentation, which means that the Contractual provisions also restrict the number of entities that have the right to access the documentation on the construction site, issued under the Contract.

According to sub-clause 1.9.1 of the Contract on Providing of Services for Supervision of Design of Project Documentation and Execution of Works for the Construction of the Bar-Boljare Highway, section Smokovac-Uvač-Mateševo no. 01-4683/2 of September 11, 2014, it is defined that the Supervising Authority (the Engineer) must not publish any material and/or information according to the Contract without obtaining the prior written consent of the Investor (Client).

Approvals, consents, opinions, resolutions, certificates, instructions, notices, announcements, requests/orders, minutes of meetings, proposals of the Contractor, Engineer (Supervising Authority), Representative of the Investor (Project Manager) are variable categories (current and labour contract administrations) that do not have a final and binding form for the parties and affect the "current contractual positions of the contracting parties in connection with the implementation of the Contract on the design and construc-

tion of the Bar-Boljare highway, Smokovac-Uvač-Mateševo section no. 01-827/1 of February 26, 2014 ("Official Gazette of Montenegro" (No. 54/14), Contract on providing consulting services with the selected Supervising Authority in connection with the implementation of the Project No. 01-4663/2 of September 11, 2014 and the Project Management Contract with the Project Manager/ Representative of the Investor No. 01-6099/1 of November 12, 2014, so it is essential that ordinary data be considered within a limited number of authorized entities. It is the information that arises in the process of preparation and harmonisation of views and opinions within one and/or between several entities on the Investor side involved in the process of monitoring the implementation of the Project and its disclosure before the final decision could lead to misinterpretation of the content of the information and seriously endanger the decision-making process, especially if the other contracting party is indirectly familiar with them (the Contractor).

Technical documentation (text and graphic) required for project design, performing of works, completion and elimination of deficiencies in order to ensure the adequacy, stability and safety of all works on the construction site and all methods works and as-built documentation are technical documentation with a great level of detail which should be available within a limited number of authorized entities, exclusively for the needs of the Project and for the purposes for which it is foreseen, all in order to ensure optimum security aspects of the use of the said capital infrastructure facility.

Disclosing of the criteria for measuring and evaluating subsequent and unforeseen works, notions on claims of the Contractor, notions on the claims of the Investor, notion of the contracting parties on initiation of dispute before the Commission for the settlement of disputes, findings of the Engineer, reports of the entities involved in monitoring the implementation of the Project could have a negative impact on the project management by the investor and jeopardize the interests of the Investor (the Government of Montenegro represented by the Ministry of Transport and Maritime Affairs), if the current contractor (China Contractor Company Ltd./China Roads and Bridge Corporation) were familiar with them, because they also contain the opinions, views, recommendations for dealing with possible amendments and corrections, the Instructions of the Supervising Authority (the Engineer), the Claims of the Contractor and/or the Investor, as well as possible dispute proceedings before the Dispute Settlement Commission, and later even before the Court of Arbitration of the Chamber of Commerce in Zurich (Switzerland), according to arbitrary rules of this Court and by settling the certain damages requests, in accordance with the standard FIDIC procedures for this kind of business and the Contract on the Design and Construction of the Bar-Boljare Highway, Smokovac-Uvač-Mateševo section no. 01-827/1 of February 2, 2014 ("Official Gazette of Montenegro" 54/14).

Decisions of the Dispute Resolution Commission are part of the contractual administration that can be changed in a friendly manner by agreement of the parties or an arbitration decision. Decisions of the Dispute Resolution Commission are also part of the documentation that can be considered in the arbitration proceedings, in which all the relevant documentation is considered confidential, in accordance with the usual arbitration rules. Arbiters are also, inter alia, authorized to open, review and modify any of the Commission's non-dispute proceedings, which means that until the end of the eventual arbitration proceedings, the decisions of the Dispute Resolution Commission have a variable character, and their publication before the final form could lead to a misinterpretation of the content of the information and endanger, both formally and substantially, the possible forthcoming arbitration procedure.

The Audit plan for technical documentation and audit reports of the State Commission for the Audit of Technical Documentation which are not final are variable categories, and their disclosure before the final form could lead to a misinterpretation of the content of the information, and consequently to the wrongful conduct of the Contractor as a Designer in the preparation of the Main Project if it were previously acquainted with them indirectly. Article 7 of the Decision on the appointment of the State Commission for the Audit of Technical Documentation ("Official Gazette of Montenegro" No. 20/15) defines that the work of the State Commission for the Audit of Technical Documentation is considered a business secret. Thus, Article 7 of the Decision on the appointment of the State Commission for Technical Inspection of Works (Official Gazette of Montenegro 30/15) defines that the work of this Commission is considered a business secret and no member of this Commission has the authority to communicate outside the Commission any kind of information related to the scope of the work of the Commission.

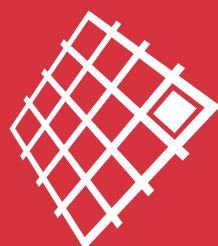
The work schedule and the Timetable of Payments defined by it are also variable contract categories until the end of the project implementation, as they represent the Contractor's plan (assessment) of organizational, working and resource structures and all relevant activities that are related to design, production, procurement, on-site works until the completion of the Project, and as such, these documents may be subject to further revision and correction until the completion of the Project, all in accordance with the procedures defined in the Contract on the design and construction of the Bar -Boljare, section Smokovac-Uvač-Mateševo section no. 01-827/1 of February 26, 2014 ("Official Gazette of Montenegro" 54/14). The program of work is a document of the Contractor for whose implementation it is solely responsible and realization of the Time schedule of payments is conditioned by it. Their publication before the completion of the works would cause misinterpretation of the information content.

Requests of the Contractor for issuing the Interim Payment Statement and Interim Payment Certificate itself, as well as the Request of the Contractor for the issuing the final certificate, are variable categories (current and labour contract administration) until the moment of confirmation by the Engineer (Supervising Authority) and payment by the Investor. Their disclosure before the final form (final situation) could lead to a misinterpretation of the content of the information.

Bearing in mind the aforementioned, it is unambiguously established that the disclosure of any document individually listed 1-19 in the text of this Decision would cause adverse consequences for the interest which is of greater importance than the public's interest in knowing the requested information.

Based on the aforementioned, it was decided as in the text of the Decision.

MINISTER
Osman Nurković



mans

www.mans.co.me