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**Access to Court Records and FOIA as a Legal Basis –
The Experience of Slovenia**

Introduction

Access to information of public character is regulated in Republic of Slovenia by Act on the Access to Information of Public Character (FOIA)¹, which has introduced since 2003 the principle of openness and transparency to all the three branches of authorities: executive, legislative and judiciary. Republic of Slovenia therefore has a uniform regulation of access to public information which is exposing to public scrutiny the judiciary in whole not just its administration or so called court management. The exceptions to freely accessible public information are therefore regulated accordingly and exhaustively listed in FOIA². According to regulation such an exception is for example the information which was acquired or assembled for the purposes of criminal prosecution or in relation to it or for the purpose of violation procedure and the disclosure of which could impair their execution. Equally the regulated exceptions are the information which were acquired or assembled for the purposes of administrative procedure and the disclosure of which could impair its execution; and the information which were acquired or assembled for the purposes of civil procedure, non-contentious proceeding or other judicial proceeding and the disclosure of which could impair their execution.

¹ Official Gazette RS; No. 51/06 – official consolidated text and No. 105/06 – ZUS-1, hereinafter FOIA.

² All the exceptions are indicated in the First Paragraph of Article 6 of FOIA.

Short comparative overview of legal regulations is presented in the table below.

Table: EXCEPTIONS CONCERNING JUDICIAL PROCEEDINGS WITH REGARD TO ACCESS TO INFORMATION OF PUBLIC CHARACTER (IPC)

COUNTRY	COURTS EXCLUDED FROM ACCESS TO IPC	JUDICIAL PROC. ARE REL. EXCEPTION	JUDICIAL PROC. ARE ABS. EXCEPTION	PRE-CRIMINAL PROCEEDINGS AS EXCEPTION
1. Austria	No	Yes	No	No
2. Belgium	No	No	No	Yes, REL
3. Czech Republic	No	Yes	No	Yes, REL
4. Denmark	No, criminal part only	Yes	No	Yes, REL
5. Estonia	No	Yes	No	Yes, ABS
6. Finland	No	Yes	No	Yes, REL
7. France	No	Yes	No	Yes, REL
8. Germany	Yes	Yes	No	Yes, ABS
9. Greece	No	Yes	Yes	Yes, REL
10. Hungary	No	No	Yes	Yes, ABS
11. Ireland	No, court records are excluded – court administration is included	No	Yes	Yes, ABS
12. Italy	Yes	No	No	Yes, ABS
13. Latvia	Yes	No	No	Yes, ABS
14. Lithuania	No	No	No	Yes, REL
15. Malta	Yes	/	/	/
16. Netherlands	Yes	No	No	Yes, REL
17. Poland	No	Yes	No	Yes, REL
18. Portugal	Yes (“secrecy of justice are protected under special legislation”)	Yes (“postponed until the decision has been taken”)	No	Yes (regulated by regulations outside the IPC system)

COUNTRY	COURTS EXCLUDED FROM ACCESS TO IPC	JUDICIAL PROC. ARE REL. EXCEPTION	JUDICIAL PROC. ARE ABS. EXCEPTION	PRE-CRIMINAL PROCEEDINGS AS EXCEPTION
19. Slovak Republic	Yes, court administration is included but not the 'decision making' process)	No	Yes	Yes, ABS
20. Slovenia	No	Yes	No	Yes, REL
21. Spain	Yes	/	/	/
22. Sweden	No	No	Some (taxes, e. g.)	Yes, REL
23. Great Britain	No	No	Yes (court records are an absolute exception)	Yes, ABS (court records are an absolute exception)
24. EU	Yes	/	/	/

It becomes evident prima facie from the comparative analysis of legal regulations that these are divided to those where the courts as public bodies are excluded from the system of access to public information (Spain, Slovak Republic, Portugal, Netherlands, Malta, Latvia, Italy, Germany, European union) and those where the courts are included in the system as are other bodies of the public sector (Great Britain, Sweden, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Poland ...). The existing arrangement in Republic of Slovenia follows the second approach to regulation of access to public information which currently prevails globally. This arrangement comparatively prevails in the European legal area since the goal of modern regulation of the access to information of public character is integrated and systematic transparency of all the three branches of authorities: legislative, executive and judiciary. The courts as representatives of the judiciary are in regulations of this type included among the bodies liable to provide access to public information and can be further divided to two groups of regulations: those where the courts are included in whole and those where some or specific court actions are either excluded from this system (Great Britain, Slovak Republic) or regulated in other laws outside the area of access to information of public character.

The subject of protected exemption referring to criminal prosecution or individual court proceedings is the protection of public interest. Each exemption to free access to public information, including the previously mentioned can be either relative or absolute in nature. It is absolute when access should always be refused; and relative when the access should only be refused if the public interest protected by it is greater than the interest of

the public to disclosure. In most of these systems also when the exemption is of absolute nature the harm test should be met to estimate the damage which would incur to the protected legal entitlement by disclosure of specific information. In case of the relative exemptions the test of prevailing interest of the public exists by which the danger of menacing serious damage to protected legal entitlement and the public interest for disclosure of specific information are balanced.

Comparative legal analysis shows that almost all the systems which include courts as liable bodies in the context of access to public information, protect execution of proceedings related to detection of criminal acts and proceedings of criminal prosecution as special exemptions to free access to public information thus protecting public interest to detection of perpetrators of criminal acts³. The Recommendation (2002) No. 2 of the Council of Europe needs to be mentioned here which specifically defines »the prevention, investigation and prosecution of criminal activities« as legitimate reasons for limiting access. Also the Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents which excludes the courts from this system defines that access to documents whose disclosure would hamper the purpose of inspective, investigative or accounting activities should be refused. It is important to note here that the EU bodies do not deal with the criminal prosecution in the same way as individual member states. Finally we need to mention the fact that the draft proposal of the Convention on access to public information which is being drafted by the Council of Europe, does not envisage inclusion of the judiciary as a whole but only its administrative part – court management, while the inclusion of the whole judiciary in the draft remains only one of the possible options⁴.

Regulation in Slovenia

It is worth noting that the exceptions which protect the criminal prosecution and judicial and administrative proceedings cumulatively define two conditions which should be fulfilled for the exception to be effective:

1. The proceeding must be in progress,
2. The disclosure of information would hamper the execution of the proceeding.

The legislator in passing FOIA, where the term criminal prosecution is used, allowed the possibility to include under protection all the information from all phases of the criminal prosecution. This exception is in part covered also by another exception, namely FOIA

³ Those systems which exclude courts from free access to public information regulate the publicity of their work in special regulations as the pre-trial proceeding should not be totally excluded from the context of access to public information. This proceeding is primarily in the domain of investigation bodies, namely the prosecution and police. As these are repressive bodies, their work needs to be included in access to public information in a systematic way representing also one of the forms of control (in the sense of scrutinizing function of the right of free access to public information), while at the same time the possibilities for their effective work need to be continuously ensured.

⁴ We are referring to the draft text of the convention, which is being prepared by the group of experts from 15 European countries; Republic of Slovenia as one of the members of the Council of Europe and a member of the group of experts has strongly opposed to such regulation of the scope of liable bodies in relation to access to public information.

protects from disclosure also the information acquired or assembled for the purposes of civil, non-contentious or other judicial proceeding, thus also criminal. The use of one or the other exception depends on the estimation of the liable body from which the information is being requested and on the phase in which the criminal proceeding is.

Exceptions whose purpose is protection of judicial proceedings require the use of so called harm test, according to which the body deciding against the disclosure of the document has to prove that the disclosure would affect the protected legal entitlement or that specific damage would occur in execution of the judicial proceeding. The threat has to be real not just hypothetical. The liable body is therefore entitled to refuse the access if the disclosure would jeopardize the execution of specific actions in the proceeding in such extent that they would become impossible or their execution would become harder or disproportionately more expensive or difficult. The body should for example prove the likelihood of the fact that the disclosure of documents in specific court case would endanger specific judicial proceeding. The harm test must be met in each individual case by the body which has to prove *in concreto* the occurrence of damage. It is often noted by the courts that the transmission of a judgment which is not yet final could have an affect on the decision of the court of appeal however they do not concretely specify what sort of damage would consequently occur. This hypothetical assertion of occurring damage without concrete implementation of the harm test does not meet the required proof of existence of the exception. As the court hearings are public, the journalists attend and comment or report especially from the hearings of greater interest to the media. Freedom of information and developed public opinion are extremely important in preventing abuses and in democratic implementation of state authority thereby also of judiciary. Accordingly these subjects are discussed also outside the courts in public opinion which should not affect the expert work of the judges and their independence and impartiality. On the contrary this threat should not be a reason for limitation of the access to information. If the court would not be able to ensure objective, professional and impartial trials in cases of different pressures in particular with the cases which get more media attention, this could lead to violation of Art. 23 of the Constitution of the Republic of Slovenia which guarantees to everyone to have an independent and impartial court constituted by the law without undue delay deciding on his rights, duties and allegations brought against him. Many other public officials or functionaries are exposed to such pressures and it is (reasonably) expected from them to provide expert, independent and impartial exercise of their duties. Refusal of access to judgments which are not yet final solely because this could affect the decision of the court of Appeal does not meet the requirement of serious legal assessment.

It is important to note here that the documents contained in specific pre-criminal or court records include information which are also subject to other exceptions to freely accessible information the most frequent one being the exception of protected personal data in accordance with the Personal data protection Act⁵. Concrete record might therefore contain also other exceptions which are intertwined with the freely accessible information. In evaluating the accessibility of individual documents the starting point should therefore be the principle of ensuring the highest possible level of accessibility to

⁵ Official Gazette RS; No. 86/2004,113/2005, 51/07 – ZUstS-A and 67/07, hereinafter ZVOP-1.

information while the main principle of FOIA is the principle of openness and thus the aim of the law to ensure the public to be informed in the best possible way. Through provisions providing for partial access in accordance with Article 7 of FOIA access to that information should be granted which could be extracted from the document without affecting its confidentiality and taking into account the reasonableness, reasonable time requirements on necessary input of administrative work and standards developed by the European court of Justice in Luxemburg. These are the arguments that prove the fear from exceeding disclosure of personal data or information in relation to the protection of judicial proceedings as ungrounded.

From the practice of the Information Commissioner

According to FOIA, each piece of information originating from work sphere of the body is considered as information resulting from performance of public law tasks or in relation to activity of the body. Information of public character must have been formed in the course of the activities of the body or procedures that fall within the competence of the body. If the first condition is fulfilled, the information of public character can relate to any content of any area of activity of the liable body and can be related to its policy, activity and decisions that fall under the sphere of activities or responsibility of the respective body.

The exercise of the authority of the judiciary which includes trials in specific civil affairs also represents a part of the public law tasks of the body and therefore falls under the sphere of activities of the body. Should it be ascertained in the appeal procedure that the requested document exists, that the body is in possession of the document and that the requested information derives from the work sphere of the body, the basic criteria for existence of information of public character are fulfilled. For that reason, individual documents from court records, such as transcripts of public hearing, orders, decisions and judgments, fulfil all the requirements for existence of information of public character.

In practice the distinction developed between the right of access to court records under the procedural law and right of access to information of public character under FOIA. Courts as liable bodies have frequently rejected requests for access on account of procedural law provisions, under which the parties have the right to examine and transcript separate records in which they act as parties. Other persons may be allowed to examine and transcript separate records, but only if they can demonstrate legitimate benefit. In this manner the courts weigh, whether the applicant has legal interest to obtain specific information and the requests for access to information of public character get regularly rejected, despite the fact that FOIA specifically enshrines the principle of free access to information of public character.

Such interpretation of FOIA is according to the Information Commissioner's practice considered inappropriate. Provisions of procedural laws that regulate the right of access and transcription of records are not in relation *lex specialis derogat legi generali*, since they do not regulate the same right. Provisions of procedural laws relate to right of clients in a judicial procedure, i.e. the right of a person who has demonstrated legitimate

benefit, to access and transcript of records in a specific court case, whereas FOIA regulates the right of anyone to access different documents – information of public character, that are at the disposal of the bodies. It is about different legal grounds and regulation of two different rights – on one hand the right of access to information of public character, under Para. (2) of Article 39 of the Constitution of the Republic of Slovenia, and on the other hand, the right of clients and other beneficiaries to access and transcript records, which is – enacted under the right to equal procedural guarantees – guaranteed by Article 22 of the Constitution. Right of access and transcription is concretisation of constitutional provision on equal protection of rights, which obligates the legislator to regulate specific judiciary and other proceedings in such manner that everyone is equal in his rights in equivalent situations in a specific proceeding or in other words that the same standards of legal protection are guaranteed. Opposing parties should therefore have equal possibilities to assert their rights (i.e. adversarial principle), and therefore also equal possibilities to access and transcript of court records, which enables the clients to get familiar with the facts and evidence put forward by the other party or in possession of the court. The above means that the right of access and transcript of records guarantees the adversarial principle in a judicial proceeding and not the principle of publicity.

When adopting its decisions in cases on access to information from court records, the Information Commissioner has taken the standpoint, that access to information of public character is a constitutional right and that the body should deal with the request according to the law regulating the exercise of this right, i.e. FOIA. The procedure of access to information of public character is a procedure in which it is being decided about an administrative issue and is therefore not a judicial procedure. The object of protection or right, regulated by such procedure, is completely different. In the procedure of deciding on the request official of the body, responsible for access to public information, is required to act in accordance with the provisions of FOIA, which stipulates that if FOIA does not regulate a specific question provisions of general administration act are applicable, and not the provisions of a procedural law (such as criminal or civil procedural law). The procedure of deciding upon access to information of public character is a procedure of administrative nature. The objects of protection are two different constitutional rights, which do not exclude one another.

The question of access to public information must be assessed in each individual case separately on a case by case basis and in doing so it is not necessary that each piece of information of public character is also publicly available. It should be noted that the law managing the conduct of courts specifically regulates that the notice board of the court is *inter alia* used for publication of hearings and sessions of which the parties in proceedings have to be notified and in which the public is not excluded either by law or following the decision of the court. All information from the notice board of the court may be published also in electronic form in such manner that provides for public access (e.g. on the internet). These data contain the reference number of the case, case type, date and hour of the hearing or session, data on location and room where the hearing or session will be held of which parties are to be informed, name of the judge or senate president judging in the case and personal name of the parties in proceeding. Other writings may be published as well if this is provided for by the law.

This provision is also applicable in cases, when the complaining party does not notify the court of the change of his address and the court rules that all the following notifications should be carried out by publishing them on the notice board of the court. Such circumstances may arise as soon as the action is filed when the court, provided that the action is incomplete, calls upon the complaining party, to correct the action. If notification at the address of the complaining party is not successful, the court may order that all further notifications are notified by publications on the notice board of the court. The decision to correct the action as well as the decision rejecting the action that follows the first decision if the complaining party does not correct the action in the set time period may thus be published on the notice board of the court. Each decision contains in the introduction several of the pieces of information that are asked for by the applicant: the address of the court, the names and surnames of the president and members of the senate, the name and surname and address of the party and a short declaration on the disputed subject of the case. All decisions of the court must be equipped with the reference number of the case in the upper right hand corner of the decision so that each decision that is attached to the notice board of the court clearly identifies the reference number of the case. All this data may be published by attaching them on the notice board of the court before the summoning of the hearing and their publication is not tied to a certain phase of the procedure and therefore they do not represent protected personal data.

Conclusion

The right of individuals to have access to the records and the right of access to public information are not rights which would be in collision or which would exclude each other. However for implementation of these two rights two different proceedings exist thus the public official of the body responsible for deciding in a matter of request for access to public information is deciding according to FOIA as this is an administrative matter. The question of access to public information should be decided separately in each concrete case and for each document. The position taken in the judgments of Administrative court of Republic of Slovenia⁶ are to be understood in light of this, namely FOIA as general law and sector specific laws regulating access to public information are equal. These positions should however in no way be understood as an additional condition regulated in procedural laws neither is it possible to request additional proof of justifiable interest or benefit for granting of access to information from court records.

It is important to mention that not all the information from court records are necessarily subject to free access and third parties who are not parties to the judicial proceeding might be more likely to get access to court records and documentation than parties to the proceeding who have to prove their legal interest to be granted access. The right of the parties to have access to the court records namely refers to the *entire court record in concrete case*, however in a proceeding regarding a request for access to public

⁶ Sodbe opr. št. U 1676/2003 z dne 23.3.2005 in U 965/2004 z dne 30.3.2005.

information which would be referring to entire court record, *each document from the record* would have to be evaluated separately. The right of a third party who would file a request for access to public information referring to all the documents from specific court record could under no condition be “equal” or stronger than the right of a party in the proceeding to examine specific court record. Each court record includes at least personal data of the parties or accused, of person suffering damage, of witnesses and potential other participants, the disclosure of which would be in violation of personal data protection standards as regulated by the act governing the protection of personal data. This would be also a ground for exception to free access to public information, based on which the body would refuse access to requested information to the applicant. This means that a third party who is not a party in judicial proceeding can be given only specific, therefore partial, parts of the court record by implementing the right of free access to public information therefore he is in his right not equal to someone who has proven his legal interest to be granted access to entire court record and all the documents in it.

In refusing access to information it is often argued by the courts that granting access to information lies outside the legal regulations and principles. Some state that this is an inappropriate mechanism representing extra-procedural public control by in-expert public. This argument seems purposeless from the point of view of access to public information and shows a lack of understanding of the meaning and importance of the judiciary. Judiciary namely represents through jurisprudence a kind of counter-balance to legislative and executive branches of authorities therefore the courts would have to proactively ensure transparency and openness and thus contribute also to effective implementation of all the other human rights, among them of the right to judicial protection.



Date: 04.12.2006

Title: Ropac Iva, journalist for the Delo newspaper, vs. Ljubljana District court

Ref. no.: 021-89/2006/7

Category: Personal data, other judicial proceedings

Status: Granted

Date: 04.12.06

Ref. no.: 021-89/2006/7

The Information Commissioner (hereinafter Commissioner) by Nataša Pirc Musar issues, pursuant to Article 2 of the Information Commissioner Act (Official Gazette of RS, No. 113/2005, hereinafter ZInfP), Par. 3 and 4 of Article 27 of Access to Public Information Act (Official Gazette of RS, No. 51/06 – Official consolidated text, hereinafter ZDIJZ), and Par. 1, Article 252 of the General Administrative Procedures Act (Official Gazette of RS No. 24/06 – Official consolidated text, hereinafter: ZUP), upon the appeal of Ropac Iva, journalist for the Delo newspaper, Dunajska 5, 1509 Ljubljana (hereinafter applicant) against the decision, no. Su. 1-8/2006-3 from 18 November 2006 of the Ljubljana District court, Tavčarjeva 9, 1000 Ljubljana (hereinafter body) for granting the reuse of public information, the following

DECISION:

1. The appeal is hereby granted and the contested decision is annulled.
2. The Body shall within 3 (three) days after this decision becomes final, provide the applicant with a judgement of the Ljubljana District court, no. III P 1839/5 from 10 March 2006 whereupon it shall delete from the judgement the following data on the claimant: Name, family name and place of residence.

GROUND:

The appeal is founded.

1. General aspects of access to public information

ZDIJZ defines in detail the constitutional right of individuals of access to public information, as in accordance with Par. 1, Article 1, every person is ensured free access to public information in the possession of government bodies, bodies of local municipalities, public agencies, public institutions, and other legal persons of public law, public powers holders and public service contractors. ZDIJZ undoubtedly projects important influence to the public sector's functioning, not only in part where it encompasses a broad range of public sector bodies liable to comply with statutory provisions on the I. level, but also as regards the definition of public information itself. Both are in the interest of ensuring transparency of the entire public sector, therefore also of courts as government bodies, not merely of other state government bodies. The aim of ZDIJZ, originating from Article 2, is to ensure that the work of the bodies is public and open, and to enable natural and legal persons to exercise their rights to

acquire information held by public authorities, whereupon the bodies shall endeavour to inform the public of their work to the greatest extent possible.

In accordance to the provision of Par. 1 of Article 4 public information shall be deemed to be information originating from the field of work of the bodies and occurring in the form of a document, a case, a dossier, a register, a record or other documentary material (hereinafter referred to as "the document") drawn up by the body, by the body in cooperation with other body, or acquired from other persons.

Pursuant to ZDIJZ public information is therefore information originating from the body's field of work, in relation to it performing its public duties or in relation to its activities. The body should compile public information within the scope of its activities and, according to general regulations, during executing its competency. Upon fulfilling the first condition, public information shall relate to any content, in all fields of activity of the liable body, and may be connected with its policy, activities and decisions falling within the scope of the individual body's obligations (see doctoral Dissertation of Urška Prepeluh "The right of access to public information", Ljubljana 2004, p. 149).

The Courts Act (Official Gazette of RS, no. 100/2005 – official consolidated text, hereinafter ZS-UPB2) states in Par. 1 of Article 1 that the judicial power in Slovenia is executed through judges, in courts of law established pursuant to this or other Act. The stated shows that the execution of judicial powers (adjudication on individual cases being one of such powers) represents a part of the body's statutory public duties and therefore falls within its field of work.

The Commissioner herewith established that the requested document does exist, that it is furthermore in the body's possession and that the information requested originates from its field of work; it is therefore clear that the judgement passed by the Ljubljana District court, ref. no. III P 1839/05 meets all conditions for the existence of public information.

2. The right to review a civil litigation case-file under the Civil Procedure Act and the right of access to public information

The body based its refusal, among other, on Article 150 of the Civil Procedure Act (Official Gazette of RS, no. 36/2004, hereinafter ZPP), stating that the parties to the procedure have the right to review and transcribe case-files in which they participate. Other persons may be granted equal right to review and transcribe a case-file, but only under condition that they demonstrate legal interest. According to the body, the applicant failed to demonstrate such legal interest.

The Commissioner initially established that the quoted provision of Article 150 of ZPP and ZDIJZ are not connected as *lex specialis derogat legi generali* as they regulate different rights. The above stated provision of ZPP pertains to the right of parties or persons, succeeding in demonstrating their legal interest in judicial proceedings to review and transcribe a case-file of an individual case, whereas ZDIJZ on the other hand regulates everyone's right to access various documents – public information in possession of the body. These are two different legal bases to regulate two different rights – on the one side, the right of access to public information, originating in Par. 2 of Article 39 of the Slovenian Constitution, and on the other, the right of parties or other rightful claimants to review and transcribe case-files, originating from the right to equal procedural protection ensured by Article 22 of the Constitution. Article 150 of ZPP defines in more detail the constitutional provision on equal protection of rights, which requires that the lawgiver regulates individual judicial and other legal proceedings in such a way, that all parties to the proceeding enjoy equal rights and are given equal standard of legal protection (OdlUS V, 201, Up-88/94 from 31 May 1996). Parties to the dispute shall have equal possibilities to enforce their rights (principle of parties' contradiction), and therefore also

equal opportunity to review and transcribe the case-file, allowing the parties to acquaint themselves with facts and evidence, proposed by the other party or those, in the court's possession (see more: Commentary to the Constitution of the Republic of Slovenia, Šturm L., editor, Faculty for postgraduate state and European studies, Ljubljana, 2002, p. 238 – 251). The stated shows that Article 150 of ZPP protects the principle of the parties' contradiction in a civil litigation, but does however not protect the principle of publicity.

Regarding the stated, the Commissioner underscores that the access to public information represents one of the constitutional rights, and that the body most adjudicate on the matter at issue in accordance with ZDIJZ as the Act, governing the procedure to fulfil the stated right. The access to public information procedure represents a procedure of deciding on an administrative matter, whereas a civil litigation represents a judicial procedure, the two therefore representing two separate fields of law. As is evident from the above stated explanation, the difference can also be observed in the subject of protection, that is, the statutorily protected right, which demands the proceeding at issue. The Official competent to transmit public information shall be, within the adjudication proceeding obliged to use the provisions laid down in ZDIJZ, and shall in addition, in accordance with Article 15 of ZDIJZ for questions concerning the procedure, which are not governed by this Act, use the provisions laid down in the Act governing general administrative procedure, and not the provisions of a procedural Act, ZPP in this case. The access to public information procedure namely represents the adjudication on an administrative matter. The subjects of legal protection are therefore two mutually non-exclusive constitutional rights. The question of access to public information should therefore be decided on individual case basis, it is however not mandatory that every information should indeed be publicly accessible. ZDIJZ namely stipulates in Par. 1 of Article 6 the cases in which the body may refuse access to public information.

Based on the stated, the Commissioner concludes that the body should, regarding the request for public information resort to ZDIJZ, whereupon it should in individual cases evaluate whether any of the exceptions laid down in Par. 1 of Article 6 of ZDIJZ apply.

3. Principle of free access according to ZDIJZ

The applicant in its complaint stated that she is employed as a professional journalist, and that journalists as such, are entitled to access to judgements of the courts. The performance of the journalist profession, the primary mission of which is informing the public, could otherwise be severely impaired or even rendered impossible. Due to the stated, the Commissioner explains that access to public information is governed by the principle of free access (Article 5 of ZDIJZ). According to this provision, public information shall be freely accessible to applicants, which may acquire information from the body by acquiring it for consulting on the spot, or by acquiring a transcript, a copy or an electronic record of such information. ZDIJZ therefore requires, as a rule, equal and uniform application of the Act's provisions, signifying also that there shall be no distinction between individual applicants as to their status and therefore no categories of privileged applicants shall exist. The applicant's identity is thus completely irrelevant, it is only important whether the requested constitutes public information and whether it may be publicly disclosed. The stated principle at the same time means that everyone may access all public information in possession of any liable body. The stated principle is elaborated in greater detail in Par. 3 of Article 17 of ZDIJZ, according to which the applicant is not required to give the legal grounds for the request or expressly characterize it as a request for the access to public information. That is, if it is evident from the request's nature that the latter concerns access to public information under ZDIJZ, the body shall consider the request pursuant to this Act. The applicant's intent pursued through the requested

information is for the purposes of deciding on the case irrelevant. The Commissioner shall be obliged, pursuant to ZDIJZ in substance only to decide whether the information requested, fulfils all criteria for public information and if so, it shall be, due to this fact, accessible to everyone (*lat. erga omnes*). The applicant's interest and legal benefit are, for the purposes of deciding on the case, irrelevant.

The Commissioner should at that bring to notice also the Media Act (Official gazette of RS, no. 110/2006—official consolidated text, hereinafter ZMed), stipulating in its Article 45 the media access to public information. Based on the above mentioned decision, the access to public information as regards the needs of journalists and media is in fact broader, as according to ZMed the government bodies are obliged to answer the journalists' questions, an obligation not present under ZDIJZ. In addition also the reply times are shorter. The bodies must provide the journalists with answers to their questions, submitted in written form at the latest in seven working days from the receipt.

4. Exceptions based on Par. 1 of Article 6 of ZDIJZ

The body may refuse access to the requested information in case of one of the statutory exceptions laid down in Par. 1 of Article 6 of ZDIJZ. The body based its challenged decision on the exception, laid down in Point 8 of Par. 1 of Article 6 of ZDIJZ, based on which the body may refuse the applicant access to the requested information, in case the request concerns data, acquired or compiled due to civil, non-contentious or other judicial proceeding, and if such disclosure would harm the proceeding's execution.

4.1 Exception based on point 8, Par. 1, Article 6 of ZDIJZ

To enact the exception, envisaged in point 8, Par. 1 of Article 6 of ZDIJZ, two conditions should cumulatively be fulfilled. The (judicial) proceeding shall not be concluded and in addition to this, the disclosure of such information would prejudice the implementation of such procedures. The stated condition however entails the execution of the so-called harm test, which must prove that through such a disclosure, a legal benefit could be jeopardised, or specific harm could ensue in the execution of civil-litigation at issue. The identified threat should be real and specific and not merely hypothetical and abstract. Access can in such a case be refused only when disclosure of data would jeopardise the execution of certain procedural acts in so much as to render impossible their execution, or to cause their execution, due to disclosure, to be impaired or associated with disproportional costs and difficulties (see also Commentary to Access to Public Information Act, Institute for public management at the Ljubljana Law School, 2005, p. 128).

The body should in each case perform the so-called harm test by way of proving that the real damage could indeed occur. In the case at hand, the body stated in the disputed decision, that the transmitting of a non-final judgement could influence the appellate court's decision, but however omitted to state the actual ensuing damage. Such damage, claimed only hypothetically without the performance of a proper harm test, however, fails to demonstrate that the asserted exception is indeed given. As court trials are in general public, they are often, in the more publicized cases, attended by professional journalists, and thus subjected to critical commentary and media reporting. The rights to being informed and to a well-developed public opinion remain crucial to prevent abuse and propagate democratic execution of powers of state, among them in particular the power of judiciary. The stated signifies that a public debate on the former can indeed take place also outside of the courtroom as part of the general public opinion, but which shall at the same time have no effect on a justice's professional conduct, his independence and impartiality. On the contrary, such a threat should not present a reason to limit access to information. If due to such pressure, the court would not be able to deliver a fair, competent and impartial trial, particularly in the more publicized cases; such conduct would constitute a breach of the right, embodied in Article 23 of the Slovenian Constitution, ensuring

everyone the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. After all, such pressures are common also among many other public servants and officials, expected, in spite of their public exposure, to perform their tasks competently, independently and with impartiality. The Commissioner sees no reason for the case at issue to be any different. Based on the stated the Commissioner held that refusing access to a non-final judgement, by claiming that such disclosure would influence the appellate court's decision, fails to meet serious legal evaluation. The exception laid down in point 8 of Par. 1, Article 6 is therefore not given.

4.2. Exception based on point 8, Par. 1, Article 6 of ZDIJZ

Based on provision of Par. 2, Article 247 of ZUP, requiring that in deciding on appeal against a decision, the body shall by official duty establish whether a material statute has been breached, the Commissioner was required to establish whether the requested information constitutes some other exception. In the case at issue, the Commissioner had to evaluate as to the existence of the exception pursuant to point 3 of Par. 1, Article 6 of ZDIJZ, stating as one of the exceptions to public information, any personal data the disclosure of which would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data, thus pointing to the use of Personal Data Protection Act (Official Gazette of RS, no. 86/04 and 113/05, hereinafter ZVOP-1).

The key purpose of ZVOP-1 is the prevention of unconstitutional, illegal and unjustified intrusions to privacy and dignity of individuals (Article 1 of ZVOP-1). According to the provision of point 1, Par. 1, Article 6 of ZVOP-1, personal data shall be any data relating to an individual, irrespective of the form in which it is expressed. Correspondingly, the individual shall be an identified or identifiable natural person to whom personal data relates; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, where the method of identification does not incur large costs or disproportionate effort or require a large amount of time.

The Commissioner reviewed the Ljubljana District Court's judgement, ref. no. III P 1839/05 and established that it contains numerous personal data. The civil-litigation proceeding has namely been instituted through a private lawsuit for payment of damages. The basis for liability is regulated in the Slovenian Obligations Code (Official Gazette of RS, no. 83/01, 32/2004, 28/2006, hereinafter OZ), stipulating in Par. 1 of Article 131 that any person, which inflicts damage on another shall be obliged to reimburse it, unless it is proved that the damage was incurred without the culpability of the former. This in turn means that if the person responsible for inflicting the damage fails to reimburse it, the injured party's only recourse shall be to request reimbursement through litigation. However the individual shall due to this fact not be required to waive his right to privacy and protection of personal data, in other words, the court shall be obliged to protect his personal data. Although the Slovenian Constitution does portend the open court principle, that is the need for court trials to be public, that judgements shall be announced in open court, as well as that any exceptions should specifically be regulated by law (Article 24 of the Slovenian Constitution), this right is however, according to the Commissioner's opinion, primarily intended for parties to individual cases where the need to ensure fair trial exists (Commentary of the Slovenian Constitution, Šturm L., editor, p. 270-273). Thus if the stated right is intended primarily for the parties to individual proceedings, which can demand payment for damages only by evoking a constitutionally recognized right, such a right should therefore not be allowed to limit another constitutionally recognized right, the right to protection of personal data and to protection of privacy, also within the frame of a judicial proceeding. The injured party or the plaintiff shall in the lawsuit for damages provide evidence as to the damages incurred, the facts stating

that such damage originates from the harmful action and that a chain of causation exists between the resulting damage and the inadmissible action. On the contrary, the defendant shall be required to exculpate himself from liability for damages. As the damage in the question at issue, is of an immaterial type, the stated therefore means that data contained in the disputed non-final judgement relates to the plaintiff's medical condition, and thus falls under sensitive personal data in accordance with point 19, Article 6 of ZVOP-1. These represent a special category of personal data, which deeply influence the individual's privacy. The intrusion into such data at the same time constitutes an intrusion into the individual's privacy. Sensitive personal data represent one of the most subtle categories of personal data, defined in point 19, Article 6 of ZVOP-1, and listed exhaustively, not declaratively. As such, these data require, due to their particular sensitivity, special safeguarding, protection and limitations to admissibility of processing, the eight points of Article 13 of ZVOP-1 exhaustively specify eight legal bases for processing of sensitive personal data. Sensitive personal data can therefore only be processed in eight specifically and exhaustively defined cases. According to point 7 of Article 13 of ZVOP-1 the processing of sensitive personal data shall only be admissible if this is necessary to fulfil or contradict a litigation claim. However the court shall be obliged, whenever adjudicating on a particular case of executing or contradicting a litigation claim, upon dealing, among other, with sensitive data, to ensure appropriate protection of such data. The duty to protect sensitive data shall also bind the defendant and all parties present at the court trial, as the mere fact that these parties acquired the data during judicial proceedings, in no way alters their inherent nature. These data are classified *per se*, as such. (for more see Access to Public Information Act with Commentary, Pirc Musar N., editor, Ljubljana 2006, commentary to Article 13 of ZVOP-1)

Based on the stated the Commissioner established that the Ljubljana District court judgement, ref. no. III P 1839/05 together with name, family name and address of the plaintiff contains sensitive personal data, which constitute an exception pursuant to point 3 of Par. 1, Article 6 of ZVOP-1.

5. Principle of partial access and importance of confidentiality under Article 7 of ZDIJZ

With regard to establishing the existence of personal data, contained in the requested document, the Commissioner subsequently considered whether the applicant could be granted partial access to the document.

The principle of partial access is stipulated in Article 7 of ZDIJZ, which states that if a document or a part of a document contains only a part of the information referred to in Article 6 (such as personal data), which may be excluded from the document without jeopardizing its confidentiality, an authorized person of the body shall exclude such information from the document and refer the contents or enable the re-use of the rest of the document to the applicant. The stated in connection with the principle of openness of public bodies, defined in Article 2 of ZDIJZ, signifies a body's duty to always resort to the principle of partial access, unless when pursuant to the criteria set out in Article 21 of Decree on transmitting and the re-use of public information (Official Gazette of RS, no. 76/2005) this shall not be possible, or when (and if) such partial disclosure would threaten the confidentiality of the protected information. Article 16 of the Decree stipulates that when a document or its part contains information from Article 6 of ZDIJZ only partially, it shall be deemed that such information may be eliminated from the document without endangering its confidentiality, if it can be physically removed, crossed out, permanently covered or made inaccessible in some other way, if the document is in hard copy, deleted, encoded, blocked, restricted or made inaccessible in some other way, if the document is in electronic form (paragraph 1). Notwithstanding the preceding paragraph, it shall be deemed that information cannot be removed from a document if the removed information can be deduced from other information in the document (paragraph 2).

The case at hand effected a situation when fundamental human rights: the right to privacy, the right to protection of personal data, the right to legal protection and the right to freedom of expression, collided. In addition, it is inherent to fundamental human rights that they are equal and none can or may prevail over the other.

The Commissioner estimates that in the case at hand, all constitutional rights can be satisfied, without having to limit one of them. By deleting the plaintiff's name, family name and address, identity and the possibility to identify the individual are thus removed, consequently removing also all possibility of contact. The sensitive data, contained in the judgement's grounds become anonymous, which in turn means that any identification of the individual becomes impossible. Through anonymisation the individual can thus no longer be located or recognized, and as a consequence the sensitive personal data lose their subtleness (see Personal Data Protection Act with Commentary, Pirc Musar, N., editor, Ljubljana 2006, commentary to Article 13 of ZVOP-1). The Commissioner therefore again underlines (expounded already in point 4.2 of this decision) that the act of anonymisation in such a way as to protect the sensitive personal data, bounds all persons, present at the court trial. The same manner is also applied in the publication of the supreme and higher courts' judgements, posted on the judiciary web portal (www.sodnapraksas.si), operated by the Supreme court, and on the IUS INFO web portal, to which judgements are delivered in anonymised form by the Supreme court of the Republic of Slovenia, as well as in the Supreme court's judgements in written form, the editors of which are supreme court justices.

The substantiation of the requested judgement contains names and family names of doctors and nurses, examined as witnesses within the judicial proceeding. Some were employed with the plaintiff, which is a legal person incorporated as a public institution, while others were sworn in as medical experts. In both cases however, their names and family names represent public information. In the first from the point of view of civil servants, as the doctors and nurses are employed in a public institution in accordance with Article 1 of Civil Servants Act (Official Gazette of RS, no. 56/02, hereinafter ZJU); consequently the information on their names and family names in relation to execution of their duties, constitutes pursuant to Par. 3, Article 6 of ZVOP-1 public information. That is to say, their examination within the procedure was connected with their employment as civil servants. On the other hand, the information on medical experts is publicly available in the Court experts register on the web page of Ministry of Justice ([http://www2.gov.si/mp/tol.nsf/\(WebIzvedenci\)?OpenView](http://www2.gov.si/mp/tol.nsf/(WebIzvedenci)?OpenView)).

Based on the stated facts the Commissioner concludes that the I. level body incorrectly applied the material law, the Commissioner therefore granted the applicant's appeal and, pursuant to Par. I, Article 252 of ZUP, annulled the body's decision and adjudicated on the matter as proceeds from the decision's operative part. The Body shall grant the applicant access to the requested public information, so as to provide her with the judgement of the Ljubljana District court, no. III P 1839/5 from 10 March 2006, as proceeds from point 2 of the decision's operative part, whereupon it shall delete from the judgement the following data on the claimant: name, family name and place of residence. The body shall do this within three days after this decision becomes finally binding, that is at the point in time when it can no longer be challenged in an administrative procedure pursuant to Par. 1, Article 225 of ZUP (the 30-day time limit to file a lawsuit in administrative procedures).

The second paragraph of Article 5 of ZDIJZ stipulates that every applicant shall have, at his request, the right to acquire information from the body by acquiring such information for consulting it on the spot, or by acquiring a transcript, a copy or an electronic record of such information. The second point of Article 17 of ZDIJZ stipulates that the applicant must specify the way in which he wishes to get acquainted with the contents of the requested information (consultation on the spot, a transcript, a copy, an electronic record).

The stated shows that it is the applicant's right to decide as to how she wants to obtain the requested information. The body must therefore provide the applicant with the document in electronic form as requested.

Instruction on legal remedy:

This decision cannot be appealed, but a lawsuit can be filed within the Administrative Court Tržaška 68/a, Ljubljana, within 30 days after receiving this Decision, in writing directly with the above mentioned court, or sent by registered mail, or orally in minutes. In case the lawsuit is filed by registered mail, the day of submitting the lawsuit to court shall correspond to it being filed with the mail office. The lawsuit with any appendices shall be filed in three copies. In attachment, the lawsuit shall also contain this Decision in original, or a copy thereof.

Information Commissioner:
Nataša Pirc Musar, LL.M.,
Commissioner