

## SUMMARY OF THE REPORT

### ON IMPLEMENTATION OF THE LAW ON FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE AND THE LAW ON PERSONAL DATA PROTECTION FOR 2014

The scope of work of the Commissioner for Information of Public Importance and Personal Data Protection is to ensure protection and to promote the right of free access to information of public importance and the right to personal data protection and to oversee the lawfulness of personal data processing, on the basis of the Law on Free Access to Information of Public Importance (hereinafter referred to as “the Law on Access to Information”) and the Law on Personal Data Protection (hereinafter referred to as “LPDP”).

In accordance with this, the Commissioner’s activities in 2014 concerned the following: handling of cases pursuant to complaints against violations of the freedom of information and violations of the right to personal data protection; supervision of implementation of the LPDP; provision of assistance to individuals and to public authorities, i.e. personal data processors, in the exercise of rights and proper implementation of these laws; issuing of legislative initiatives and opinions to public authorities in connection with the enactment or amendment of laws and other regulations; organisation of and participation in seminars and lectures, primarily for employees of public authorities and personal data controllers; maintenance of the Central Register of Data Files; development of international and regional cooperation; activities in connection with the EU accession process etc.

**The volume of the Commissioner’s activities, reflected in the number of cases handled and their complexity, has continued increasing throughout 2014.** Thus, in 2014 the Commissioner handled a total of 11,387 cases (8,749 cases in the field of freedom of information and 2,638 cases in the field of personal data protection), which was about 15% higher than in 2013. **The volume of activities increased by 23% compared with 2013,** because in the course of 2014, the Commissioner closed the proceedings in 7,763 cases, including 5,563 in the field of freedom of information and 2,200 cases in the field of personal data protection.

The increased volume of activities resulted from employees’ increased efforts to tackle backlog of cases from the period when the Commissioner’s Office was understaffed and also from employment of a certain, although still insufficient, number of employees, whose hiring was endorsed by the National Assembly.

#### **A. Freedom of Information**

**Freedom of information has been continually used to a large extent in Serbia.** Information requesters were still mainly wanted to know how public authorities managed budget funds and other public money, whether government and other authorities operated in accordance with the law, including in particular cadastre offices, the police, public

prosecutors' offices and courts, public enterprises etc., how the competent authorities treated the environment, human health and animal welfare etc.

The largest share of information requesters were individual citizens and citizens' associations, journalists/media outlets, followed by trade unions, representatives of political parties, public authorities themselves and economic operators, lawyers etc.

**The volume of the Commissioner's activities in the field of freedom of information in 2014 was 26.2%, higher than in 2013**, with a 18.1% increase in the number of received cases. The Commissioner terminated the procedure in 5,563 cases of a total of 8,749 cases handled in 2014 (5,778 received in 2014 and 2,971 pending cases carried forward from 2013). 3,186 pending cases which could not be closed due to understaffing were carried forward to 2015.

Most of the Commissioner's activities involved handling of individual cases pursuant to complaints filed by information requesters. In 2014, the Commissioner received 3,929 complaints due to denial of access to information, which was 19% more than in 2013. **The number of resolved complaints was 3,739, which was 28.5% higher than in 2013. Of that number, 3,388 complaints (90.6%) were found to be justified** and the most frequent grievance of the complainants was the so-called "administrative silence". These are situations where an authority either fully ignores a freedom of information request or answers it cannot comply with a request without providing proper justification, in spite of the fact that failure to honour freedom of information requests is an infringement punishable under the law.

The majority of the complaints in 2014 – 1,811 complaints or **46.1% of the total number of complaints received in 2014** were filed **against national authorities, including 816 complaints (45%) against ministries, which was 23.6% higher than in 2013**, and the number of requests to ministries also increased by 1,160 requests or 29.6%. What is worrying is the fact that in 2014 the number of cases in which public authorities invoked confidentiality of information without proper legal basis while denying information has increased by 12% compared with 2013.

**The percentage of proceedings pursuant to citizens' complaints that were terminated** because the public authorities allowed access to the information they had previously withheld immediately upon learning of a complaint, before the Commissioner passed a decision, **remains high (about 60%)**. Obviously, there was no proper reason not to comply with requests even before the Commissioner's intervention and irresponsible treatment of citizens could have easily been avoided, together with the unnecessary administrative actions and associated expenses.

**As regards justified complaints, the Commissioner's interventions enabled the requesters to exercise their rights in 93.1%. However, out of the total number of cases in which the Commissioner ordered the respondents to make the information available to the complainant (1,056), the authorities failed to comply in 225 cases (21.3%)**, including ministries in 43 cases, other national authorities in 46 cases, judiciary authorities in 17 cases, local self-government authorities in 46 cases, state-owned

enterprises and other enterprises majority-owned by the state in 35 cases and local public enterprises in 38 cases.<sup>1</sup>

Enforcement of the Commissioner's decisions and resolutions remains an issue. On requests from information requesters, **the Commissioner carried out 92 enforcement procedures**, within the framework of which he issued 151 enforcement orders and decisions on fining, as well as 124 resolutions on termination of proceedings in cases where the respondents complied with the decisions.

**As regards the enforcement of his decision, the Commissioner asked the Government to enforce his decisions in 13 in accordance with the law, but to no avail**, except in one case when a public authority complied with a decision after enforcement procedure. **The fines** imposed by the Commissioner in enforcement procedures secured **an inflow of RSD 2,060,000 to the budget**, while the outstanding amount of RSD 2,480,000 owing in fines could not be collected forcibly because the competent court in Belgrade declines jurisdiction in these cases, while all other courts in Serbia accept jurisdiction. Such divergent practice of courts is highly detrimental to the exercise of the rights and calls for an urgent response by the competent authorities, which the Commissioner emphasized in his previous reports.

In 2014, **193 claims were filed against the Commissioner's decisions** with the Administrative Court. **The Court did not meritoriously uphold a single claim and did not overturn any Commissioner's decision.** From the aspect of judicial control of the legality of the Commissioner's work, this result is indeed praiseworthy.<sup>2</sup>

Other activities of the Commissioner included provisions of assistance to public authorities in the implementation of laws and to citizens in the exercise of their rights, through **opinions and explanatory instructions (175 cases)**, issuing of a publication containing views and opinions from the Commissioner's practice, **measures to improve proactive publication of information (94 cases)**, **legislative initiatives and opinions in connection with the enactment of legislation (7)**, **communication in connection with requests** submitted or forwarded to the Commissioner by information requesters (**774**), replies to **freedom of information requests address to the Commissioner (93)**, acting on **petitions** that are largely outside the scope of the Commissioner's powers (**341**) etc.

**The Ministry of Public Administration and Local Self-Government, or more specifically the Administrative Inspectorate** within it, as the authority in charge of overseeing the implementation of the Law on Access to Information and initiating infringement proceedings against responsible public authorities, **initiated in 2014 only four infringement proceedings** because of failure to submit report to the Commissioner and failure to publish information booklets. Thus, with the exception of individual

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<sup>1</sup> The annex to the Report provides an overview of the Commissioner's decisions that have not been complied with.

<sup>2</sup> In only one case the Court overturned the Commissioner's decision and returned the case for renewed procedure because an acknowledgement of receipt as evidence of untimely legal actions was not enclosed by mistake to documents submitted to the Court, following which the Commissioner passed the same decision.

requests filed by citizens as wronged parties for initiation of infringement proceedings, **virtually no one is held to account for violations of freedom of information for four years running. And all this despite the fact that the Commissioner alone submitted to the Inspectorate the files of 350 cases in which infringement proceedings should have been initiated** because authorities fail to comply with the Commissioner's decision and the fact that there were more than 3,388 justified complaints, which appears to indicate that in 2014, similarly as in the previous years, at least several thousand infringements occurred.

The so-called legal framework for exercise of freedom of information needs to be improved. Despite the fact that the Law on Access to Information is based on high standards, **the Law needs to be modified because of new changes in other fields of the legal system and in practice, including the needs of European integration.** The Law must include certain entities that have not been subject to this Law so far and are vested with serious public powers, such as notaries public and bailiffs, it is necessary to expand the Commissioner's powers to include filing of petitions for infringement proceedings, to increase fines and the level of responsibility for implementation of the law, to eliminate obstacles in implementation of the Law in connection with compliance with the Commissioner's decision, to increase the level of proactive publishing of information etc. Amendments to the Law are also necessary because of the need to adopt and transpose EU directives on re-use of information and access to information on the environment.

**The reform of state administration requires much higher transparency and responsibility of public authorities** and amendments to the Law on Access to Information are one of the most important manners to achieve this and are also justified from the aspect of anti-corruption potential of this Law.

The Commissioner would like to emphasize again that **the said normative improvements would produce real effects only if introduced simultaneously with fully functional mechanisms of accountability for violations of rights and a mechanism of enforcement of the Commissioner's decisions by the Government, while at the same time addressing the diverging practices pursued by courts** in the judicial enforcement of the Commissioner's resolutions on imposition of fines, since the main obstacle standing in the way of consistent implementation of the Law is the absence of functional mechanisms which are beyond the Commissioner's control and within the mandate of the executive branch.

The fact that the Government has not enforced the Commissioner's decisions in any of the cases where this was required by the Commissioner on proposal of requesters, (in 13 cases),<sup>3</sup> although it was clearly required under the law to do so, while the Ministry of Public Administration and Local Self- Government has not prosecuted a single one of the by now numerous offenders in the period 2011-2013 and in 2014 it did so in only four symbolic cases for minor offences, appears to simply beg for more violations of the law. The Commissioner would like to warn again that an end must be put to this practice.

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<sup>3</sup> In one case a public authority complied with the Commissioner's decision after the Commissioner addressed the Government.

**The results of interventions by the Commissioner emerge as even more praiseworthy because of the fact that they were achieved without any means of enforcement.** Even when they are collected, the fines or penalties imposed by the Commissioner in enforcement of issued decisions are not efficient means of enforcement and besides the fact that their amount is insufficient, they are paid from the budgets of authorities.

**The main challenge for the Commissioner in the field of freedom of information in the coming years will be to clear the backlog of still more than 3,000 cases.** Had the Commissioner been able to hire sufficient staff in accordance with the job classification instrument, this issue would be much less of a challenge, but even with the currently available human resources the Commissioner will do absolutely everything to resolve the high inflow of new cases. A high and increasing number of complaints against the Commissioner in cases when the Commissioner does not issue a decision on a complaint within the statutory time limit of 30 days is an additional burden to the Commissioner's work, despite the fact that this situation is beyond his control.

**The national strategic documents in connection with the reform of public administration, the fight against corruption, formal accession of the country to the international initiative for the so-called open administration and the European integration process require consistent respect and performance of the legal duties towards the public and citizens in real life and not only through regulations.**

**The National Assembly has been implementing the majority of conclusions passed in connection with the review of the Commissioner's Report for 2013, but oversight of implementation of conclusions adopted in connection with the review of reports of independent authorities has not been fully implemented.** The competent committees of the National Assembly do not use sufficiently suggestions and opinions submitted by the Commissioner in the process of review and enactment of laws because the Commissioner is excluded from the opinion giving process at the stage when draft laws and bills are adopted and does not have the power to submit amendments himself.

Taking into account the presented situation in the field of freedom of information and obstacles which have been undermining the effects of protection of this right for years, the Commissioner concludes that **the majority of conclusions of the National Assembly which impose a duty on executive authorities to eliminate these obstacles have not been put into practice and all recommendations that have not been complied with are repeated in this Report.**

**The main condition for further Commissioner's work and improvement of the situation is to change practice of slow or improperly passive relation of the competent authorities towards elimination of obstacles to the exercise of rights which persist for years and which the Commissioner alone cannot influence.** Irresponsible treatment of legal duties and disrespect of human rights which remain unsanctioned most certainly do not contribute to the country's efforts in the fight against corruption and achievement of most other objectives of transition.

## **B. Personal Data Protection**

### **Legal Framework**

The existing legal framework cannot nearly provide unobstructed exercise of the right to privacy and personal data protection in all fields of an individual's life. Numerous provisions of LPDP are improper and incomplete, while a number of issues are regulated by neither LPDP nor special sector-level laws.

The situation is similar with secondary legislation, which often regulates the subject matter that should be regulated only by laws and thus directly disrespect the provision of Serbian Constitution (Article 42, paragraph 2) according to which collecting, keeping, processing and use of personal data are regulated by the law and not by secondary legislation. In addition, secondary legislation often insufficiently or incompletely regulate technical and similar issues regarding data processing activities, which should be regulated by these enactments.

Certain pieces of secondary legislation have not been passed, particularly those which should have been enacted a long time ago by Serbian Government. As an example, the Commissioner has pointed time and again to the need to adopt an instrument on the manner of filing and the measures for the protection of particularly sensitive data provided for in Article 16, paragraph 5 of LPDP, which should have been adopted by the Government within six months of the effective date of this Law, i.e. by 4. May 2009, but The Government has still not done so (delay of almost six years, although the Commissioner reminded about this duty on numerous occasions). This means that the protection of particularly sensitive data proclaimed by LPDP remains a dead letter.

What is particularly worrying is chronic lack of the necessary strategic approach in this field. The Serbian Government should have adopted the Action Plan on Implementation of the Personal Data Protection Strategy, with defined activities, expected effects, implementers of specific tasks and periods for their completion, within 90 days of publication of that Strategy in the "Official Gazette of the Republic of Serbia", i.e. by 20 November 2010, but this has still not been done (delay of more than four years, although the Commissioner reminded about this as well duty on numerous occasions). Of course, without the Action plan which should ensure its implementation, the Strategy also remains a dead letter, and taking into account the time passed, it is probably already also obsolete compared with the standards affirmed in democratic countries, particularly in EU.

Serbian Government has not taken appropriate measures even after the National Assembly passed its conclusions, such as on its session held on 5 June 2014 to review the Commissioner's Report for 2013, when the Assembly concludes it should "invite the competent authorities and public power holders to take measures necessary for

implementation of the Commissioner's recommendations, repeated year after year in the Commissioner's reports." And recommendations on personal data protection in the Commissioner's Report for 2013 among other things points to the need and invites Serbian Government to propose a new text of LPDP, to propose amendments to several sector-level laws, to propose amendments to the instrument on the manner of filing and the measures for the protection of particularly sensitive data and to enact the Action Plan for implementation of the Personal Data Protection Strategy.

Apart from adoption of draft amendments to several sector-level laws, Serbian Government has not complied with any other of the above conclusions of the National Assembly. According to the Commissioner, such treatment of conclusions of the National Assembly by Serbian Government is simply inexplicable and inadmissible.

Faced with the above situation and with numerous problems in practice resulting from such situation, in the previous 3 or 4 years the Commissioner emphasized this on several occasions to Serbian Government and the Ministry of Justice. Since Serbian Government did not respond to this either, the Commissioner prepared the new Model LPDP. On that occasion, the Commissioner has not opted for amendments to the currently applicable LPDP because amendments would include over seventy percent of the existing text and for technical legal reasons he prepared the text of the new Model LPDP. After suggestions were received during the discussion, in October 2014 the Commissioner submitted the new Model LPDP to the Ministry of Justice and published it on his official website, where it is still available. The Commissioner does not know whether the Ministry of Justice or Serbian Government took activities to adopt the submitted Model LPDP or to prepare new text on the basis of this Model.

Inadequate legal framework directly results in low level of implementation of LPDP in practice, which means that individuals cannot fully exercise their constitutional right to personal data protection in all spheres of life and to free exercise the right to privacy. Regardless of that, in 2014 Serbian citizens addressed the Commissioner more frequently than in previous years, which can be seen from the data below.

### **Figures on Cases in the field of Personal Data Protection**

In the course of 2014, the Commissioner closed proceedings in 2,200 cases, which was an increase of 15.7% compared with 2013 when he closed 1,901 cases.

**Supervision.** In 2014, the Commissioner closed 1,031 inspection procedures, which was an increase of 24.06% compared with 2013 when he closed 831 inspection procedures. Inspection procedures in 2014 were closed as follows: violations of LPDP were found in 350 cases; 538 cases were closed because it was found that previous inspection, warning or resolution was complied with, while 143 cases were closed by issuing notifications. In addition, another 312 cases were closed by official notes.

In 350 cases where the Commissioner found violations of LPDP, he issued 298 warnings and 13 rulings and filed 35 petitions for institution of infringement proceedings and 4 criminal reports.

The data controllers most frequently subjected to inspection procedures were: companies - 247 (31.6%), banks - 146 (18.7%), public administration authorities - 98 (12.5%) etc.

The percentage of data controllers' compliance with the Commissioner's enactments stating the violations of LPDP found was as follows: compliance with warnings issued in accordance with Article 50 LPDP (preliminary check of processing activities) – 91.76%; compliance with warnings issued in accordance with Article 56 LPDP (the Commissioner's power to take certain measures after he finds violations of the law in inspection) – 84.96%; compliance with rulings (on deletion of data collected without legal grounds, rectification of irregularities within the specified time limit and on temporary ban on processing) – 90.91%.

**Acting on complaints.** In 2014, the Commissioner handled 299 complaints, of which 241 were received in 2014, while the remaining 58 were carried forward from 2013. The most frequent cause for lodging of complaints with the Commissioner was the fact that data controllers did not allow access to the data or did not issue copies of the data or failed to do so within the time limit and in the manner provided for by the LPDP (105). The majority of the complaints – as many as 202 - were lodged due to actions of public authorities or their failure to act, including 75 complaints against ministries, which usually related to the Ministry of Internal Affairs (48).

The Commissioner closed the proceedings pursuant to 244 complaints, which was an increase of 40.23% compared with 2013 when he closed the proceedings pursuant to 174 complaints. Acting on complaints, the Commissioner found that complaints were unjustified in 105 cases, or 43.1%; in 58 cases, or 23.7%, the Commissioner terminated the proceedings by passing resolutions; in 51 cases, or 20.9%, the Commissioner rejected complaints as unjustified or rejected requests as unjustified, while in 30 cases, or 12.2%, he dismissed complaints on formal grounds.

The percentage of data controllers' compliance with complaints filed with the Commissioner is 81.58%.

**Issuing of opinions.** The Commissioner issued 699 opinions, which was an increase of 36.79% compared with 2013 when he issued 511 opinions. Opinions and relevant responses were issued to: individuals - 398; legal entities - 138 and public authorities and local self-government authorities - 163. In addition, the Commissioner also issued 19 opinions addressing the requests for changes in the Central Register.

Of the 163 opinions issued to public and local self-government authorities, 24 related to draft laws and bills, including 16 on requests from the competent authorities



and 8 the Commissioner's own initiative. The percentage of data controllers' compliance with these opinions is 83.33%.

**The Central Register.** The commissioner emphasizes the negative trend of fewer and fewer data controllers submit fewer and fewer records of their data files. Thus, in the course of 2014, 226 data controllers submitted records of data files they maintain, which was 40.27% less than in 2013 when 317 did so. Also, in 2014 data controllers submitted records of 950 data files they maintain, which is 70.53% less than in 2013 when they submitted records of 1,620 data files.

**Other activities.** In addition to the above activities, the Commissioner also ruled on 101 petitions, 64 requests for access to information, provided 18 replies to legal action to the Constitutional Court, ruled on 5 forwarded requests, issued 13 instructions on improvement of protection and prevention, ruled on 14 requests for transborder transfer of data, accepted 3 requests for exercise of the rights regarding personal data processing, completed 6 cases in connection with other communication with data controllers and requesters, rejected one motion for reversal and completed one case in the field of international cooperation.

In 2014 the Commissioner also continued numerous activities on promotion and affirmation of the right on personal data protection. As an example, the Commissioner took part in numerous educational seminars and trainings, round tables, conferences etc. The Commissioner also informed the public and indirectly certain data controllers through the media, Internet presentation, social networks and other manners of communication on the exercise and obstacles in the exercise of the right to personal data protection.

**As regards acting of prosecutors' offices on criminal reports filed by the Commissioner,** during the course of 2014, the Commissioner filed 4 criminal reports (one was rejected on the basis of the principle of opportunity of prosecution, while the remaining ones are pending). However, The Commissioner is not aware of any court proceedings initiated pursuant to the several dozens of criminal reports he has so far filed.

**As regards acting of Magistrates' Courts,** in 2014 the Commissioner filed 35 petitions for initiation of infringement proceedings against violations of LPDP and received 39 judgements of Magistrates' Courts (first instance and second instance) pursuant to petitions for infringement proceedings he filed in the previous period. Of those 39 judgements, majority were convictions (27). The Commissioner notes that an analysis of all judgements of several Magistrates' Courts reveals that cases with identical factual and legal basis often resulted in opposite decisions, as well as that the amounts of fines imposed in convictions are much closer to the statutory minimum than the statutory maximum.

**As regards acting by the Administrative Court,** in 2014 the Administrative Court ruled on 19 legal actions against the Commissioner by rejecting nine and upholding

one, which it returned to the Commissioner for renewed procedure, dismissing 3 and terminating the proceedings in 6 cases.

The Commissioner once again recalls that although more than two years have passed, the competent authorities still took no activities to implement majority the package of “14 measures” proposed jointly by the Commissioner and the Ombudsman, which, among other things, proposes the integration of procedures and the existing duplicated technical resources of various “services” and the police into a single national agency that would provide technical services necessary for interception of communications to all authorised users, with indelible recording of a trail of access to telecommunications that would include all data necessary to subsequently inspect the lawfulness of access. The Commissioner reminds that this “package” garnered strong verbal support at the time when it was proposed.

The inevitable conclusions in the field of personal data protection are that the overall legal framework is still alarmingly deficient, inadequate and incomplete. In addition, both the Government and the Assembly finalize and enact regulations, even laws, without prior Commissioner’s opinion, which result in additional confusion and elements of unconstitutionality. Because of this, the same problems persist for years in achievement of real progress in the field of personal data protection. Those problems are beyond the Commissioner’s control and their elimination depends on executive and legislative authorities.