ACCESS TO INFORMATION LITIGATION IN BULGARIA

VOLUME 2

SELECTED CASES

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Volume 2
Selected cases

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INTRODUCTION

The Access to Public Information Act (APIA) is in force for about four years. During the time citizens, journalists and non-governmental organizations (NGOs) increasingly seek information from the state and other public institutions. Gradually, though slowly the administrative capacity for its implementation improves. The court practice on the law is an important guarantee of the citizens' right to access government held information.

Since 2000 the legal help in court cases where access to information denials are challenged is one of the key activities of the Access to Information Programme (AIP). It goes hand in hand with the permanent consultation of citizens, journalists and NGOs how to request information, the advocacy for better access to information legislation, the campaign for citizens' awareness of that constitutional right, the trainings for state and local government administration. With all these activities we endeavor to help the exercise of the right to access to information confident that this right is in the fundament of a democratic society. Only an informed citizen is capable to participate in the decision-making process, to vote and exercise control over the government.

In this book we present the most important Supreme Administrative Court decisions under APIA in the period of autumn 2002 - March 2004. We have selected cases which we deem most important as regards public interest and the interpretation of the law. We tried to publish the most important documents from the court files likewe did in the previous book. The aim is to give light of the arguments raised as much as possible.

The commenting text reflects more cases than the ones included in the book. It is an attempt to systematize the main questions arising out of the court practice and also to present our expectations of its development. In this analysis we adhered to the spirit and purpose of the right to access public information.

The AIP team is pleased to realize that not only people with special interests but also wider public finds our first book useful. This is seen from referrals made both in writings and in public discussions. We hope the present book will be of value either.

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Any comments are welcome.

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ACCESS TO INFORMATION LITIGATION IN BULGARIA 2002 - 2004

PREFACE

In 2003, a total of 29 court cases were brought with the assistance of the legal team of the Access to Information Programme (AIP) under the Access to Public Information Act (APIA). The cases, in which AIP provided legal assistance, were selected on the basis of the following criteria:

- the public interest in obtaining the requested information;
- the need for judicial interpretation of some unclear provisions of the law which are of material significance for its application;
- the impossibility for the applicants to finance the legal defence of their infringed rights on their own;
- another prerequisite for the selection was whether the issue had been brought to the court before and, if yes, whether a positive judgement was ruled or not.

The need for applying those criteria stemmed from the fact that it was impossible, for all practical purposes, to work on all cases reported to AIP and also to try and overcome that constraint and contribute to the application of APIA as much as possible.

What follows is the brief statistical overview of the litigation as regards the applicants, the respondents and the challenged decisions to refuse access to information.

In 13 out of the 29 cases the appellant was an individual citizen, in ten cases it was a non-governmental organisation, and in seven cases it was a journalist to lodge the appeal. They add up to 30 because there were two Members of Parliament who were information requesters and subsequently applicants in the case of the refusal by the Minister of Public Administration to provide a copy of the contract with Microsoft[1].

Twenty-two cases related to a refusal by a government authority, three cases related to local governments and another three cases involved refusals by public law entities other than government authorities within the meaning of Art. 3, para 2, subpara 1 APIA. Those were the National Health Insurance Fund (2) and the Bulgarian Export Insurance Agency. There was only one case of a respondent being an entity financed from the state budget within

[1] *AIP, Stoicho Katsarov and Ivan Invanov versus the Minister of Public Administration* (Administrative Case No. 9502/2003, SAC, Fifth Division).

the meaning of Art. 3, para 2, subpara 2 APIA (a local community centre - *chitalishte*)[2].

Out of the 22 refusals by government authorities, three came from the Council of Ministers, eight from ministries, five from state agencies, two from the judiciary (the Yambol Regional Court and the Supreme Public Prosecutor's Office of Cassation), two from units subordinated to a ministry, and two from the Chairman of the Auditor General.

In ten cases a silent refusal was appealed, while in the other 19 cases there was an explicit refusal on various grounds. In four cases the grounds for the refusal referred to Art. 13, para 2, subpara 1 APIA, i.e. administrative information of preparatory nature and no significance on its own. In three cases the grounds given for the refusal were stated to be „a state secret" and in another three cases „an official secret" was invoked[3]. There was a case of refusal claiming that the information was classified without specifying whether it constitutes a state secret or an official one. The provisions of Art. 37, para 1, subpara 2 were invoked in three cases stating that the information affected the interests of a third party and there was no consent on its part to provide access and in one case it was indicated that the request for access referred to personal data rather than public information. There were two cases of refusal on grounds that APIA did not apply to the information in question and one case of refusal on account of the claim that the body had no obligations under APIA (the refusal given by the Bulgarian Export Insurance Agency). It was in one single case that the subject-matter of the appeal was not a refusal to provide access to information but a refusal to provide the information in the form requested by the applicant (a copy on paper), i.e. refusal to take into account the applicant's preferences with regard to the form of access to information[4].

A number of other cases[5] were brought by individual citizens and legal entities on their own. An interesting new feature was the litigation related to refusals to provide applicants with access to their own personal data kept with the respective institution.

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[2] *Apostol Stoichev versus Hristo Botev Local Community Centre - village of Banevo* (Administrative Case No. 210/2003 BRC, Administrative Case No. 8825/2003 SAC, Fifth Division).

[3] The definition of both the secrets is given in the Protection of Classified Information Act (2002), Art. 25 and Art. 26 respectively. Available at:
http://faculty.maxwell.syr.edu/asroberts/foi/library/secrecylaws/BG_class_info_law.pdf

[4] *Todor Yanakiev versus the Prison Administration* (Administrative Case No. 3167/2003 SCC AD III-g panel).

[5] AIP is monitoring the development of another 26 cases under APIA.

GENERAL PROBLEMS

The previous publication on the litigation under the Access to Public Information Act[6] highlighted several factors that produced deterring effect to the development of practices[7]. Some of those problems were overcome over the period from the autumn of 2002 to March 2004. Meanwhile, some new problems occurred. During the first half of 2002 Parliament adopted the Personal Data Protection Act and the Protection of Classified Information Act, which regulated in detail the main restrictions on the right of access to public information. Those pieces of legislation completed the legal framework of the constitutional right to seek information. In our opinion, the current major challenges to the application of APIA and the judicial review on the denials are as follows:

- The novelty and imperfections of the legislation concerning the restrictions on the right of access to information - the Protection of Classified Information Act (PCIA) and the Personal Data Protection Act (PDPA)[8];
- The persistent lack of clarity in some APIA provisions despite the newly established court practice and lack of harmonisation with other pieces of legislation[9];
- The problems of the reform process in the system of administrative justice.

The administrative justice system, which covers the cases related to access to information refusals, is yet to be reformed, i.e. to be adjusted to the principles of the democratic state. Its principles should build on the idea that *„the public administration ceases to act as the master of society and directs its*

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[6] *Access to Information Litigation in Bulgaria*, published by the Access to Information Programme, Sofia 2002. Available at: http://www.aip-bg.org/pdf/court_eng.pdf

[7] There were specified the following issues: the novelty of that legislation, the lack of clarity in APIA and the lack of harmonisation with the existing legislation, court practices prior to the adoption of APIA, and the incomplete administrative reform process - op. cit., p. 9.

[8] Court practices are still hesitant to support the restrictive interpretation of the restrictions on the right of access to information. See also *Access to Information Litigation in Bulgaria 2002*, published by the Access to Information Programme, Sofia 2004, pp. 15 - 20.

[9] Ibid., pp. 13 - 15, 20 - 21.

activities at the service of its citizens"[10]. In this connection, the tasks of administrative justice are seen in *„the upgrading of the quality of performance of the public administration and the protection of citizens' rights in their interaction with government institutions*"[11]. The task to draft and adopt a new procedural law in accordance with these principles and objectives is still pending[12]. It is another issue that the prioritization of these tasks will be of special importance to see whether the improvement of the quality of administrative actions or the protection of citizens' rights will prevail[13]. The approach to this issue determines the way to resolve many other problems that citizens face on a daily basis in their disputes with government authorities and other institutions exercising power with respect to individual citizens.

The task of the courts that exercise judicial review under the Administrative Procedures Act (APA) and the Supreme Administrative Court Act (SACA) is reduced to questions of the lawfulness of the acts issued by bodies of the executive. The time limits for citizens to lodge appeals are short and preclusive. There is ex officio scrutiny of administrative acts by courts under Art. 41, para 3 APA[14]. The recognition of the appellant's rights is tackled insofar as they relate to the lawfulness of the appealed act. Damages due to unlawful acts, actions or omissions remain beyond the purview of administrative justice. All these specific features of judicial review on administrative decisions make it different from the civil process[15]. Hence by definition the existing legislation fits to the concept that lawfulness of administrative acts, not the protection of citizens' rights is of priority.

At the same time, there is a tendency to develop administrative justice towards broader protection of citizens' rights. This approach can be seen in the development from APA of 1979 through the Constitution of 1991 to SACA

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[10] Svetla Petkova, Acting President of SAC, *Administrative Justice in Bulgaria: Current Condition and Ongoing Reforms*, p. 7, in Human Rights Journal, No. 3 of 2003 (in Bulgarian.

[11] Ibid.

[12] Ibid. p. 9.

[13] In the doctrine there also exist opposite views on this matter: Cf. D. Hrusanov, *Challenging Administrative Acts*, Sofia 2002, p. 21 (in Bulgarian).

[14] This means that in pending cases the court is not bound by the arguments of the parties, but has the authority to consider all possible arguments. Practically this sometimes results in finding new arguments by the court for the respondent due to inherited attitude from the past.

[15] Although the rules are applied on the basis of subsidiarity - Art. 45 APA and Art. 11 SACA.

of 1997 and the Amending Acts to SACA adopted in the 1990's. Generally, as a result of some essential amendments to the existing legislation and the adoption of new legislation one can notice the existence of a general rule that individual and general administrative acts and the secondary legislation are subject to judicial review, burden of proof in accordance with the Civil Procedure Code rules, powers of the court to decide on merit the matter determined by the administrative act (Art. 42, para 2 APA; Art. 28 SACA in conjunction with Art. 42 APA)[16]. This tendency should further develop with the adoption of an Administrative Procedure Code.

Common law systems do not make such a detailed distinction between public and private law as the civil law system does. This is reflected in the principles and the system of administrative law in them[17]. Hence one may ask the question whether there exists greater proximity of the administrative justice to the civil process in case law system and hence greater priority attached to the protection of citizens' rights. For instance, an interesting ground in common law systems to exercise judicial control of the limits of administrative discretion relates to its *„consistency and rationality"*[18]. Another aspect of common law systems, which perhaps contributes in a large measure to the effectiveness of administrative justice, is the powerful statutory authority of the judiciary that ensures the effective enforcement of court judgements[19]. It would be useful to review these legal systems in the process of identifying the priorities of administrative justice in this country[20].

The thorough examination of priorities of administrative justice is needed also in the light of the fact that the rights of individuals are enshrined in the preamble of the Constitution of 1991 as a fundamental principle. The public interests placed on equal footing with the rights of individuals there are only the protection of the national and state integrity of Bulgaria and the

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[16] See the detailed outline of this issue in K. Lazarov, *Administrative Law*, R. 2001, p. 221 (in Bulgarian).

[17] Cf. R.J. Pierce, S.A. Shapiro and P.R. Verkuil, *Administrative Law and Process*, New York 1992, pp. 2 - 10.

[18] The review should focus also on whether similar administrative decisions were taken in a similar manner and whether the administrative authority applies the same decisional standards over time. See op. cit., pp. 116 - 120.

[19] And other judicial acts, such as the power to issue injunctive relief.

[20] Moreover, there is a trend of common and civil law getting closer. An example to this effect is the practice of the European Court of Human Rights under the European Convention on Human Rights.

development of a democratic and social state based on the rule of law. A number of basic human rights among those enshrined in the Constitution and international and regional treaties and agreements constituting an integral part of the domestic legislation by virtue of Art. 5, para 4 of the Constitution are exercised through government authorities' action, usually by the form of administrative acts. Therefore administrative justice, being the most essential form of control of their legality, is faced not only with the need to abandon the so-called *„presumption of lawfulness*" of administrative acts *„that has been created and maintained over the years out of inertia*"[21] but also with the task to give priority to the protection of the rights of individuals[22]. The same line of reasoning could be applied to the issues concerning the legal defence of the constitutional right of citizens to have access to the information created and kept by the state.

[21] As pointed in K. Lazarov, *Review of the Practices of the Supreme Administrative Court* (1998-2000), 2002 , p. 65 (in Bulgarian).

[22] This issue has already been raised in court practice. See the presentation on the nature of the defect in the case of silent refusals below.

LEGAL PROTECTION OF THE RIGHT OF ACCESS TO PUBLIC INFORMATION

In the light of these considerations one may draw the conclusion that the court should be guided by the priority of the defence of the rights of citizens when hearing cases of refused access to public information. The reasons lie in the fact that this right is guaranteed in the Constitution and also in the interpretation set out in Judgement No. 7/1996 of the Constitutional Court on Constitutional Case No. 1/1996 that the rights laid down in Arts. 39 and 40 and Art. 41, para 1 of the Constitution should be interpreted in relation to the restrictions thereof as a principle towards its exception. The Constitutional Court held that the exception was subject to restrictive interpretation. Besides, it is subject to compliance with the requirements set forth in Art. 19 of the International Covenant on Civil and Political Rights and Art. 10, para 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[23], which constitute an integral part of the national legislation pursuant to Art. 5, para 4 of the Constitution. Art. 10, para 2 ECHR reads that these requirements are:

- to apply restrictions only if prescribed by law;
- for the protection of the rights and legitimate interests perscribed in the same provision of the Convention: and
- to make sure that they *„are necessary in a democratic society"*.

Recommendation R (2002)2 of the Committee of Ministers of the Council of Europe to the Member States on the Access to Official Documents[24] states explicitly that the restrictions should be *„proportionate to the aim to protect"* the interests enlisted therein[25]. The third part of the test involves two specific considerations in the assessment of *„the necessity in a democratic society"*. One of them is to make sure that the disclosure of information is not likely to infringe upon the protected interests.

[23] Referred to as „European Convention on Human Rights (ECHR)".

[24] Referred to as „Recommendation (2002)2".

[25] Principle IV, section 1. The same requirement has been formulated by way of interpretation of constitutional provisions in Judgement No. 7/1996 of the Constitutional Court: *„restrictions ... apply in a restrictive manner and only to ensure the protection of a competing interest"*.

The other one is to assess whether it would be appropriate to disclose the information due to an overriding public interest even when this would harm a protected interest[26]. The approach to the restrictions on access to information is similar under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[27], which is expected to be promulgated soon and become an integral part of the national legislation[28]. The Convention applies to access to environmental information which is broadly defined and overlaps with public information in most of the cases[29].

The high level of protection of the right to access public information and the concept that its restriction is only an exception from a principle implies effective judicial review focusing on the protection of this right at first place and thus ensuring compliance of executive power decisions with the law. Since government authorities impose restrictions by decisions in the form of individual administrative acts, the legal protection is provided by the system of administrative justice. In other words, the fact that the right of access to public information is guaranteed through administrative justice is a challenge to the further development of that system and the prioritization of its tasks in a democratic society.

[26] Principle IV, section 2.

[27] The United Nations' Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was done at Aarhus, Denmark on 25 June 1998. It is hereby referred to as „the Aarhus Convention".

[28] Ratified on 2 October 2003 and entered into force for the Republic of Bulgaria on 16 March 2004.

[29] Pursuant to Art. 4, para 4 of the Convention, access to such information may be refused, where the disclosure of the information would affect the competing rights and interests set out in sub-sections (a) to (h). The grounds for refusal are interpreted restrictively, while taking into account the public interest serve by disclosure.

SILENT REFUSALS

The effective protection of the right of access to information needs the existence of remedies also in the cases when there is failure to make a timely decision[30]. This need stems from the indisputable fact that any failure of this kind is an infringement upon the right of access[31]. At the same time, although there is no explicit act in such cases and therefore there are no arguments to be challenged, the level of protection should not be lower than in the other cases. Remedy in court should be equal in all cases and effective, which means that courts should decide on merit.

Admissibility of Applications against Silent Refusals

As stated earlier[32], the issue whether silent refusals are subject to judicial review under APIA was raised in 2001. The court upheld the citizens' right to file complaints against such omissions of administrative authorities. It held that: *„to assume that the lack of specific provision in the special law (APIA) establishing the fiction (that failure to decide within the prescribed time limits amounts to silent refusal - Art. 14, para 1 APA) is in fact absence of silent refusal, amounts to denial of justice and of protection of citizens' rights, which is unacceptable. The court may not deny justice even when law is not in place*"[33].

This approach of the Supreme Administrative Court (SAC) was consistently applied since. It has provided an important guarantee for access to justice in cases of infringement on the access to information right. One can easily imagine that a controversial judgment would make bodies subject to APIA feeling absolutely free to continuously ignore access to information requests; that the citizens' right of access to justice would depend only on the good will of the administrative authority to deliver its refusal in writing; and that

[30] Notably in some countries the so-called „silent refusal" is unknown due to the absence of such cases.

[31] Per argumentum of Art. 56 in conjunction with Art. 41, para 1 of the Constitution, Art. 6, subpara 4 APIA, Art. 9, section 2(b) of the Aarhus Convention, and Principle IX of Recommendation (2002)2.

[32] See *Access to Information Litigation in Bulgaria*, p. 19.

[33] Ruling No. 8645/16 November 2001 on Administrative Case No. 6393/01 г. of SAC, five-member panel.

administrative authorities would be in unequal position, where those less responsible would benefit[34].

Nature of the Defect in the Case of Silent Refusals

Grounds for Reversal of Silent Refusals

Having resolved the admissibility issue, the Supreme Administrative Court focused on the issue of lawfulness of silent refusals, treating them as tantamount to individual administrative acts in accordance with the fiction set out in Art. 14, para 1 APA. Some SAC judgements reversed the appealed silent refusal as unlawful. In some of those cases it was not always clearly stated which of the five requirements of the lawfulness test laid down in Art. 41, para 3 APA had been violated. A judgement of a three-member panel of SAC pointed directly to the difficulty to identify the substance of the breach in law: *„... the court is not in a position to judge the reasons for the refusal in the context of the substantive law requirements and to see whether a complete or partial refusal had to be given"*[35]. Consequently the case could not be solved on merit. Another judgement of a three-member panel of SAC referred to the non-compliance with the prescribed written form of the decision: *„there is no administrative act issued in the form as prescribed by the law and therefore the file should be referred back to the administrative authority to make a decision in compliance with the procedural rules"*[36]. Hence the court found in addition failure to meet another requirement for the lawfulness of administrative acts, i.e. the procedural law[37]. A more recent judgement of a three-member panel of SAC acting as the instance of cassation concluded that the silent refusal

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[34] In the amendments to APIA introduced by Borislav Tsekov and a group of Members of Parliament on 26 November 2001 (Reg. No. 154-01-78) it was proposed to amend Art. 40 APIA so that to explicitly provide judicial review over silent refusals as well. Court practices in that regard were still very scarce at that time. At present, however, since the issue has been resolved in court practices, it is questionable that amendment is still appropriate. The reason is that the explicit regulation of silent refusals would be a kind of recognition of its „legitimacy" as a form of decision-making.

[35] Judgement No. 1795/26 February 2002 on Administrative Case No. 7176/2001 of SAC, Fifth Division. Thus the defect of the silent refusal is considered to be similar to the lack of reasons in the administrative act. See *Access to Information Litigation in Bulgaria*, pp. 48 - 49.

[36] Judgement No. 2764/2002 on Administrative Case No. 1763/2001 of SAC, Fifth Division. Ibid., p. 92 - 93.

[37] The appellant argued in the presented written defence that the silent refusal was in fact failure to comply with all five requirements stated by law (of authority, of form, of substantial law, of procedural law and of purpose of the law). See *Access to Information Litigation in Bulgaria*, p. 87.

„... represents a line of conduct that is impermissible by law. This is so because a fundamental principle of administrative law is the authorities may not act in contravention to what has been prescribed by the law, while Art. 28 APIA contains the imperative obligation of the authorities to make a reasoned decision, especially when they refuse access to information"[38].
There are cases, where breach of law was found without any further specification: *„if the refusal was given by the administrative authority for the reasons laid down in Art. 37, para 1 APIA or other reasons relevant to the case, they had to be spelled out in the refusal itself ...*"[39].

These judgements come to show that the court finds non-compliance of either requirements related to the form, or to the procedural rules or just refers to the lack of reasoning, emphasizing in all the cases the seriousness of the breach of imperative legal provisions

Judgement after the Reversal of a Silent Refusal
The next issue related to the consideration of a silent refusal is how should the court determine the obligation of the executive. In some cases taking into account the arguments of the parties the court decides on merit pursuant to Art. 42, para 2 APA[40]. In other cases it assumed that the reasons for the refusal *„should have been stated in the refusal itself rather than in the court room*"[41]. Having accepted that, the same court added that it could not *„rule on the legality of reasons (of the decision) that are in fact missing*"[42]. Hence court practices are quite contradictory on this issue. All three judgements referred to above were issued by the instance of cassation that upheld the judgments of the Regional Court and the Sofia City Court respectively. As seen from the first two judgements of cassation the court clearly decided on merit, while the third one stated that no judgement could be ruled on merit to replace the missing administrative decision. However, there is no clarity as to why in

[38] Judgement No. 2666/31 March 2003 on Administrative Case No. 10261/2002. See also Judgement No. 6009/27 June 2003 on Administrative Case No. 2664/2003, both cases of SAC, Fifth Division.
[39] Judgement No. 793/2004 on Administrative Case No. 8302/2003. The silent refusal was again treated similarly to the lack of reasons in the administrative act. See p. 176
[40] Judgement No. 2666/31 March 2003 on Administrative Case No. 10261/2002 and Judgement No. 6009/27 June 2003 on Administrative Case No. 2664/2003, both cases of SAC, Fifth Division.
[41] Judgement No. 793/2004 on Administrative Case No. 8302/2003. The quotation follows the text cited above. Cf. Footnote 39.
[42] Ibid.

one case it was assumed that the issue had to be decided on merit and next time the conclusion was converse.

Furthermore, there is no doubt that where the appeal is rejected the case is decided on merit, i.e. the outcome of the enforceable judgement is the existence of a stabilized administrative act, despite such has not been issued at all[43]. It is interesting to trace out the approach of the court to cases where the issue is left at the discretion of the administrative authority. In the reasons of one of its judgements of 2002, the five-member panel of SAC agreed theoretically with the legal argument of the appellant that *„the court judgement could not come to replace the fictive administrative act as (the court) would intervene in the administrative discretion*". However the court added that this argument was not in place in view of the specific facts and the evidence in that particular case[44]. Consequently one can draw the conclusion that according to the court the silent refusal cannot to be ever lawful provided that the administrative authority failed to make a decision using its power of discretion.

Are Silent Refusals Null and Void?

Two three-member panels of SAC issued judgements of special significance to the question of silent refusals legality. They assumed that the failure to comply with the form in the case of silent refusals under APIA was such a material breach that it led their nullity. Two arguments were adduced to support that conclusion. Firstly, APIA does not explicitly provide the fiction of „silent refusals" and therefore the latter are unacceptable, i.e. there is statutory prohibition on inaction. The second argument related to the interpretation in the light of the purpose of the law which gives guarantees for the exercise of the citizens' constitutional right to information. The court ruled, *„due to the importance of the social relationships it regulates, the special law does not allow silent refusal as a possible form of administrative act*"[45]. There are two consequences of this judgement: (i) silent refusals can be complained of without any time limits; and (ii) they represent a line of conduct that is prohibited by law in all cases.

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[43] Judgement No. 7339/2002 on Administrative Case No. 3362/2002, Judgement No. 1195/2004 on Administrative Case No. 9881/2003, Judgement No. 1461/2004 on Administrative Case No. 8825/2003, all cases of SAC, Fifth Division.

[44] Judgement No. 7339/2002 on Administrative Case No. 3362/2002 of SAC, five-member panel. See *Access to Information Litigation in Bulgaria*, p. 141.

[45] Judgement No. 11218/2002 on Administrative Case No. 6471/2002; Judgement No. 12234/2002 on Administrative Case No. 7721/2002, both cases of SAC, Fifth Division. See the latter on p.123

The five-member panel did not agree with those conclusions. One of its points was that *„the silent refusal is presumed to be an informal act"*. However, the other point was more interesting - the court stated that to declare the silent refusal null and void *„means to deny a decision on merit and restrict its jurisdiction to obligating the authority to make an explicit decision"*[46]. The effect of that judgement was the preservation of the judiciary powers to rule on the substantive lawfulness of the silent refusal, i.e. to replace an unlawful refusal in the event of its reversal.

The first important conclusion of this discussion is that the protection of a constitutional right in administrative justice is at issue in the arguments of the above-mentioned judgements. That point was present beyond any doubt for all judges who took part in the discussion. Next, both sides argued for the protection of the citizen's right, i.e. there was unanimity on the need for attaching priority to its protection[47].

As regards the differences, one has to admit that both the argument on the nullity of silent refusals and the argument on the need for ruling on merit with a view to the effective safeguarding of the right of defence of those who seek information are right in a certain sense. It has been established that since the adoption of APIA silent refusals are still a considerable share of the total number of refusals. A firm opinion that they always contravene the law and may be complained without any time limits has its grounds in APIA in the light of the interpretation of its purpose. It would also produce a tangible effect on the conduct of the executive authorities in the implementation of APIA. At the same time, the protection of the applicant's rights should be effective, recognizing the powers of the court to decide the case involving a silent refusal on merit so that to achieve *„the desired result, i.e. to obtain the public information sought"*[48]. This is the only way for the court to assert its role as a guarantor of citizens' rights in administrative justice and, more specifically, of the right of access to public information. The

[46] Judgement No. 5188/2003 on Administrative Case No. 791/2003; Judgement No. 5618/2003 on Administrative Case No. 1553/03, see p. 130.

[47] That could be seen in all aspects of the discussion, including the dissenting opinion on the Judgement on Administrative Case No. 791/2003: *„It is likely that even in cases of silent denial the reasons of the administrative authority could be presumed. In this particular case, however, the applicant is deprived of the opportunity to guess since he is not aware of the essence of the information"*. See p. 132-133.

[48] Judgement No. 5188/2003 on Administrative Case No. 791/2003; Judgement No. 5618/2003 on Administrative Case No. 1553/2003, both cases of SAC, five-member panel.

problems related to the lack of knowledge of applicants as to the essence of this information so that to effectively exercise the right to protection can be resolved in other ways provided by APIA, e.g. through the court exercising the powers under Art. 41, paras 3 and 4 of the law[49]. Another way to tackle the issue is to set correctly the burden of proof.

This discussion might reach a common view that the violation of the form prescribed by the law is a very serious violation of the law and it can be overcome in the judicial phase only by way of exception. It is appropriate in the cases of lack of explicit refusal to have more stringent requirements posed on the administrative authority to prove the existence of all statutory prerequisites, including the facts that would support a possible explicit refusal in an exhaustive and timely manner[50]. Anyway, one should not allow a situation in which, as a result of the establishment of the defect in the silent refusal, the entities with obligations under APIA find themselves in a more favourable position than the one in which the refusal would be given in the form required by the law. Furthermore, it is not conceivable or fair to make the recognition of the applicant's right in court dependent on the good will of the administrative authority to issue and act in writing[51].

[49] The issue is examined elsewhere in this text.

[50] On the burden of proof, see K. Lazarov, op.cit. 64 - 64.

[51] Recommendation (2002)2, Principle IX and the Aarhus Convention make no distinction in the legal remedy depending on the form of infringement of the right (partial or full refusal to provide access to information, dropping, failure to examine within the prescribed time limits or inaction respectively).

WHO HAS TO PROVIDE INFORMATION UNDER APIA? JURISDICTION IN CASES OF REFUSAL TO PROVIDE ACCESS

The issue as to who exactly is obliged to provide access to public information under APIA has been often raised.
The legislation offers the following solution. Pursuant to the provisions of Art. 3, para 1 APIA, these are the central government authorities and local governments, while para 2 adds also public law entities other than government authorities and two more categories of entities which have obligations only with regard to a specific type of information. These are natural persons and legal entities with regard to the activities they carry out with financing from the consolidated state budget, and the media with regard to the information related to the transparency of their operation as described in detail in Art. 18 APIA.

It should be noted that APIA covers a wider range of entities obligated to provide information than Recommendation (2002)2 does. The Recommendation envisages the government authorities and within this meaning these are the state and the administration at the national, regional and local level, as well as natural persons or legal entities insofar as they perform government functions or exercise administrative powers in accordance with the provisions of the national legislation. As is seen, these categories fit into the government authorities and local governments under Art. 3, para 1 APIA and the public law entities under Art. 3, para 2, subpara 1and APIA covers two more categories, i.e. budget financed entities and the media. The comparison between the provisions of APIA and the Recommendation comes to show that public law entities are described more clearly in the Recommendation by specifying that these are natural persons and legal entities performing government functions or exercising government powers as prescribed by the law. The Explanatory Memorandum to the Recommendation makes it clear that in some Member States the obligation is extended also to natural persons and legal entities providing services in public interest or private enterprises financed with state budget resources.
Two major points have to be made with regard to the entities obligated to provide information, i.e. **government authorities**, in the context of administrative and judicial practices.
First, it is common practice of regional subdivisions to refer the access requests to the head office instead of handling them. They claim that only the head office is subjected to APIA. Those practices even led to the need to specify in the amendments to APIA adopted at first reading in May 2003 that both

government authorities and their regional subdivisions have obligations under the law.

Another common practice is that persons different from the respective government authorities sign refusals to provide access to information. Often these are heads of administrative units like, for example, directorates. In this respect, the court practice out of AIP litigation and other monitored cases reveals that there is not unanimous opinion as to the jurisdiction in cases of refusal to provide access to information; whether it follows the entity that is obligated under the law or the specific officials who has signed the refusal. This lack of clarity on that matter is one of the main reasons for the delayed hearing of cases concerning the access to information and their wandering around court instances. Therefore we are going to discuss this aspect of court practices further below. Before that we shall focus on court practices related to the entities under Art. 3, para 2, subparas 1 and 2 APIA: public law entities and budget financed legal entities[52].

The previous publication on selected cases[53] highlighted some judgements, whereby the Sofia City Court (SCC) considered the National Health Insurance Fund (NHIF) to be an entity with obligations under APIA. Later on, in 2003, two more cases were heard with the support of AIP, where NHIF was the respondent and the court once again examined the issue whether the Fund had obligations under APIA or not. In both cases the judges reached the conclusion that NHIF had obligations in its capacity of a public law entity other than the government authorities within the meaning of Art. 3, para 2, subpara 1 APIA. In the case of the Institute for Market Economy[54] the court assumed that: „*Pursuant to the provisions of Art. 6, para 1 of the Health Insurance Act (HIA), NHIF is established as a legal entity based in Sofia with the task to implement the mandatory health insurance. The provisions of the law lead to the conclusion that NHIF is a legal entity of public law and it is not included in the system of government authorities or local governments within the meaning of Art. 3, para 1 APIA and therefore NHIF should be assumed to be a public law entity within the meaning of Art. 3, para 2 APIA*".

[52] This contradiction has been recently resolved by Decision No 4 of 2004 of the SAC Plenum, taken on 22 April.

[53] See *Access to Information Litigation in Bulgaria*.

[54] *The Institute for Market Economy Foundation versus NHIF* (Administrative Case No. 2295/2001 SCC AD III-c panel, Administrative Case No. 2471/2003 SAC, Fifth Division).

The same concludion, although in a different way, was reached in the case of Dr. Dimitar Zaekov[55]: *„NHIF is a legal entity belonging to the category of institutions rather than the category of corporate entities. At the same time, its activities of providing the mandatory health insurance scheme are of substantial interest to society and they are regulated with imperative legal provisions, which give grounds to consider the latter to be of public rather than private nature. All this comes to show that although NHIF does not belong to the system of the state authorities still it is a public law entity within the meaning of Art. 3, para 2, subpara 1 APIA*".

Still scarce are court practices concerning the entities under Art. 3, para 2, subpara 2 APIA, i.e. natural persons and legal entities financed from the budget. There continues to exist substantial lack of clarity with regard to the application of these provisions.

For instance, it is unclear whether companies with 100 % state/municipal ownership of their capital are entities with obligations under the law or whether the government share is irrelevant and the only thing that matters for the application of subpara 2 is whether the company receives financing from the state budget for the respective year or not. The lack of clarity is caused also by the lack of a legal definition of the words **„activities financed from the consolidated state budget"**. For example, the refusal by the Minister of Public Administration Dimitar Kalchev to provide a copy of the contract with Microsoft for the supply of software to the public administration[56] stated that the signing of a contract between the government and a private company did not turn the latter into an entity with obligations under the law because the agreed payments were consideration for services provided rather than an act of financing.

There was an opportunity, albeit indirect, for the court to give its interpretation of the provisions of Art. 3, para 2, subpara 2 APIA in the case that heard the refusal by the Mayor of the Municipality of Vidin to provide a copy of the contract between the municipality and the municipal company *Chistota* on the reduction of the number of stray dogs in the city[57].

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[55] *Dr. Dimitar Zaekov versus NHIF* (Administrative Case No. 3208/2002 SCC AD III-d panel).

[56] *AIP, Stoicho Katsarov and Ivan Ivanov versus the Minister of Public Administration* (Administrative Case No. 9502/2003 SAC, Fifth Division).

[57] *Lyubov Gusseva versus the Municipality of Vidin* (Administrative Case No. 35/2003 VRC, Administrative Case No. 8752/2003 SAC, Fifth Division).

The Mayor refused access to that information pursuant to Art. 37, para 1, subpara 2 APIA, stating that the information concerned the interests of a third party and the latter had not given its consent with the disclosure of the requested information. No comments are needed for the purposes of this paper but one cannot ignore the fact that a letter by the manager of the municipal company was present in court, where the manager said he did not agree with the disclosure of the information because of bad relations with the applicant. The refusal was challenged on grounds that the consent of the company was not needed in that particular case because the company was municipal and performed its activities in public interest and with public resources and therefore the provisions of Art. 31, para 5 APIA applied to the case as the consent of the third party was not needed where the third party itself had obligations under the law. Subsequently the Vidin Regional Court (VRC) issued its judgement to reverse the refusal, assuming that Art. 31, para 5 did apply to the case since the requested information was public by nature and the consent of the company was not needed. Regrettably, the lack of reasons to show how the court reached the conclusion that the company had obligations under the law failed to shed more light on the interpretation of Art. 3, para 2, subpara 2 APIA.

The last case related to Art. 3, para 2, subpara 2 APIA heard the silent refusal of the chairman of a local community centre (*chitalishte*)[58]. The interpretation of the Burgas Regional Court (BRC) was in the sense that when an application for access to information was served to a legal entity: „*... it has to take into consideration also the restrictive provisions of Art. 3, para 2, subpara 2 as to the nature of information*". The conclusions of the court in this respect were as follows: „*In accordance with the above mentioned legal provisions, the requested information is determined by those activities of the legal entity that are carried out with financing from the consolidated state budget. This is also the framework, within which public information can be sought from the legal entity - it has to refer to a specific activity financed from a specific source specified in the law*".

As stated earlier, court practices are rather inconsistent and controversial as relates to the jurisdiction in cases of information refusals, where they are signed by officials other than the respective government authority, e.g. the director of a directorate. On the other hand, often the official representing the government authority and the public servant who has signed the refusal

[58] *Apostol Stoichev versus Hristo Botev Local Community Centre - village of Banevo (Administrative Case No. 210/2003 BRC, Administrative Case No. 88258/2003 SAC, Fifth Division*).

are not the same person, since in most institutions there is an officer designated to be responsible for applications[59]. The ground of this delegation is Art. 28 of APIA, which reads that the requests shall be examined within certain time limits and **the authorities or persons expressly designated by them** make the decision to grant or refuse access. At the same time, Art. 41, para 1 APIA states that the decisions to grant or refuse access to information are subject to appeal before either the regional courts or SAC, depending on **the level of the executive authority** that has issued the act. It is sufficient to present the opinion of the court of two cases in which AIP was involved to illustrate the point.

In the case *Vassil Chobanov versus the Council of Ministers*[60] the appeal against the refusal by the Council of Ministers (CoM) was lodged with SAC, while the refusal was signed by the Director of the Government Information Service (GIS). A three-member panel referred the case to SCC because it decided that the director of a directorate would not fall within its jurisdiction as determined in Art. 5 of the Supreme Administrative Court Act (SACA). Later on, the ruling was appealed before a five-member panel. One of the arguments was that the Director of GIS was authorised to make decisions on access to public information requests with an order by the Prime Minister but it is still on behalf of him. This did not turn the director into an administrative authority within the meaning of APIA or the Public Administration Act, where Art. 19 specified **the bodies** of executive power. The five-member panel of SAC rejected the appeal and left the earlier ruling in force, referring the appeal to SCC. In its reasons, the court assumed that the words „***for its decision***" used in Art. 28, para 2 indicated unambiguously that the person designated by the respective authority would make a decision on the application for access on his or her own behalf rather than on behalf of the body that had authorised him or her. Therefore, the court went on, the provisions of Art. 40, para 1 APIA had to be given wider interpretation in the sense that refusals were to be appealed before the respective court, depending on the authority or the person having issued the act.

[59] Under Bulgarian law „state organ" is the head of the respective institution (Minister of ministry or Executive Director of agency etc.), while other servants could sign a document on behalf of the institution only after a specific authorization

[60] *Vassil Chobanov versus the Council of Ministers* (Administrative Case No. 1913/2003 SAC, Fifth Division, Administrative Case No. 3559/2003 SAC, five-member panel, Administrative Case No. 1822/2003 SCC AD III-z panel).

SAC abandoned that practice in the case *AIP versus the Council of Ministers*[61], where the challenged refusal by the CoM was again signed by the Director of GIS. At the court hearing held on 6 June, the barrister representing the Council of Ministers raised objections with regard to the jurisdiction in the light of the existing practices in similar cases and pleaded to the court to drop the proceedings and refer the case to SCC. The arguments to support that position were that the decision on the refusal had not been made by any of the authorities envisaged in Art. 5 SACA and that there was an order by the Prime Minister to designate the director as the person to reply to the applications for access to information. Having received the order by the Prime Minister, the court **did not** drop the proceedings and heard the case on merit, stating that it would rule on the objection raised with regard to the lack of jurisdiction in its final judgement. The court held that the case had to be heard by SAC due to the subject-matter of the dispute and the Prime Minister's order presented by the respondent. The reasons were as follows: *„... where a government authority (public law entity under Art. 3, para 1) receives a request for information, kept beyond any doubt by that authority, the fact that a person from its administration has been expressly authorized to make the decision does not lead to „replacement" of the authority subjected to the law. In other words, in the case of authorization, where the person who signed the decision and the authority (or its representative) are different persons, there is no change of jurisdiction. Whether it is the jurisdiction of SAC or SCC depends on* ***which is the authority with obligations under the law*** *(a collegiate or single-member government authority) rather than on who is the person designated under Art. 28, para 2 APIA and what administrative unit this person is the head of within the structure of the government authority*".

[61] *AIP versus the Council of Ministers* (Administrative Case No. 9898/2002 SAC, Fifth Division, Administrative Case No. 11243/2003 SAC, five-member panel).

FORMULATION OF ACCESS TO INFORMATION REQUEST. ACCESS TO INFORMATION OR ACCESS TO DOCUMENTS?

The provisions of APIA concerning the content of the application for access seem, at first glance, to be intended solely to facilitate the process of requesting and obtaining access to information. Court practices, however, revealed that the wording of the request could be disputable.

The issue of the wording relates to the interpretation of the provisions of Art. 25, para 1, subpara 2 APIA, whereby the access request is required to include **a description of the requested information**, and Art. 29, para 1 which reads that if it is not clear what exactly information is sought or it is described in too general terms, the seeker should be advised thereof and has the opportunity to specify the subject-matter of the requested information. Obviously, the legislator have introduced these provisions in order to ensure a simple and fast procedure for the citizens, while minimizing formalities (Art. 24 provides also „oral information requests") rather than to facilitate public administration to decline access requests. This understanding takes account of the fact that the administrative authority is always put in a favorable position compared to the individual citizens as it is in possession of the information in question and knows it.

The provisions of APIA to this effect comply with the standards set out in Recommendation (2002) 2, where Principle V reads that **formalities** in connection with the written requests have **to be minimized**. It should be remembered that the approach of the Recommendation implies that the same principle should apply to oral requests, too. Moreover, the very existence of the opportunity to ask orally makes it easier for citizens willing to draw up a picture of the activities of government authorities.

The problem of the access requests formulation have been considered in several judgements of SAC. It was approached from the aspect of whether the law means **access to documents** or **access to information**. In 2003, SAC continued to rule that APIA entitles citizens to access information rather than documents. Furthermore, if a citizen requested access to a document (*i.e. if he or she opted for the wording „please provide a copy of this or that contract or administrative order"*), the administration was not even required to reply or the provisions of Art. 29 APIA applied as those were cases, where the request was „too general" and the applicant had to be advised thereof in order to specify the subject-matter of the request.

In its judgement on the case concerning the contract of the Minister of Finance (MF) with the British consulting company Crown Agents, SAC came to the conclusion that Art. 25, para 1, subpara 2 APIA required **a description of the requested information**, while the content of the request made it clear that there was no such description. The conclusion of the court was supported with the argument that if the request was formulated as referred to **a copy of the contract**, the requirement set out in Art. 25, para 1, subpara 2 APIA could not be considered to have been satisfied insofar as the contract was the physical carrier of the public information sought but not the information per se in accordance with the legal definition laid down in Art. 2 APIA. Similar were the considerations of SAC in the case that the journalist Alexey Lazarov[62] brought in 2002 against the refusal of the Council of Ministers to provide a copy of the verbatim record of the first session of the cabinet. In the Lazarov case, a five-member panel of SAC found that, while requesting a copy of the verbatim record, the journalist failed to meet the requirement of Art. 25, para 1, subpara 2 APIA to give a description of the requested information and the request was formulated in a too general way, specifying only the preferred form of access as required under Art. 25, para 1, subpara 3 APIA.

Notwithstanding all these findings, the court reversed the refusal of the Minister of Finance to provide a copy of the agreement with Crown Agents as given in violation of administrative procedural rules. The Minister of Finance appealed that judgement before a five-member panel. It is more interesting to note that the cassation appeal challenged **also in that part** the judgement where the court assumed that the Minister failed to advise the information seeker to specify the subject-matter of the requested information (the procedure under Art. 29 APIA). The arguments of the appeal to that effect were that the wording of the application was not unclear; moreover, the Minister had made a decision on the request to receive a copy of the contract signed between the MF and Crown Agents. The reason, in the opinion of the administrative authority, was that the information request did contain **an accurate and specific** description of the requested information, i.e. access to the content of the contract signed or those parts thereof which did not contain classified information. Subsequently a five-member panel confirmed the reversal of the refusal by the Minister of Finance but it found that indeed the judgement of the three-member panel was ruled in violation of the law with regard to the description of the requested information and the

[62] *Alexey Lazarov versus the Council of Ministers* (Administrative Case No. 7189/2001 SAC, Fifth Division., Administrative Case No. 1543/2003 SAC, five-member panel).

applicability of Art. 29 APIA, stating the following: *„It is obvious that by requesting a copy on paper, the citizen requested access to public information contained in the clauses of the agreement rather than in the set of 110 sheets of paper as the physical carrier of public information. In this particular case, the generic term „agreement" is specified and what is requested is not just any agreement but the one signed between the Bulgarian Government and the British consulting company Crown Agents. As is seen in the conduct and the procedural statements of both sides to the dispute,* ***they are clearly and undoubtedly aware of what exactly public information was requested***".

Obviously the major problem stems from the fact that where an access request refers to agreement, contract, administrative order, verbatim record, etc., this could be seen either as specification of the requested information or only as notification of the form of its carrier. However, it is still unclear why the court continues to examine the issue whether the requirement for specification of the information is complied, where access to an agreement/ contract/verbatim record/administrative order was denied. Once the entity subject to APIA refuses to provide access, it makes it perfectly clear that was aware of the precise type and content of the information sought. For instance, in the case of Vassil Chobanov against another refusal of the Council of Ministers[63] to provide a copy of the verbatim record from one of its meetings, having concluded that the applicant had to specify the content of the information, the court continued two sentences further below in the text of the judgement to say that *„the verbatim record related to the meeting of the Council of Ministers, where an amending bill was discussed* ***and there was no dispute between the parties*** *that it was a case of a request for access to public administrative information"*[64].

Another judgement of SAC raised the same issue in hearing the appeal of Apostol Stoichev[65] against the silent refusal by the chairman of a local community centre (*chitalishte*). The court came to the conclusion that the

[63] *Vassil Chobanov versus the Council of Ministers* (Administrative Case No. 1822/2003 SCC AD III-h panel).

[64] APIA distinguishes between official and administrative information, held by public authorities. While the first category relates to documents issued in the circle of competence of authorities subject to the law (Art. 10), the latter consists of all the other documents created in connection with the former or just anyhow related to the function of the same authorities (Art. 11). Both the categories are publicly available in principle.
See: http://www.aip-bg.org/library/laws/apia.htm

[65] *Apostol Stoichev versus Hristo Botev Local Community Centre - village of Banevo* (Administrative Case No. 210/2003 BRC, Administrative Case No. 88258/2003 SAC, Fifth Division).

request for access to a document provided grounds for refusal and thus it found even the silent refusal to be lawful in spite of the recent court practices to consider all silent refusals to provide access as a violation of the requirement to deliver the refusal in writing (Art. 38 APIA) which was so essential that typically led to unlawfulness of such refusals. The court judgement justified the lawfulness of the silent refusal saying that „***in the case of a request (formulated as) access to a document, decision on the request is not due***".

Coming to that conclusion, the court assumed that: „*... it should be noted that what can be requested access to under APIA is information in the sense described above rather than documents... In this particular case, the request does not refer to information, but only to accounting and other documents; in other words, the request refers to a document instead of information described therein. Only when the applicant specifies the type of the requested information in the sense and framework laid down by the legislator the administrative authority is obliged to provide it if the said information is available. These grounds are sufficient to conclude the refusal of the administrative authority was lawful because it has no obligation to provide information in the way the applicant requested*". In fact, similar reasons concerning the formulation of the request were put forward by the court as early as the time of the case of Nickolay Marekov[66] complaining of the refusal by the Minister of Finance to provide access to **a copy of** the first quarterly **report** of the British company Crown Agents on the implementation of the above contract. However, these considerations of the court as to the formulation of the access request infringe upon the right of access to information to the greatest extent because they amount to denial of justice in cases of requested copies of documents.

A final note on this topic is that a citizen will hardly find a plausible explanation of any difference between a request for access to **a copy of the contract** with Crown Agents and a request for **access to the information** contained in that contract because the public authority subject to APIA is capable of identifying the requested information in both cases. In fact, this is the purpose of the law, i.e. to make sure that the request contains a specification of the requested information so that the relevant public authority can easily identify the information asked.

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[66] *Nickolay Marekov versus the Ministry of Finance* (Administrative Case No. 8962/2002 SAC, Fifth Division, Administrative Case No. 8717/2003 SAC, five-member panel).

WHICH INFORMATION IS „PUBLIC"?

Art. 41, para 1 of the Constitution provides for the right of each citizen to seek information. The Constitutional Court finds that this right implies correspondent obligation of state authorities to provide the information kept by them.

The detailed description of that obligation is left to statutory legislation[67]. This means that the latter should regulate matters such as the procedure for the fulfillment of this obligation - who is obliged, in what terms and conditions. It does not embrace substantial matters such as the scope of public information.

This stems from the Constitutional Court's interpretation of the Art. 41 of the Constitution as setting the framework of that scope:

„Restriction of these rights is permissible for the purposes of the protection of other rights and interests subject to constitutional protection and it may be allowed only on the grounds set forth in the Constitution. Restriction of these rights on legal grounds outside those, described in the Constitution, is not permitted"[68].

This interpretation of the Constitution leads to the conclusion that the scope of the information the state is obliged to provide cannot be determined or restricted by law[69]. Hence it has follows it overlaps with the volume of information kept by government authorities[70]. To accept the opposite would mean to allow the legislative to freely extend or restrict the volume of the information due, without compliance with the constitutional provisions.

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[67] Judgement No. 7/1996 of the Constitutional Court on Constitutional Case No. 1/1996. available at: http://www.aip-bg.org/documents/ruling.htm

[68] Ibid., section 3 of the judgment.

[69] However, it should be assumed that it is possible to expand that scope by law. The purpose of the Constitution is to provide minimum guarantees for the right to information, for which the minimum scope has to be ensured. For this reason, the right to request the preparation of information that is not yet readily available by the respective government authority under the Protection of the Environment Act is in compliance with the Constitution.

[70] This does not apply to other entities subject to APIA because their obligation is not explicitly provided for in the Constitution.

This will be classical example of abuse of power, where government authorities do have the information but do not provide it on grounds other than those set out in the Constitution[71].

In this context, public information created or kept by the entities under Art. 3, para.1 of APIA should be considered as *„the full volume of the information they keep*". This is what the provision of Art. 2, para 1 APIA says, we think, although it was referred as „lacking clarity" by courts. According to this definition public information is any information that enables a citizen to form an opinion on at least of one institution subject to APIA. For the purposes of clarifying the term „public information", the court continued to refer to the provisions of Arts. 10 and 11 APIA, specifying the two types of public information as official and administrative[72]. In its judgement on the case of *Lazarov versus the Council of Ministers*, the five-member panel of SAC interpreting the notion „public information" emphasized the importance of the access to public information in a democratic society with a view to ensuring the transparency of public administration and the availability of information on issues of public nature[73].

Despite the court interpretation of the question as to what information is public has remained unchanged in general, attempts to narrow it arose in 2003 in two aspects: (i) by taking into account the specific interest of the applicant in the requested information, and (ii) by rejecting the validity of APIA principles in other laws regulating access to specific types of information.

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[71] This pervert interpretation of the Judgement of the Constitutional Court that the ordinary law-maker is allegedly free to establish the volume of the information due was put in the reasons attached to the government bill on the access to public information submitted to Parliament in 2000. It is claimed that that the Constitutional Court has introduced the term *„information of public importance*". This is not true, otherwise the Constitutional Court would have defined it. It is not explained in the reasons attached to Judgement No. 7/ 1996 of the Constitutional Court (not to speak of its obvious absence in the constitutional provisions) but it features in section V of the judgment. Apparently its meaning is that the information the State holds is implied to be of public importance.

[72] See footnote 64 above. Cf. *Access to Information Litigation in Bulgaria*, p. 23.

[73] Judgement No. 4694/2002 on Administrative Case No. 1543/2002 of SAC, five-member panel. See *Access to Information Litigation in Bulgaria*, pp. 207- 212. The reasons quote Recommendation (2002)2.

PUBLIC AND PRIVATE INTERESTS

The principle of equality of information seekers has been recognized as early as the date of Recommendation R (81) 19 of the Committee of Ministers of the Member States of the Council of Europe on the access to information held by public authorities. One of its specific manifestations, as emphasized in the Recommendation, is that *„Access to information shall not be refuted on the ground that the person requesting the information has no specific interest in the matter*". The introductory memorandum to the 2000 government bill on the access to public information emphasized that principle referring to the Recommendation. The intention was to ensure real equality of information seekers. The underlying concept was that seeking information the individual, while exercising a personal right, reached a result of benefit to the society. That was the reason for the broad definition of „public information" in Art. 2, para 1 APIA as to underline that information is important to society even when a single member would form an opinion about the activities of the respective entities. The right of access to information as exercised by a single individual, regardless of the reasons, considerations, objectives and motivation, is valuable to society because it provides for the availability of this information to broader access once a decision on a single case is made.

In its ruling of 2003, a five-member panel of SAC supported a somewhat different interpretation, while leaving in force the ruling by the three-member panel. The proceedings were dropped because the court assumed that the application in question was not access request but rather a complaint in connection with the non-performance of a privatisation agreement. However, the court put forward another reason for dropping the proceedings by stating that *„the content of the application to the court leads to the conclusion that the request is not related to any public interest as it relates to personal ownership rights of the applicants*" and *„such interests cannot be the subject-matter of litigation under APIA*"[74]. Indeed, as to the principle mentioned above in connection with the right of access to information, the situation is reversed - the right of access to information is denied not because of lack of specific interest in the information but, conversely, because of the existence of such an interest. It should be noted that in both cases the denial of this right is equally far away from the purpose of APIA.

[74] Ruling No. 7356/2003 on Administrative Case No. 5310/2003 of SAC, five-member panel.

It is true that pursuant to Art. 8, para 1 APIA its scope excludes the information provided in connection with administrative services[75]. However, this is a specific exemption following not a ground for denial, but the simple fact that there is a special procedure for obtaining information in connection with administrative services. One can imagine that the disclosure of the requested information would have satisfied not only the private interest of the applicant but also the public interest in enabling each individual or legal entity to request access to the same or similar information and thus to fulfill the purpose of the law to ensure transparency in the activities of public administration. In our opinion, the fact that the information obtained could be used for various purposes - to lodge a civil claim, to inform the public prosecutor or another relevant authorities of wrongdoings or breaches of law, to carry out scientific research, to publish it, or to use it in any other legitimate way - is not to be examined in cases under APIA. The question of measuring public interest in obtaining access to specific information arises is a different occasion. It is necessary only after recognition that the information is public and meeting a competing right or legal interest. Then the right to know should be balanced against the later to decide whether to provide complete or partial access to the information at issue.

[75] Which is definitely not the case here.

THE RELATIONSHIP BETWEEN GENERAL AND SPECIAL LAW

As stated earlier, the Constitution safeguards the right of each citizen to seek information, while APIA is *„based on the constitutional right of citizens set forth in Art. 41...“*[76]. A number of other pieces of legislation provide for special rules concerning the access to specific types of information. To the extent that the information is created or kept by the government authorities or other entities under Art. 3 APIA, the right of access nevertheless stems from the same provision of Art. 41 of the Constitution. Since APIA is a law based on the Constitution, providing the general regulation of the right of access to public information and the correspondent obligation of the respective entities, it shall be considered a general law. This is explicitly stated in its Art. 4, para 1. The special laws in this field are quite numerous referring to different occasions: i) access to personal data (in the Personal Data Protection Act [EPA]), ii) access to environmental information (in the Environmental Protection Act), iii) access to municipal property registers (in the Municipal Ownership Act), iv) access to information in connection with administrative services (in the Administrative Services to Legal Entities and Individuals Act), v) access to various public registers (company register, records of real estate, mortgages, etc.).

A practical issue is the protection of the right of access to information when **special rules for seeking information** exist. In its judgement on the case *Grigorov versus the Mayor of Berkovitsa* the court assumed that the applicable law was different, i.e. the Municipal Ownership Act (MOA) and the Regulations on its application, since the subject-matter was access to the title deed for municipal property. The court found that to be sufficient for the rejection of the appeal against the refusal to provide information. The reasons did not make the argument very clear as to whether the court considered that the applicant had to specify the relevant law in the access request or in the application addressed to the court. But statutory requirements to identify the legal ground do not exist in either case. Neither Art. 25 APIA nor Art. 62, para 2 MOA provide for an obligation of the applicant to specify the law on the basis of which the right is exercised. No such requirements exist with regard to the appeal either[77].

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[76] See Introductory memorandum to the 2000 government bill on the access to public information.

[77] Art. 40 APIA makes reference to APA and SACA, while Art. 17, subpara 3 SACA and even more so Art. 33 APIA do not require the applicant to specify the law, the violation of which he or she is making reference to.

It was in that spirit that the court ruled on the case *Ecoglasnost National Movement versus the Director of the Prevention and State Sanitary Control Department at the Ministry of Health*. The court stated there that: „*Undoubtedly, the information sought is public information of great importance, the access to which is regulated by special law, i.e. the Protection of the Environment Act (repealed)*". However, it went on to assert that the above mentioned consideration provided grounds to reject the appeal of the Association[78].

One cannot find it natural to reject appeals in cases, where it is established that the right of access to information exists and the requested information is public and even of great importance. Such an approach is on the verge of absurdity and it fails to guarantee the right of each citizen to seek information as prescribed by the Constitution and the laws. Indeed, if a special law prescribes specific time limits they must be applied instead of the ones determined by APIA and the failure of the applicant to comply would lead to the termination of court proceedings. In all other cases, however, it is the task of the court to find the applicable law and once it identifies the applicant has the right to information, to decide the case on merit. Moreover, the court has the obligation to do so *ex officio* reviewing the lawfulness of the refusal complained of. A refusal of the administration to provide information under APIA for reasons of its being due under another law is tantamount to impermissible abuse of the purpose of the law. The administrative authority has to find out the applicable provisions on its own, guided by the actual content of the access to information request, and to make efforts to clarify the facts and circumstances relevant to the case[79]. In this connection it may, if necessary, apply Art. 29, para 1 APIA and ask for specification of the subject-matter of the requested information for the purposes of identifying the applicable law.

Anyway, the requirement for the applicant to identify and apply the relevant law on his or her own is an unjustifiable restriction on the exercise of the constitutional right to information. Obviously, the intention of the legislators

[78] Judgement No. 108/2004 on Administrative Case No. 5496/2003 SAC, Fifth Division. See p. 219-221.

[79] In fact, it is the public administration itself that has difficulty in the proper identification of applications, as far as our information goes. The difficulty does not refer to the distinction between the general and special arrangements for seeking information but the distinction between access to information request and a request for the provision of administrative services.

has been to ensure the exercise of this right in the most informal manner as convenient to the information seeker. It should be added in this respect that the legislative finds the information subject to special regulation under specific law to be regarded as public to the extent it is created or kept by the entities under Art. 3 of APIA and falls within the scope of Arts. 10 and 11 APIA. Hence the basic principles to access such information can be found in APIA, while the access is regulated in a special law.

EXISTENCE OF THE INFORMATION

Courts emphasize in their practice under APIA that one of the typical difficulties information seekers face is to find out and prove whether certain data exist in the hands of given public authority[80]. This obstacle occurs because typically the applicant knows what he or she wants to learn but is not always aware of the specific document where this information can be found. This situation requires preliminary research on the questions of where such information usually is kept, in which documents, by which authorities and on what legal ground. A considerable part of the legal advice provided by AIP is dedicated to these issues. Several problems can be discerned in the litigation phase. One is how to become aware of the existence of the information available to the respective authority or entity. The other one is what follows if information expected to exist under legal obligation has never been created or collected.

In one of its rulings, SAC, Fifth Division gave its considerations on the requested information (the annual reports of the manager of the water supply company in Sliven) in the following way: *„obviously the reports were neither administrative acts of the respondent, i.e. the Minister of Regional Development and Public Works, nor was he obligated by law to create or keep such information*". The conclusion was that *„the administrative authority cannot be obliged and required to provide access to information, the existence of which has not been proven beyond any doubt*"[81]. Two issues can be raised here.

The first one is what the words *„beyond any doubt*" mean provided that the applicant, as it was noted, would hardly have any evidence to prove the point. Still it would be appropriate to accept also some indication of the existence of the document in the public authority's disposal[82].

The second issue relates to the connection that the court makes between these two considerations - what would happen if there is no statutory obligation to create certain information but evidence exists that the public authority possesses it. The above-mentioned ruling stated that *„since it does*

[80] See the dissenting opinion on the Judgement on Administrative Case No. 791/2003 SAC, five-member panel. See p. 132-133.
[81] Ruling No. 9700/2003 on Administrative Case No. 2819/2003 SAC, Fifth Division.
[82] At least by now, there has been no practice to the opposite.

not have the obligation to collect and keep such information, it is not competent to make a decision on the request of the Association". That conclusion was perhaps reached in the context of the facts in that particular case but a general assumption that administrative authorities are not obliged to make decisions on access requests they receive is contrary to the law. The provision of Art. 11 APIA have introduced a more general criterion - the obligation under APIA exists inasmuch as certain information is kept in connection with the official information or is collected, created or kept in somewhat relation to the activities of the authorities and their administrations. The existence of legal provision on the creation or keeping of information in a specific form by a specific authority or entity facilitates the proof but does not limit the obligation to that scope. Where the rights of third party which supplied the information are affected, the exemption under Art. 31 APIA may be referred to, if applicable, but in all the cases decision on the request is mandatory[83].

The existence of provisions that introduce the obligation to create or keep certain information is not always sufficient to ensure the existence of the information itself. In the case *Ivailo Ganchev versus the Minister of Education and Science*, it turned out in the course of the collection and presentation of evidence that, in fact, no documents had been drawn up for the award of a procurement or any other contract to exhibit promotional materials of a private company on the wall of a corridor in the main building of the Ministry. In that particular case, the refusal based on the claims that the information had been submitted to the State Archive Fund and the provisions of Art. 8, subpara 2 APIA were applicable[84], was apparently construed to hide a violation of the law because of the failure to issue the relevant documents. Notwithstanding the lack of that information, the court reversed the refusal as unlawful, assuming that *„this is an obvious case of incorrect attitude of the authority obliged to provide access to public information in the person of the Minister of Education and Science to the petitioner*" and that the right to receive an adequate answer from the administrative authority in accordance with the points of fact and law was not granted. This judgement is particularly interesting because it clearly attaches priority to the protection of the right of the citizen concerned, whereas the judicial oversight of the lawfulness of

[83] An additional argument to this effect is the fact that APIA contains no provision identical to that of Art. 20 EPA, whereby the access to information may be refused if the information has been provided voluntarily under the conditions of confidentiality.
[84] According to that provision documents kept in the State archives are not subject to APIA. See http://www.aip-bg.org/library/laws/apia.htm

the administrative act comes second. Indeed the Constitution and the international legal instruments require adequate protection of the right, which means to subject any forms of its violation to the control of the judiciary. In our opinion, taking into account not only the oversight of the refusal but also the need for protection of the right of access to information against unlawful infringements is the approach that fits best into the purpose of APIA and its interpretation in accordance with the Constitution.

The five-member panel that reversed the above mentioned judgement assumed that *„the satisfaction of the applicant renders senseless to send back the case to the public authority for notification purposes under Art. 33 APIA, as this has already been done"*[85]. Hence the applicant had no further interest in appealing the denial. However, a judgement to this effect might prevent the applicant from seeking damages under Art. 1, para 1 of the Liability of the State Act concerning Damage Inflicted to Individuals because the ruling on the lawfulness of the administrative act is a preliminary issue pursuant to para 2[86].

[85] Judgement No. 2383/2003 on Administrative Case No. 8518/2003 SAC, five-member panel, p. 92.

[86] The Romanian law on free access to information of public interest provides for claim for damages in the same court case reviewing the lawfulness of the administrative act.

DECISION ON MERIT. ENFORCEABILITY OF JUDGEMENTS

Judicial decision on merit is very important for the effective right to justice. In many cases, the court exercises its powers to reverse the administrative decision and to refer the file back with mandatory instructions. This approach possibly enables the administration to apply APIA more correctly but it does not ensure satisfaction of the right to information. A specific feature of this right is that it needs fast exercise by its nature. This opportunity is anyway lost in a large measure during the litigation phase but time is doubled when the file is referred back for a new decision to be made. Next, an opportunity is created for the administrative authority to abuse its power by pointing rather scare arguments to the court in the hope that it will be able to raise new arguments after the file is referred back to it[87]. On the other hand, generally administrative authorities have no discretion to freely decide under APIA. The restrictions of the right to access could be applied only when relevant law and a competing interest (right) exist and discretion as to these matters is not allowed. This interpretation should be valid also to the provisions of Art. 13, para 2 and Art. 31, para 4 APIA, even that the word „may" is used[88]. In this context, there should be no obstacles to deliver judgments on merit, while the need for this approach is enormous.

Another practical problem is the failure of the respondent to execute the judgement. This happens often. After several judgments on various cases the Director of the National Health Insurance Fund has to provide access requested information but has failed to do so. It is important to point out in this respect the lack of adequate mechanisms to enforce the judgement[89].

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[87] Second refusal on different grounds was received in the case of *Social Barometer Association versus the Director of PIFCA* and the case of *K. Terziiski versus the Minister of Finance* concerning the agreement with Crown Agents. The repeated refusal in the case of *A. Lazarov versus the Council of Ministers* was silent.

[88] The above mentioned Judgement No. 7339/2002 may possibly lead to a conclusion to this effect with regard to Art. 13, para 2, subpara 1. As to Art. 31, para 4, there is a rennet interpretation given to this effect in Judgement No. 9822/2001 on the case of *Lazov versus the Minister of Envrionment and Water. Access to Information Litigation in Bulgaria*, p. 226.

[89] A major omission in Arts. 42 and 43 APIA is to specify who will establish the administrative violation.

As stated earlier, no damages can be sought in this type of proceedings and the respective authority will not be imposed any other penalties either. In the only case, where the court was requested to impose a fine for failure to fulfill a court judgement, it decided that it was not necessary. Obviously the problem relates not only to cases under APIA but generally to the enforceability of judgements in the field of administrative justice. Coupled with the failure to rule on the merit of the dispute, the non-enforcement of judgements is a serious obstacle to the effective guarantee of the right of access to information.

RESTRICTIONS OF THE RIGHT OF ACCESS

The restrictions on the right of access to information are applied as exceptions from the rule of free access to information in accordance with Judgement No. 7/1996 of the Constitutional Court on Constitutional Case No. 1/1996. Besides, they are subject to the conditions and requirements set forth in Art. 19 of the International Covenant on Civil and Political Rights and Art. 10, para 2 ECHR. The same requirements are read in Judgement No. 7/96 of the Constitutional Court on Constitutional Case No. 1/1996, Recommendation (2002) 2, and the Aarhus Convention. According to them any restriction should be prescribed by law; it should be aimed at protecting the rights and interests laid down in Art. 41, para 1 of the Constitution[90], and to be necessary in a democratic society. The last element of the test requires that any restriction should be:

- proportionate to the aim to protect competing rights and interests;
- applied only where the disclosure of information will harm or may harm the protected rights and interests, **unless there is overriding public interest in disclosure**.

The provisions of Art. 41 of the Constitution as interpreted in Judgement No. 7/96 of the Constitutional Court contain the rule that any restriction of the right to seek information may be introduced only if prescribed by the law and it is applicable with the aim to protect a competing right or interest. The Constitutional Court has emphasized that any restriction will be permissible **only** for the achievement of this aim, i.e. the requirement for proportionality is implied here. It was for the first time when the Protection of Classified Information Act of 2002 was passed that the legislators introduced statutory requirement that restrictions of the right to information should take into account the potential harm of the disclosure. This necessitates case-by-case assessment of facts in order to avoid undue restriction of the right to information. An explicit requirement set forth in Art. 20, para 4 EPA is to take into account the public interest served by disclosure, where a decision to refuse access to information is made.

[90] Art. 10 ECHR provides for a larger number of protected rights or interests but the Constitution should prevail as a legal instrument of higher order. This is not a case of real conflict of norms because, being a multilateral international agreement in the field of human rights, ECHR provides the minimum standard and allows higher level of protection such as the narrowing of the range of protected interests.

A requirement with regard to the lawfulness of refusals under APIA is to state the legal and factual grounds (Art. 38). Interesting court practices have developed in connection with points of law and fact.

State Secret

AIP has no data of refusals related to state secrets prior to the adoption of the Protection of Classified Information Act (PCIA)[91]. Such cases occurred after the adoption of PCIA, whose provisions repealed the List of Facts, Data and Items Constituting State Secret (1990 - April 2002). This fact is an indication of a possible widening of the scope of classified documents[92].

Art. 25 PCIA enumerates four interests protected with the state secret[93]. Checking them for compliance with Art. 41 of the Constitution[94] leads to the conclusion that all four are within the scope of national security[95]. Further to these protected interests, a list of categories is attached to specify the information subject to classification as state secret.

In the case *K. Terziiski versus the MF* concerning the access to the contract with Crown Agents, SAC, Fifth Division assumed that the refusal to grant access did not comply with the requirements of Art. 38 APIA. It did not contain *„any data on the type or nature of the information qualified it as state secret or the statutory grounds for its determination as such"*[96]. The administrative authority had to specify the category of information under Appendix No. 1

[91] The comparison of the findings of the Access to Information Programme surveys with regard to the fulfillment of the obligations of the executive power under APIA comes to show that in 2001 there were no refusals based on the state secret, while in October 2002 their number reached 91. See *The Year of Rational Ignorance*, published by the Access to Information Programme, Sofia 2002, p. 38. Available at: http://www.aip-bg.org/pdf/ignorance2.pdf

[92] This is probably the consequence of the increased number of categories of information constituting state secret from 38 to 64. The difference is not only in the number but also in the scope of new categories.

[93] Defense, foreign politics, national security and constitutionally established order. See http://faculty.maxwell.syr.edu/asroberts/foi/library/secrecylaws/BG_class_info_law.pdf

[94] Rights and reputation of others, national security, public order, public health and morality. See http://www.aip-bg.org/documents/const.htm

[95] I.e. these are three interests, as the fourth one, national security, is certainly contained in itself.

[96] Judgement No. 11682/2003 on Administrative Case No. 3080/2003 SAC, Fifth Division. See p. 251-257.

to Art. 25 PCIA, in which the information contained in the contract allegedly falls. The failure to fulfill that obligation provided grounds for the reversal of the administrative decision. When confirming the decision, the instance of cassation added one more argument: the right to judicial review of classification of information pursuant to Art. 41, para 4 APIA *„implied the obligation of the administrative authority to specify when and on what grounds the classification was done"*[97]. Hence the decision to refuse access had to accurately state the points of fact so that to determine the time of classification and the relevant legislation at that time. Further to these arguments, another panel of the court ruled in the case of *the Access to Information Programme versus the Council of Ministers* that *„the provisions of Art. 38 APIA are imperative and hence their violation always constitutes a material breach"*[98].

Official Secret[99]

The adoption of PCIA was the first attempt to systematize the matters related to the official secret in legislation. Art. 26 PCIA defines it as any information created or kept by the authorities under Art. 3 APIA other than the state secret, the unauthorised access to which might affect the interests of the state or damage another interest protected by law. The comparison to the definition of the state secret makes it even less clear. Art. 26, para 2 has introduced the imperative rule that any information subject to classification as official secret should be prescribed by the law. Pursuant to Art. 26, para 3, the head of the organisation unit has to approve the list of specific categories of information under para 2 relevant in the circle of its functions.

In the case of *the Social Barometer Association versus the Public Internal Financial Control Agency (PIFCA)* the instance of cassation found the refusal to be unlawful and pointed out the need for accurate specification of the relevant legal provisions. In order to refuse access to an audit report, the Director of PIFCA stated that the law prohibited the disclosure of any information that was an official secret pursuant to Art. 3, subpara 4 and Art. 12, subpara 3 of

[97] Judgement No. 2113/2004 on Administrative Case No. 38/2004 SAC, five-member panel. See p. 264.

[98] Judgement No. 10640/2003 on Administrative Case No. 9898/2002 SAC, Fifth Division, still pending. The subject-matter of the request was the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30 of 1980.

[99] In the translation of APIA it is referred to as „administrative secret". Both translations convey the meaning of the expression.

the Public Internal Financial Control Act. Both envisage the prohibition for the bodies of the Agency to disclose facts and circumstances that become known to them in the course of the discharge of their duties. According to SAC, Fifth Division, *„the appealed refusal does not invoke a specific provision of the Public Internal Financial Control Act, under which the requested information is determined as an official secret and therefore prohibits access to it"*[100]. In that case, the prohibition was blank and did not specify the scope of the information that constitutes official secret. In order to have this scope defined, it is necessary to have a definition of the information constituting official secret (i.e. described or specified in categories) pursuant to Art. 26, para 2 PCIA and then its categories should be specified pursuant to para 3. As to the requirement for the protection only with the purpose to prevent any harm to the protected interest, court practices are yet to develop like in the field of the state secret.

Court Practices under Art. 41, paras 3 and 4 APIA

2003 saw the development of court practices under Art. 41, paras 3 and 4 APIA. In cases of refusal on grounds of classification as state or official secret, these provisions enable the court to request the document from the respective authority and inspect it in camera. It has the power to review the lawfulness of both the classification and the refusal. These court practices appeared after the adoption of the PCIA as the number of refusals involving state or official secrets increased.

As far as AIP is informed, the first case, where the court exercised its powers to request the document from the authority and, having examined it in camera, to rule on the lawfulness of both the refusal and classification was the case of AIP[101] concerning the access to *the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30 of 1980*. Having obtained the Decree and the Rules from the Council of Ministers, the three-member panel of SAC issued a ruling after the in camera inspection. It stated that Council of Ministers' Decree No. 30 of 1980 (6 sheets) was marked *„Strictly Confidential"* and the Rules (79 sheets) were marked *„Confidential"*. Almost the same happened in the case concerning the refusal by the Minister of Finance to

[100] Judgement No. 10539/2002 on Administrative Case No. 5246/2002 SAC, Fifth Division.

[101] *AIP versus the Council of Ministers* (Administrative Case No. 9898/2002 SAC, Fifth Division, Administrative Case No. 11243/2003 SAC, five-member panel), p.180-194.

provide a copy of the contract with Crown Agents. In that case, it was again a three-member panel of SAC that issued a ruling and communicated it after the in camera inspection. It said the contract consisted of 110 sheets and was marked as „*Secret*". One should note that the court did not rule on the lawfulness of the classification in the rulings or the subsequent judgements in both cases. This can be explained with the fact that none of those refusals specified the factual and legal grounds for the classification of the information. For that reason, the court reversed both refusals with the argument that the non-specification of a legal provision regulating the classification made the refusals unjustified and the lack of reasons for the criteria and grounds that had led the administrative authority to assume that the requested public information constituted state secret and no access had to be provided for that matter prevented the court from deciding on merit as to the lawfulness of the appealed denial. The reasons set out in the judgements were that the court was not allowed to seek and find the arguments that had possibly led to the refusal complained of by interpretation of APIA and PCIA provisions and thus „*to supplement*" the administrative act with the missing reasoning. That was task of the public authority subject to APIA. In that connection, the five-member panel of SAC issued its judgement in the case concerning the agreement with Crown Agents, stating that: „*The amendment to Art. 41, para 4 APIA (The State Gazette, No. 45 of 2002) authorised the court to exercise oversight of the classification of information. That implies the obligation of the administrative authority to specify* ***when and on what grounds the classification was made****. The Minister has to specify the time and grounds for the classification, i.e. prior to or after the adoption of the Protection of Classified Information Act, in accordance with the instructions given by the court. The three-member panel rules in accordance with the law that the administrative authority had to specify whether the contract contained any facts, data and/or items constituting state secret within the meaning of List of Facts, Information and Items Constituting State Secret of the People's Republic of Bulgaria (promulgated in The State Gazette, No. 31 of 1990, now repealed) or what category of information subject to classification as state secret under Appendix No. 1 to Art. 25, para 1 PCIA the information contained in the agreement fell into*".

The case of *the Bulgarian Helsinki Committee versus the Supreme Prosecutor's Office of Cassation*[102] was different. The ruling of the Sofia City Court covered the lawfulness of the classification, although the refusal did not feature the legal provision that constituted the grounds for the classification. The court

[102] *The Bulgarian Helsinki Committee versus the Supreme Prosecutor's Office of Cassation* (Administrative Case No. 642/2002 SCC AD III-g panel).

ruling stated that: *„Taking into account that data in the report requested had been collected under the Special Surveillance Means Act and that the collected data represent an official secret within the meaning of Art. 26 PCIA, the court finds that the report in question has been correctly marked „**For Official Use**" pursuant to Art. 28, para 3 PCIA. Therefore the request of the appellant is unjustified*". Still the judgement on the lawfulness of the refusal is expected. As relates court review of the legality of classification it should be pointed that the lack of court findings in the former two cases as to the classification authority, the date and specific legal grounds for classification can be explained with the fact that those details were not required prior to the adoption of PCIA when probably the documents were classified. However their absence in the last case implies unlawfulness of the classification as the level *„for official use*" exists only after PCIA.

Commercial Secret

Denials are often justified with the commercial secret exemption. Sometimes the third party interest exemption actually overlaps with commercial secret. The issues related to this restriction on access to information are not considered separately by the Constitutional Court[103]. Pursuant to the provisions of Art. 19 of the International Covenant for Civil and Political Rights and Art. 10 ECHR, the protection of the commercial secret is subject to the same requirements as all other exemptions. The definition of commercial secret is given in § 1, subpara 7 of the Transitional and Final Provisions of the Competition Protection Act (CPA)[104]. These facts, decisions and data may be given in any form, including on paper, for instance in contracts and agreements[105]. Para. 1, subpara 1 of the Transitional and Final Provisions does not explicitly mention that the disclosure of information would or would be likely to harm the business[106]. However, this condition is implied by the law for two reasons. Firstly, a constitutional right cannot be restricted *„in any*

[103] Unlike the restriction related to the protection of national security: Judgement No. 7/1996 of the Constitutional Court on Constitutional Case No. 1/1996.

[104] *„Industrial or commercial secret"* means facts, information, decisions and data related to business operations, the non-disclosure of which is in the interest of its holders who have undertaken the necessary measures to protect their right.

[105] For instance, Judgement No. 118/2004 on Administrative Case No. 5496/03 SAC, Fifth Division assumed that the agreement between the Roads Executive Agency and the Italian company Spea Ingegneria Europea contained commercial secret.

[106] The reason is that CPA was adopted in 1998 prior to the adoption of APIA and PCIA at a time when those requirements were not much developed yet.

case". The acceptance of such interpretation would allow abusive exercise of a right, which is prohibited under Art. 57, para 2 of the Constitution. Secondly, Art. 30 CPA defines unfair competition as *„an action or inaction in conducting business operations, which contravenes commercial practices conducted in good faith and damages or may damage the interests of competitors in their interrelations or in the relations with consumers*". Disclosure of commercial secret is a kind of unfair competition and therefore it is prohibited insofar as it damages or may damage the interests specified in Art. 30 CPA. In the case of *Green Balkans Association versus the Executive Roads Agency*, the applicant raised the argument that *„... the prohibition of the disclosure of commercial secret as a form of unfair competition refers to the definition of unfair competition given in Art. 30, para 1 CPA. An essential element of such competition is the existence of competitors that might take advantage of this information*". Responding to this argument, the court stated in its judgement that *„the definition of the term „unfair competition" under Art. 30, para 1 CPA implies that activities of the above mentioned type harm or may harm the interests of competitors in their interrelations or their relations with third parties...*"[107]. Thus the court accepted the interpretation that exemption commercial secret could be applied only to prevent damage or threat of damage of the interests mentioned in Art. 30 CPA.

In the same judgement, the court assumed that harm or threat of harm within that meaning require that two conditions were met:

- the affected interests of the third party that is a party to a contract should relate to business relations (in connection with the agreement in that particular case);
- the content of the contract has to be a commercial secret and the disclosure thereof might create conditions for unfair competition.

The analytical approach of the court to the definition of the term *„commercial secret*" should be assessed positively. At the same time, the words *„might create conditions for unfair competition*" should be further clarified with specific forms and hypotheses. The court judgement did not answer the question whether relations of competition (and competitors respectively) existed after the end of the tender procedure and the award to a specific company.

[107] Decision on Administrative Case No. 5496/2003, see p. 218

Another outstanding issue is to balance the interests, which is the third part of the test applicable to restrictions. It was raised in the same case. The argument that the information was of great importance to society was answered in the court judgement as follows: *„Access to public information is aimed at enabling citizens to obtain information about the activities of the government authority but its beyond that purpose and scope to use it for finding out whether there are data of possible non-performance of contractual obligation (in the various forms envisaged in the law of contracts)"*[108]. In fact, it is not undisputable that money spending by government authorities, albeit within the framework of private law activities, goes beyond the purposes of the access to public information. However, what matters in this case is the fact that the court examined the existence of overriding public interest. Although the outcome was negative for the appellant in that particular case, one may see that the court examined all requirements applicable to the restriction of the right of access to information in the reasons for its judgement. This undoubtedly sets a precedent and some potential to achieve proper understanding of the right to information in the light of international standards.

Deliberative Process Privilege under Art. 13, para 2, subpara 1 APIA

Art. 13, para 2, subpara 1 APIA provides for some special grounds to refuse access to information, insofar as in the cases described there the authority or entity may (at its own judgment) restrict the access, i.e. acts under discretion of government authorities or other entities with obligations under APIA. Pursuant to these provisions, the access to official information, which is free under Art. 13, para 1 APIA, may be restricted, where this information *relates to the preparatory work on an act of the bodies, and has no significance in itself (opinions and recommendations prepared by or for the body, consultations and advice)*[109]. Obviously, these provisions follow the approach underlying Recommendation (2002)2, in accordance with which the definition of the term *„official documents"* excludes the documents in the process of preparation. The understanding that Art. 13, para 2 is intended not to impede the government authority in the decision-making process is supported by the wording of para 2, subpara 2, in accordance with which the access may be restricted in the case of information containing opinions or positions in connection with ongoing or future negotiations held by the authority. Both restrictions envisaged in Art. 13, para 2 are applicable only within two years

[108] Judgement cit. p. 219.
[109] See http://www.aip-bg.org/library/laws/apia.htm .

after the information was generated. In this regard, the Explanatory Memo to Recommendation (2002) 2 reads that, as a rule, unfinished documents are not included in the term „*official documents*": „*Furthermore, in some member states, documents which contribute to the decision-making process (for instance, opinions, memoranda, etc.) are not considered as official until the decision to which they refer is taken. However, in other member states, documents can be made available before the decision for which the document is being prepared is taken, in particular to enable participation in the decision-making process*".

Since Art. 13, para 2, subpara 1 APIA is one of the most frequently invoked grounds for refusals to grant access to information, court practices related to the framework of the powers under Art. 13 are quite extensive.

The question whether the enumeration „*opinions and recommendations prepared by or for the authority, consultations and advice*" is exhaustive or not was raised for the first time in the case[110] of Alexey Lazarov versus the Council of Ministers concerning the refusal of the latter to provide a copy of **the verbatim record** from the first meeting of the cabinet held in July 2001 pursuant to Art. 13, para 2, subpara 1. The appellant maintained that the list under para 2, subpara 1 was exhaustive and wider interpretation was not admissible and therefore there were no grounds to refuse access since the verbatim record was not an opinion or recommendation prepared by or for the Council of Ministers or expression of views or advice. It was also pointed out that in order to apply those grounds for refusal, the administrative authority had to prove that the information was related to the preparation of a specific act that had at least started, while no evidence was produced in the case to prove that certain acts were adopted at the first session of the Council of Ministers, the verbatim record of which was requested. For all practical purposes, the matter related to the interpretation of the law-maker's words „***operational preparation of acts***". However, the three-member panel of SAC failed to accept those arguments: „*The court does not share the legal argument of the appellant and finds that the enumeration in brackets in Art. 13, para 2, subpara 1 APIA is not exhaustive; it is tentative and given for clarification purposes. In fact, quite diverse documents may be related to the preparation of acts and therefore their exhaustive enumeration in the law is impossible. However, all these physical carriers have one single distinctive feature they share - the information is related to the operational preparation of acts and has no significance in itself... **The***

[110] *Alexey Lazarov versus the Council of Ministers* (Administrative Case No. 7189/2001 SAC, Fifth Division., Administrative Case No. 1543/2003 SAC, five-member panel). See *Access to Public Information Litigation*, pp. 189-218. See here, pp. 116-136.

appellant's objection that no specific acts were adopted at that meeting of the Council of Ministers couldn't be accepted as relevant". The subsequent judgement of a five-member panel of SAC found those conclusions to be wrong and stated: „*Besides, given the fact that* ***no decisions were taken*** *at that meeting of the Council of Ministers,* ***i.e. no acts of that collegiate authority were issued****, the applicable legal provisions cited as grounds* ***to refuse*** *access* ***may not*** *be the provisions of Art. 13, para 2, subpara 1 APIA because they envisage restriction of the access to administrative public information only where the latter is related to the operational preparation of acts and has no importance of its own*". Unfortunately, this interpretation of the words „***preparation of acts***" did not prevail later on because the Sofia City Court, adhered to the position of the three-member panel, rejecting the appeal of Vassil Chobanov against the refusal of the Council of Ministers[111] to provide the verbatim record from another meeting.

The applicability of that restriction was examined also in the case[112] concerning the refusal of the Director of the Prophylaxes and State Sanitary Control Department at the Ministry of Health to provide a copy of **the report** out of the noise measurements in a building. The noise was generated from a nearby factory bothered the habitants of an apartment block and public health authorities undertook the measuring. It its judgement, the court noted that: „*... the results of the measurements of penetrating noise had no importance or relevance of their own. Their purpose was to serve for the drafting of certain acts of the specialised state sanitary authority, undertaking specific measures to provide proper hygiene of the living conditions*"[113]. The expression „***the drafting of certain acts***" point to the opinion of the court that information should not be necessarily related to the preparation of a specific act. Moreover, the judgement stated that the rationale of the restriction could be seen in the lack of importance, as well as definitiveness and long-term value of that type of administrative public information. „*By using such data, citizens will not be in a position to reach an objective and comprehensive opinion on social life and the activities of central and local government authorities, which is a major objective of the Access to Public Information Act*"[114]. If this is the case, however, then one

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[111] *Vassil Chobanov versus the Council of Ministers (*Administrative Case No. 1822/2003 SCC AD III-h panel).

[112] *Ecoglasnost National Movement versus the Directorate of the Prevention and State Sanitary Control Department at the Ministry of Health* (Administrative Case No. 4554/2003 SAC, Fifth Division). See pp. 137-154

[113] See p. 153.

[114] See p. 154.

has all reasons to ask why the law-maker has stated in Art. 13, para 3 that the restriction is applicable only within two years of the date of creation of the information.

The same spirit prevailed in the reasoning of the court in the case[115] concerning the refusal by the Minister of Finance to provide a copy of the first quarterly report on the activities of Crown Agents with the argument that the report had no importance of its own but it would be used to prepare certain acts aimed at undertaking specific measures to support the reform process in the Bulgarian customs administration. In its judgement, the five-member panel of SAC once again stated that the enumeration in brackets in Art. 13 was not exhaustive but tentative and given for clarification purposes. The interpretation of the words „***operational preparation of acts***" used in Art. 13 is of special interest. The court ruled that: *„Generally, it does not matter whether the preparation will lead to the adoption of a specific act or whether the preparation will not lead to a specific decision of the authority at all. Under the conditions of administrative discretion, the administrative authority can always deny access to public information related to the preparation of its acts, which has no importance of their own for this reason. It is irrelevant whether the drafting of the final act with significance in itself has stated or not*". The same judgement also found unjustified the claim that in order to exercise its powers under Art. 13, para 2, subpara 1 APIA, the administrative authority first had to examine the possible occurrence of any damage and if it concluded that no such damage would occur then it had to provide access in all cases. Still, it was plausibly not the intention of the law-maker to introduce the provisions of Art. 13, para 2 APIA purely with the aim to enable public administration to invariably refuse access to administrative public information by formally invoking the provisions of Art. 13, para 2, subpara 1 APIA.

Finally, it should be pointed out that in 2003 both the Sofia City Court (SCC) and the Supreme Administrative Court (SAC) developed positive practices as to what grounds for refusing access to information could be invoked by the entities under Art. 3, para 2 APIA and to what extent they could refer to the restriction under Art. 13, para 2, subpara 1 APIA. In two cases with the support of AIP, there were lodged appeals against the refusal by the Director of the National Health Insurance Fund (NHIF) to provide access to information pursuant to Art. 13, para 2, subpara 1 APIA.

[115] *Nickolay Marekov versus the Ministry of Finance* (Administrative Case No. 8962/2002 SAC, Fifth Division, Administrative Case No. 8717/2003 SAC, five-member panel).

The conclusion that public law entities under Art. 3, para 2 APIA could refuse access to information **only** pursuant to Art. 17, para 2 APIA, i.e. in the cases, where the information constitutes a commercial secret or information whose disclosure or dissemination would lead to unfair competition, was drawn by SCC for the first time in the case of *the Institute for Market Economy versus the National Health Insurance Fund (NHIF)*[116]. Of course, in order to reach that conclusion in the above mentioned case, the court first came to the conclusion that NHIF was a public law entity within the meaning of Art. 3, para 2 APIA since it was a legal entity under the public law and it **was not** included in the system of government authorities and local governments within the meaning of Art. 3, para 1 APIA. Subsequently SAC reiterated the conclusions of SCC with the argument that, being a public law entity, NHIF had no legal power to invoke Art. 13, para 2 APIA because its provisions concerned the restricted access to administrative public information that, given the legal definition under Art. 11 APIA, was the information collected, created or kept in connection with the official information, as well as the activities of the authorities under Art. 3, para 1 APIA. In other words, public law entities under Art. 3, para 2 APIA cannot invoke the restrictions laid down in Art. 13, para 2 APIA because they refer only to the authorities under Art. 3, para 1 APIA, i.e. government authorities and local governments.

Similar was the development of the case of *Dr. Zaekov versus NHIF*[117] - the refusal by the NHIF Director was again given pursuant to Art. 13, para 2, subpara 1 APIA, claiming that the information in question was administrative and preparatory by nature and it had no significance in itself. In the first-instance judgement, SCC again reached the conclusion that since NHIF was a public law entity under Art. 3, para 2 APIA, the information that the Fund created and kept in connection with the activities related to the mandatory health insurance was neither official nor administrative public information and therefore the provisions of Art. 13, para 2 APIA did not apply to it[118].

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[116] *The Institute for Market Economy Foundation versus NHIF* (Administrative Case No. 2295/2001 SCC AD III-c panel, Administrative Case No. 2471/2003 SAC, Fifth Division). See pp. 95-113.

[117] *Dr. Dimitar Zaekov versus NHIF* (Administrative Case No. 3208/2002 SCC AD III-d panel).

[118] *For more information on the access to information court cases see: www.aip-bg.org/court.htm*

SELECTED COURT CASES

CASE

Bulgarian Helsinki Committee

v.

Regional Military Prosecutor
Sliven

TO: REGIONAL MILITARY PROSECUTOR'S OFFICE - SLIVEN
C/C: CHIEF PROSECUTOR'S OFFICE

ACCESS TO PUBLIC INFORMATION REQUEST

Ladies and Gentlemen,

The Bulgarian Helsinki Committee is a non-governmental human rights organisation, member of the International Helsinki Human Rights Federation. The organisation has been registered as an association of citizens under the Persons and Family Act at a judgement of the Sofia City Court of 1993.

I request you in accordance with the Access to Public Information Act (The State Gazette, No. 55 of 2000) to provide us with access to information on how many reports on unlawful use of force and firearms were registered at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result.

We would like to have the information presented on paper carrier. If necessary, we are prepared to cover the costs for the preparation of the requested information. We kindly request you to take into consideration the time limits under Art. 28, para 1 APIA.

Yours truly,

Yonko Grozev
Bulgarian Helsinki Committee

RULING

On this twelfth day of December 2001, in Sliven, the undersigned Colonel HITOV, Regional Military Prosecutor, Sliven, having examined the details of file No. B-1149/2001 in connection with the request for access to public information by a representative of the Bulgarian Helsinki Committee, has established the following:

The request is unjustified and should not be granted.

In accordance with the Access to Public Information Act, the authorities which have obligations within the meaning of Art. 3, para 1 APIA are the central or local government authorities in the Republic of Bulgaria, which generate or store public information. With a view to this legal definition, the Public Prosecutor's Office of the Republic of Bulgaria and, more specifically, the Regional Military Prosecutor's Office in Sliven, is not an authority with obligations within the meaning of the Access to Public Information Act. The reason lies in the fact that the Public Prosecutor's Office, being part of the judiciary, is not a government authority and, in this sense, there is incompatibility between the requirements of APIA and the obligations of the Public Prosecutor's Office.

Decisive for the existence of this incompatibility is the meaning of the term "government service" used in Art. 68, para 1 of the Constitution of the Republic of Bulgaria. Generally, the term "government service" is used in administrative law, where it is related to government and public administration, i.e. with the functions of the executive power. In the narrow sense, it is perceived as the performance of administrative functions by government institutions and, more broadly, it covers also the structures of the public administration, through which the executive power performs its functions with regard to the public property. One can speak of government service with specific content also in other braches of law; therefore, given the lack of a uniform doctrinal or legal definition of the government service, the meaning and content of the term in the individual cases should be revealed through the specific objectives of the provisions and institutions it relates to (Judgement No. 25 of 6 June 1993 of the Constitutional Court of the Republic of Bulgaria). In order to clarify this term and the status of the Public Prosecutor's Office, one should keep in mind the provisions of Art. 132, para 1 of the Judiciary Act, which is worded as follows: "Art. 132. Judges, public prosecutors and investigation magistrates, while occupying their positions, may not:

1. Serve as Members of Parliament, Ministers, Deputy Ministers, Mayors, or Municipal Councillors;

2. /Amended - The State Gazette, No. 133 of 1998/ Exercise the profession of attorneys-at-law and pursue activities of attorneys-at-law;

3. Occupy elective or appointed positions in central or local government authorities or business bodies."

It is obvious that since public prosecutors may not occupy appointed positions in government authorities, they are not government authorities and, for this reason, it is not justified for them to provide information under the Access to Public Information Act.

The procedure for disclosure of facts and circumstances related to the activities of investigation services is regulated in the Criminal Procedure Code.

There is no obstacle to providing specific information, which is of particular public interest on a specific matter and in specific cases but not representing statistical configuration.

For these reasons and pursuant to Art. 180, para 1 of the Criminal Procedure Code, I

HAVE RULED:

REFUSE to provide the requested public information under the Access to Public Information Act on how many reports on unlawful use of force and firearms were received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result.

A copy of this ruling is to be sent for information to the Bulgarian Helsinki Committee, Ref. No. A-115/6 December 2001.

This ruling is subject to appeal before the Military Prosecutor's Office of Appeal - Sofia.

REGIONAL MILITARY PROSECUTOR - SLIVEN
(HITOV)

C/O: REGIONAL MILITARY PROSECUTOR - SLIVEN

TO: REGIONAL COURT - SLIVEN ADMINISTRATIVE DIVISION

APPEAL

BY: Bulgarian Helsinki Committee Association,
represented by Krassimir Ivanov Kunev, Chairman

THROUGH: Alexander Emilov Kashumov, Attorney-at-law

VERSUS: Refusal to provide access to public information under file No. B-1149/2001 of the Regional Military Prosecutor's Office - Sliven

PURSUANT TO: Art. 40, para 1 of the Access to Public Information Act in conjunction with Art. 33 APA

Honorable Justices,

Pursuant to Art. 38, para 1 of the Administrative Procedures Act (APA) in conjunction with Art. 40, para 1 of the Access to Public Information Act (APIA), I hereby appeal versus the refusal of the Regional Military Prosecutor - Sliven to provide access to the public information requested by the Bulgarian Helsinki Committee (BHC) Association.

A. FACTS

On 6 December 2001, BHC served a request Ref. No. A-115/6 December 2001 for access to public information to the Regional Military Prosecutor - Sliven pursuant to Art. 24, para 1 APIA, requesting information on how many reports on unlawful use of force and firearms were received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result. File No. B-1149/2001 of the Regional Military Prosecutor's Office (RMPO) - Sliven was started on that basis. On 12 December 2001, the access to the requested public information was refused with a ruling of the Regional Military Prosecutor - Sliven, stating that the public prosecutor's office was not a government authority and therefore it did not have obligations within the meaning of APIA.

B. CONTRADICTION OF THE REFUSAL WITH THE LAW

The appealed ruling, which refused access to public information, represents a decision within the meaning of Art. 38 APIA. It is an act affecting our right of access to public information, i.e. an act within the meaning of Art. 2, para 1 APA like any decision under Art. 38 APIA. According to Art. 40, para 1 APIA the decisions on granting or refusing access to public information are subject to appeal before the regional courts under APA. Hence the appealed ruling is subject to appeal only before the Regional Court of Sliven, in spite of its wording. It is so because APIA is the law to regulate matters concerning the right of access to public information, including the procedure for the issuance, implementation and control of the decisions on granting or refusing access to information. Furthermore, pursuant to Art. 116 of the Judiciary Act, the control exercised by the higher-standing public prosecutor's office is admissible only if the law provides for no control by the court of law. Since the law does provide for such control, the only competent body to hear an appeal versus the refusal to provide access to the requested public information is the Regional Court of Sliven.

The refusal to provide access to public information has been ruled in contradiction to the law - the argument that the public prosecutor's office is not a subject with obligations under APIA is unjustified.

Firstly, central and local government authorities are not the only ones with obligations under APIA. Conversely, the range is much wider, as is seen in Art. 3, para 2 APIA and also in the motives to the law that „the effective exercise of this right enables the members of society to make an opinion of their own on the activities of both government authorities and other entities whose activities are of **public nature**". In accordance with this objective of the law, the public law entities (Art. 3, para 2, subpara 1) also have obligations to provide access to information. The intention of Art. 3, para 2, subpara 1 is clear, i.e. to avoid the problem of a purely formalistic and narrow interpretation of the term „central and local government authorities" and to introduce the obligation of any institution exercising power prescribed by law to the benefit of society to provide access to public information. The obligation to provide access to information is a kind of obligation to be accountable before the general public. Even if the public prosecutor's office were not a government authority, which it is, it is undoubtedly a public law body as it exercises powers by virtue of the special laws empowering them, such as the Judiciary Act, the Criminal Procedure Code and others, and its activities are defined to the benefit of the general public and its individual members.

Secondly, the argument that the Public Prosecutor's Office of the Republic of Bulgaria and the Regional Military Prosecutor's Office - Sliven in particular has no obligations under APIA is unjustified. It goes beyond any doubt that the Regional Military Prosecutor's Office of Sliven is a separate structural and organisational unit assigned with powers under Art. 3, para 2 in conjunction with Art. 67, para 2 et seq. JA and Arts. 388 through 408 Citizen Procedural Code. In this capacity, it is part of the government authorities. Pursuant to Art. 8 of the Constitution, the government power is separated into executive, legislative, and judiciary, while pursuant to Art. 1, para 2 of the Constitution it is exercised in two ways only - either directly by the people or through the bodies envisaged in the Constitution. Art. 117, para 2 of the Constitution undoubtedly puts the public prosecutor's office among the legal entities that perform functions for the exercise of the judiciary power. These legal entities cannot be Government authorities, as is seen in Art. 1, para 2 of the Constitution. Art. 4, para 2 JA refers to the court as „an authority", which applies to the public prosecutor's office by analogy, while Art. 17, para 2 specifies the number of members of the Supreme Judicial Council elected from among „the judiciary authorities". The Criminal Procedure Code is full of provisions, where the public prosecutor's office is referred to as „an authority", e.g. Chapter Five.

One cannot accept that the concept „government authority" is different from the authorities exercising government power. Conversely, these two terms are identical - Art. 20 CPC defines the terms and conditions for the competent **government** authority to start criminal proceedings, while Art. 192, para 1 CPC reads that the preliminary proceedings are started by the public prosecutor. Hence the public prosecutor is a government authority.

The considerations put forward in the appealed refusal with regard to the term „government service" are irrelevant because APIA never makes any distinction between officials in the government service and others and it never uses the term at all. The only issue to be clarified with a view to resolving whether an obligation to provide access to information exists or not is to see whether the respective legal entity falls within the purview of Art. 3 APIA.

The arguments concerning the term „government service" are not only irrelevant but also unjustified in their essence but this matter cannot be brought in this particular case.

C. REQUEST

For these reasons, I kindly request the honorable judges to reverse the refusal of the Regional Military Prosecutor - Sliven as unlawful and to refer the file back for hearing it on merit with mandatory instructions on the application of the law.

Encl.:
1. Copy of the Ruling of the Regional Military Prosecutor's Office - Sliven
2. Copy of request Ref. No. A-115/ 6 December 2001
3. Copy of letter No. B 1149/2001 the Regional Military Prosecutor's Office - Sliven
4. Copy of the SCC judgement on Company Case No. № 3168/1993 of 16 March 1996
5. Copy of the SCC judgement on Company Case No. 3168/1993 of 12 June 2000
6. Copy of the reasons of APIA
7. Power of Attorney

Yours truly,
(**Attorney**)

JUDGEMENT

No. 48
Yambol, 25 April 2002

IN THE NAME OF THE PEOPLE

THE REGIONAL COURT OF YAMBOL, Second Civil Division, at the public court session held on the twenty-eighth day of March 2002 composed of:

PRESIDING JUDGE: ANGELINA DIMITROVA
MEMBERS: ROSSITSA CHOKOVA, NIKOLINKA OBRETENOVA

with the participation of Public Prosecutor G. Grozev and Secretary D. Stoyanova, heard the report by Judge R. CHOKOVA
on Administrative Case No. 162/2002.

Whereas,

The case was brought to the Yambol Regional Court on the basis of the appeal by the Bulgarian Helsinki Committee represented by its Chairman Krassimir Ivanov Kunev versus the refusal to provide access to public information under file No. B-1149/2001 of the Regional Military Prosecutor's Office - Sliven (RMPOS) as to how many reports on unlawful use of force and firearms were received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result, which was given in the Ruling of the Regional Military Prosecutor of 12 February 2001.

The appeal put forward detailed considerations on the contradiction of the refusal with the substantive law, i.e. APIA. Firstly, it pointed out that the appealed ruling which refused access to public information was a decision within the meaning of Art. 38 APIA and an act within the meaning of Art. 2, para 1 APA, on the one hand, and, on the other hand, the public prosecutor's office had obligations under APIA with a view to the reasons and objective of the law (Art. 3, para 2, subpara 1) since its activities were of „public nature“ and therefore it was „a public law entity“ and had obligations to provide access to public information as such. The court was requested to

reverse the unlawful act of RMPOS and refer the file back for hearing it on merit with mandatory instructions on the application of the law. The appeal was fully supported in the pleading in the court room. Reversal and legal costs were claimed.

In its letter No. B-1149/2001 of 10 January 2002 attached to the appeal, the respondent RMPOS expressed the opinion that the appeal had to be left without any hearing because the prosecutor's ruling was not an individual administrative act within the meaning of Art. 2 APA and, in this particular case, the ruling that refused access to information had to be related to Art. 7, para 1 APIA since the access to information concerning the procedural actions of the public prosecutor's office was restricted through the provisions of Art. 79, para 1 and Art. 191, para 4 Citizen Procedural Code (CPC) and it had to be appealed before a higher-standing public prosecutor's office. It expressed the opinion that, according to the motives of APIA, the scope of the law was undoubtedly limited to the activities of the public administration. The attorney of the respondent, Military Prosecutor 1st Lieut. V. Purvanov found the appeal to be unjustified for the reasons outlined in the ruling and the opinion of the Regional Military Prosecutor, and also in his pleading in the court room, stating more specifically that the public prosecutor's office had no obligations under Art. 3 APIA contrasting it to Art. 132, para 1 JA. Furthermore, he stated that the provisions of Art. 13, para 1 APIA were applicable because the requested information was a secret protected under Art. 191, para 4 and Art. 179, para 1 CPC, prohibiting the disclosure of information from preliminary proceedings and investigations and, moreover, because the appeal did not specify any provisions of CPC and RMPOS was not in a position to provide the requested information concerning the phase of the preliminary investigation of the reports.

The representative of the Regional Prosecutor's Office raised objections that this court was incompetent to examine the appeal and pointed out that the competent body to examine the appeal versus the RMPOS ruling was the Military Prosecutor's Office of Appeal - Sofia. He alternatively pleaded that the appeal was unjustified insofar as the question asked by the Association was not a case of public information under APIA since the answer of that question would not enable citizens to make an opinion on the activities of RMPO, on the one hand, and, on the other hand, he referred to Art. 13 APIA, reading that the access to administrative information could be restricted, where that information related to the operational drafting of acts and had no importance of its own.

On the basis of the evidence collected in this case, the court has accepted that the following **facts** have been established:

The appellant served request Ref. No. 1149/10 December 2001 for access to public information to RMPOS put in file No. 1149/2001, requesting the respondent to provide information under APIA on how many reports on unlawful use of force and firearms have been received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result. In the request the applicant specified the preference for the information to be on paper carrier, the address for correspondence, and the preparedness to cover the costs for the preparation of the requested information. RMPOS issued a ruling of 12 December 2001 sent to the requestor with letter No. B-1149/2001 of 12 December 2001, refusing to provide access to the public information requested by the appellant under APIA. According to the reasons outlined in the ruling, the refusal was given because the Public Prosecutor's Office of the Republic of Bulgaria and the Regional Military Prosecutor's Office - Sliven in particular, had no obligations within the meaning of APIA because as part of the judiciary the Public Prosecutor's Office was not a government authority and, furthermore, the procedure for disclosure of facts and circumstances related to investigation proceedings was regulated in the provisions of the Criminal Procedure Code. The respondent stated that there was no obstacle to providing specific information which is of particular public interest on a specific matter and in specific cases but not representing statistical configuration.

In view of these facts, the Regional Court hereby draws the following **legal conclusions:**

Having taken into account the standing practice of the Supreme Administrative Court of the Republic of Bulgaria, this court assumes the appeal to be **admissible**, having been served within the time limits under Art. 37, para 1 APA. On the one hand, there is no written evidence produced by the respondent as to the delivery of letter No. B-1149/2001 of 12 December 2001 of RMPOS, sending a copy of the ruling for information; on the other hand, the respondent did not raise objections related to exceeded time limits for appeal before the competent body - the Yambol Regional Court specified to hear the case with Ruling No. 1349/15 February 2002 on Administrative Case No. 108/2002 of the Supreme Administrative Court, First Division instead of removing all regional judges from the Sliven Regional Court due to challenge under Art. 12, para 2 CPC. Besides, the appealed

refusal to provide access to public information given in the RMPOS Ruling of 12 December 2001 under file No. 1149/6 December 2001 was actually a decision to refuse access to public information and pursuant to Art. 40, para 2 APIA, it was subject to appeal before regional courts under APA.

Examined on merit, the appeal is justified for the following reasons:
The dispute between the litigants in this administrative case refers to the following: Is RMPOS an authority with obligations to provide access to public information and do the statistical data requested by the appellant represent „a protected secret" or „an official secret".

APIA regulates the social relations in connection with the right of access to public information. In accordance with the provisions of Art. 2 APIA, the term „public information" calls for the existence of two cumulative prerequisites: (i) the information has to be related to social life in the Republic of Bulgaria, and (ii) this information should enable citizens to make an opinion of their own on the activities of the authorities with obligations under the Art. In this particular case, the access to public information requested by the appellant actually refers to public information, which would enable citizens to make an opinion of their own on the activities of RMPOS. According to the reasons attached to the law, the effective exercise of the right of access to public information enables the members of society to make an opinion of their own on the activities of both government authorities and other entities whose activities are of public nature. The provisions of Art. 3 APIA specify the authorities and entities with obligations to provide access to public information, including the central and local government authorities, generating or holding public information under para 1, as well as the legal entities under para 2 other than those envisaged in para 1. RMPOS has obligations to provide access to public information since it is a public law entity within the meaning of Art. 3, para 2, subpara 1 other than those under para 1. The fact that the Public Prosecutor's Office (and RMPOS in particular) is a public law entity is derived from the provisions of § 2a- inserted of the Access to the Documents Act of the State Security Service and the Former Intelligence Unit of the General Staff (The State Gazette, No. 24 of 2001), where the public prosecutor is included on the list of public positions.

As a result, the public prosecutor carries out public activities which, in its turn, makes the public prosecutor's office a public law entity different from the central and local government authorities in the Republic of Bulgaria,

generating and holding public information, to which the persons under Art. 4 APIA have access. On the other hand, the fact that the Public Prosecutor's Office is a public law entity can be seen in the provisions that the judiciary is part of government (Art. 8 of the Constitution of the Republic of Bulgaria, stating that the government power is separated into legislative, executive and judiciary and Art. 1 JA, stating that the judiciary is the government powers administering justice in the Republic of Bulgaria).

Pursuant to Art. 4, para 1 APIA, entitled to access to public information are all Bulgarian citizens, foreign nationals, persons without citizenship and legal entities under the terms and conditions laid down in the law, and exceptions to this rule are the cases, where another law provides special arrangements for seeking, obtaining and disseminating such information and where the public information represents a state secret or another secret protected by law, to which the access may be full or partial. As is seen in the provisions of Art. 136, para 2 of the Judiciary Act, the official secret that public prosecutors (civil and military ones) have to protect includes the information that has become known to them in the discharge of their duties and affects the interests of citizens, legal entities, and the state. In this case, Art. 179, para 1 and Art. 191, para 4 CPC prohibit the disclosure of materials from preliminary proceedings and investigations and provide penalties for failure to observe the prohibition.

In this particular case, however, the appellant does not request specific information referring to materials of preliminary proceedings or investigations or disclosure of the names of those who submitted reports on the unlawful use of force and firearms. Therefore the concept „official secret“ does not include the requested information.

In other words, the Yambol Regional Court deems the refusal of RMPOS to provide access to public information to be unlawful for the reasons stated above and hence subject to reversal pursuant to Art. 41, while the file should be referred back to the respondent to provide the requestor with access to the requested public information under APIA.

Guided by these reasons, the Yambol Regional Court

HAS RULED:

REVERSES the refusal of the Regional Military Prosecutor's Office - Sliven to provide access to public information to the Bulgarian Helsinki Committee from Sofia, represented by its Chairman Krassimir Ivanov Kunev under **file No. B-1149/2001** on how many reports on unlawful use of force and firearms were received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result given in the Ruling of Regional Military Prosecutor Col. Hitov of 12 February 2001 **as unlawful;**

REFERS file No. B-1149/2001 back to RMPOS, OBLIGING it to provide access to public information requested with a request with the same Ref. No. And date by the Bulgarian Helsinki Committee from Sofia, represented by its Chairman Krassimir Ivanov Kunev on how many reports on unlawful use of force and firearms were received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result in accordance with the instructions given hereinabove.

This judgement is subject to appeal before the Supreme Administrative Court within 14 days of its notification.

PRESIDING JUDGE:
MEMBERS:

C/O
THE REGIONAL COURT - YAMBOL

TO
THE SUPREME ADMINISTRATIVE COURT - SOFIA

CASSATION APEAL

By Col. Alexander Alexiev,
Regional Military Prosecutor at RMPO - Sliven

Versus Judgement No. 48 of 25 April 2002 on Administrative Case No. 162/2002 of the Yambol Regional Court

HONORABLE SUPREME JUSTICES,

The Regional Court - Yambol has issued the appealed judgement to reverse the ruling of the Regional Military Prosecutor's Office which refused access to public information to the Bulgarian Helsinki Committee, Sofia in connection with the reports on unlawful use of force and firearms were received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result. It has referred the file back with instructions to provide the requested information.

Within the preclusive time limits prescribed by law, I hereby appeal this judgement, finding it to contravene the substantive law.

1. The judgement has been issued in contradiction with the substantive provisions of the law, In order to reach its decisive legal conclusions that the information requested by the Association belongs to the category described in the Access to Public Information Act, the court has actually assumed that the information is related to public life in the Republic of Bulgaria and enables citizens to make an opinion of their own on the activities of the authority or entity with obligations under the law or the Regional Military Prosecutor's Office - Sliven in this particular case.

These conclusions of the court contravene the substantive law. As is seen from the evidence in the case, the requested information refers to the number

of reports by individual citizens on unlawful use of force and firearms by officers of the Ministry of Defence and the Ministry of Interior. The appeal is essentially a reflection of the subjective attitude of a person that certain events have actually taken place. In this sense, one cannot accept that the information relates to public life or even less that it should be used to form an opinion of the other members of society on the work of any institution of organisation. In this particular case, the only information that can serve to make an opinion on the activities of the authorities under Art. 2, para 1 APIA is the information related to completed proceedings reflected in enforceable decisions of the competent authorities.

On the other hand, the information sought by the Association is within the scope of the restriction under Art. 7 APIA, i.e. it represents official secret. Art. 179, para 1 and Art. 191, para 1 Citizen Procedural Code give explicit description of the procedure to disclose information concerning preliminary proceedings and investigations, as well as of the persons entitled to access thereto. These provisions are special with regard to the provisions of APIA and the Regional Military Prosecutor's Office - Sliven has to abide by this restriction as otherwise it would affect the interests of the parties concerned, be it individual officers of the Ministry of Interior or the Ministry of Defence or the institutions as a whole.

I believe that evidence has been collected in the case to show that the prerequisites for providing access to the information requested by the Bulgarian Helsinki Committee are non-existence and therefore the judgement of the Yambol Regional Court reversing the ruling of the Regional Military Prosecutor - Sliven is unlawful.

I REQUEST you to start cassation proceedings on the basis of this appeal and, having ascertained the justification of my arguments, to issue a judgement REVERSING the appealed judgement No. 48 of 25 April 2002 on Administrative Case No. 162/2002 of the Yambol Rwgional Court and to rule on merit by CONFIRMING the refusal of the Regional Military Prosecutor - Sliven to provide the information to the Bulgarian Helsinki Committee Association as JUSTIFIED and LAWFUL.

Encl.: Copy of the appeal for the other litogant.

20 May 2002
Sliven

JUDGEMENT

No. 708
Sofia, 29 January 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at the court session held on the thirteenth day of January 2003 composed of:

PRESIDING JUDGE: ALEXANDER ELENKOV
MEMBERS: VANYA ANCHEVA, DIANA GURBATOVA

in the presence of Iliana Ivanova as the Secretary and with the participation of Public Prosecutor Mary Naidenova, heard the report by the Presiding Judge ALEXANDER ELENKOV on Administrative Case No. 6269/2002.

The proceedings are conducted pursuant to Art. 33 et seq. of the Supreme Administrative Court Act (SACA).
It was brought on the basis of the cassation appeal of the Regional Military Prosecutor - Sliven versus Judgement No. 48 of 25 April 2002 on Administrative Case No. 162/2002 of the Yambol Regional Court.

The cassation appeal was served within the time limits under Art. 33, para 1 SACA and it is admissible but, examined on merit, it is unjustified.

The above mentioned judgement of the Yambol Regional Court reversed the refusal of the cassation appellant given in the ruling of 12 February 2001 to provide the Bulgarian Helsinki Committee with access to public information on how many reports on unlawful use of force and firearms had been received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result. In order to rule, the Regional Court assumed that the information requested by the Bulgarian Helsinki Committee, Sofia was not official secret within the meaning of Art. 132, para 2 of the Judiciary Act (JA).

The cassation appeal put forward arguments on the irregularity of the judgement due to violation of the substantive law. The reports on unlawful use of force or firearms by officers of the Ministry of Defence and the Ministry of the Interior were defined, in their essence, as „a reflection of the subjective attitude of a person that certain events have actually taken place" and therefore the information therein could not allegedly relate to public life and even less be used to form an opinion on the work of any institution or organisation. The claim is that opinion on the activities of the authorities and entities under Art. 2, para 1 of the Access to Public Information Act (APIA) could be formed only on the basis of information on completed proceedings with enforceable decisions of the competent authorities thereon. On the other hand, the information requested by the Bulgarian Helsinki Committee was claimed to represent official secret, while Art. 179, para 1 and Art. 191, para 4 of the Criminal Procedure Code (CPC) described the procedure for providing information on preliminary proceedings and investigations with clear specification of the persons entitled to access. Those special rules excluded the application of the provisions of APIA.

The defence of the Bulgarian Helsinki Committee, Sofia and the Public Prosecutor from the Supreme Administrative Public Prosecutor's Office expressed their opinions on the lack of justification of the cassation appeal.

The Supreme Administrative Court, Fifth Division, finds the cassation appeal to be unjustified, as stated above.

As is seen from the case, the Bulgarian Helsinki Committee, Sofia served request Ref. No. A-115 of 6 December 2001 for access to information on how many reports on unlawful use of force and firearms were received at the Regional Military Prosecutor's Office, Sliven in 2000 and 2001, and how many investigation cases were brought as a result.

Pursuant to Art. 179, para 1 CPC, the materials of preliminary proceedings cannot be disclosed without the permission of the Public Prosecutor, while Art. 191, para 4 CPC prohibits the disclosure of the fact that preliminary investigation will be started.

However, the request for access to public information is not about data on specific materials of preliminary proceedings or aim at disclosing the fact that preliminary investigation will be started. The requested information is of statistical nature and does not affect the personality or individual rights of

certain citizens or officials. It does not represent official information within the meaning of Art. 136, paras 2 and 3 JA because it does not affect the interests of certain or at least identifiable persons or legal entities and even less any state interests at all. Therefore the cassation appeal is unjustified. In the appealed judgement the Yambol Regional Court has given detailed reasons, which this instance fully shares and does not find it necessary to repeat them here.

For these reasons, the Supreme Administrative Court, Fifth Division, finds that the above mentioned judgement of the Yambol Regional Court should be left in force.

Guided by these reasons, the Supreme Administrative Court, Fifth Division,

HAS DECIDED:

LEAVES IN FORCE Judgement No. 48 of 25 April 2002 on Administrative Case No. 162/2002 of the Yambol Regional Court.

THIS JUDGEMENT is not subject to appeal.

True to the original,
PRESIDING JUDGE: (signed) **Alexander Elenkov**
MEMBERS: (signed) **Vanya Ancheva,** (signed) **Diana Gurbatova**

CASE

Ivailo Ganchev

v.

Minister
of Education and Science

TO THE MINISTER OF
EDUCATION AND SCIENCE

REQUEST

under the Access to Public Information Act
by
Ivailo Ognyanov Ganchev

MR. MINISTER,

I request you to provide copies on paper carrier of the following documents:

1. The order by the Minister of Education and Science to open a public tender or competitive bidding procedure for leasing part of immovable property in the public domain, representing approximately 3 sq m on the wall in the corridor on the first floor in the building of the Ministry across the door of the office of the Document Registration Department, which has been leased to a private person for advertisement purposes;

2. The order of the Minister of Education and Science specifying the winner in the public tender or competitive bidding procedure;

3. The lease contract or another contract signed by the Minister for the use of the above-mentioned property.

SIGNED:
(IVAILO GANCHEV)

MINISTRY OF EDUCATION AND SCIENCE
2A, Knyaz Dondukov Blvd., 1000 Sofia, Tel. 9217799

DECISION
02/4 September 2002

Pursuant to Art. 8, subpara 2 of the Access to Public Information Act, I

REFUSE

to provide access to public information to Ivailo Ognyanov Ganchev.

The Access to Public Information Act does not apply to the information kept in the State Archive Records of the Republic of Bulgaria.

The orders by the Minister of Education and Science and the agreements signed with the Ministry of Education and Science are kept at the State Archive Records pursuant to Art. 3, para 1 of the State Archive Records Act. This decision is subject to appeal before the Supreme Administrative Court.

MINISTER:

C/O:
THE MINISTER OF EDUCATION AND SCIENCE
TO:
THE SUPREME ADMINISTRATIVE COURT

MINISTRY OF EDUCATION AND SCIENCE

APPEAL

By:
Ivailo Ognyanov Ganchev,

VERSUS:
Decision No. 2/4 September 2002 of the Minister of Education and Science to refuse access to public information

On 7 September 2002, I received Decision No. 2/4 September 2002 of the Minister of Education and Science, refusing to provide access to the copies of the following documents I had requested under the Access to Public Information Act (APIA):

1. The order by the Minister of Education and Science opening a public tender or competitive bidding procedure for leasing part of immovable property in the public domain, representing approximately three square meters on the wall in the corridor of the first floor of the building of the Ministry opposite to the door of the Registration Office, which has been provided to a private person for the purposes of advertising;

2. The order by the Minister of Education and Science specifying the winner in the public tender or competitive bidding process;

3. The lease agreement or another agreement signed in this connection by the Minister.

I find the above-mentioned administrative act to be unlawful for the following reasons:

I. Material breach of the administrative procedural rules (Art. 12, subpara 3 of the Supreme Administrative Court Act) has been committed in issuing the Decision. Pursuant to Art. 15, para 2, subpara 3 of the Administrative Procedures Act (APA) in conjunction with Art. 11 SACA, the administrative act has to be substantiated by stating the factual and legal grounds for its issuance. The appealed decision has stated the legal grounds for the refusal - Art. 8, subpara 2 APIA but „factual grounds" are missing in practice. There is no indication of the specific facts concerning the status and location of the requested documents. It is not stated when and how the documents, copies of which I requested, were included in the State Archive Records. The failure to mention these facts prevents me from becoming aware of the specific factual situation, which has led to the application of the provisions of Art. 8, subpara 2 APIA, and hence from exercising my right to seek remedy against an unlawful administrative act (Art. 120 of the Constitution).

Instead of factual grounds, the issuer of the act has reproduced almost word for word the relevant provisions of APIA in the first paragraph, and the provisions of the State Archive Records Act (SARA) in the second paragraph.

II. The decision has been made in contravention to the substantive law. Pursuant to Art. 8, subpara 2 APIA, the law does not apply to the information kept at the State Archive Records. Pursuant to Art. 2 and Art 3, para 1 SARA, the State Archive Records consist of documents and items generated in the course of activity of institutions, other legal entities, and individual citizens. The major criterion to establish the belonging of a document or item to the State Archive Records is whether it has „value" (Art. 2, para 1 SARA). SARA and the Regulation on its implementation specify the terms and procedures for defining a document or item as „valuable". Hence it is not all documents generated by an institution that will be included in the State Archive Records (the opposite would be legal and logical absurdity). By claiming that all orders and agreements („the orders" and „the agreements") of the Ministry of Education and Science belong to the State Archive Records, the Minister of Education and Science has obviously interpreted the substantive law (SARA) perversely and applied it unjustifiably.

III. The decision has been issued in contravention to the objectives and the spirit of APIA. APIA has been adopted to regulate and guarantee the

constitutional right of citizens to be informed about the activities of government authorities (Art. 41, para 2 of the Constitution). The law builds on the principle that any person, without proving any direct or personal interest, is entitled to obtain information about the way, in which the government through its authorities exercises its statutory powers and how it administers the resources and assets accumulated thanks to taxpayers. It is for these reasons that the cases of restricted or prohibited access to public information are specified explicitly and need strict interpretation.

The claim in the appealed decision that the whole documentation of an institution may prove to be beyond the purview of APIA, if taken to its extreme, would render APIA senseless, insofar as any government institution may invoke Art. 8, subpara 2 of the said Act in the same manner.

For these reasons and pursuant to Art. 12, subparas 3, 4, and 5 SACA, I request you to rule on the reversal of Decision No. 2/4 September 2002 of the Minister of Education and Science, refusing access to public information, and to obligate the Minister to provide access to the public information requested by the appellant.

I also request you to sentence the respondent to pay the legal costs incurred by the appellant in these proceedings.

Encl.:

1. Copy of the appeal for the Minister of Education and Science
2. Copy of the request for access to public information
3. Decision No. 2/4 September 2002 of the Minister of Education and Science to refuse access to public information
4. Envelope with postmark
5. Receipt for the payment of the state fee

Yours truly,
(Ivailo Ganchev)

JUDGEMENT

No. 2383
Sofia, 17 March 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Division, at the court session held on the eighteenth day of February 2003 composed of:
PRESIDING JUDGE: EKATERINA GRUNCHAROVA
MEMBERS: JANETA PETROVA, DIANA DOBREVA

in the presence of Maria Popinska as the Secretary and with the participation of Public Prosecutor Maria Begumova, heard the report by Judge DIANA DOBREVA
on Administrative Case No. 8518/2002.

The proceedings are conducted pursuant to Art. 12 et seq. of the Supreme Administrative Court Act (SACA) in conjunction with Art. 40, para 1 of the Access to Public Information Act (APIA).

The case was brought on the basis of the appeal by Ivailo Ognyanov Ganchev from Sofia versus Decision No. 2/4 September 2002 of the Minister of Education and Science to refuse access to public information. Detailed arguments were given to support the claimed unlawfulness of the decision, leading to its reversal pursuant to Art. 12, subparas 3, 4, and 5 SACA. In fact, the appeal does not maintain to obligate the Minister to provide access to the information but to obligate him to make a lawful decision pursuant to Art. 33 APIA. The legal costs are also claimed.

The respondent attacks the appeal and finds it to be procedurally inadmissible due to the lack of legal interest. The requested information is not available; it does not exist objectively. The documents envisaged in the request have not been issued, drawn up, or signed at the Ministry. The alternative opinion is that of justifiability without any specific arguments.

The representative of the Supreme Administrative Prosecutor's Office gives a substantiated opinion on the justifiability of the appeal. The provisions of

Art. 8, subpara 2 APIA invoked in the refusal are inapplicable. Since the specific acts that the appellant is interested in and has requested on a paper carrier do not exist, the appealed decision should have had entirely different content.

This panel of the Supreme Administrative Court, Fifth Division, finds the appeal to be procedurally admissible. It was served within the prescribed time limits by a duly authorised party, and the objection referring to the lack of legal interest is not shared.

Judged on merit, the appeal is justified.

There is no dispute between the litigants as far as facts are concerned. The appellant has filed a request with Ref. No. 33573/23 July 2002 to the Minister of Science and Education, requesting the following documents to be provided on paper carrier: 1. The order by the Minister of Education and Science opening a public tender or competitive bidding procedure for leasing part of immovable property in the public domain, representing approximately three square meters on the wall in the corridor of the first floor of the building of the Ministry opposite to the door of the Registration Office, which has been provided to a private person for the purposes of advertising; 2. The order by the Minister of Education and Science specifying the winner in the public tender or competitive bidding process; 3. The lease agreement or another agreement signed in this connection by the Minister. On 4 September 2002, the appealed refusal was given in Decision No. 2 of the same date, which was signed by Minister Vladimir Atanassov. The act is legally grounded on Art. 8, para 2 APIA with the following wording: „The Access to Public Information Act does not apply to the information kept in the State Archive Records of the Republic of Bulgaria. The orders by the Minister of Education and Science and the agreements signed with the Ministry of Education and Science are kept at the State Archive Records pursuant to Art. 3, para 1 of the State Archive Records Act".

It is the opinion of the court that the information requested by the appellant can be defined as administrative public information - Art. 11 APIA. As a rule, the access to this information is free (Art. 13, para 1) but it may be restricted in the case of some prerequisites prescribed by law.

In this particular case, the respondent referred to the inapplicability of APIA because the requested information was allegedly kept at the State Archive Records of the Republic of Bulgaria. It was established in the proceedings

that the claim was untrue, as seen in the content of letter No. 9400-0353/17 February 2003 of the General Administration of Archives at the Council of Ministers. That negative fact was confirmed also in the explicit statement of the legal defence of the respondent that such orders of the Minister had never been issued and that there was no lease agreement signed. Hence it is impossible for something to be kept or stored somewhere if it has never been created in the first place. Since the requested public information does not exist objectively and it has never existed, the legal grounds for the refusal (Art. 8, para 2 APIA) do not exist either. This means that the authority has applied the substantive law wrongly, which provides grounds for the reversal of the act pursuant to Art. 12, subpara 4 SACA. Since the requested public information does not exist, the provisions of Art. 33 APIA will apply. In accordance with these provisions, where the authority does not have the requested information at its disposal and has no information about its location, the applicant has to be advised thereof within 14 days. In this case, although the prerequisites under Art. 33 APIA were in existence and the authority had to abide by the provisions of the law, it issued a refusal to provide access to public information on grounds of inapplicable statutory provisions.

The appealed refusal has been issued also in material breach of administrative procedural rules. The reasons, i.e. the factual grounds of the act, actually re-tell the wording of Art. 8, para 2 APIA and interpret the invoked legal provisions of SARA. There exist no facts whatsoever in relation to the requested documents so that to justify the application of Art. 8, para 2 APIA. There exist grounds for reversal also under Art. 12, subpara 3 SACA in conjunction with Art. 15, para 1, subpara 3 APA.

The appealed decision has been made also in contravention to the objectives and spirit of APIA. The intention of the law is to regulate and guarantee the constitutional right of citizens to obtain information about the activities of government authorities, as enshrined in Art. 41, para 2 of the Constitution of the Republic of Bulgaria. The cases, in which this right is restricted or prohibited, are explicitly stated and should be interpreted strictly. This is an obvious case of incorrect attitude of the authority obliged to provide access to public information in the person of the Minister of Education and Science to the appellant. Therefore it is unjustifiable to maintain that the lack of the requested information renders the appeal senseless and that the applicant has no interest in the reversal of the act. It has been ascertained beyond any doubt that the appellant has not been provided with access to the requested public information which he believed to be in existence. This right and the

right to receive an adequate answer from the administrative authority in accordance with the factual situation and the law have not been exercised. Therefore the appealed refusal should be reversed by the court as unlawful and the file should be referred back to the Minister of Education and Science for a new decision to be made, while taking into account the reasons of this judgement.

With a view to this outcome of the legal dispute, the request of the appellant to have the legal costs adjudicated to his benefit is justified. Pursuant to Arts. 49 and 50 SACA, the respondent should be sentenced to pay him the amount of BGN 10.

Motivated by these reasons and pursuant to Art. 28 SACA in conjunction with Art. 42, para 1 APA

HAS DECIDED:

REVERSES Decision No. 2/4 September 2002 of the Minister of Education and Science refusing access to public information;

REFERS the file back to the administrative authority for a new decision to be made in conformity with the instructions given by the court.

THIS JUDGEMENT is subject to appeal with a cassation appeal before a five-member panel of the Supreme Administrative Court within 14 days of its notification to the parties.

True to the original,

PRESIDING JUDGE: (signed) Ekaterina Gruncharova
MEMBERS: (signed) Janeta Petrova, (signed) Diana Dobreva

JUDGEMENT

No. 5878
Sofia, 16 June 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, five-member panel, at the court session held on the thirtieth day of May 2003 composed of:
PRESIDING JUDGE: STEFKA STOEVA
MEMBERS: LILYAN TSACHEV, MARIA KOSTOVA, VESSELIN ANGELOV, GALINA MATEISKA

in the presence of Magdalena Mikhailova as the Secretary and with the participation of Public Prosecutor Penka Stefanova, heard the report by Judge LILYAN TSACHEV
on Administrative Case No. 3964/2003.

The proceedings are conducted pursuant to Art. 33, para 1 et seq. in conjunction with Art. 5, para 4 of the Supreme Administrative Court Act (SACA) as brought on the basis of the cassation appeal of the Ministry of Education and Science served through Rumyana Lilova, Attorney-at-law versus Judgement No. 2383 of 17 March 2003 on Administrative Case No. 8518/2002 of the Supreme Administrative Court, Fifth Division.

The said Judgement has reversed Decision No. 2 of 4 September by the Minister of Education and Science, refusing access to public information requested with request Ref. No. 33573 of 23 July 2002 to Ivailo Ognyanov Ganchev from Sofia pursuant to Art. 8, para 2 of the Access to Public Information Act, and referred the file back to the administrative authority for a new decision to be made in conformity with the instructions given by the court. The three-member panel of the Supreme Administrative Court has accepted that the requested public information does not exist objectively and it has never existed and therefore the legal grounds under Art. 8, para 2 APIA invoked in the decision of the administrative authority were not applicable to the refusal. The administrative authority is considered to have applied the substantive law wrongly, which gives grounds for reversal of the

act pursuant to Art. 12, subpara 4 APIA, whereby the authority has to inform the applicant thereof. The authority has failed to abide by the legal provisions and issued a refusal to provide access to public information on grounds of inapplicable legal provisions. The objection that the lack of the requested public information render the appeal senseless and that there is no legal interest in the reversal of the act has been deemed to be unjustified. The right of the reequestor to receive an adequate answer from the administrative authority to his request in accordance with the factual situation and the law has not been granted.

The cassation appeal objects on grounds of inadmissibility and wrongfulness of the appealed judgement under the conditions of contingency - Art. 218b, para 1, items (b) and (c) of the Citizen Procedural Code (CPC) in conjunction with Art. 11 SACA. In the course of the proceedings before the three-member panel of the Supreme Administrative Court, the applicant was informed about the lack of the information he sought and his interest was granted and therefore the proceedings had to be dropped. This is an absolute procedural prerequisite of the category of positive ones, the existence of which has to be followed by the court *ex officio*, although the administrative authority as the respondent also raised objections to that effect. In the course of the proceedings, the objective of APIA was attained and therefore the return of the file back to the administrative authority for a new decision to be made as ruled by the court is void of sense. Considerations on the wrongfulness of the judgement have also been put forward. The legal costs for the two instances are claimed as well.

The respondent requests that the judgement remain in force.

The opinion of the public prosecutor is that the cassation complaint is unjustified. The fact that the requested information has not been created and does not exist does not mean that the applicant has no legal interest in obtaining an answer from the authority asked to provide access to the information.

The cassation appeal was served within the time limits prescribed by Art. 33, para 1 SACA by a procedurally legitimate party and therefore it is admissible.

Judged on merit, the cassation appeal is justified.

The refusal to provide access to public information given in Decision No. 2 of 4 September 2002 of the Minister of Education and Science appealed

before the first instance invokes the provisions of Art. 8, subpara 2 APIA, in accordance with which the said Act does not apply to the information kept at the State Archive Records of the Republic of Bulgaria.

It was ascertained in the proceedings that the information requested with request Ref. No. 33573 of 23 July 2001 by Ivailo Ognyanov Ganchev in the form of copies on paper carrier of the documents described in the request was not kept at the Central State Archive Directorate at the Council of Ministers (letter No. 9400-0353 of 17 February 2003) and that such documents had never been created and they did not exist, which led to the conclusion that the legal grounds for the refusal were not in existence. Where the authority does not have the requested information at its disposal and has no information about its location, the authority will advise the applicant thereof - Art. 33 APIA. In this particular case, the administrative authority failed to abide by the provisions of Art. 33 APIA and issued a refusal on inapplicable grounds instead. The appeal versus the refusal before the fist instance was justified. However, in the course of the proceedings, the applicant was informed of the lack of the information he sought. That was the meaning of the request served by the administrative authority on 10 December 2002 in the course of the implementation of the court ruling dated 3 December 2002, where the court instructed it to give its firm opinion on the requested information, the statement put on the record of the court session held on 18 February 2003, as well as the letter of 17 February 2003 sent by the State Archive Records and presented to the court.

In connection with the above considerations, it should be assumed that the applicant has been informed that the authority does not have the requested information at its disposal, as a result of which his legal interest expressed in the appeal has been lost, although the manner of informing the applicant is different from the one laid down in Art. 33 APIA. It is irrelevant that he was informed in the course of the proceedings. This is a circumstance to be taken into account pursuant to Art. 188, para 3 CPC but the three-member panel of the Supreme Administrative Court has failed to do so.

The satisfaction of the applicant renders senseless to send back the case to the public authority for notification purposes under Art. 33 APIA, as this has already been done.

The loss of the legal interest leads to inadmissibility of the appeal and hence of the judgement ruled by the first instance. There exist the reversal grounds

under Art. 218b, para 1, item (b) CPC. For these reasons and in accordance with the terminology accepted in the wording of Art. 40, para 1 SACA, the judgement has to be reversed and the dropping of court proceedings should be ruled instead.

The claim of the cassation appellant to have the legal costs adjudicated to its benefit is unjustified because it became the reason for serving an appeal versus its decision to refuse access to information.

Guided by the above considerations and pursuant to Art. 40, para 1, second sentence and Art. 20, para 1, subpara 3 SACA, the five-member panel of the Supreme Administrative Court

HAS DECIDED:

REVERSES Judgement No. 2383 of 17 March 2003 on Administrative Case No. 8518/2002 of the Supreme Administrative Court, Fifth Division, and rules instead:

LEAVES the appeal of Ivailo Ognyanov Ganchev from Sofia versus Decision No. 2 of 4 September 2002 of the Minister of Education and Science without examination;

DROPS the proceedings.

This judgement is not subject to appeal.

True to the original,

PRESIDING JUDGE: (signed) Stefka Stoeva
ЧЛЕНОВЕ: (signed) Lilyan Tsachev, (signed) Maria Kostova, (signed) Vesselin Angelov, (signed) Galina Mateiska

CASE

Institute for Market Economy

v.

National Health Insurance Fund

TO
THE DIRECTOR OF
THE NATIONAL HEALTH
INSURANCE FUND

REQUEST
FOR ACCESS TO PUBLIC INFORMATION

The Institute for Market Economy
Sofia, Triaditsa District,
Represented by **Krassen Stanchev** - Chairman

Access to Information Programme
Sofia, Triaditsa District,
Represented by **Gergana Jouleva** - Chairperson

Dear Sir,

In accordance with the Access to Public Information Act, we request you to provide access to the following information:

1. The full and complete budgets (by items) of Regional Health Insurance Funds for 2000 - the requested form of access to this information is a copy on technical carrier or copies on paper;

2. The full and detailed reports (by items) of Regional Health Insurance Funds on the spending of their 2000 budgets - the requested form of access to this information is a copy on technical carrier or copies on paper;

3. The list of banks recommended by the Ministry of Finance and the Bulgarian National Bank pursuant to Art. 27, para 3 of the Health Insurance Act. The requested form of access to this information is a copy on technical carrier or copies on paper;

4. The decision of the NHIF Managing Board, specifying the banks to operate with the NHIF resources. The requested form of access to this information is a copy on technical carrier or copies on paper;

5. A written report on the amount of assets of NHIF with banks - deposits and government securities respectively - at present. The requested form of access to this information is a written report.

We thank you in advance and look forward to receiving your answer within the time limits prescribed by law.

Yours truly,

Gergana Jouleva
Executive Director, Access to Information Programme

Krassen Stanchev
Executive Director, Institute for Market Economy

NATIONAL HEALTH INSURANCE FUND
Address: 1, Krichim St., 1407 Sofia

TO
MR. KRASSEN STANCHEV
EXECUTIVE DIRECTOR
INSTITUTE FOR MARKET
ECONOMY

Re: Your letter Ref. No. 33-00-11/23,

DEAR MR. STANCHEV,

NHIF is not in a position to provide the information you request because it constitutes administrative secret. Pursuant to Art. 37, para 1 of the Access to Public Information Act, there exist grounds for refusal to provide access to public information, where the requested information is an administrative secret. Within the meaning of § 1 of the Tax Procedure Code, the concept of „administrative secret" included specific individualized data on: tax liable persons, the nature, source and amount of income and/or revenues and expenditures.

Furthermore, I would like to inform you that the NHIF budget is subject to approval by the Parliament and promulgation in The State Gazette. At present, the report on the execution of the budget is in the process of preparation and it is also subject to approval by the Parliament. You will be able to obtain the information you request after the promulgation of the report.

As to your request to provide the decision of the NHIF Managing Board, specifying the banks to operate with the NHIF resources, I would like to inform you that the request should be sent to the Managing Board. NHIF cannot provide you with the decision of the Managing Board without its consent.

NHIF DIRECTOR
DR. BOIKO PENKOV

C/O
THE DIRECTOR OF THE
NATIONAL HEALTH INSURANCE
FUND

TO
THE SUPREME ADMINISRATIVE
COURT
OF THE REPUBLIC OF BULGARIA

APPEAL
by

the Institute for Market Economy Foundation
Sofia, Triaditsa District,
Represented by **Krassen Stanchev**, Executive Director

VERSUS
Decision No. 33-00-11/01
of the Director of the National Health Insurance Fund

PURSUANT TO
Art. 40, para 1 of the Access to Public Information Act
in conjunction with Art. 5, para 1 SACA

Honorable Supreme Justices,

On 23 February 2001, we served a written request pursuant to Art. 24, para 1 of the Access to Public Information Act to the Director of the National Health Insurance Fund (NHIF), requesting copies of last year's budgets and reports of the Regional Health Insurance Funds; information about the bank that NHIF has chosen to operate with its resources and the selection procedure in this regard; information about the amount of assets of NHIF with banks.

Within the 14-days time limit prescribed by law, the NHIF Director sent an answer in writing to the request, refusing to provide access to the requested information at all. In his opinion, it constitutes an administrative secret within the meaning of § 1 TPC. He informed us that the NHIF budget was

promulgated in The State Gazette. As to our request to receive information related to the selection of the servicing bank, he informed us that the addressee of that request was the NHIF Managing Board rather than the Director.

The refusal was given in violation of the substantive and procedural law.

I. NHIF is a legal entity established pursuant to Art. 6, para 1 of the Health Insurance Act, whose objects of activity are „to carry out the mandatory health insurance", i.e. it is the only legal entity within the territory of this country specially and directly authorised by law to carry out this public activity. Therefore NHIF is a public law entity within the meaning of Art. 3, para 1, subpara 1 APIA and has the obligation to provide access to public information.

The written answer to our request for access to public information represents a refusal to provide access to public information within the meaning of APIA and it is subject to appeal in court.

II. The NHIF refusal was given in material breach of the procedural law, i.e. the requirements of Art. 38 APIA and Art. 15, para 2, subpara 3, the first sentence of APA to give the factual grounds for the refusal. Therefore it does not follow at all that the alleged legal grounds for the refusal (administrative secret within the meaning of § 1 TPA) exist in reality. Moreover, it is difficult to draw a conclusion as to what the NHIF Director meant by referring to the administrative tax secret because § 1, subpara 1 TPA includes six subparagraphs covering different hypotheses. This violation is material as it leads to total lack of factual grounds in the decision to refuse access to information.

III. The decision to refuse access was given also in violation of the substantive law. The reason lies in the fact that the NHIF Director has made specific reference only with regard to one of the requests for access of information, i.e. the one concerning the servicing bank (item 5 of the request), without mentioning the other requests.

On the other hand, the alleged administrative tax secret is non-existing for the following reasons: (i) this secret is envisaged in the Tax Procedure Code, the enforcement of which is assigned to the tax administration rather than NHIF. Hence the obligation not to disclose the tax secret is assigned to the

tax administration alone, which, inter alia, is the only authority keeping such information.

The information requested with regard to NHIF and its bodies is public information - it is related to social life in this country and it can be used to form an opinion on the NHIF activities. Besides, it does not fall within the scope of secrets protected by law. Furthermore, the way of spending resources and the related issues are justifiably the object of the keenest interest of the general public.

The referral to the Managing Board with regard to one of the requests contained in the request is wrong. The authority that has obligations within the meaning of APIA is NHIF because it is the institution assigned by law to carry out the mandatory health insurance. Pursuant to Art. 19, para 1 of the Health Insurance Act, NHIF is represented by its Director. Therefore he or she is the only one to provide the requested information.

On the basis of these considerations, I hereby request you TO REVERSE the refusal and to obligate the NHIF Director to provide the requested information for the reasons mentioned above.

Encl.:

1. Two copies of the appealed decision.
2. Two copies of the request for access to information.
4. Copy of the appeal for the respondent.
5. Receipt for the payment of the state fee.

Yours truly,

Krassen Stanchev - Executive Director

JUDGEMENT

Sofia, 2 August 2002

IN THE NAME OF THE PEOPLE

The Sofia City Court, Administrative Division IIIc, at a public court session held on the twenty-second day of May 2002 composed of:

Presiding Judge: Marussya Dimitrova
Members: Theodora Nikolova Dessislava Popkoleva

in the presence of V. Gavrilova as the Secretary and with the participation of Public Prosecutor Petkova, heard the report by the M. Dimitrova on Administrative Case No. K2995/2001.

Whereas:

The proceedings are conducted pursuant to Art. 40 APIA.

The appellant, the Institute for Market Economy Foundation, through its Executive Director Krassen Stanchev, requested that Decision No. 33-00-11/01 of the NHIF Director be reversed as unlawful and given in breach of the procedural law. The respondent is authorised under Art. 6 HIA to carry out the mandatory health insurance and therefore it is a public law entity within the meaning of Art. 3, para 2, subpara 1 APIA with the obligation to provide access to public information. The refusal is claimed to contain no factual grounds thereof, which is a violation of Art. 15, para 2, subpara 1 APA and to have been given in violation of Art. 38 APIA. The reference to § 1, para 1 TPA is claimed to be unjustified and unlawful as none of the six hypotheses given in its provisions has been specified. The statement that the requested data constitutes an administrative secret is considered unlawful.

The requested information is claimed to be public as it can be used to form an opinion about the NHIF activities and does not fall within the scope of the secrets protected by law. The spending of public resources is a matter of public interest. The referral to the Managing Board with regard to one of the requests is claimed to be unlawful. The authority having these obligations is

NHIF represented by its Director and therefore the latter has the obligation to provide information.

NHIF as the respondent challenges the appeal and requests its rejection as unjustified. It is the respondent's thesis that after the NHIF report was prepared, all the requested information was sent to the appellant with a latter dated 6 June 2001. As to the activities of the Managing Board, the NHIF Director is claimed to have been authorised to represent it by virtue of Art. 19 HIA and be responsible for the activities of the Managing Board only insofar as he or she has been explicitly authorised by the latter to do so.
The representative of the Public Prosecutor's Office finds the appeal to be justified.

Having heard arguments of the litigants and the evidence collected in the course of the proceedings, the courts finds the following to have been established:

The appellant sent a request of 21 February 2001 to the NHIF Director for access to the following information: full and detailed budgets of RHIFs for 2000; the RHIF reports on the spending of the 2000 budgets; the list of banks recommended by MoF and BNB under Art. 27, para 2 HIA; the decision of the Managing Board, specifying the banks to operate with the NHIF resources; a written report on the NHIF assets with banks in the form of deposits and government securities at that time.

In reply to the request, the respondent sent letter No. 33-00-11/23 February 2001 of the NHIF Director, refusing to provide the requested information on grounds of its being an administrative secret. The appellant was informed that the report for the Parliament was in the process of preparation and instructed to ask a copy of the decision of the Managing Board from the latter since NHIF could not provide the decision without the consent of the Managing Board.

On 6 June 2001, the respondent sent the appellant the report on the execution of the NHIF budget and the annual report of NHIF for 2000, which are attached thereto. As is seen, they do not include the information requested by the appellant. The annual report, p. 83 presents a table with data on the budget of all RHIFs for medical payments and the execution of this budget by RHIFs rather than the whole information about RHIFs requested by the appellant.

The letter of 23 February 2001 constitutes a refusal under Art. 37 APIA. The decision does not specify the legal grounds for the refusal and it is unlawful, having been given in violation of Art. 38 APIA. In accordance with Art. 37 APIA, access to public information may be refused in the case of an administrative secret and also in the cases under Art. 13, para 2 APIA. Pursuant to Art. 5, para 8 HIA, the mandatory health insurance is carried out on the basis of openness and transparency of the NHIF activities. Pursuant to Art. 3, para 2 APIA the law applies to public law entities other than government authorities, such as NHIF according to the provisions mentioned above and Art. 6 HIA. The appellant requested access to administrative public information which is free under Art. 13, para 1 APIA. Art. 13, para 2 APIA reads that this access may be restricted, where the requested information is administrative public information of no meaning on its own, such as opinions or recommendations. In this particular case, the respondent refused access to the budgets and reports of RHIFd and presented it its report its opinion on its own activities and the activities of RHIFs; therefore the provisions of Art. 37, para 1, subpara 1 APIA do not apply to the refusal to provide access to the requested information. Art. 17, para 1 APIA reads that the access to public information related to the activities of entities having obligations under Art. 3, para 2 APIA is free. Its provisions do not introduce any restrictions concerning administrative secrets and the respondent was unjustified in invoking them. Public law entities under Art. 3, para 2 APIA may not invoke Art. 13, paras 2 and 3 APIA which apply only to the authorities under Art. 3, para 1 APIA, i.e. central and local government authorities. Pursuant to Art. 19, subparas 1 and 2 HIA, the Director of NHIF represents the latter within the framework of the powers delegated by the Managing Board, and organizes and guided the NHIF activities in conformity with the law. Pursuant to Art. 28, para 2 APIA, the authorities or entities or persons designated explicitly by them make decisions to grant or refuse access to public information. The wording of Art. 19, subpara 2 HIA leads to the conclusion that the Director has to provide the information requested under APIA as it is the only body within NHIF to organize and guide its activities and hence the argument that the consent of the Managing Board was needed for the purposes of providing the decision of the Managing Board on the selection of banks is not justified.

Being unlawful, the refusal should be reversed and the respondent should be obligated to provide the requested information.

For these reasons, the court

HAS DECIDED:

REVERSES refusal No. 33-00-11/23 February 2001 of the NHIF Director to request Ref. No. 33-00-11/23 February 2001 by the Institute for Market Economy Foundation represented by its Executive Director Krassen Stanchev as unlawful;

OBLIGATES NHIF to provide access to information under request Ref. No. 33-00-11/23 February 2001 by the Institute for Market Economy Foundation through its Executive Director Krassen Stanchev.

This Judgement is subject t to appeal before the Supreme Administrative Court within 14 days of its notification.

Presiding Judge:
Members:

C/O
THE SOFIA CITY COURT
ADMINISTRATIVE DIVISION

TO
THE SUPREME ADMINISTRATIVE COURT

CASSATION APPEAL

By **the NATIONAL HEALTH INSURANCE FUND**
Through its Attorney Emilia Ivanova Toneva, Legal Counsel

VERSUS THE JUDGEMENT OF THE SOFIA CITY COURT, DIVISION IIIc ON ADMINISTRATIVE CASE No. 2295/01

HONORABLE SUPREME JUSTICES,

We are dissatisfied with the judgement issued by the Sofia City Court, Division IIIc on Administrative Case No. 2295/2001 and, therefore, we appeal it in its entirety and within the prescribed time limits. We believe that the judgement contravenes the substantive law; it has been ruled in breach of some essential procedural rules, and it is unjustified.

Our arguments to claim this are as follows:

1. NHIF has been established on the basis of the Health Insurance Act with its seat in Sofia and its objects to carry out the mandatory health insurance under Art. 6, para 3 HIA. By its nature, NHIF is a public law entity performing a specific activity, i.e. the mandatory health insurance. NHIF is a specific legal entity from the viewpoint of its objects. However, in terms of its character and objectives, NHIF differs from the other public law entities. NHIF has been delegated certain powers and controlling functions in the course of the discharge of its duties related to the mandatory health insurance (Arts. 72, 74, and 77 HIA). Being empowered in this manner, NHIF comes close to government authorities in its activities. Therefore the opportunity for restricting the access to information under Art.13, para 2 APIA should be applicable to NHIF from this perspective. The provisions of APIA make it

possible for government authorities to restrict the access to some administrative information. When receiving requests for access to certain information, NHIF, too, may refer to the fact that the information is administrative and thus restrict the access to it.

2. In its request for access to information, the Institute for Market Economy has requested information concerning „the full and detailed reports of RHIFs by items". APIA specifies the entities having the obligation to provide information but the subject-matter of the law is only the information existing as of the time of the request. Entities are not required to prepare information that is non-existent as of the date of the request for access. At the time when the Institute for Market Economy requested access to the above mentioned information (item 2 of the request), that information was not available with NHIF. Besides, the current execution of the budget by items, including the budgets of individual RHIFs, is operational information, the access to which may be restricted under Art. 13, subpara 2. It is with a view to this operational information that the NHIF budget is drafted and adopted by the Parliament.

3. As to item 1 of the request of the Institute, it should be assumed that this is information of operational nature. It is on the basis of this information that the NHIF budget is drafted and adopted by the Bulgarian Parliament. The NHIF budget is adopted by Act of Parliament. Therefore the basis act is the law adopted by the Bulgarian Parliament, while the individual budgets in NHIF represent operational information without any importance on their own. Since NHIF should be considered to be equivalent to a government authority in respect to this activity, NHIF has the opportunity to impose restrictions on the information of operational nature.

4. The court has assumed that actually NHIF refused to provide access to the information concerning the list of banks recommended by the Minister of Finance. APIA provides for the obligation of government authorities and other entities to give information only about their own actions and activity. There is no provision for them to give information about the activity of other authorities or entities. The Institute requested information concerning „a list" given to NHIF by MoF. That information had to be asked from the Ministry of Finance. It relates to the activities of a government authority, which is to decide on its own whether to provide or refuse access to that information.

5. The NHIF Director could not provide the decision of the Managing Board on the selection of a bank upon the recommendation of NHIF because that would imply provision of information about the activities of a government authority (MoF) with regard to the banks it recommended. Besides, in that way NHIF could possibly provide information subject to restriction under Art. 17, para 2 APIA.

HONORABLE SUPREME JUSTICES,

We request you for the reasons mentioned above to reverse the judgement of the Sofia City Court on Administrative Case No. 2295/2001 as wrong and unlawful due to contradictions with the substantive and procedural law.

We request you to award the legal defence fees to our benefit in the amount specified in Regulation No. 1 on Legal Defence Fees.

Encl.:
Power of Attorney of the legal counsel

Yours truly,

JUDGEMENT

No. 5286
Sofia, 29 May 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at the court session held on the thirteenth day of May 2003 composed of:

PRESIDING JUDGE: JANETA PETROVA
MEMBERS: EKATERINA GRUNCHAROVA, TATYANA HINOVA

in the presence of Maria Popinska as the Secretary and with the participation of Public Prosecutor Maria Begumova, heard the report by Judge TATYANA HINOVA
on Administrative Case No. 2471/2003.

The proceedings are conducted pursuant to Art. 33, para 1 of the Supreme Administrative Court Act (SACA) in conjunction with Art. 218b, para 1, item (c) of the Citizen Procedural Code /CPC/.

The case was brought on the basis of the cassation appeal by the National Health Insurance Fund versus the judgement of August 2, 2002 of the Sofia City Court, Administrative Division IIIc on Administrative Case No. 2295/ 2001, reversing refusal No. 33-00-11 of 23 February 2001 by the NHIF Director under request Ref. No. 33-00-11 of 23 February 2001 of the Institute for Market Economy Foundation, Sofia and obligating NHIF to provide access to the public information with request Ref. No. 23 February 2001 of the Institute for Market Economy Foundation through its Executive Director Krassen Stanchev.

The cassation appeal put forward arguments claiming that the judgement was in contradiction with the substantive law, that it had been ruled in material breach of procedural rules, and it was unjustified - cassation grounds for reversal under Art. 218b, para 1, item (c) CPC. The appeal gave detailed considerations on the violations and requested that the wrong decision be reversed.

The respondent under the cassation appeal, the Institute for Market Economy through its Attorney Terziiski expressed the opinion that the cassation appeal was unjustified and therefore the appealed judgement of the Sofia City Court has to remain in force as correct and lawful.

The Public Prosecutor from the Supreme Administrative Public Prosecutor's Office expressed the opinion that the cassation appeal was unjustified, while the appealed judgement was correct and lawful, and therefore it had to remain in force.

Having taken into account the arguments and considerations of the litigants, this panel of the Supreme Administrative Court, Fifth Division considered the cassation appeal to be admissible being served within the time limits prescribed by Art. 33, para 1 SACA by a duly constituted party. The cassation appeal is unjustified on its merit.

The appealed judgement of the Sofia City Court, Administrative Division IIIc, reversed as unlawful refusal No. 33-00-11 of 23 February 2001 of the NHIF Director under request Ref. No. 33-00-11 of 23 February 2001 of the Institute for Market Economy Foundation through its Executive Director Krassen Stanchev and obligated NHIF to provide access to the requested public information.

The court assumed that the administrative authority unlawfully refused access to the requested public information with the reasons that the requested information constituted administrative secret as Art. 5, para 8 HIA introduces the principle of openness and transparency of the NHIF activities. The court assumed that the second case of grounds under Art. 38 APIA for refusal to provide public information under Art. 13, para 2 APIA was not applicable because NHIF is a public law entity within the meaning of Art. 3, para 2 APIA and the access to public information concerning the activities of public law entities is free under Art. 17, para 1 APIA.

As to the refusal of NHIF to provide the requested information (the decision of the NHIF Managing Board specifying the banks to operate with NHIF resources), the court assumed that the refusal was unlawful because the NHIF Director, to whom the request was addressed, guides and organizes the activities of NHIF under Art. 19, subparas 1 and 2 HIA and therefore he has the obligation to provide the requested information concerning the NHIF activities.

The cassation appeal, first and foremost, put forward considerations that the judgement was unlawful since NHIF was not a public law entity as deemed by the court but a body delegated with powers and controlling functions, which brought the activities of NHIF close to those of government authorities. In this main objection, the cassation appellant claims that the conclusions of the court on the inapplicability of the provisions of Art. 13, para 2 APIA were unlawful and unjustified.

This court finds these arguments to be unjustified for the following reasons: Pursuant to the provisions of Art. 6, para 1 HIA, NHIF has been established as a legal entity seated in Sofia with the objects of carrying out the mandatory health insurance. The statutory provisions lead to the conclusion that NHIF is a legal public law entity and it is not incorporated in the system of central or local government authorities within the meaning of Art. 3, para 1 APIA. Therefore it should be assumed that NHIF is a public law entity within the meaning of Art. 3, para 2 APIA. Being a public law entity, NHIF has no legal opportunities for applying the restriction under Art. 13, para 2 APIA since these provisions refer to the restricted access to public administrative information that, in the context of the legal definition under Art. 11 APIA, is the information collected, generated and stored in connection with the official information, as well as on the occasion of the activities of the authorities under Art. 3, para 1 APIA and their administrations, i.e. there is no opportunity for public law entities with obligations within the meaning of Art. 3, para 2 APIA to refuse access to public information with a view to the admissible restrictions under Art. 13, para 2 APIA. With regard to the obligation of public law entities, they are entitled to refuse access only under Art. 17, para 2 APIA, i.e. in the cases, where the information constitutes a commercial secret or information the provision or dissemination of which would lead to unfair competition.

Unjustified is the argument of the cassation appellant that the judgement of the Sofia City Court, reversing the refusal to provide access to public information concerning the activities of other government authorities is unlawful. APIA does not require the authority or entity to provide access to information only in cases when it is the source or issuer of that information. Ad argumentum of the provisions of Art. 32 APIA, a conclusion can be drawn that, in all cases when the requested information is kept at the authority or entity, to which the request was sent, that authority or entity has to provide it, unless the prerequisites for refusal to provide access under Art. 37, para 1 APIA are applicable. These provisions of the law explicitly provide for the obligation of the administrative authority or entity to refer the request to the

location of this information which the authority is aware of, advising the applicant thereof. However, the law does not provide for the opportunity to refuse access to such grounds.

Lastly, unjustified is the argument of the cassation appellant that the request for access to information, i.e. the decision of the NHIF Managing Board on the selection of banks to operate with the NHIF resources, cannot be granted as this will be tantamount to providing information about the activities of another authority. Pursuant to Art. 19, para 4, subpara 2 HIA, the NHIF Director organizes and provides operational guidance to the activities of NHIF, while observing the law, the NHIF Rules, the decisions of the Meeting of Representatives, the Managing Board, and the management contract. Hence comes the conclusion that the NHIF Director as an operational management body has the obligation to provide access to information about the NHIF activities as a whole, including the activities of its bodies.

For these reasons, the court finds that the cassation grounds for reversal under Art. 218b, para 1, item (c) CPC are not applicable. The judgement is correct and lawful; the court has applied the substantive law correctly, and has not committed any breach of procedural rules.

Guided by the above considerations and pursuant to Art. 40, para 1 SACA, the Supreme Administrative Court

HAS DECIDED:

LEAVES IN FORCE the judgement of 2 August 2002 of the Sofia City Court, Administrative Division IIIc on Administrative Case No. 2295/2001.

This judgement is final.

True to the original,

PRESIDING JUDGE: (signed) Janeta Petrova
MEMBERS: (signed) Ekaterina Gruncharova, (signed) Tatyana Hinova

CASE

Alexey Lazarov

v.

Council of Ministers

REPUBLIC OF BULGARIA
COUNCIL OF MINISTERS

21 May 2002

TO
MR. ALEXEY YURDANOV
LAZAROV
Head of Domestic Policy
Department
The Capital Newspaper

DEAR MR. LAZAROV,

Further to your access to information реяуест Ref. No. 03.07-10 of 31 July 2001 and in accordance with Judgement No. 4694 of 16 May 2002 of the Supreme Administrative Court on Administrative Case No. 1543/2002, I would like to inform you that the реяуест does not conform to the requirements laid down in Art. 25, para 1, subpara 2 of the Access to Public Information Act (APIA) since it does not contain a description of the requested information. The verbatim reports from the meetings of the Council of Ministers are not information within the meaning of APIA and your request to receive the verbatim report from a meeting of the Government does not provide grounds to draw a conclusion about the information you are interested in and hence to assess whether legal grounds exist for providing it.

With a view to these considerations and pursuant to Art. 29, para 1 APIA, I ask you to specify, within the time limits under Art. 29, para 2 APIA, the subject-matter of the public information which, in your opinion, is contained in the verbatim report from the meeting of the Council of Ministers held on 26 July 2001, which you have requested access to.

DIRECTOR
INFORMATION AND PUBLIC RELATIONS DEPARTMENT
Tsvetelina Uzunova

TO
Ms. Tsvetelina Uzunova
Director
Press Centre and Public Relations Department
Council of Ministers

Re: Access to Information Request

SPECIFICATION
by
ALEXEY YURDANOV LAZAROV

Dear Ms Director,

Further to your notice to specify my access to information request, I hereby specify that I would like to have access to the following information:

- The agenda of the meeting of the Council of Ministers held on 26 July 2001;
- The opinion of all members present there on the agenda and the results of the vote thereon;
- The message of greetings by the Prime Minister to the members of the Council of Ministers;
- The opinion of each member of the Council of Ministers present there on item 1 of the agenda;
- The opinion of each member of the Council of Ministers present there on the other items of the agenda;
- The discussion of the strategy and priorities of the Government during its term of office and the allocation of tasks among the individual members of the Council of Ministers.

As stated in my access to information request, the form of access I would like to have is a copy of the verbatim report of the discussions at the meeting held on the date mentioned above. I would like to have access to those parts of the verbatim report that contain the foregoing information.

Yours truly,
Alexey Lazarov

C/O
THE DIRECTOR OF THE INFORMATION AND PUBLIC RELATIONS DEPARTMENT AT THE COUNCIL OF MINISTERS

TO
THE SUPREME ADMINISTRATIVE COURT

APPEAL
by
Alexey Yurdanov Lazarov

VERSUS
the silent refusal by the Director of the Public Relations Department

Honorable Supreme Justices,

A five-member panel of the Supreme Administrative Court issued Judgement No. 4694/16 May 2002 to reverse the refusal by the Director of the Public Relations Department (PRD) to provide access to the public information I had requested. On 21 May 2002, the PRD Director sent me a notice to specify my request. On 7 June 2002, I sent the notice of specification. The 14-day time limit for making a decision thereof expired on 21 June 2002. I have not received an answer so far.

1. The law requires the relevant authority to give a decision with reasons, when issuing the requested administrative act or refusing to do so (Art. 15, para 1 APA). In this particular case, such a decision is obviously lacking. The imperative provisions of Art. 15, para 2 APA require that the act or the refusal respectively to be given in writing. The refusal has to be given in writing also in accordance with the provisions of the special law - Arts. 38 and 39 of the Access to Public Information Act, whereby the decision to refuse access must specify both the legal and factual grounds for the refusal. These statutory requirements have not been observed at all, which constitutes a material breach of procedural rules. In its Judgement No. 1795/26 February 2002 on Administrative Case No. 7176/2001 concerning the silent refusal and the possible hypothesis of grounds for refusal pursuant to Art. 13, para 2

APIA, the three-member panel of the Supreme Administrative Court stated: „where there are indications of the existence of such (information), the court is not in a position to judge the reasons for the refusal vis-a-vis the substantive prerequisites set out in the law - the extent to which the refusal should be total or partial". A three-member panel of the Supreme Administrative Court issued Judgement No. 2764/25 March 2002 to reverse the appealed silent refusal as unlawful because „no administrative has been issued in the form prescribed by law. Therefore the file should be referred back to the administrative authority and it should be obliged to take a decision, abiding by the relevant procedural rules".

2. In the application of the substantive and procedural law, the PRD Director had to observe the mandatory instructions of the Supreme Administrative Court, which she has obviously failed to do. Hence the refusal is unlawful.

For these reasons, I request you to reverse the appealed refusal as unlawful.

Yours truly,

JUDGEMENT

No. 12234
Sofia, 29 December 2002

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at the court session held on the twelfth day of November 2002 composed of:
PRESIDING JUDGE: EKATERINA GRUNCHAROVA
MEMBERS: MILKA PANCHEVA, DIANA DOBREVA

in the presence of Maria Popinska as the Secretary and with the participation of Public Prosecutor Nadezhda Doichinova, heard the report by Judge DIANA DOBREVA
on Administrative Case No. 7721/2002.

Alexey Yurdanov Lazarov from Sofia served an appeal versus the silent refusal by the Director of the Public Relations Department (PRD) at the Council of Ministers of the Republic of Bulgaria to provide access to public information under his request Ref. No. 03.07-10/31 July 2001. Complaints of unlawfulness were made and the reversal of that refusal was requested.

The Council of Ministers raised objections against the admissibility of the appeal and, alternatively, against its justification.

The representative of the Supreme Administrative Public Prosecutor's Office is of the opinion that the appeal is admissible and justified.

Having examined the admissibility of the appeal and the lawfulness of the appealed administrative act, the Supreme Administrative Court has accepted the following:

Pursuant to Art. 40, para 1 of the Access to Public Information Act (APIA), the decisions to provide access to public information or to refuse access to public information are subject to appeal before the regional courts or the Supreme Administrative Court, depending on the issuer of the act, in

accordance with the provisions of the Administrative Procedures Act (APA) or the Supreme Administrative Court Act (SACA).

The legal dispute in this case is in the jurisdiction of the Supreme Administrative Court and therefore the admissibility of the appeal should be assessed in accordance with the provisions of Art. 13, para 2 SACA in conjunction with Art. 22, para 2 APA and Art. 28, para 1 APIA.

Alexey Yurdanov Lazarov served request Ref. No. 03.07/31 July 2001, requesting access to the verbatim report from the meeting of the Council of Ministers held on 26 July 2001. The Council of Ministers, through the Director of the above mentioned Department, issued an explicit refusal to provide access to the requested information, invoking the provisions of Art. 37, para 1, subpara 1 in conjunction with Art. 13, para 2, subpara 1 APIA, stating the reason for the refusal to be the fact that the verbatim report from the meeting of the Council of Ministers is a document related to the internal activities of the Government and has no importance on its own, as it reflects the will of the Government in connection with the drafting of its acts.

The refusal was reversed with Judgement No. 4694/16 May 2002 on Administrative Case No. 1543/2002 of a five-member panel of the Supreme Administrative Court and the file was referred back to the administrative authority for a new decision to be made, while observing the instructions of the court given in the reasons of the judgement.

The authority sent a letter dated 21 May, requesting to specify the subject-matter of the requestor by describing the information requested therein. That was done with a specification letter, which the appellant served on 7 June 2002.

This three-member panel of the Supreme Administrative Court finds the appeal to be procedurally admissible.

Pursuant to Art. 28, para 1 APIA, the access to public information requests are to be examined within 14 days of their date of registration. In this particular case, after the reversal of the explicit refusal by the court and the referral of the file back for a new decision on the initial request of 31 July 2001 as specified at the request of the authority on 7 June 2002, there was no decision within the time limits prescribed by law, i.e. by 7 June 2002. Therefore it has to be assumed that the authority has issued a silent refusal. There is a 14-day time limit for attacking the silent refusal and it expired on

5 July 2002 (Friday). Lazarov's appeal was served via the administrative authority on 8 July 2002 (Monday) and there is no indication of its sending by mail.

However, the fact whether the time limits for appeal have expired or not is irrelevant since the appeal has to be examined also with a view to checking the administrative act for nullity, which the court does ex officio and without any limitations in time. The appeal itself puts forward arguments to this effect.

The court finds that the appealed administrative act is null and void due to the serious violation committed by the administrative authority with regard to the form of its issuance. The essential form of making a decision on the request for access to public information was not observed. Art. 28, para 2 APIA reads that, within the time limits under para 1, the authorities or persons specially designated by them take a decision to grant or refuse access to the requested public information and advise the requestor thereof in writing. By way of interpretation, it should be assumed that the special law requires an explicit decision of the administrative authority, which has to be issued in the form of an administrative act given in writing. The failure to take a decision within the 14-days time limits under Art. 28, para 1 APIA should be considered a silent refusal, which is not permissible. The grammatical and logical analysis of these provisions lead to this conclusion about the form of the decision and it is supported also by its interpretation with a view to the objectives of the law, providing guarantees for the exercise of the constitutional right of citizens to be informed. Due to the importance of the regulated social relations, the special law has provided for deviation from the matters related to the silent refusal as a possible form of an administrative act.
Therefore the silent refusal of the PRD Director at the Council of Ministers to provide access to the public information requested by Alexey Yurdanov Lazarov should be proclaimed null and void and the file should be referred back to the authority in order to issue a valid administrative act.

For these reasons and pursuant to Art. 28 SACA in conjunction with Art. 42, para 3 APA, the Supreme Administrative Court, Fifth Division

HAS DECIDED:

PROCLAIMS the silent refusal of the Director of the Public Relations Department at the Council of Ministers to provide access to public information under request Ref. No. 03.07-10/31 July 2001 as specified with request

Ref. No. 03.07.14/7 June 2002 served by Alexey Yurdanov Lazarov to be null and void;

REFERS the administrative file to the Director of the Public Relations Department at the Council of Ministers for examination and issuance of a valid administrative act thereof.

This judgement is subject to appeal before a five-member panel of the Supreme Administrative Court within 14 days of the notification of the litigants of its issuance.

True to the original,

PRESIDING JUDGE: (signed) Ekaterina Gruncharova
MEMBERS: (signed) Milka Pancheva (signed) Diana Dobreva

REPUBLIC OF BULGARIA
COUNCIL OF MINISTERS

C/O THE SUPREME ADMINISTRATIVE COURT, FIFTH DIVISION

TO THE SUPREME ADMINISTRATIVE COURT, FIVE-MEMBER PANEL

CASSATION APPEAL

by the Council of Ministers versus Judgement No. 12234/29 December 2002 on Administrative Case No. 7721/2002 of the Supreme Administrative Court, Fifth Division

HONORABLE SUPREME JUSTICES,

This is to appeal versus the judgement, within the time limits prescribed by law, as wrong, unjustified and unlawful, and to request its reversal.

Our considerations in accordance with the requirements laid down in Art. 35, subparas 3 and 4 SACA are as follows:

1. The appeal does not contain any request concerning the nullity of the refusal of the Council of Ministers within the meaning of Art. 37, para 2 APA and it has not been justified by the appellant in accordance with the requirements laid down in Art. 17, subpara 3 SACA. The provisions of SACA do not include any obligation of the court to rule ex officio on the nullity of an act, where its is not the subject-matter of the appeal.

Therefore the court has exceeded its competence, ruling on a dispute with which it has never been seized.

2. Pursuant to Art. 20, subpara 2 SACA, the court checks ex officio whether the requirements laid down in Art. 13, para 2 SACA have been met, since the time limits are an absolute procedural prerequisite for constituting and

hearing cases. In this particular case, the court has established that it cannot draw a conclusion as to whether the appeal was served within the prescribed time limits and assumed that the above mentioned statutory requirement is „irrelevant“ because the court „checks ex officio“ possible nullity without any limitation in time. Such an approach on part of the judiciary generates doubts as to its unbiased conduct.

3. The judgement has been issued in the context of incompleteness of evidence, i.e. lack of such an important document as the request for access to information Ref. No. 07-10 of 31 July 2004. The fact that it is mentioned in letter No. 03.07.10/21 May 2002 by the Director of the Information and Public Relations Department does not provide sufficient grounds to believe that it exists insofar as it has not been attached to the case file. The request for access to information served to the Council of Ministers is not a document duly drawn up in its form and content and it has not been signed by the appellant. Please find enclosed a copy of that request.

For these reasons, we request you to reverse the judgement in its entirety.

Encl.:

CHIEF LEGAL COUNSEL:

JUDGEMENT

No. 5188
Sofia, 27 May 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, five-member panel, at the court session held on the fourteenth day of March 2003 composed of:

PRESIDING JUDGE: ANDREY IKONOMOV
MEMBERS: JANETA PETROVA, ZAKHARINKA TODOROVA, TANYA RADKOVA, VANYA ANCHEVA

in the presence of Magdalena Mikhailova as the Secretary and with the participation of Public Prosecutor Lydia Angelova, heard the report by Judge VANYA ANCHEVA
on Administrative Case No. 791/2003.

The proceedings are conducted pursuant to Art. 33, para 1 et seq. of the Supreme Administrative Court Act (SACA).

It was brought on the basis of the cassation appeal of the Council of Ministers versus Judgement No. 12234 of 29 December 2002 on Administrative Case No. 7721/2002 of a three-member panel of the Supreme Administrative Court, Fifth Division. On the basis of detailed arguments concerning violations of the substantive and procedural law in the ruling of the appealed judgement, its reversal is requested pursuant to Art. 218b, para 1, item (c) Citizens Procedural Code (CPC).

The cassation appeal was served within the prescribed time limits by a duly constituted party, which is entitled to appeal, is a party concerned and meets the requirements of Art. 35 SACA and, therefore, it is procedurally admissible. When examined on merit, the appeal is justified.

The three-member panel of the Supreme Administrative Court, Fifth Division issued the appealed judgement to proclaim null and void the silent refusal by the Director of the Public Relations Department at the Council of Ministers

to provide access to public information under request No. 03.07-10/31 July 2001 of Alexey Yurdanov Lazarov as specified with request Ref. No. 03.07-14/7 June 2002.

Being dissatisfied with the judgement, the Council of Ministers appealed the judgement. It maintains that the court applied the substantive and procedural law wrongly by assuming that the silent refusal, which was the subject of the appeal was null and void, while the appellant never raised such an argument. By ruling on a dispute that it had not been seized with, the court went beyond its competence and the subject-matter of the proceedings.
It requested that the judgement be reversed and a new one be ruled to reject the appeal. Costs were also claimed.

The respondent Alexey Yurdanov Lazarov through his legal defence considered the appeal unjustified and requested that the appealed judgement remain in force.

The Public Prosecutor gave the opinion that the appeal was unjustified, pointing out considerations that the appealed judgement was ruled, while observing the requirements of the substantive law and the procedural rules. In order to take a decision, the five-member panel of the Supreme Administrative Court accepted the factual situation in its entirety as established by the three-member panel on the basis of the evidence involved.

It goes beyond any doubt that the respondent Alexey Yurdanov Lazarov served request No. 03.07-10/31 July 2001 for access to public information for the verbatim record from the meeting of the Council of Ministers held on 26 July 2001. The Director of the Public Relations Department gave an explicit refusal of 13 August 2001 to provide access to the requested information. That refusal was reversed with Judgement No. 4694/16 May 2002 on Administrative Case No. 1543/2002 of the Supreme Administrative Court and the file was referred back for re-examination. Letter No. 03.07-10/01 of 21 May 2002 was sent to Lazarov, asking him to specify the subject-matter of the public information he wanted access to. The specification was made in request Ref. No. 03.07-14/7 June 2002. Since the authority did not issue a decision, appeal No. 03.07-14/10 July 2002 was served to appeal the silent refusal.

Given that factual situation, the three-member panel drew the legitimate conclusion that the inaction of the administrative authority was tantamount to silent refusal. However, we cannot share the opinion put forward in the

appealed judgement on the nullity of that silent refusal on the sole grounds that the form prescribed in Art. 28, para 2 APIA was not observed. That conclusion violates the substantive law.

Undoubtedly, the Council of Ministers is an authority with obligations within the meaning of Art. 3 APUA, which is authorised to issue an administrative act on access to public information requests and, therefore, its inaction is not legally irrelevant. The existence of competence to examine the request is a prerequisite for the application of the provisions of Art. 14, para 1 APA that the failure to make a decision within the prescribed time limits is deemed to be an attackable silent refusal. There is a silent refusal, where the request to the administrative authority refers to the issuance of an individual administrative act, i.e. where the authority has the obligation to make a decision on the request and the rights of the party concerned are affected in that manner. The above mentioned legal provisions apply only where all the factual elements are in place, which means that a request must have been served to the competent authority to issue an administrative act and the authority must have failed to issue a decision within the prescribed time limits. By analogy to the explicit administrative act, which should be issued by the competent authority in order to produce legal effect, the equivalent silent refusal has to relate to failure of the administrative authority to issue a decision. Otherwise, the provisions of Art. 14, para 1 APA would not apply so that the applicant requesting the recognition of a right or the protection of its interest could become bound to a decision of the authority that the applicant would have to abide by.

APIA does not contain any rule regulating the failure of the authority to make a decision within the prescribed time limits - ad argumentum of Art. 40, which reads that the decisions to grant or refuse access to public information are subject to appeal in court. Given the lack of a provision in this special law to rule out the applicability of the general administrative procedural law (APA), where the authorities under Art. 3 APIA fail to make a decision within the prescribed time limits, silent refusal will be deemed to have been given within the meaning of Art. 14, para 1 APA, which is subject to judicial review for its lawfulness. This is the only statutory mechanism to force the authorities under Art. 3 APIA to make the decision required by law within the time limits under Arts. 28 through 31 APIA in the format under Art. 38 APIA. The Supreme Administrative Court has repeatedly ruled on this matter. Cf. Ruling No. 8645 of 16 November 2001 of the Supreme Administrative Court on Administrative Case No. 6393/2001, five-member panel; Ruling

No. 5679 of 13 July 2001 on Administrative Case No. 5190 of 2001, five-member panel.

It is a rule in administrative law and the administrative process to have administrative acts given in writing. This form is required by the general clause on the issuance of individual administrative acts under APA, requiring these acts to have a whole system of essential elements. The form is the external expression of the will constituting the internal content of the administrative act and an important prerequisite for its lawfulness. The very fact that the silent refusal is attackable obviously removes the requirement to have it given in writing under Art. 15 APA, obligating the higher-standing body and the court respectively to rule on its substantive lawfulness. Since the silent refusal is presumed to be an informal act, the lack of the form prescribed by law cannot be deemed to provide grounds for its nullity. The silent refusal is only presumed to have been given and it is ascribed all legal effects related to an explicit refusal. To assume that the refusal may be reversed due to non-observance of the form in writing (and proclaim it null and void on these grounds), i.e. due to the fact that it is silent, means to deny a decision on merit and restrict its jurisdiction to obligating the authority to make an explicit decision. That would contradict with the objective, for which Art. 14 APA has introduced the legal institute of the silent refusal, i.e. to have the issue brought to the attention of the administrative authority resolved within the prescribed time limits even in the case of inaction on part of the latter. According to item 5 of Judicial Rule 4/76, when a silent refusal is appealed, the court must rule on its lawfulness guided by the substance of the request and the assumed reasons for its rejection. This comes to reveal that the silent refusal cannot be reversed or proclaimed null and void respectively due to non-observance of the form in writing, including the requirement under Art. 15, para 2, subpara 3 APA for its reasons, as the three-member panel did. The refusal to issue the act is subject to appeal because it represents, in itself, the administrative power vested with the competent authority. It is a unilateral obstacle to the occurrence of the legal effect, which is the desired legal outcome, i.e. the access to the requested public information.

All these considerations necessitate the reversal of the judgement of the three-member panel and since the litigants have no dispute that the appeal versus the silent refusal was served after the expiration of the time limits prescribed by law for attacking it, the appeal considered inadmissible and the proceedings should be dropped. The rules as to the time limits for attacking administrative acts in court are based on Art. 22, para 2 and Art. 37, para 1

of the Administrative Procedures Act. Pursuant to Art. 22, para 2 APA, the silent refusal under the request of Alexey Yurdanov Lazarov for access to public information could be appealed within 14 days as from 21 June 2002 or before 5 July 2002. The appeal was served in court after the said date, i.e. on 8 July 2002 and, therefore, it exceed the time limits and it is procedurally inadmissible on these grounds. The expiration of the time limits prescribed by law for attacking the silent refusal of the administrative authority precludes the right to appeal and therefore the proceedings are conducted in the absence of a procedural prerequisite from the category of absolute ones, which the court has the obligation to monitor *ex officio*.

In view of these considerations, the appealed judgement should be reversed and the proceedings on the basis of the evidence collected so far should be dropped as inadmissible.

Guided by these reasons and pursuant to Ary. 40, para 2, second sentence of SACA in conjunction with Art. 218b, para 1, item (c) CPC, this court

HAS DECIDED:

REVERSES Judgement No. 12234/29 December 2002 on Administrative Case No. 7721/2002 of the Supreme Administrative Court, Fifth Division, and RULES instead:
LEAVES WITHOUT HEARING the appeal by Alexey Yurdanov Lazarov from Sofia, versus the silent refusal by the Director of the Public Relations Department at the Council of Ministers to provide access to public information under request Ref. No. 03.07-10/31 July 2001 as specified with request Ref. No. 03.07.14/7 June 2002 and DROPS the proceedings.

This judgement is not subject to appeal.

True to the original,

PRESIDING JUDGE: (signed) Andrey Ikonomov
Secretary: MEMBERS: (signed) Janeta Petrova
(signed) Zakharinka Todorova
(signed) Tanya Radkova
(signed) Vanya Ancheva

DISSENTING OPINION OF JUDGE JANETA PETROVA:

I do not share the understanding set out in the judgement that the lack of the form prescribed by law cannot be treated as grounds for the nullity of the silent refusal being an informal act. In accordance with the reasons of the five-member panel of the Supreme Administrative Court hearing the appeal versus the judgement of 29 December 2002 on Administrative Case No. 7721/ 2002 of the Supreme Administrative Court, that would contradict with the objective for which Art. 14 APA has introduced the legal institute of the silent refusal, i.e. to have the issue brought to the attention of the administrative authority resolved.

In my opinion, these considerations cannot substantiate the impossibility for proclaiming the administrative act given as silent refusal null and void and I can immediately object that, given the lack of reasons for the decision made by the administrative authority, the court, too, does not resolve the dispute from the viewpoint of its substantive lawfulness and may reverse the administrative act on these grounds alone.

The will of the administrative authority on a request served to it may be expressed orally, in writing, or through conclusive action. In the case of lack of such will within the time limits prescribed by law, an individual administrative act with negative content is assumed to have been issued (Art. 14, para 1 APA). The party whose rights or interests are affected by the administrative act may appeal it with complaints of its being unlawful, including unlawfulness based on the non-observance of the form prescribed by law.

The administrative act has to be issued in the form prescribed by law (Art. 12, subpara 2 SACA). Where decisions are made on access to public information requests under the Access to Public Information Act, the decision must be given in writing. Where the administrative authority fails to observe the form prescribed by law, these provides grounds for proclaiming its administrative act null and void and thus consider its legal effect to not have been occurred. The reflection of the content of the act in a written document with explicit specification of any or all of the reasons for refusal under Art. 37, para 1 APIA is an essential guarantee for the right of the applicant to defence. It is likely that even in cases of silent denial the reasons of the administrative authority could be presumed. In this particular case, however, the applicant is deprived of the opportunity to guess since he is not aware of

the essence of the information. The lack of such awareness prevents the court from froming its opinion on the merit. Unlike the other cases, where the court demands the administrative file to ascertain the justification of the application in hearing disputes under the Access to Public Information Act, the court cannot issue a ruling to make the document materializing the requested information available. This would contravene the objective of the law introducing special procedures for access to public information.

All these features call for a specific approach to the hearing of cases, which relate to the opportunity for getting access to public information rather than the information itself. Having introduced the mandatory form in writing for the issuance of administrative acts, the law-maker has envisaged this particular difference.

Therefore I assume that the three-member panel of the Supreme Administrative Court has ruled a correct judgement, which the five-member panel of the Supreme Administrative Court had to leave in force.

RULING

No. 1659
Sofia, 25 February 2004

The Supreme Administrative Court of the Republic of Bulgaria, five-member panel, at the court session held on the fourteenth day of November 2003 composed of:

PRESIDING JUDGE: TSVETANKA TABANJOVA
MEMBERS: YORDAN KONSTANTINOV, YORDAN ZLATAREV, VIOLETA KOVACHEVA, RUMYANA PAPAZOVA

in the presence of Tsvetanka Grozdanova as the Secretary and with the participation of the Public Prosecutor, heard the report by Judge VIOLETA KOVACHEVA
on Administrative Case No. 9455/2003.

The proceedings are conducted pursuant to Art. 41, para 1 of the Supreme Administrative Court Act (SACA) in conjunction with Art. 231, para 1, item (a) of the Civil Procedure Code.

It was brought on the basis of the petition by Alexey Yurdanov Lazarov from Sofia to reverse the enforceable Judgement No. 5188 of 27 May 2003 on Administrative Case No. 791/2003 of a five-member panel of the Supreme Administrative Court, reversing Judgement No. 12234 of 29 December 2002 on Administrative Case No. 7721/2002 of a three-member panel of the Supreme Administrative Court and leaving without hearing the appeal by Alexey Lazarov versus the silent refusal of the Director of the Public Relations Department at the Council of Ministers.

The Council of Ministers as a respondent did not send a representative in the court session but presented an opinion in writing, which challenged the petition as inadmissible and unjustified in its entirety for the reasons given in detail in the opinion.

In order to take a decision, the five-member panel of the Supreme Administrative Court took into account the following considerations:

The petition was served within the time limits under Art. 232, para 1 of the Citizens Procedural Code /CPC/ by a duly constituted party but it is procedurally inadmissible for the following reasons:

The petition served under Art. 231, para 1, item (a) CPC in conjunction with Art. 11 SACA is a pleading to reverse the judgement of the five-member panel of the Supreme Administrative Court rules in the course of cassation proceedings on the occasion of the appealed judgement of a three-member panel of the Supreme Administrative Court rules under Art. 12 et seq. SACA.

The Supreme Administrative Court Act has adopted and introduced the principle of two-instance proceedings for attacking administrative acts. In cases like this one, the Supreme Administrative Court examines as first-instance the appeals versus acts of heads of institutions and the judicial control over the first instance is exercised by a five-member panel of the Supreme Administrative Court in the course of cassation proceedings - Art. 33 et seq. SACA. The judgement of the five-member panel of the Supreme Administrative Court puts an end to the administrative proceedings and it is non-attackable and irreversible under Art. 231 CPC. The reason lies in the fact that in our judicial system the reversal of a judgement may be requested only from a higher-standing court. There is no judicial instance above the five-member panel of the Supreme Administrative Court in the structure of the judiciary and the five-member panel cannot act as a reversing instance with regard to judgements ruled by a court at the same level.

For these reasons, this five-member panel of the Supreme Administrative Court deems the appeal of Alexey Yurdanov Lazarov versus the judgement of a five-member panel of the Supreme Administrative Court to be inadmissible and it should be given no hearing as such, and the proceedings should be dropped.

Guided by these reasons, the Supreme Administrative Court, five-member panel

HAS RULED:

REVERSES the ruling of 14 November 2003, which started proceedings on merit;

LEAVES WITHOUT HEARING the petition by Alexey Yurdanov Lazarov from Sofia for reversal under Art. 231, para 1, item (a) CPC of Judgement No. 5188/

27 May 2003 of a five-member panel of the Supreme Administrative Court on Administrative Case No. 791/2003;

DROPS the proceedings in Administrative Case No. 9455/2003 of the Supreme Administrative Court.

THIS RULING is not subject to appeal.

True to the original,

PRESIDING JUDGE: (signed) Tsvetanka Tabandjova
MEMBERS: (signed) Yordan Konstantinov, (signed) Yordan Zlatarev, (signed) Violeta Kovacheva, (signed) Rumyana Papazova

CASE

Ecoglasnost National Movement - Montana Chapter

v.

Minister of Health

Ref. No. 3933/06.12.00

Ecoglasnost National Movement - Montana Chapter

Ref. No. 15/05.12.2000

TO
DR. KARAILIEVA
DIRECTOR
PUBLIC HEALTH SERVICE
MONTANA

Dear Ms. Karailieva,

We would like your apologies for asking information on the following two unrelated issues with a single letter:

1. A copy of the statements of findings from the measurements of noise, which you took in the apartment blocks around Balkan AD, Montana on 8 November 2000;

2. A copy of the statements of findings from the measurements of the water of Izvora from the last three dates, as well as those of the catchments on the right-hand slope below the wall of the Ogosta dam with regard to the content of arsenic.

Thanking you in advance, we wish to reiterate our preparedness to further cooperate in the name of sustainable development.

Yours truly,
Petar Penchev (signed)
Member of the National Managing Board

PUBLIC HEALTH SERVICE
MONTANA

Ref. No. IV 3933/14.12.2000

TO
ECOGLASNOST NATIONAL
MOVEMENT
MONTANA CHAPTER
Montana

To our Ref. No. 15/05.12.2000.

Further to your request for information under item 1 of your letter, we would like to inform you that the Public Health Service, Montana cannot provide you with the statements of findings from the measurements taken there. The final opinion on the issue has been given by a committee of experts from the Ministry of Health in letter No. 97-B-66/24.11.2000, a copy of which is at your disposal.

As to item 2 - the chemical analyses of water samples from Izvora revealed a deviation of the arsenic content in the amount of 0.055 mg/l from the standard of 0.05 mg/l in accordance with the existing standard for drinking water Bulgarian State Standard 2823-83.

I hope that the information provided to you under item 2 will be used for the identification of an adequate solution to the important social and sanitary problem related to the water supply in Montana.

Director
Public Health Service:

C/O THE DIRECTOR OF THE PREVENTION AND STATE SANITARY CONTROL DEPARTMENT AT THE MINISTRY OF HEALTH
TO THE SOFIA CITY COURT ADMINISTRATIVE DIVISION

APPEAL
by
Petar Penchev Troyanski
Ecoglasnost National Movement
Montana Chapter

VERSUS
Decision Ref. No. 97-00-5/ 17.08.2001
Of the Director of the Prevention and State Sanitary Control Department
at the Ministry of Health

Honorable Justices,

On 7 May 2001, I requested the Ministry of Health to provide information on the findings from the measurements of the noise penetrating into an apartment block taken by the public health authorities. Our organisation was informed about the taking of the measurements by people living in the apartment block. On 22 August 2001, we received a refusal in writing by the Director of the Prevention and State Sanitary Control Department, according to which the public health authorities were not obliged to provide access to the requested information pursuant to Art. 13, para 1, subpara 1.

The refusal worded in this way contravenes the substantive law and the objective of the law. The arguments to this effect are as follows:

1. First and foremost, the information requested with regard to the measurements of penetrating noise constitutes data related to the condition of what is called „components of the environment". Hence this information is within the scope of Art. 8, subpara 1 of the Environment Protection Act

(PEA). Pursuant to Art. 9 PEA any person is entitled to access to the available information under Art. 8. Since the Access to Public Information Act (APIA) provides for the right of any person to any public information, while EPA provide for the right of any person to certain types of information, the latter law relates to the former one as a special to a general law. Pursuant to Art. 11, para 2 of the Legal Instruments Act, specifying the *lex specialis legem generalem derogat* principle, the applicable regime will be the one set out in EPA. The latter provides for no restriction similar to the one introduced with Art. 13, para 2, subpara 1 APIA nor does it make any reference to APIA with regard to restrictions. Moreover, to allow the authority to have the discretionary powers to decide whether to provide information on the condition of the components of the environment would be tantamount to placing its subjective will above the health and lives of people.

2. Next, the allegations that the measurements taken by public health authorities constitute information of no relevance of their own are fully arbitrary. The document in question obviously has relevance of its own since it is the only one to contain information about the condition of the components of the environment. It is equally unclear what final instrument would have the statement of findings as its preparatory phase. It is also obvious that the statement of findings does not constitute any opinion, recommendation or consultation, while the list under Art. 13, para 2, subpara 1 APIA is exhaustive.

3. The reasons of the refusal lead to the conclusion that it was issued at least in deviation from, if not in violation of the law. The interpretation of Art. 13, para 2, subpara 1 APIA in the sense that these provisions allegedly do not envisage any obligation of the respective authority to provide information is wrong and would render the whole law senseless. Conversely, these provisions obligate the respective authority, upon finding justified reasons thereof and having assessed the factual situation (Art. 38 APIA) as well as having drawn a balance between the possibly contradictory interests of the requestor the person in need of data protection, to exercise its right and duty acting in operational independence. One cannot agree that there exist cases, where government authorities have only rights without ensuring that these rights are, at the same time, their obligations. Any interpretation to the opposite effect would render senseless the principles set out in Art. 6 APIA and the obligation of the authority under Art. 38 APIA to give its reasons.

In view and on account of the foregoing, I kindly request the Honorable Court to reverse the refusal as unlawful and issues in deviation from the

objective of the law, as well as to recognize our right to access to the requested information and to obligate the relevant authority to provide us with this information.

Encl.
1. Request for Access to Information.
2. Decision to Refuse Access No. 97-00-5/01.
3. Letters attached to the Appeal.
4. Copy of the appeal and the evidence for the respondent.
5. Receipt for the payment of the state fee (BGN 10) to the account of the Sofia City Court.

Yours truly,

JUDGEMENT

No. 28
Sofia, 29 October, 2002

IN THE NAME OF THE PEOPLE

THE SOFIA CITY COURT, Administrative Division, Panel IIIb, at its public session held on the thirtieth day of September 2002 composed of:

PRESIDING JUDGE: ANNA DIMITROVA
MEMBERS: RUMYANA MONOVA, Junior Justice KALINA ILIEVA
with Maria Nedyalkova as a Secretary and in the presence of Public Prosecutor Kostova, Having examined the report presented by Justice Monova in Administrative Case No. 2361 of 2001,

Whereas:

The proceedings were pursued under Art. 40 of the Access to Public Information Act (APIA) and Art. 33 et seq. of the Administrative Procedures Act.

Ecoglasnost National Movement appealed against the decision on the refusal to provide access to public information by the Director of the Prevention and State Sanitary Control Department at the Ministry of Health. It invoked Art. 13, para 2, subpara 1 and Art. 33 APIA to substantiate its claim that the refusal was unlawful. It stated that the information requested about the measurements of the penetrating noise were included in the scope of the data under Art. 2 APIA. Therefore the appellant requested that the decision of the Director be repealed and that access to the requested information be provided.
The respondent fully challenged the appeal. First and foremost, he claimed that the authority with passive legitimacy to answer requests for access to that type of information was the Director of the Public Health Service, Montana rather than the Director of the Prevention and State Sanitary Control Department. Secondly, he claimed that no proper request had been filed within the meaning of APIA since it was addressed to the Minister of Health and therefore the letter did not constitute a refusal within the meaning of the Act.

The representative of the Sofia City Public Prosecutor's Office finds the appeal to be justified.

Having assessed the evidence collected and presented in the courtroom and the pleas of the litigants, the Court accepts to the following to have been established:

The appellant served a request No. 97-00-5 of 5 February 2001 to the Minister of Health. It was worded as a request to intervene in the provision of access to the following information: a statement of findings dated 8 November 2000 on the measurements taken by the public health authorities in Montana with regard to the noise penetrating into an apartment block near Balkan AD, Montana. On 17 August 2001, the Director of the Prevention and State Sanitary Control Department at the Ministry of Health gave an explicit answer to the request. However, there is no indication that the answer has been received by the requestor. Moreover, Letter No. 97-00-5 of 28 November 2000 of the Ministry of Health has been presented at the request of the court. Therefore the court has accepted that the appeal was served within the time limits prescribed by the provisions of Art. 37, para 1 APA in conjunction with Art. 40, para 1 APIA and it should be considered on its merits.

The Minister of Health was requested to provide information within the meaning of Art. 2, para 1 APIA. The answer to the request was given by the Director of the Prevention and State Sanitary Control Department at the Ministry of Health rather than the Minister. The content of the answer does not imply that it was not the relevant authority to make a decision on the request and it actually gives a substantive opinion. If the administrative authority that was approached considered that it was not the one to give an answer to the request or that it did not have the necessary information at its disposal but it was aware of its location (the public health service in Montana, in this particular case), the administrative authority had to refer the file and the request to the public health service for the purposes of obtaining its decision pursuant to Art. 8 APA and Art. 32 APIA. The answer given in the letter explains why such information will not be made available at all. With a view to the above considerations, the court considers that there is a violation in two aspects: firstly, there is no answer by the authority, i.e. the Minister of Health, and, secondly, if he had decided that he was not the relevant authority to be approached, then he had to refer the file to the public health service in Montana for an answer. The court is not considering the issue whether the

Director of the Public Health Service in Montana has been approached or not because this is a separate procedure with regard to another administrative act. In this context, the court deems the answer to the request to be null and void as it has been issued by an authority other than the relevant one. Its nullity has to be proclaimed and the file has to be referred to the respondent for taking the requisite action. For these reasons, THE COURT

HAS DECIDED:

PROCLAIMS THE REFUSAL by the Director of the Prevention and State Sanitary Control Department at the Ministry of Health given in Letter No. 97-00-5 of 28 November 2001 **TO BE NULL AND VOID**,

REFERS BACK the file to the Director of the Prevention and State Sanitary Control Department at the Ministry of Health.

THIS JUDGEMENT is subject to appeal before the Supreme Administrative Court within 14 days of the date of the notice on its ruling sent to the parties.

PRESIDING JUDGE: (signed)

MEMBERS: **1. (signed)**
2. (signed)

REPUBLIC OF BULGARIA
MINISTRY OF HEALTH

C/O
SOFIA CITY COURT
ADMINISTRATIVE DIVISION
PANEL III-B
TO THE SURPEME
ADMINISTRATIVE COURT

APPEAL

BY THE MINISTRY OF HEALTH
Respondent under administrative case no. 2361/2001 c/o
attorney Mirena Marinova

VERSUS:

Judgement No. 28/29 October 2002 of the Sofia City Court, Administrative Division, Panel IIIb on Administrative Case No. 2361/2001

HONORABLE SUPREME JUSTICES,

I appeal versus Judgement No. 28/29.10.2002 of the Sofia City Court, Administrative Division, Panel IIIb on Administrative Case No. 2361/2001 within the prescribed time limits and request you to reverse it as wrong. My considerations are as follows:

The Sofia City Court, Panel IIIb has proclaimed „the refusal by the Director of the Prevention and State Sanitary Control Department given in letter No. 97-00-5 of 17 August 2001" to be null and void on grounds of this answer to have been issued by an authority other than the relevant authority. The reasons of the court point to the fact that the Minister of Health as the authority which has been approached on this matter has not issued the answer.

The operative part of the court judgment refers the file back to the Director of the Prevention and State Sanitary Control Department since, as stated in the reasons of the court, the file has to be referred back to the respondent for the requisite action to be taken.

The judgment ruled in this way in the operative part contravenes the reasons stated. In its reasons, the court accepts that the Director of the Prevention and State Sanitary Control Department I not the relevant authority to make a decision on the request sent with letter No. 97-00-5/05.07.2001 and, at the same time, refers the file back to the same authority for the requisite action to be taken.

Next, the court has proclaimed „the refusal by the Director of the Prevention and State Sanitary Control Department given in letter No. 97-00-5 of 17 August 2001" to be null and void, without any consideration of the fact whether the refusal constitutes an individual administrative act and, furthermore, an act issued pursuant to the Access to Public Information Act. In this connection, the court has failed to taken into consideration our arguments that the request (letter No. 1-2 of 7 May 2001 which has initiated these proceedings) is worded as a request „to intervene for the provision of access to a statement of findings dated 8 November 2000 on the measurements taken by the public health authorities in Montana with regard to the noise penetrating..." rather than as a request within the meaning of Art. 24 of the Access to Public Information Act and, for this reason, it cannot be deemed to constitute a refusal to provide access to public information. As is seen in the text of letter No. 1-27 of 7 May 2001, the requestor intended to ensure the intervention of the Minister of Health in his capacity of an authority exercising internal administrative control over the bodies and structured in the healthcare system.

With a view to the referring to the Minister of Health with the need for his intervention as a controlling authority, the Director of the Prevention and State Sanitary Control Department, exercising internal administrative control over the public health offices pursuant to Art. 26, para 15 of the Regulations of the Ministry of Health, informed the requestor that an administrative procedure has been instituted to examine the justification of an appeal, and that the taking of measurements was an integral part of that examination procedure. The provisions of Art. 13, para 2, subpara 1 APIA have been invoked insofar as to illustrate the assessment of the correctness of the actions undertaken by the public health office in Montana. These provisions have not been invoked in any way to justify any refusal to provide access to public information.

The evidence collected in the course of the proceedings makes it clear that the requestor had information that the statement of findings dated 8 November 2000 issued by the Public Health Service, Montana was available at the

Public Health Service, Montana and therefore his letter was not worded as a request to provide the statement of findings itself but as a request to the Minister to intervene with regard to the Public Health Service in Montana.

As is seen in the text of letter No. 1-27/7 May 2001, the requestor did not even mention the Access to Public Information Act.

I kindly request the Honorable Court to take into account also the following consideration: the Access to Public Information Act provides for the obligation to provide public information upon request and no obligation of the government authorities „to intervene" in providing access to information at the disposal of another person (an authority, a legal entity, etc.). The Act does not provide for any procedure, in accordance with which the Minister could possibly „intervene" or exercise control with regard to the lawfulness of the actions undertaken in connection with the provision of access to information by another authority.

In the light of the above mentioned considerations, the answer received by the requestor is in full conformity with his request and the defense he was seeking.

For these reasons, I request you to rule on the complete reversal of Judgment No. 28/29 October 2002 of the Sofia City Court, Administrative Division, Panel IIIb on Administrative Case No. 2361/2001.

M. MARINOVA: (signed)
CHIEF EXPERT, LEGAL DEPARTMENT

JUDGEMENT

No. 10034
Sofia, 11 November 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at its court session held on the first day of October 2003 composed of:
PRESIDING JUDGE: JANETA PETROVA
MEMBERS: DIANA DOBREVA, JULIA KOVACHEVA
with Maria Popinska as a Secretary and the participation of Public Prosecutor Ivo Ignatov,
heard the report of Presiding Judge JANETA PETROVA on Administrative Case No. 4554 of 2003.

The Director of the Prevention and State Sanitary Control Department at the Ministry of Health filed a cassation appeal versus the judgement of 20 October 2002 in Administrative Case No. 2361/2001 with the Sofia City Court, proclaiming the refusal under Letter No. 97-00-5 of 17 August 2001 null and avoid and referring the file back to the Director. The complaints pointed to the wrongfulness of the judgement due to violation of the substantive law and material breaches of the rules of administering justice; a request was made to reverse the judgement.
Ecoglasnost National Movement, Montana Chapter as the respondent requested that the appeal be rejected.
The representative of the Supreme Administrative Prosecutor's Office gave the opinion that the judgement was correct because the administrative act under Letter No. 97-00-5 of 17 August 2001 was not issued by the competent administrative authority.
Having examined the correctness of the judgement with a view to the cassation complaints made thereof, the Supreme Administrative Court accepted the following:
As well as the complaints in the cassation appeal, the appellant raised objections against the admissibility of the judgement rules, which the court is following up ex officio. Therefore the objection should be examined notwithstanding the rule set out in Art. 39 of the Supreme Administrative Court Act that the court has to rule only on the grounds indicated in the appeal.

Given the evidence existing in the said case, the Sofia City Court was justified to accept that the appeal by Ecoglasnost National Movement versus the administrative act under Letter No. 97-00-5 of 17 August 2001 issued by the Director of the Prevention and State Sanitary Control Department at the Ministry of Health was made within the prescribed time limits. In order to draw a conclusion to the opposite, evidence had to be produced to prove the communication of the act, which was the commencement date of the 14-day time limit for serving an appeal. In the absence of such evidence, there was no negative procedural prerequisite for the hearing of the case and therefore the appealed judgement is admissible.

The court established that request No. 97-00-5 of 7 May 2001 was served on behalf of Ecoglasnost National Movement, Montana Chapter to the Minister of Health, requesting him to intervene in the provision of a statement of findings dated 8 November 2000 of the Public Health Service in Montana with data on the measurements taken of the noise penetrating into an apartment block in the vicinity of an industrial enterprise owned by Balkan AD, Montana. Further to the request, the answer of the Director of the Prevention and State Sanitary Control Department at the Ministry of Health was prepared under letter No. 97-00-5 of 17 August 2001. It was to inform the requestor that the measurements were taken in connection with the decision of the Public Health Service in Montana on the appeals that had been filed by a group of citizens and Ecoglasnost National Movement itself and that the authority had no obligation to provide access to that information pursuant to Art. 13, para 2, subpara 1 of the Access to Public Information Act.

From the legal perspective, the court accepted that the letter of the Director of the Prevention and State Sanitary Control Department at the Ministry of Health was a case of refusal of access to public information, which had been requested. The administrative act was deemed null and void as it was not issued by the Minister of Health to whom the request for intervention was addressed. Since the statement of findings on the measurements, which was requested by Ecoglasnost National Movement was available with the Public Health Service, Montana, the request for access to public information had to be sent there rather than having another authority decide upon the matter. Therefore the court proclaimed the administrative act null and void and referred the file back to the Director of the Prevention and State Sanitary Control Department.

In ruling on the case, the court did not commit any material breach of the provisions of Art. 188, para 1 Citizen Procedural Code, which obligated it to assess all the evidence, as well as the arguments of the litigants. Short as

they are, the reasons outlined by the court gave its understanding on the essence of the administrative act and its legal effects. In the course of the deliberations, all controversies between the litigants were examined, and therefore one cannot draw the conclusion that the judgement was ruled without taking into consideration those circumstances that were of decisive importance for the outcome of the proceedings.

There is no case of contradiction between the reasons and the operative part of the judgement with regard to the referral of the file back to the Director of the Prevention and State Sanitary Control Department at the Ministry of Health, as it is claimed in the appeal. The court put forward its considerations that the said authority was involved in the administrative procedure because it had the obligation to refer the file to the Director of the Public Health Service in Montana pursuant to Art. 32, para 1 of the Access to Public Information Act.

However, the court applied the substantive law wrongly. The conclusion that the administrative act of the Director of the Prevention and State Sanitary Control Department at the Ministry of Health was null and void does not comply with the legal solution set out in the Access to Public Information Act. When enumerating the government authorities obligated to provide access to public information, the said Act does not apply the type of their functions as a criterion but it applies their direct involvement in the creation and storage of public information (Art. 3 APIA). Furthermore, the provisions of Art. 32, para 1 APIA give clear instructions on the manner to identify the competence of the authority, which has decided to provide access to public information or to refuse such access. It has to be a central or local government authority or a body of any of the entities under Art. 3, para 2 APIA, and it is also obliged to make such a decision, where the requested information is available with it. A derivative option is to have a decision made under Art. 28, para 2 APIA by officials expressly designated by the authorities under Art. 3 APIA.

Since the Prevention and State Sanitary Control Department at the Ministry of Health plans, organizes and controls the research of the specific impact of the factors from the natural, working, school, and household environment on the health of the population and the conduct of individuals (Art. 26, subpara 8 of the Rules of the Ministry of Health), the court had no grounds to consider that the administrative act issued by the Director of the said Department was null and void just because the request of Ecoglasnost National Movement, Montana Chapter for access to public information had been sent to the Minister of Health. The content of the letter reveal that the Director of the Prevention and State Sanitary Control Department had the requested

information available with it, although it had been created by another authority. Therefore it was competent to make a decision on the request for access to that information. Since most of the authorities envisioned in the Access to Public Information Act have information of specific type available with them, there is no obstacle to requesting access from any of them.
Therefore the judgement of the Sofia City Court is wrong and should be reversed. It should be superceded by another judgement, rejecting the appeal of Ecoglasnost National Movement, Montana Chapter.
The decision of the Director of the Prevention and State Sanitary Control Department under letter No. 97-005 of 17 August 2001 contained a refusal to provide information pursuant to Art. 13, para 2, subpara 1 of the Access to Public Information Act. The public information requested by Ecoglasnost National Movement should be defined as official within the meaning of Art. 11 of the Access to Public Information Act because it was collected, created and stored in connection with the activities of the Public Health Service in Montana as a specialised body of the Ministry of Health in charge of the state sanitary control exercised locally. As stated earlier, the measurement of penetrating noise taken by employees of the Public Health Service in Montana was made at the decision of the specialised authority upon the appeal of a group of citizens and Ecoglasnost National Movement. The test was activity regulated in the provisions of Arts. 36 to 39 of the Regulation on the Application of the Public Health Act. Pursuant to Art. 37a of the said Regulation, the findings of tests are laid down in a sanitary statement drawn up in writing and submitted to the party concerned or its authorised representative. The comparison between these legislative requirements and the circumstances of the case of requesting access to official public information leads to the conclusion that the results of the measurements of penetrating noise had no importance or relevance of their own. Their purpose was to serve for the drafting of certain acts of the specialised state sanitary authority, undertaking specific measures to provide proper hygiene of the living conditions.
As a rule, the access to official public information is free, except for the cases explicitly mentioned in Art. 13, para 2 APIA. It provides for restricted access to official public information, where the latter is related to the operational drafting of the acts of the authorities and has no importance or relevance of its own, as well as where it contains opinions and positions in connection with current or future negotiations conducted by the relevant authority or on its behalf or related information. The meaning of this restriction refers to the lack of importance or relevance, as well as to the specific nature and duration of this type of official public information. By using such data, citizens

will not be in a position to form an objective and comprehensive opinion on social life and the activities of central and local government authorities, which is a major objective of the Access to Public Information Act. Therefore the authority requested to provide access to official information without any importance or relevance of its own, is free to refuse such access.

As a conclusion, it should be assumed that the individual administrative act issued by the Director of the Prevention and State Sanitary Control Department under letter No. 97-00-5 of 17 August 2001 complies with all statutory requirements. The appeal against it is unjustified and should be rejected.

For these reasons and pursuant to Art. 40, para 1 SACA, the Supreme Administrative Court

HAS DECIDED:

REVERSES the Judgement dated 20 October 2002 under Administrative Case No. 2361 of 2001 with the Sofia City Court and RULES INSTEAD:

REJECTS the appeal of Ecoglasnost National Movement, Montana Chapter versus the decision of the Director of the Prevention and State Sanitary Control Department at the Ministry of Health under letter No. 97-00-5 of 17 August 2001 to refuse access to official public information.

This judgement is final.

True to the original,

PRESIDING JUDGE: (signed) Janeta Petrova
Secretary: MEMBERS: (signed) Diana Dobreva, (signed) Julia Kovacheva

CASE

Vanya Paunova

v.

Regional Healthcare Centre (RHC)
Veliko Turnovo

To
The Director of Regional Health Center (RHC) - Veliko Turnovo

REQUEST
for Access to Information

by **Vanya Paunova Ilieva** - Yordanova,
Reporter of Yantra DNES Newspaper, Veliko Turnovo

Dear Sir,

In accordance with the Access to Public Information Act, I would like to have access to the available information with regard to:

1. For what, when, and to whom RHC - Veliko Turnovo issues the insufficiency certificates in conformity with its obligations? What are the procedures and legal documents, on the basis of which RHC - Veliko Turnovo is a party indispensable to the launch of specific healthcare activities in the region of Veliko Turnovo?

2. The amount of grants/aids provided to GPs by RHC - Veliko Turnovo since the start of the health reform within the framework of the World Bank assistance. How many GP practices (by communities) have received such grants and what is their specific form? After the aid is provided in the form of equipment, who is responsible for it and on the basis of what documentation is the transfer from RHC to the specific GP carried out - copy of the contract form;

3. What anti-corruption measures have been undertaken by the management of RHC - Veliko Turnovo in connection with its direct activity, such as the issuance of insufficiency certificates to certain specialists?

4. What is the contract of the Director of RHC - Veliko Turnovo? Is the Director elected or appointed on the basis of competition and what is the term of the contract?

5. Is RHC - Veliko Turnovo involved and what measures does it undertake in connection with the vacant outpatient practices within the territory of the region? How many are they at present?

6. RHC - Veliko Turnovo has the latest data on the disease rate and the demographic condition of the region in accordance with the summarized report of the National Centre for Health Studies. The latter is directly subordinated to the Ministry of Health, while RHC is its regional subdivision.

On this basis, I wish to on receive the data as follows:
- By gender and for the last five years by municipalities: population growth rates; age structure of the population; labour activity rate; birth rate; total mortality rate of the population; infant mortality rate; natural growth rate of the population; abortions; disease rate by consultations with outpatient healthcare providers; number of patients in hospital; number of patients registered with dispensaries; amounts paid to finance free of charge or partially subsidized prescriptions.

I would like to receive the requested information in the following form:
- on paper carrier.

Signed:

To
The Director of RHC - Veliko Turnovo

REQUEST
for Access to Information

by **Vanya Paunova Ilieva** - Yordanova,
Reporter of Yantra DNES Newspaper, Veliko Turnovo

Dear Sir,

In accordance with the Access to Public Information Act, I would like to have access to the available information with regard to the following:

1. Is the issuance of the so-called registration certificates paid to RHC by the applicants for private healthcare practices, such as provider practices, medical centres, diagnostic and consultative centres, and others?

2. If yes, what is the breakdown by items?

3. What is the procedure for a medical centre registered with RHC to increase the number of its specialists? Is this to be paid?

4. Did RHC receive any complaints and reports against outpatient and hospital healthcare providers in the region from 1 January 2002 to 21 November 2002?

- What was their number?

- What was the decision/opinion of RHC in each case?

5. What is the amount of the resources transferred by the Ministry of Health from the beginning of the year to 21 November for government-supported or subsidized healthcare establishments?

6. What is the RHC opinion on the optimization of the quality of healthcare in the region?

7. What are the statutory grounds for the RHC Director to refuse to provide information in any other way but in writing? Isn't this a sign of bias against Yantra DNES newspaper after its publication on the upcoming competition for the position of director?

8. What are the statutory grounds for employees of RHC - Veliko Turnovo to collect reporting documentation of RHIF from their contractual partners?

9. Whom has RHC leased its premises in the building of the Dental Centre in Veliko Turnovo to? Please specify the number of the agreement, the lessee and the term.

I would like to receive the requested information in the following form:

- on paper carrier.

Signed:

REGIONAL HEALTHCARE CENTRE - VELIKO TURNOVO

To
the Editor-in-chief of Yantra Dnes
newspaper, Veliko Turnovo

Dear Mme Editor-in-chief,

This is to request you to designate, if possible, another employee of Yantra Dnes newspaper to replace Ms Vanya Paunova, who will be invited to all press conferences and briefings organized by RHC - Veliko Turnovo on regional healthcare issues.

The Regional Healthcare Centre - Veliko Turnovo has always worked throughout the years under the conditions of full openness and transparency for the media, the healthcare community, and the population in the region.

The arguments for our request to you are more than justified but, in the name of our principled well-meaning attitude to the media, we wish to remain polite.

We have always been perfectly correct to Ms Paunova and all reporters and I dare say that the process was two-sided until the first story of the series of publications on the competition announced by the Ministry of Health, featuring things that were untrue, to put it mildly, as time has firmly borne it out. The subsequent publications which had nothing to do with realities or truth confirmed and deepened my conviction that Ms Paunova serves vested group interests.

I take the liberty of sending you copies of the questions asked to RHC - Veliko Turnovo by Ms Paunova, which I leave with no comment out of respect for the institution I manage.

Finally, I would like to share with you that after it became clear to the public that there were no other alternatives for the position of director, a member of the working group at RHC and Dr. Ivanov, to demonstrate "loyalty" provided me with those questions almost a month before they were asked 'spontaneously" by Ms Paunova.

I, on my side, brought together the leading specialists at RHC - Veliko Turnovo and presented to them the questions that would be asked "spontaneously" and "only" by Ms Paunova.

We take the liberty of sending you only the requested health and demographic information.

Your respectfully in principle,
Director

C/O
THE REGIONAL HEALTHCARE CENTRE - VELIKO TURNOVO

TO
THE REGIONAL COURT OF VELIKO TURNOVO

APPEAL

by: **VANYA PAUNOVA ILIEVA - YORDANOVA**

Versus: the refusal of the Regional Healthcare Centre (RHC) - Veliko Turnovo to provide information

Pursuant to Art. 40, para 1 of the Access to Public Information Act (APIA)

Honorable Justices,

In my capacity of a reporter of Yantra DNES newspaper, Veliko Turnovo and pursuant to Art. 24 of the Access to Public Information Act (APIA), I requested the Regional Healthcare Centre (RHC) - Veliko Turnovo to provide information related to the RHC activities. For that purpose, I served two requests Ref. Nos. 5356 of 15 November 2002 and 5367 of 21 November 2002 respectively to the RHC Director with detailed description of the requested information and the form in which I wanted it to be provided.

The information available with the respondent and requested on my part in both requests was not provided to me within the time limits under Art. 28, para 1 APIA. Instead, letter Ref. No. I of 29 November 2002 of RHC - Veliko Turnovo was sent to the editor-in-chief of Yantra DNES newspaper, making arbitrary comments on my publications in the newspaper, expressing opinions on my work, and suggesting to the editor-in-chief in an inconceivable manner to designate another journalist to cover healthcare issues. Attached to the letter were only reports with health and demographic information requested in item 6 of my request Ref. No. 5356/15 November 2002 (except the information about the amounts paid under free of charge and partially subsidized prescriptions). No answer was given to any other of the questions asked in that request and the other one. Copies of the requests were sent to

the editor-in-chief of the newspaper with the note that they were left „with no comment".

I believe that the above mentioned letter, although not duly given in the format of a decision of the relevant authority, represents a REFUSAL to provide the public information I requested and I have the right of access to under APIA. This refusal is UNLAWFUL. It is not substantiated with any reasons and contains no factual or legal grounds for the refusal to provide the requested information. In fact, such grounds to not exist at all.

For these reasons, I hereby APPEAL versus the refusal of the Director of RHC - Veliko Turnovo to provide access to the information I requested in requests Ref. Nos. 5356/15 November 2002 and 5367/21 November 2002 and REQUEST the court to reverse the refusal and obligate the Director of RHC - Veliko Turnovo to provide the requested information in the format I specified pursuant to Art. 41, para 1 APIA.

Encl.:

1. Copies of requests to RHC - Veliko Turnovo Ref. Nos. 5356/15 November 2002 and 5367/21 November 2002.
2. Copy of letter Ref. No. 5356/29 November 2002 of RHC - Veliko Turnovo.
3. Copy of the appeal for the respondent.
4. Receipt for the payment of the state fee.

Veliko Turnovo
13 December 2002

Yours truly,

JUDGEMENT

No. 299
Veliko Turnovo, 20 June 2003

IN THE NAME OF THE PEOPLE

The Veliko Turnovo Regionale Court, Administrative Division, at the public court session held on the thirtieth day of May 2003 composed of:

PRESIDING JUDGE: Maria Gadjonova
MEMBERS: Hristina Daskalova, Diana Kostova

in the presence of Galina Georgieva as the Secretary and with the participation of Public Prosecutor K. Leshtakova on behalf of the Veliko Turnovo Regional Public Prosecutor's Office, heard the report by Judge Maria Gadjonova
on Administrative Case No. 18/2003.

Whereas:

Appeal under Art. 40 of the Access to Public Information Act

The appellant Vanya Paunova Ilieva - Yordanova from Veliko Turnovo stated in her appeal that in her capacity of a reporter of Yantra DNES newspaper she requested information from the Regional Healthcare Centre in Veliko Turnovo in connection with the activities of the Centre. The request was given in two requests Ref. Nos. 5356/15 November 2002 and 5367/21 November 2002 respectively. The information requested in the two requests was not provided within the time limits under Art. 28, para 1 APIA. Instead, a letter was sent to the editor-in-chief of the newspaper. The appellant believes that the letter represents a refusal to provide the requested information and therefore requests the court to reverse the refusal and to obligate the RHC Director to provide the information. She claims also payment of the legal costs.

Respondent - RHC challenges the appeal, raising objections with regard to its admissibility for reasons that the appellant is not a „duly constituted party". The arguments to support these considerations are that the requests were served by the appellant but in her capacity of a reporter of Yantra DNES

newspaper in the discharge of her contractual functions. The legal entity Yantra DNES, Veliko Turnovo is actively legitimate to pursue the case but since the appellant is not authorised to represent it, the proceedings should be dropped. Another reason for the inadmissibility of the appeal is seen in the lack of a subject-matter, i.e. an attackable administrative act. The letter to the editor-in-chief of the newspaper sent by the RHC Director is correspondence rather than an act expressing the will of the authority, which may be subject to appeal. Notwithstanding these objections, the respondent finds the appeal also to be unjustified, claiming that the refusal is lawful because the requests were not requests for information within the meaning of APIA but rather heterogeneous questions, which were perceived in that way by the administrative authority, too, and therefore the answer was given in the form of correspondence. The respondent requests the court to reject the appeal and claims payment of the legal costs in case of dropping the proceedings, as well as rejecting the appeal. Objections have been raised with regard to the excessive fee paid to the attorney representing the appellant in the court proceedings.

The representative of the Veliko Turnovo Regional Public Prosecutor's Office is of the opinion that the case should be decided in accordance with the evidence.

Having examined the arguments of the litigants and the evidence in the proceedings, the Veliko Turnovo Regional Court assumes the following to have been established:

Admissibility of the Appeal

The appeal is procedurally admissible. The appellant is an actively legitimized party to a judicial administrative appeal process. She requested access to public information and her requests were accepted by RHC - Veliko Turnovo. The capacity of a reporter of Yantra DNES newspaper indicated by the appellant herself cannot be perceived in the manner interpreted by the respondent, namely that the information was requested by the media as the legal entity and, in that connection, only the media had the right to appeal. Art. 4 APIA specifies the scope of persons entitled to access to public information, i.e. any citizen of the country, including foreign nationals and persons without citizenship, as well as all legal entities, while observing the terms and conditions laid down in the law, unless another law provides for special arrangements for seeking, obtaining, and disseminating information.

The fact that the applicant stated she was a reporter in a local newspaper did not deprive her from her statutory right; conversely, it suggests why the information was needed. Her right to seek and obtain information is derived also from the provisions of Art. 41, para 1, the first sentence of the Constitution of the Republic of Bulgaria. As to the second argument for inadmissibility of the appeal (lack of an attackable administrative act), it is unjustified as well. Undoubtedly, there is no explicit refusal to provide information under the requests. It is an equally undoubted fact that the letter sent to the editor-in-chief by RHC is just correspondence. In this specific case, no explicit refusal has been issued, while APIA obligates the authorities to give explicit answer. The idea of the law-maker has been to prevent the authorities with obligations to provide information from failing to make a decision within the time limits under Arts. 28 through 31. However, APIA has not provided for cases, where the authority fails to give information. These cases are regulated in APA - Art. 14, para 1, declaring the failure to make a decision within the prescribed time limits to be tantamount to silent refusal. To assume lack of legal provisions in the special law on these matters means that the court may possibly reach to denial of justice and protection of citizens' rights. The court may not deny justice even when there is no explicit provision in the special law and it has to apply the general provision instead. The general legal provision is given in Art. 14, para 1 APA. It is not excluded by APIA as the special law and therefore when the authorities under Art. 3 APIA fail to make a decision on an request for access to information within the prescribed time limits, a silent refusal will be presumed to exist within the meaning of Art. 14, para 1 APA and this refusal is subject to legal review in court. The act subject to appeal is the silent refusal and the appeal is admissible.

Lawfulness of the Appealed Act

The act is unlawful as it has not been issued in the format prescribed by law.

Pursuant to Art. 28, para 1 APIA, the request for access to public information has to be examined within the shortest possible time limits and not later than 14 days after its registration. The administrative authority is entitled to assess the existence of the statutory prerequisites to provide access to the requested information or the grounds under Art. 37, para 1 APIA for refusal to provide access. The underlying principle of the law is that the access is free and the grounds for refusal are laid down in Art. 37, para 1 - where the information constitutes a state or official secret, where it affects the interests of a third

party and there is no explicit consent given by the latter, or where the requested information was provided to the applicant during the preceding six months. Assessing the type of requested information and the non-existence of obstacles to granting the request, the authority makes a decision to provide access and issues a decision under Art. 28 in accordance with the requirements set out in Art. 34 APIA. Where the administrative authority deems that the grounds for refusal under Art. 37 are in place, the request has to conform to the provisions of Art. 38 APIA. Letter Ref. No. 5356/29 November 2002 to the editor-in-chief of Yantra DNES newspaper and the minutes of 25 November 2002 taken by the commission appointed with Order No. 358/15 October 2002 by the RHC Director state in general opinions as to why access to information was refused (the former on personal grounds and the latter on purely formal grounds due to the lack of address for correspondence) but they are not given in the format prescribed by law or issued by a competent authority (the former contains just an illegible signature without the name of the sender and the latter is signed by an auxiliary body). The administrative act has not been issued in the format prescribed by law and therefore it has to be reversed and the file should be referred back to the administrative authority to make a decision, while observing the requirements of APIA.

The appellant should also be awarded the legal costs in their actual amount, i.e. a total of BGN 211.35. The objections as to the excessive level of the legal fee are unjustified. The legal defence agreement submitted to the court makes it clear that Valeri Stavrev, Attorney-at-law was paid a fee of BGN 200 as agreed and the minimum fee for this case is BGN 50 in accordance with Art. 7, para 1, subpara 4 of Regulation No. 1/1999 on the Minimum levels of Legal Fees. The agreed amount is not excessive, taking into account also the provisions of § 2 of the said Regulation.

Guided by the above considerations, the court:

HAS DECIDED:

REVERSES the refusal of the Director of the Regional Healthcare Centre - Veliko Turnovo to issue decisions on requests Nos. 5356/15 November 2002 and 5367/21 November 2002 of Vanya Paunova Ilieva - Yordanova, a reporter in Yantra DNES newspaper, Veliko Turnovo for access to information and **REFERS THE FILE BACK** to the administrative authority to examine the requests, while observing the instructions given in these proceedings;

Sentences the Regional Healthcare Centre - Veliko Turnovo to pay Vanya Paunova Ilieva - Yordanova from Veliko Turnovo, PIN 7508181539 the costs in the amount of BGN 211.35.

Presiding Judge:
Members:

This judgement is subject t to cassation appeal to the Supreme Administrative Court within 14 days of its notification to the parties.

C/O:
THE VELIKO TURNOVO
REGIONAL COURT

TO
THE SUPREME ADMINISTRATIVE
COURT

CASSATION APEAL

by
Tanya Marekova, Attorney-at-law
in her capacity of attorney of Dr. Georgi Ivanov,
Director of the Regional Healthcare Centre Veliko Turnovo

Versus: Judgement No. 299/20 June 2003
of the Veliko Turnovo Regional Court
on Administrative Case No. 18/2003

Pursuant to Art. 286b, para 1, item (b) or (c) CPC
in conjunction with Art. 11 SACA

Honorable Supreme Justices,

The Veliko Turnovo Regional Court ruled its Judgement No. 299 of 20 June 2003 to grant the appeal served by Vanya Paunova Ilieva - Yordanova versus the refusal of my client to provide information under APIA, obligating RHC - Veliko Turnovo to examine the requests for access to public information envisaged in the proceedings and awarded the legal costs in the actual amount incurred by the appellant. By serving this appeal within the prescribed time limits versus Judgement No. 299 of 20 June 2003 of the Veliko Turnovo Regional Court on Administrative Case No. 18/2003 on behalf of my client, I request you to invalidate it as inadmissible and drop the proceedings or, alternatively, to reverse it as wrong due to violation of the substantive law, material breach of procedural rules, and unjustifiable nature.

My considerations are as follows:

The appealed judgement has been ruled in court proceedings wrongly brought under Art. 40 APIA, in the context of lack of an absolute procedural

prerequisite for examining the appeal, namely legal interest on part of Vanya Paunova Ilieva - Yordanova and hence procedural legitimacy of the appeal to her benefit, as well as in the context of lack of an attackable administrative act within the meaning of Art. 38 APIA.

In an unjustified manner and contrary to the facts, the first-instance court assumed that the appellant was „a duly constituted party" to the proceedings, taking argument from the general constitutional right set out also in APIA of all persons to seek and obtain information. The reasons of the court judgement arbitrarily neglect and misrepresent the facts as ascertained by the content of the requests for access to public information served to RHC - Veliko Turnovo, the arguments in the appeal, and the position of the representative of the appellant, i.e. the capacity of „reporter" in which Ms Ilieva - Yordanova exercised her right under Art. 4 APIA before the administrative authority. The materials of the case and the appellant's position do not support the assumption of the court that the requestor possibly wished to substantiate the need for obtaining the requested information. Furthermore, the provisions of Art. 25 APIA do not envisage such a feature of the request for access to information. In this particular case, it should be considered beyond any doubt that the initiative to approach my client with a request for access to information came from the employer, the editorial board of Yantra Dnes newspaper, Veliko Turnovo or the owner of the newspaper in case the editorial board is not a legal entity (argument from the notes of the representative of the appellant). The initiative can be seen in requests Ref. Nos. 5367/21 November 2002 and 5356/15 November 2002 served to the Regional Healthcare Centre (RHC) - Veliko Turnovo by Vanya P. Ilieva - Yordanova as a reporter of the newspaper. It is frivolous to claim that Ms Yordanova acted on her own behalf because the nature and position she occupies are not equivalent to the address for correspondence and, moreover, APIA does not obligate administrative authorities at all to try and interpret the intention of requestors or search for them. The fact that all persons are entitled by law to seek and obtain information is irrelevant to these proceedings because such a dispute has never been brought to court. On the contrary, the only relevant issue is whether this right has been exercised and affected on the behalf and in the legal sphere of the requestor so that to recognize her as „a duly constituted party" to the administrative proceedings or not. The arguments in the defence of her attorney in support of alleged right on her part to serve an appeal pursuant to Art. 35, para 1 APA are unjustified and cannot substantiate the position of the court. The suggested example from court practices does not support them either.

Conversely, Judgement No. 4417/5 July 2000 of the Supreme Administrative Court, Second Division envisages an entirely different factual situation. Within its meaning „the right to appeal is given to persons *whose legal sphere is affected* adversely by the vicious administrative act. Adverse affecting is any legal effect of the act representing: termination or restriction of existing subjective rights; creation of new legal obligations or expansion of existing ones; non-generation of requested subjective rights, the occurrence of which needs to have the refused administrative act in place". The appellant is not a subject in any administrative relationship materialized in the appealed refusal and this reason is sufficient for proclaiming the lack of legal interest in attacking it. This is also the spirit of Ruling No. 8406 of 23 September 2002 of the Supreme Administrative Court on Administrative Case No. 7504/2002.

Notwithstanding the above considerations, the judgement is inadmissible also due to the lack of an attackable administrative act.

There is no refusal, including a silent one, to the requests envisaged in the court proceedings, as there has been no procedure for the issuance of an administrative act. This is due to the irregularity of the form of the requests, as a result of which they cannot start an administrative procedure and engage my client to make a decision. The content required for requests for access to public information is specified in Art. 25, para 1 APIA, part of which is mandatory *ad argumentum* of para 2 of the said Article. The requests submitted to the Veliko Turnovo Regional Court failed to specify an address for correspondence with the requestor. Thus the requests fell within the scope of the sanctioning hypothesis of Art. 25, para 2 APIA which was unfavourable to the requestor. The special commission acting at my client dropped the examination of the requests due to the lack of proper approach and precluded the start of an administrative procedure to grant or refuse access to the requested public information, which implied a decision of the administrative authority empowered to do so by law. Moreover, the person interested in obtaining information had the legal opportunity to serve a proper request and the provisions of Art. 40 APIA could not apply due to the absence of the administrative acts envisaged in them.

Even if you accept the requests submitted in this case to be regular and fit to start administrative proceedings, we believe that they are subject to different proceedings for the issuance of administrative acts and those acts could be subject to appeal in court separately from one another. This is due to the difference in the requested information contained therein, the different dates

of serving them, and the lack of initiative on part of the administrative authority to bring them together for joint examination, which by analogy of Art. 123 of the Citizen Procedural Code (CPC) is a legal option for the latter, depending on its discretion but not an obligation. It is inadmissible for the regional court to accept for examination and rule on a non-existent legal institute, i.e. a silent refusal, on the two administrative proceedings together.

We alternatively appeal the above mentioned judgement of the Veliko Turnovo Regional Court as wrong due to violations of the substantive law, material breach of procedural rules, and lack of justification.

The first-instance court ruled its judgement in contravention of the procedural provisions of Art. 4 Citizen Procedural Code and the principles of fair and objective trial by ruling on a claim that had not been filed at all. In the course of the court proceedings, the appellant was given the opportunity to specify her request (see the minutes taken at the court session) and there was expressed the opinion that the subject-matter of the claim was the refusal by my client given in the letter from RHC to the editor-in-chief of Yantra Dnes newspaper, Veliko Turnovo, without any alternative defence position. It did not become clear on what grounds the court ruled on the lawfulness of a silent refusal, which was never brought to my client, violating his right to defence. Furthermore, the first-instance court assumed that there was no doubt as to the character of that letter as a form of correspondence. At the same time, the arguments of the respondent were totally based and developed on objections aimed at justifying the meaning of the letter by the RHC Director to the editor-in-chief of Yantra Dnes newspaper as an administrative act.

In violation of the provisions of Art. 188 CPC in conjunction with Art. 45 APA, our objections with regard to the nature of the requests were ignored and never commented on. The conclusions on the incompetence of the Director of RHC - Veliko Turnovo as the author of letter No. 5356 of 29 November 2002 and the officials who signed the minutes dated 25 November 2002 in their capacity of members of the commission working on the requests for access to information, which was appointed with Order No. 358 of 15 October 2002 by the Director of RHC - Veliko Turnovo issued in pursuance of Art. 5, para 5 of the Regulation on the Structure and Activities of Regional Healthcare Centres and Art. 28, para 2 APIA, were lacking in legal argumentation and given in the absence of a dispute between the parties.

While ignoring the will of the legislators expressed in Art. 25, paras 1 and 2, the conclusions of the commission specially designated for that purpose that the form of the requests was irregular were considered to be tantamount to and deemed as an opinion and reason for refusing access to the requested information rather than as a statutory obstacle to the start of any administrative procedure.

The refusal to grant our objection as to the excessive level of the legal fees paid by the requestor was not justified either.

For these reasons and pursuant to Art. 11 SACA in conjunction with Arts. 218g and 209 CPC, I request you to invalidate Judgement No. 299 of 20 June 2003 of the Veliko Turnovo Regional Court on Administrative Case No. 18/ 2003 as inadmissible and drop the court proceedings or, alternatively, to reverse it as wrong due to violations of the substantive law, material breach of procedural rules and lack of justification.

Pursuant to Art. 11 SACA in conjunction with Art. 64, paras 2 and 3 CPC, we request you to award the legal costs to our benefit.

Encl.: Copy of the appeal for the respondent

Yours truly,
T. Marekova, Attorney-at-law

JUDGEMENT

No. 793
Sofia, 30 January 2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at the court session held on the twenty-sixth day of January 2003 composed of:
PRESIDING JUDGE: ANDREY IKONOMOV
MEMBERS: MILKA PANCHEVA, VANYA ANCHEVA

in the presence of Annie Krustanova as the Secretary and with the participation of Public Prosecutor Makedonka Popovska, heard the report by the Presiding Judge ANDREY IKONOMOV
on Administrative Case No. 8302/2003.

The proceedings are conducted pursuant to Art. 33 et seq. of the Supreme Administrative Court Act (SACA) in conjunction with Art. 40, para 1 of the Access to Public Information Act (APIA). The case was brought on the basis of the cassation appeal by the attorney of the Director of the Regional Healthcare Centre (RHC) - Veliko Turnovo versus Judgement No. 299/20 June 2003 of the Veliko Turnovo Regional Court (VTRC) on Administrative Case No. 18/2003.

The cassation appeal was served within the prescribed time limits and it is procedurally admissible.

The VTRC issued the appealed judgement to reverse the refusal of the Director of RHC - Veliko Turnovo to make a decision on the request of Vanya Paunova Ilieva - Yordanova from the same city to get access to information given in requests Nos. 5356/15 November 2002 and 5367/21 November 2002 and to refer the file back to him to examine the requests, while observing the instructions given in the court judgement.
The RHC Director was dissatisfied with the judgement and appealed it. In his opinion, it is inadmissible due to the lack of legal interest in the appeal, the procedural legitimacy of the appellant Ilieva, and the lack of an attackable administrative act. The judgement is claimed to be wrong due to material breach of procedural rules and the substantive law, as well as lack of justification.

The respondent Vanya Ilieva through her attorney expressed the opinion that the cassation appeal was unjustified.

The Public Prosecutor, too, finds the cassation appeal to be unjustified.

The Supreme Administrative Court, in order to rule, has taken into account the following considerations:

There is no doubt that the respondent under the cassation appeal served two requests for access to public information, which were registered at RHC with Ref. Nos. 5356/15 November 2002 and 5367/21 November 2002. There Ilieva did not specify her postal address but her position as a reporter of Yantra Dnes newspaper, Veliko Turnovo. As is seen in the minutes of 25 November 2002 taken at the meeting of the commission designated by the RHC Director to examine requests under APIA pursuant to Art. 25, para 2 APIA, the requests were not given any examination. Attached to the file is a letter drawn up and signed by an unknown person to the editor-in-chief of Yantra Dnes newspaper, Veliko Turnovo, RHC Ref. No. 5356/29 November 2002, whereby comments were made on the behaviour of the applicant Ilieva and part of the requested information was enclosed.

Given these facts, the legal conclusions of VTRC are correct and lawful.

The admissibility of the appealed judgement:

The court drew the lawful conclusion that in the presence of the requests for access to public information there was silent refusal to provide it. The fact that Ilieva failed to specify an address in the sense of a city, street and number to contact her does not lead to the conclusion that such contact was impossible. The meaning of the provisions of Art. 25, para 2 APIA is to drop requests under which no contact can be established between the applicant and the authority in connection with the request. It is obvious in this particular case that the specified place of work of Ilieva is also the address for correspondence with her. It is sufficient and the place of work is a possible way of establishing the contact envisaged in the law.

Wrong and legally unjustifiable is the opinion that there is lack of any administrative procedure started in this case. First and foremost, in the context of the above considerations, the obstacle to the examination of the requests mentioned in the minutes of 25 November did not exist and the authority

or the persons designated by it had the obligation to make a decision on the requests. The failure to do so within the prescribed time limits was correctly assumed by VTRC to be silent refusal within the meaning of Art. 14 APA. Legally unjustifiable is also the interpretation of the cassation appellant given in the course of the proceedings at VTRC and in the cassation appeal with regard to the identification of the duly constituted party requesting public information and hence capable of serving an appeal versus the act rules in that connection. It is obvious in this case that Ilieva requested the information in her capacity of a natural person specifying her place of work rather than as a representative of the employer as a legal entity or its owner/s/.

In the course of the hearings, this court did not find any material breach of procedural rules on part of VTRC. If the refusal of the administrative authority was given due to the reasons laid down in Art. 37, para 1 APIA or other reasons relevant to the case, they had to be outlined in the refusal itself rather than in the court room. The court cannot hear and rule on the justification of reasons that do not exist in the appealed act. The argument related to the specification of the subject-matter of the appeal is unjustified either. It was explicitly stated in the initial appeal of Ilieva to VTRC: „The information available with the respondent and requested on my part in both requests was not provided to me within the time limits under Art. 28, para 1 APIA". This statement is sufficient to specify the subject-matter of the appeal and the court proceedings.

The argument on the unlawfulness of the VTRC conclusion on the lack of competence of the officials who signed the minutes of 25 November is justified. The conclusion does not conform to the provisions of Art. 28, para 2 APIA, enabling the administrative authority in possession of the requested public information to delegate its rights to other specially designated persons to make decisions on granting or refusing access to public information on the basis of requests for such access. Since those persons specially designated in Order No. 383/15 November 2002 of the RHC Director could do the greater thing, they could do also the smaller (i.e. to give no examination of the request in this particular case) but only under the terms and conditions laid down in the law. However, this does not affect the correctness of the appealed judgement as a whole.

For these reasons, the cassation appeal is unjustified.

The appealed judgement should remain in force, and therefore the Supreme Administrative Court, Fifth Division

HAS RULED:

LEAVES in force Judgement No. 299/20 June 2003 of the Veliko Turnovo Regional Court on Administrative Case No. 18/2003.

This judgement is final.

True to the original,

PRESIDING JUDGE: (signed) Andrey Ikonomov
MEMBERS: (signed) Milka Pancheva, (signed) Vanya Ancheva

CASE

Access to Information Programme

v.

Council of Ministers

TO
THE MINISTER OF THE PUBLIC ADMINISTRATION

REQUEST

by
Access to Information Programme Foundation

PURSUANT TO: the Access to Public Information Act

Dear Minister,

We kindly request you to provide us with a copy of the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30 of 1980 and repealed with Council of Ministers' Decree No. 22 of 1990 on the Approval of the List of Facts, Data and Items Constituting State Secret in the Republic of Bulgaria.

The information we hereby request is public within the meaning of Art. 2 of the Access to Public Information Act and it is not subject to any restriction on legal grounds. Therefore we are looking forward to getting access o it within the 14-day time limits prescribed by law.

Sofia
15 June 2002

Yours truly,
G. Jouleva, Executive Director

COUNCIL OF MINISTERS OF THE REPUBLIC OF BULGARIA
INFORMATION AND PUBLIC RELATIONS DEPARTMENT

15.07.2002

TO
MRS G. JOULEVA
EXECUTIVE DIRECTOR
ACCESS TO INFORMATION
PROGRAMME FOUNDATION

Request under the Access to Public Information Act
Ref. No. 03.07-15 of 2 July 2002

DEAR Mrs. Jouleva,

Further to your request under the Access to Public Information Act, we would like to inform you that the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30/1980) is designated as „Secret" and, for this reason, we are not in a position to make it available to you.

TSVETELINA UZUNOVA
DIRECTOR INFORMATION
AND PUBLIC RELATIONS DEPARTMENT

C/O THE DIRECTOR OF THE INFORMATION AND PUBLIC RELATIONS DEPARTMENT AT THE COUNCIL OF MINISTERS TO THE SUPREME ADMINISTRATIVE COURT

APPEAL

by
Access to Information Programme Foundation
represented by **Gergana Delova Jouleva**
Executive Director

VERSUS
Decision No. 03.07-15 on the refusal
by the Director of the Public Relations Department

PURSUANT TO
Art. 40, para 1 of the Access to Public Information Act in conjunction with Art. 5, para 1 of the Supreme Administrative Court Act

Honorable Supreme Justices,

On 1 July 2002, we served a request for access to public information to the Director of the Public Relations Department at the Council of Ministers. With it we requested a copy of the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30 of 1980. The Director of the Public Relations Department (PRD) refused to provide access to the public information requested by us with Decision No. 03.07-15/15 July 2002. The decision stated that the requested Rules were designated as „Secret" and, for that reason they were not in a position to provide us with it.
The refusal to provide access to information is unlawful. The substantive law and procedural rules have been violated in its issuance. The format prescribed by law has not been observed.

1. Pursuant to Art. 38 of the Access to Public Information Act (APIA), the authority is obligated to respond with a decision to public information requests. In this particular case, the answer of the PRD Director is not explicitly named „decision on refusal", although this is exactly its essence and it had to be reflected in the format. Furthermore, in violation of Art. 38 APIA there is no reference to the legal grounds for the refusal and the procedure for appealing versus it. The lack of these features is a material breach of the procedural law. The factual and legal grounds constitute the reasons for the decision, while of these elements and the more important one at that is totally missing in the appealed decision. This violation of the procedural rules is of material importance because its commitment by an administrative authority deprives citizens and legal entities, which are parties to the procedure of guarantees against judgmental decisions and administrative high-handedness. The guarantees are even smaller due to the other violation of procedural rules, i.e. the failure to specify the procedure for appealing versus the decision (time limit and competent authority). Hence the decision has been made by committing material breach of procedural rules and the requirement for a specific format.

2.1. The refusal has been issued in breach of the substantive law as well. The appealed decision states the factual grounds for the refusal - the respondent has noted the fact that the requested Rules are designated as „Secret". However, this finding does not cover the full extent of the obligation of the administrative authority because the latter has to check the existence of the prerequisites laid down in the law for restricting the right of access to information.
2.2. If she had done that, in our opinion, the PRD Director had to conclude, first and foremost that documents constituting a state secret would be designated as such. Besides, in order to check whether it is really a case of state secret and the right of access to information has to be restricted, it is necessary to assess the existence of the prerequisites laid down in Art. 25 of the Protection of Classified Information Act (PCIA). As is seen in the above mentioned provision, there prerequisites are three:

1. the information should be related to the interests of the national security, defence, foreign policy or the protection of the constitutional order;

2. the disclosure of the information would threaten to damage or damage these interests /the harm principle/;

3. the information should be included in the list under Appendix No. 1 PCIA.

As is seen in the wording of Art. 25, these prerequisites should be present on a cumulative basis in order to make a given information state secret. The prerequisite, which we shall stipulate to be „the harm principle" in accordance with international practices, is further developed also in Art. 34. In accordance with Art. 34, para 3, free access shall be provided to this information after the expiration of the time limits set out in para 1. As is seen in the appealed decision, the Rules we requested are designated as „Secret". Pursuant to § 9, para 1 of the Transitional and Final Provisions of the Protection of Classified Information Act, the materials and documents prepared prior to the entry into force of the Act and designated as „Secret" will be deemed to have been designated as „Confidential", and the time limits are calculated in accordance with Art. 34, para 1 as from the date of their creation. Pursuant to Art. 34, para 1, subpara 3 PCIA, the access to documents designated as „Confidential" may be refused within five years of their creation. That time limit expired in 1985. Hence the refusal of the PRD Director is unlawful.

It should be pointed out in addition that the requested information is contained in rules which, according to the Legal Instruments Act, is a statutory act, representing official information within the meaning of Art. 10 APIA. The very classification of a statutory act is, *inter alia*, unconstitutional. Moreover, there is great public interest in learning about the rules developed in historical times in order to protect what was secret information in those times in fight against the ideological enemy.

With a view to the above mentioned considerations, I request you to reverse the appealed refusal as unlawful and obligate the respondent to provide access to the requested information.

Encl: 1. Request for Access to Information.
2. Copy of the appeal enclosed for the respondent.

Yours truly,

G. Jouleva, Executive Director

RULING
on the Course of Proceedings

Sofia, 27 March 2003

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at a session held in camera on the twenty-sixth day of March 2003 composed of:

PRESIDING JUDGE: EKATERINA GRUNCHAROVA
MEMBERS: MILKA PANCHEVA, DIANA DOBREVA

in the presence of a Secretary and with the participation of the Public Prosecutor, heard the report by the Presiding Judge EKATERINA GRUNCHAROVA
on Administrative Case No. 9898/2002.

The case was brought on the basis of the appeal of the Access to Information Programme Foundation versus decision No. 0307-15 on the refusal by the Director of the Public Relations Department at the Council of Ministers of the Republic of Bulgaria to provide access to public information under request Ref. No. 0307-15/2 July 2002. The reasons for the refusal state that the requested information (Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30/1980) is designated as „Secret" (Art. 37, para 1, subpara 1 APIA).

Pursuant to Art. 41, para 3 APIA. where a refusal to provide public information under Art. 37, para 1, subpara 1 is appealed, the court may hold a meeting in camera to ask the relevant authority to produce the necessary evidence.

The Supreme Administrative Court finds that with a view to resolving the case correctly, it is necessary to ask the administrative authority to present the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria.

With a view to the above consideration, the court

HAS RULED:

REVERSES its ruling of 28 January 2003 to proceed with the case on its merit;
OBLIGATES the Director of the Information and Public Relations Department at the Council of Ministers of the Republic of Bulgaria to present the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30/ 1980 within seven days, while observing the rules for protecting secrets, which will be examined at a court session held in camera.
Having ruled in camera, the court will schedule a public session with new summoning of the litigants.
THIS RULING is not subject to appeal.

True to the original,

PRESIDING JUDGE: (signed) Ekaterina Gruncharova
MEMBERS: (signed) Milka Pancheva
(signed) Diana Dobreva

RULING
on the Course of Proceedings

Sofia, 11 April 2003

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at a session held in camera composed of:

PRESIDING JUDGE: ANDREY IKONOMOV
MEMBERS: JANETA PETROVA, DIANA DOBREVA
in the presence of a Secretary and with the participation of the Public Prosecutor, heard the report by Judge DIANA DOBREVA on Administrative Case No. 9898/2002.

The case was reported in connection with the certified copy of Council of Ministers' Decree No. 30 of 1980, six sheets, and Annex No. 2 thereof, the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria - 79 sheets sent by the Council of Ministers. Those had been demanded by the court with its ruling of 27 March 2003.

This court panel ascertained the existence of the marking „Strictly Secret" on Council of Ministers' Decree No. 30/1980 and the marking „Secret" on the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria. The court is of the opinion that these secret materials should be returned to the Council of Ministers, without attaching them to the case file or classifying the case.

Therefore, the court

HAS RULED:

TO RETURN to the Council of Ministers the sent copies of secret materials - Decree No. 30 of 1980, six sheets, and Annex No. 2 thereof, the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria - 79 sheets;
TO REPORT the case to the Presiding Judge of the Fifth Division of the Supreme Administrative Court with a view to scheduling it in a public court session.

PRESIDING JUDGE: (signed) Andrey Ikonomov
MEMBERS: (signed) Janeta Petrova, (signed) Diana Dobreva

JUDGEMENT

No. 10640
Sofia, 25 November 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Division, at the court session held on the twenty-second day of October 2003 composed of:
PRESIDING JUDGE: ANDREY IKONOMOV
MEMBERS: DIANA DOBREVA, JULIA KOVACHEVA
in the presence of Maria Popinska as the Secretary and with the participation of Public Prosecutor Elena Encheva, heard the report by Judge DIANA DOBREVA on Administrative Case No. 9898/2002.

The proceedings are conducted pursuant to Art. 12 et seq. of the Supreme Administrative Court Act 9SACA) in conjunction with Art. 40, para 1 of the Access to Public Information Act (APIA).

The case was brought on the basis of the appeal by the Access to Information Programme Foundation represented by Gergana Delova Jouleva versus letter No. 03.07-15 of 15 July 2002 signed by the Director of the Information and Public Relations Department at the Council of Ministers of the Republic of Bulgaria. The letter was sent to inform the appellant that the information requested in request Ref. No. 03.07-15 of 2 July 2002 served pursuant to APIA could not be provided because the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30/1980 were designated as "Secret".

It is maintained that the refusal of access to public information is unlawful. The substantive law and procedural rules have been violated in issuing it. The format prescribed by law has not been observed. The features required for the decision to refuse access under Art. 38 APIA are missing. With a view to these objections substantiated with specific arguments in the appeal, the reversal of the appeal refusal is requested and the court is requested to obligate the respondent to provide the information.

The Council of Ministers of the Republic of Bulgaria as the respondent attacks the appeal as unjustified.

The representative of the Supreme Administrative Public Prosecutor's Office gave a substantiated opinion to reject the appeal.

In connection with the dispute between the litigants as to which is the competent court, this panel of the Supreme Administrative Court, Fifth Division, finds the appeal to be procedurally admissible for examination by a three-member panel of this court as a first-instance court for the following reasons:

Access to public information has to be provided by the following entities producing or keeping such information:
- central or local government authorities and other public law entities;
- natural persons and legal entities with regard to their activities financed from the consolidated state budget;
- mass media in connection with the transparency of their activities.

Pursuant to Art. 40, para 1 APIA, the decisions on providing access to public information or refusing such access are subject to appeal before the regional courts or the Supreme Administrative Court, depending on the authority that has issued the act under APA or SACA respectively. Pursuant to para 2 of the above article, the same acts issued by the entities under Art. 3, para 2 APIA are subject to appeal before the regional courts in accordance with the provisions of APA.

The interpretation of these provisions in conjunction with Art. 28, para 2 APIA leads to the conclusion that where a government authority (a public law entity under Art. 3, para 1) has been approached with a request for access to public information, which it undoubtedly generates or keeps, the fact that a person from its administration has been expressly authorised to make the decision does not lead to „replacement" of the authority that has obligations under the said Act. In other words, in the case of authorization, where the actual issuer of the act and the authority (or its representative) are different persons, the competent jurisdiction does not change with regard to the appeal. The decisive fact as to whether it will be examined by the Supreme Administrative Court or the Sofia City Court is to see the authority obligated under the law (a collective or single-member government authority)

rather than the person authorised under Art. 28, para 2 APIA and the administrative unit he or she is the head of in the structure of the government authority. Art. 40, para 1 APIA in conjunction with Art. 36, para 1 APA and Art. 5, para 1 SACA should apply to the consideration of this specificity.

With a view to these considerations in connection with the subject-matter of the dispute and Order No. B-36/29 December 2000 by the Prime Minister of the Republic of Bulgaria presented in the case, the court finds that the case should be heard by the Supreme Administrative Court.

The appeal is justified in its substance.

The content of the appealed letter indicates that it has the features of a refusal to provide access to public information. Being an individual administrative act, it has to meet the requirements laid down in Art. 15, para 2 APA and contain certain features. The lack of any of them leads to its unlawfulness, where such a breach of the administrative procedural rules is material (Art. 12, subpara 3 SACA).

As well as the applicable Art. 15 APA, Art. 38 APIA as the special law requires the decision to refuse access to public information to include the legal and factual grounds for the refusal under APIA, the date of the decision, and the procedure for appealing against it. These statutory provisions are imperative and hence the breach is always of material importance.

In this case, there is no dispute as to the fact that the appealed refusal fails to contain any provision of the primary r secondary legislation, which it invokes. The reasons of the administrative act are the unity of the factual and legal grounds for its issuance, and their presence in the act enable the recipient to become aware of the will of the authority and seek remedy in court in case the latter believes that its rights and interests have been infringed upon. The reasons are of essential importance to the court, too, in order to rule correctly on the dispute. In this particular case, actually there are no reasons specified in the appealed letter. The court is not in a position to look for the arguments that have led to the appealed refusal to provide access to public information by way of interpretation of provisions of APIA and PCIA in order to „supplement“ the contents of the act. This should be done by the authority, which is the public law entity with obligations under APIA, namely the Council of Ministers of the Republic of Bulgaria through the Prime Minister or a person authorised under Art. 28, para 2 APIA.

With a view to the above, the court finds that the appealed decision coming from the Director of the Information and Public Relations Department at the Council of Ministers given in letter of refusal No. 03.07-15/15 July 2002 should be reversed as having been issued in violation of the administrative procedural rules - Art. 12, subpara 3 SACA in conjunction with Art. 38 APIA and Art. 15, para 2, subpara 3 APA. Pursuant to Art. 42, para 3 APA the file should be referred back to the authority for a new decision to be made with regard to the request of the Access to Information Programme Foundation, Sofia, while taking into account the instructions of the court.

Motivated by these reasons and pursuant to Art. 28 SACA, the Supreme Administrative Court, Fifth Division

HAS DECIDED:

REVERSES refusal No. 03.07-15 of 15 July 2002 by the Director of the Information and Public Relations Department at the Council of Ministers of the Republic of Bulgaria to provide access to public information to the Access to Information Programme Foundation, Sofia;

REFERS the file back to the Council of Ministers of the Republic of Bulgaria for a new decision to be made with regard to request Ref. No. 03.07-15 of 2 July 2002 under the Access to Public Information Act.

This judgement is subject to appeal with a cassation appeal before a five-member panel of the Supreme Administrative Court within 14 days of its notification to the parties.

True to the original,

PRESIDING JUDGE: (signed) Andrey Ikonomov
MEMBERS: (signed) Diana Dobreva
(signed) Julia Kovacheva

REPUBLIC OF BULGARIA
COUNCIL OF MINISTERS

C/o:
SAC, Fifth Division
Administrative Case No. 9898/ 2002

To:
SAC, Five-member panel

APPEAL

By:
The Council of Ministers

Administrative Case No. 9898/2002
SAC, Fifth Division

HONORABLE SUPREME JUSTICES,

We are not satisfied with the judgement ruled on Administrative Case No. 9898/2002 by the Supreme Administrative Court, Fifth Division on Administrative Case No. 9898/2002, reversing refusal No. 03-07-15/15 July 2002 by the Director of the Information and Public Relations Department at the Council of Ministers to provide access to public information to the Access to Information Programme Foundation, Sofia and referring the file back to the Council of Ministers for making a new decision under the Access to Public Information Act, and therefore we appeal versus it within the time limits prescribed by law.

We find the judgement of the first-instance court to be wrong within the meaning of Art. 218b, item (b) of the Citizens Procedural Code (CPC).

1. The Supreme Administrative Court, Fifth Division has ruled on an act that does not fall within the scope of Art. 5 of the Supreme Administrative Court Act. A letter has been signed by the Director of the Information and Public

Relations Department. It is perfectly clear that this is not an act of the Council of Ministers, the Prime Minister, a minister or a head of an institution subordinated directly to the Council of Ministers.

The court has ruled that material breach of administrative procedural rules has been committed in the preparation of the said letter. We find the judgement to be unlawful and ill grounded. Pursuant to Art. 7 of the Access to Public Information Act, no restrictions of the right of access to public information shall be allowed, unless it is classified information constituting a state secret or another secret in the cases prescribed by law.

In this case, it should be assumed that there is restriction of the access to public information because the special Protection of Classified Information Act is applicable.

Pursuant to § 9, para 1 of the Transitional and Final Provisions of the Protection of Classified Information Act, the materials and documents designated as „Top Secret of Special Importance", „Top Secret" and „Secret" prior to the effective date of the Act shall be deemed to have been designated at the following levels of classification: „Strictly Secret", „Secret", and „Confidential" accordingly.

Notwithstanding the provisions of § 9, para 2 of the Transitional and Final Provisions of the Act, we consider the requested material to be still designated with a level of security classification.

With a view to the above considerations, we kindly request you to reverse the judgement of the Supreme Administrative Court, Fifth Division on Administrative Case No. 9898/2002 on merit and to consider the Appeal unjustified with all the ensuing legal effects.

CHIEF LEGAL COUNSEL:

CASE

GREEN BALKANS Association

v.

Executive Director
of the Roads Executive Agency

To The Director
Road Executive Agency
The Minister of Regional
Development and Public Works

REQUEST
for Access to Information

Pursuant to Art. 41 of the Constitution of the Republic of Bulgaria
and the Access to Public Information Act
By **GREEN BALKANS Association**;
Represented by **Elena Yovanova Tsingarska**

Dear Sirs,

We would like to get acquainted with the information related to the design of Struma Highway. We are aware that a contract, financed by the PHARE programme for transborder cooperation, for the design of the Highway has been signed with the Italian company SPEA Ingegneria Europea.

More specifically, we insist on getting acquainted with the following documents:
1. The contracts signed between the Bulgarian authorities and SPEA Ingegneria Europea for the design of the Struma Highway;
2. All appendices, and annexes, to above contract;
3. The reports, studies and designs prepared in the course of the fulfillment of these contract by the Italian company;
4. The documents certifying the payments made under the contracts;
5. The Environmental Impact Assessment prepared under this contract.

If there exist some other documents related to these issued, we kindly ask you to provide them to us so that to get acquainted with them and receive copies thereof, if necessary.

The form of access we prefer is: copies of the documents. We are prepared to pay the costs for their copying.

If you fail to answer to our request within the time limits prescribed by law once again (previous requests to REA, your Ref. Nos. 53-00-1569/ 23.11.2000 and 94-00-83/24.01.2001), we shall seek remedy to defend our rights.

Date: 21 February 2001
Yours truly:

To The Director
Road Executive Agency
The Minister of Regional
Development and Public Works

REQUEST
for Access to Information

Pursuant to Art. 41 of the Constitution of the Republic of Bulgaria
and the Access to Public Information Act
By **GREEN BALKANS Association**;
Represented by **Elena Yovanova Tsingarska**

Dear Sirs,

We would like to get acquainted with the information related to the design of Struma Highway. We are aware of the fact that, prior to the signing of the contract with the Italian company SPEA Ingegneria Europea for the design works, design works had been carried out, routes had been adopted, and even EIA reports had been prepared. More specifically, we insist on getting acquainted with the following documents:

1. The contracts signed with design companies;
2. All appendices, annexes, terms of reference, and acceptance protocols to the said contracts;
3. The reports, studies and designs prepared in the course of the fulfillment of these contracts;
4. The documents certifying the payments made under the contracts.

If there exist some other documents related to these issued, we kindly ask you to provide them to us so that to get acquainted with them and receive copies thereof, if necessary.

The form of access we prefer is: copies of the documents. We are prepared to pay the costs for their copying.

If you fail to answer to our request within the time limits prescribed by law once again (previous requests to REA, your Ref. Nos. 53-00-1570/23 November 2000 and 94-00-83/24 January 2001), we shall seek remedy to defend our rights.

Date: 21 February 2001
Yours truly:

To The Director
Road Executive Agency
The Minister of Regional
Development and Public Works

REQUEST
for Access to Information

Pursuant to Art. 41 of the Constitution of the Republic of Bulgaria
and the Access to Public Information Act
By **GREEN BALKANS Association**;
Represented by **Elena Yovanova Tsingarska**

Dear Sirs,

We would like to get acquainted with the information related to the design of Struma Highway. We are aware of the fact that, prior to the signing of the contract with the Italian company SPEA Ingegneria Europea for the design works, design works had been carried out, routes had been adopted, and even EIA reports had been prepared. More specifically, we insist on getting acquainted with the following documents:

1. The contracts signed with companies or experts in the field of EIA for preparing the environmental impact assessment of the designs for the construction of Struma Highway;
2. All appendices, annexes, terms of reference, and acceptance protocols to the said contracts;
3. The documents certifying the payments made under the contracts;
4. The EIA reports prepared so far.

If there exist some other documents related to these issued, we kindly ask you to provide them to us so that to get acquainted with them and receive copies thereof, if necessary.

The form of access we prefer is: copies of the documents. We are prepared to pay the costs for their copying.

If you fail to answer to our request within the time limits prescribed by law once again (previous requests to REA, your Ref. Nos. 53-00-1570/23 November 2000 and 94-00-83/24 January 2001), we shall seek remedy to defend our rights.

Date: 21 February 2001
Yours truly:

C/o: THE EXECUTIVE DIRECTOR OF THE ROADS EXECUTIVE AGENCY

TO: SOFIA CITY COURT ADMINISTRATIVE DIVISION

APPEAL
By **GREEN BALKANS Association**
Represented by **Elena Yovanova Tsingarska**

VERSUS: the refusal by the Executive Director of the Roads Executive Agency to provide information

PURSUANT TO: Art. 40, para 1 of the Access to Public Information Act I conjunction with Art. 33 APA

Honorable City Justices,

Pursuant to Art. 38, para 1 of the Administrative Procedures Act (APA) in conjunction with Art. 40, para 1 of the Access to Public Information Act, this is to appeal before you the silent refusal by the Executive Director of the Roads Executive Agency to provide access to the public information I have requested.

A. FACTS
On 22 February 2001, I filed a request to the Director of the Roads Agency, pursuant to Art. 24, para 3 in conjunction with para 1 APIA, requesting details related to the contracts signed with design companies for the design of Struma Highway, the annexes thereof, the implementation reports, and the documents certifying the payments made under those contracts. I received no answer either within the 14-day time limits laid down in APIA or after its expiration.

B. CONTRADICTIONS OF THE REFUSAL WITH THE LAW
The failure of the Executive Director of the Roads Executive Agency to make a decision constitutes a material breach of the procedural and substantive law:
1. Contradictions with the procedural law - Art. 15 APA and Art. 38 APIA.

The law requires the relevant authority to make a substantiated decision in issuing the requested administrative act or refusing to issue it (Art. 15, para 1 APA). Obviously, there is no such decision in this particular case. The imperative provisions of Art. 15, para 2 APA require that the act or the refusal be given in writing. The refusal has to be given in writing also under the provisions of the special law - Art. 38 of the Access to Public Information Act, requiring that the legal and factual grounds for the refusal be pointed out therein. These legal requirements have not been observed at all, which is a material breach of procedural law.

The total absence of reasons for the refusal is an obstacle to the exercise of my right to defence because I do not know what to defend against.

2. Contradictions with the substantive law - Arts. 2 and 3 APUA.

The information requested by the Association is public information within the meaning of Art. 2, para 1 APIA because it relates to social life in the Republic of Bulgaria and, if provided to us, it would enable us to form our own opinion on the activities of the Executive Director of the Roads Executive Agency and the other authorities which have possibly been involved in legal action with regard to the contractual relations in the design of Struma Highway. The issue of the need for alternative designs for Struma Highway and the efforts and resources used by the competent authorities is of substantial importance for the right of people to healthy environment.

Further to these considerations, I kindly request the Honorable Court **TO REVERSE** the refusal by the Executive Director of the Roads Executive Agency to rule on our request for access to public information and decide the case on its merits, **TO RECOGNIZE** our right of access to the requested information, and **TO SENTENCE** the Executive Director of the Roads Executive Agency to provide us with access in the requested form.

Encl.:
1. Copy of Request No. ...
2. Receipt for the payment of the state fee.

Yours truly,

JUDGEMENT

Sofia, 28 January 2003

IN THE NAME OF THE PEOPLE

THE SOFIA CITY COURT, Administrative Division, Panel IIIb, at its public session held on the eleventh day of December 2002 composed of;

PRESIDING JUDGE: Ana Dimitrova
MEMBERS: Rumyana Monova and **Kalina Ilieva**

with Maya Ninova as a Secretary and in the presence of Public Prosecutor Draganova

Having examined the report presented by Junior Justice Kalina Ilieva in Administrative Case No. 382 of 2001 with the Sofia City Court,

Whereas:

The proceedings were pursued under Arts. 33 to 45 APA.

The case has been brought on the basis of appeals of Green Balkans Association versus „refusals" to provide information by the Executive Director of the Roads Executive Agency to three requests for access to information Ref. Nos. 53-00-325/22 February 2001, 53-00-326/22 February 2001, and 53-00-327/22 February 2001.

The appellant requests that the appealed refusals be reversed and access to the requested information be provided. He claims that the respondent has not ruled on the request for providing access to information about the contracts related to design companies for the design of Struma Highway, which is in contradiction to Art. 15 APA and Art. 38 APIA, requiring the administrative authority to rule with an act substantiated with reasons, and Art. 38 APIA requiring that the act be given in writing. There is a contradiction with Art. 2 APIA because of the claims that the requested information is public.

With its appeal served in the court on 29 November 2001, the appellant requested also the reversal of the decision Ref. No. 55-00-325-7/2 March 2001, refusing access to the information requested in request Ref. No. 53-00-325/22 February 2001. The decision is claimed to have been made in violation of Art. 4 APIA. The provisions of Art. 38 APIA have not been observed with regard to the requirement to state the factual and legal grounds for the refusal. The requested documents are not specified because the applicant is not aware of them. It is claimed that the grounds for the refusal stated in the appealed act (Art. 3, para 2, subpara 2 APIA) are not applicable to government authorities like the respondent.

There is no evidence as to the respondent having informed a third party and therefore there are no grounds to invoke Art. 31 APIA to refuse access to public information. But even if that were the case, the respondent had the obligation to provide information to the extent to which the rights of third parties would not be affected. The alleged possible violation of Art. 17, para 2 APIA is not supported with specific facts. There is no indication of provision of access to documents, such as the requested ones, in another way and, for this reason, it is claimed that they have to be made available in the same way.

The respondent, the Executive Director of the Roads Executive Agency, requests that the appeal be rejected. The request for access has not specified the information requested and the related documents.

The representative of the Sofia City Prosecutor's Office finds the appeal to be unjustified.

The appeals versus the silent refusal to requests Ref. Nos. 14 53-00-326/22 February 2001 and 53-00-326/22 February 2001 are admissible and they were served within the 14-day time limits for appeal as from the expiration of the 14-day time limits for making the decision under Art. 28, para 1 APIA with regard to the request for access to information that the appellant served on 22 February 2001. Insofar as the evidence in this case cannot establish the date of delivery of the third appealed act - the explicit refusal of the respondent to provide access to information and given the explicit statement of its legal defence that the refusal was not delivered, it should be assumed that the earliest date, on which the appellant became aware of the appealed act, was the date of depositing the appeal in court and, for this reason, it should be assumed to have been served within the prescribed time limits.

As to the grounds of the appeals, having examined the evidence and the arguments presented by the litigants, the court finds the following:

With its request of 21 February 2001, Ref. No. 53-00-325/22 February 2001 to the respondent, the appellant requested to get acquainted with the information concerning the design works of Struma Highway and, more specifically, to get access to:

1. The contract signed between SPEA Ingegneria Europea and the relevant Bulgarian institution for the design of Struma Highway;
2. All appendices and annexes to the said contract;
3. The reports, studies and designs prepared by SPEA so far in the course of the fulfilment of the contract;
4. The documents certifying the payments made under the contract;
5. The EIA report prepared under the contract.

With its request of 21 February 2001, Ref. No. 53-00-326/22 February 2001 to the respondent, the appellant requested to get acquainted with the information concerning the design works of Struma Highway and, more specifically, to get access to:

1. The contracts signed with design companies for the design of the highway;
2. All appendices, annexes, terms of reference, and acceptance protocols to the said contracts;
3. The reports, studies and designs prepared in the course of the fulfilment of these contracts;
4. The documents certifying the payments made under the contracts.

With its request of 21 February 2001, Ref. No. 53-00-327/22 February 2001 to the respondent, the appellant requested to get acquainted with the following information:

1. The contracts signed with companies or experts in the field of EIA for preparing the environmental impact assessment of the designs for the construction of Struma Highway, an activity that had been performed before the contract between SPEA Ingegneria Europea, Italy and the relevant Bulgarian institution signed the contract for the design of the highway;
2. All appendices, annexes, terms of reference, and acceptance protocols to the said contracts;
3. The documents certifying the payments made under the contracts;
4. The EIA reports prepared so far.

Letter Ref. No. 53-00-323/28 February 2001 signed by the Project Director of the PHARE Programme financing the construction of the highway has been presented and it makes it clear that no consent was given to provide access to the requested information in connection with request for access to information Ref. No. 53-00-325/22 February 2001.

The Access to Public Information Act (Art. 37, para 1) gives an explicit list of the grounds, on which the authority obligated to provide access to the requested information might refuse to do so. Art. 37, para 1, subpara 2 provides for a refusal to be given, where the access to public information will affect the interests of a third party and there is no consent given by the third party in writing with the provision of access to the requested public information. As is seen in the above mentioned request, the appellant requested access concerning contracts signed with third parties, i.e. the Italian company SPEA Ingegneria Europea for a highway financed through the PHARE Programme.

With a view of the above, this court panel finds that no access should be provided to the information requested in items 1 to 4 set out in request Ref. No. 53-00-325/22 February 2001 insofar as there is no explicit consent given by a party whose interests might be affected by the requested information. Therefore the refusal by the respondent has been ruled in conformity with Art. 37, para 1, subpara 2 APIA and, for this reason, the appeal should be rejected in this part. As to the information requested in item 5, i.e. to provide access to the EIA report prepared on the basis of the contracts, this court panel finds that access should be provided insofar as the prerequisites under Art. 37, para 1 APIA are not applicable. Therefore this part of the appealed decision should be reversed.

As to requests Ref. Nos. 53-00-326/22 February 2001 and 53-00-327/22 February 2001, to which a silent refusal to provide access was given, this court panel finds that they should be reversed and the file should be referred to the administrative authority to apply the procedure under Art. 29 APIA, insofar as the respondent puts forward the consideration that it is not clear what exactly information is requested.

Pursuant to Art. 29 APIA, where it is not clear what exactly information is requested or where the request has been formulated too broadly, the requestor is advised thereof and is entitled to specify the object of the

requested public information. Failing to specify the object of the requested public information within 30 days, the request is left without consideration.

Where the requested information affects the interests of third parties (in this particular case, the requested information concerns contracts signed with third parties), the procedure under Art. 31 APIA should apply to obtain the consent from these third parties (having specified them beforehand).

Therefore the court finds that the appealed silent refusals should be reversed and the file should be referred to the administrative authority for the purposes of specifying the requested information and obtaining the consent of the third parties in case their interests are affected by the provision of access to this information.

For these reasons, the court

HAS DECIDED:

REJECTS the appeal by Green Balkans Association versus the Executive Director of the Roads Executive Agency versus its decision under file No. 55-00-325-7/2 March 2001 with regard to request Ref. No. 53-00-325/22 February in that part which contains a refusal to provide access to the information requested under items 1 to 4 of the request, i.e. to provide access to information about the contract signed with the Italian company SPEA Ingegneria Europea and the relevant Bulgarian institution; all appendices and annexes thereof; the reports, studies and designs prepared by SPEA so far in the course of the fulfilment of the contract, and the documents certifying the payments made under the contract;

REVERSES the decision under file No. 55-00-325-7/2 March 2001 with regard to request Ref. No. № 53-00-325/22 February 2001 in that part which contains a refusal to provide access to the requested information about the EIA reports prepared so far;

OBLIGATES the Roads Executive Agency to provide the requested EIA report prepared in connection with the design of Struma Highway;

REVERSES the silent refusal of the Roads Executive Agency to rule on the information requested in requests of Green Balkans Association Ref. Nos. 53-00-326/22 February 2001 and 53-00-327/22 February 2001;

REFERS the file back to the Roads Executive Agency for the purposes of applying the procedure under Arts. 29 and 31 APIA with regard to requests Ref. Nos. 53-00-326/22 February 2001 and 53-00-327/22 February 2001 and making decisions thereof.

THIS JUDGEMENT is subject to appeal before the Supreme Administrative Court within 14 days of the date of the notice on its ruling sent to the parties.

PRESIDING JUDGE: (signed) Ana Dimitrova

MEMBERS: (signed)Rumyana Monova, (signed) Kalina Ilieva

C/o SOFIA CITY COURT
ADMINISTRATIVE DIVISION
Panel IIIb

TO THE SUPREME
ADMINISTRATIVE COURT

CASSATION APPEAL
by
Alexander Emilov Kashumov
and **Kiril Dimitrov Terziiski**, Attorneys-at-law,
Attorneys of the Appellant
Green Balkans Association, Sofia

VERSUS
Judgement of 28 January 2003 SCC, AD, Panel IIIb
on Administrative Case No. 882/2001

PURSUANT TO
Art. 45 APA in conjunction with Art. 33 SACA

Honorable Supreme Justices,

I appeal versus the Judgement dated 28 January 2003 of the Sofia City Court, Administrative Division, Panel IIIb on Administrative Case No. 882/2001 versus the decision of the Roads Executive Agency (REA) under file No. 55-00-325-7/2 March 2001 with regard to request Ref. No. 53-00-325/22 February 2001 in that part which envisions items 1 to 4 of the request.

In items 1 to 4 of the request for access to public information, Green Balkans Association requested the following information from REA: the contract between REA and SPEA, Italy concerning the construction of Struma Highway; appendices and annexes; the reports, studies and designs prepared in that connection, as well as documents certifying the payments made. REA refused access to that information on grounds of Art. 37, para 1, subpara 2 of the Access to Public Information Act (APIA). SCC rejected the appeal

versus that part of the REA decision to refuse access as it assumed that there was no explicit consent of the person whose interests might be affected by the provision of access to the said information. That part of the SCC judgement is unlawful for the following reasons:

In its judgement, SCC failed to examine the issue whether the procedure for obtaining the consent of a third party concerned under Art. 31 APIA had been fulfilled lawfully or not. The only thing that SCC mentioned in the reasons for its judgement in that connection is that there is no explicit consent of the person whose interests might be affected by the provision of that information. However, in order to make such a conclusion, SCC had to examine the issue whether and how the procedure for obtaining the consent of a third party had been applied. Firstly, the consent had to be asked for specifically and clearly for each document kept at REA separately. Furthermore, there is no evidence in that case to certify that such consent was asked for within the prescribed time limits. It is not clear where the letter from SPEA presented in the courtroom came from, while the will of legal entities is to be worded in a manner strictly prescribed by law only by the persons duly authorised to represent them. Besides, the content of the letter is not specific and clear either and it does not reflect what exactly the notice from REA to SPEA read. Given this factual situation, the SCC conclusion that there was no explicit consent of the third party concerned is wrong.

Even if the procedure for obtaining the consent of the third party concerned had been applied lawfully, the subjective will of that party is not binding on the authority obligated under APIA. The law cannot be construed to enable any third party to defend any interests of its own, both lawful and unlawful, in its own arbitrary way. Conversely, Art. 31, para 1 APIA provides for the consent of a third party to be given, *if necessary*, where cannot be interpreted in any other way but as statutory necessity. Furthermore, Art. 31, para 4 APIA Art. 31, para 4 APIA in conformity with Art. 7, para 2 of the said Act reads that access to the requested information may be provided also in the case of absence of consent by the third party in the volume and manner that will not affect its rights (and not unlawful interests). Moreover, even in the case of explicit refusal by the third party to give its consent with providing access to information concerning it, the authority obligated under APIA may provide the requested information in the volume and manner that will not disclose the information about the third parties (*this is the meaning of Judgement No. 9822 of 18 December 2001 on Administrative Case No. 5736 of 2001, Fifth Division, Supreme Administrative Court*). The respondent has never undertaken any measures for providing such partial access at all.

Next, the fact that a company has received public procurement order in connection with a project of national importance and the order has been placed by the Bulgarian Government represented by the REA Executive Director and paid with resources from the EU PHARE Programme (public resources) cannot be conceived to represent a secret protected by law in any way. The manner, in which the respondent has fulfilled its statutory obligations under APIA (or rather it has failed to fulfill them), comes to testify whether the actual reasons for the refusal are aimed at protecting the rights of a third party or at hiding information for subjective reasons.

For these reasons, I request you to reverse the judgement of SCC, AD, Panel IIIb in its appealed part and decide the case on its merits, reversing entirely the refusal by the Director of the Roads Executive Agency as unlawful and obligating him to provide access to the requested information.

Yours truly,

1.
(Attorney)
2.
(Attorney)

MINISTRY OF REGIONAL DEVELOPMENT AND PUBLIC WORKS
ROADS EXECUTIVE AGENCY

C/o SOFIA CITY COURT

TO THE SUPREME ADMINISTRATIVE COURT

Budgetary institution exempted from the payment of state fees pursuant to Art. 63, para 4 CPC and CMD No. 30/76

APPEAL
by **THE ROADS EXECUTIVE AGENCY**,
Represented by **Engineer Pavel Vassilev Dikovski**,
Executive Director

AGANIST
Court Judgement of 28 January 2003 of the Sofia City Court, Administrative Division, Panel IIIb on Administrative Case No. 882/01

HONORABLE SUPREME JUSTICES,

This is to appeal versus the judgement rules on the above mentioned case within the time limits prescribed by law, i.e. appeal versus that part of the judgements which reverses the decision on file No. 55-00-325-7/2 March 2001 with regard to request Ref. No. 53-00-325/22 February 2001 in that part which refuses to provide access to the requested information about the EIA reports and which obligates the Roads Executive Agency to provide access to the requested EIA report prepared in connection with the design of Struma Highway.

The judgement, in its appealed part, is unlawful, wrong, and unjustified. It has been ruled in violation of the substantive law, which has brought about wrong application of substantive legal provisions.

The following circumstances are of material importance for the outcome of the case:
1./ are there any prerequisites for a refusal to provide the information requested in item 5 of request Ref. No. 53-00-325/22 February 2001; and

2./ is there any right of access to public information under the terms and conditions laid down in APIA and, in this connection, are the grounds for refusal to provide access to information under Art. 37, para 1 APIA applicable.

The court has assumed that the prerequisites under Art. 37, para 1 APIA do not exist with regard to the information requested in item 5 of the above mentioned request, which is the only reason for the judgement ruled in that manner. Thus the court has wrongly accepted that there exists the right of access to the requested information to be exercised under the terms and conditions laid down in APIA and has made the unjustified general conclusion that there existed no grounds for refusing access to the EIA report.

The Green Balkans Association is not a subject of the right of access to public information within the meaning of Art. 4, paras 1 and 3 APIA. Pursuant to Art. 4, paras 1 and 3 APIA, individual citizens and legal entities are entitled to access to public information under the terms and conditions laid down in the said Act, unless another law has introduced special arrangements for seeking, obtaining and disseminating such information. Pursuant to the requirements of Art. 23a, para 3 in conjunction with Art. 23a, para 1 of the Environmental Protection Act (EPA, promulgated in The State Gazette, No. 86 of 1991 repealed and adopted anew in The State Gazette, No. 91 of 2002, effective as of the date of serving and examining request Ref. No. 53-00-325/22 February 2001 and making decision No. 53-00-325/2 March 2001), the local government authorities, representatives of non-governmental organisations, the general public, and natural persons or legal entities concerned shall be informed by the competent authority through the mass media or in another appropriate manner not later than one month prior to the public discussion of the EIA report, in which they are entitled to take part. The said Act regulates the procedure for obtaining information in the course of the procedure for public discussion of EIA reports, which is described in detail in Art. 17 of Regulation No. 4 of 7 July 1998 on the Environmental Impact Assessment (promulgated in The State Gazette, No. 84 of 1998). Pursuant to Art. 17, para 3, subparas 3 and 4 of the said Regulation, the authority that has commissioned the EIA report shall provide a copy of the EIA documentation, including the EIA report, to the municipal administration, while the authorities specified in Art. 17, para 1 of the said Regulation determine the venue, date and hour of holding the public discussion, as well as the time and venue for public access to the EIA documentation, and announce them in the manner prescribed by EPA. We are faced with the exception to the rule under Art. 4, paras 1 and 3 APIA,

i.e. the provision of access to public information under APIA is excluded, where special arrangements exist for seeking, obtaining and disseminating the requested information, such as the arrangements laid down in the repealed Environmental Protection Act, as well as the related Regulation No. 4 of 7 July 1998.

With a view to the above considerations, the decision under file No. 53-00-325/2 March 2001 (wrongly identified in the court judgement under No. 55-00-325-7/2 March 2001) in its reversed part has been made lawfully on grounds of the exception to the rule under Art. 4, paras 1 and 3 APIA in conjunction with Art. 23a EPA and therefore the court judgement should be reversed in its appealed part, while the appeal versus the decision under file No. 53-00-325/2 March 2001, in the above mentioned part, should be rejected as unjustified.

With a view to these considerations, I kindly request you to reverse the judgement of 28 January 2003 of SCC, AC, Panel IIIb on Administrative Case No. 882/2001 in its part which reverses the decision under file No. 55-00-325-7/2 March 2001 with regard to request Ref. No. 53-00-325/22 February 2001 in that part, which refuses to provide the requested information about the EIA reports prepared so far and obligates the Roads Executive Agency to provide the requested EIA report prepared in connection with the design of Struma Highway, and to reject the appeal as unjustified in that part and adjudicate the legal fees to our benefit instead.

Pursuant to Art. 2 and Art. 4, para 4 of the Rules of the Roads Executive Agency (promulgated in The State Gazette, No. 63 of 2000 and effective as from 1 October 2000) in conjunction with Art. 2, para 2, subpara 5 of Council of Minister's Decree No. 267/23 November 2001 (promulgated in The State Gazette, No. 104 of 2001), the Agency is an administration to the Minister of Regional Development and Public Works, which is budget supported and a secondary budget spending unit and, for these reasons and pursuant to Art. 63, para 4 Citizens Procedural Code and Art. 4 Council of Ministers Decree No. 30/1976, it is exempted from payment of fees.

ENCL: copy of the appeal for the other party

EXECUTIVE DIRECTOR

JUDGEMENT

No.118
Sofia, 9 January 2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Division, at the court session held on the third day of November 2003 composed of:
PRESIDING JUDGE: MILKA PANCHEVA
MEMBERS: VANYA ANCHEVA, JULIA KOVACHEVA

with Annie Krustanova as the Secretary and the participation of Public Prosecutor Mary Naidenova heard the report of Justice JULIA KOVACHEVA on Administrative Case No. 5496 /2003.

The proceedings are conducted pursuant to Art. 33 of the Supreme Administrative Court Act.

The case was brought on the basis of the cassation appeals of the Green Balkans Association, Sofia and the Roads Executive Agency versus the judgment of 28 January 2003 of the Sofia City Court, Administrative Division, Panel IIIb on Administrative Case No. 882/2001.

The Green Balkans Association, Sofia, through its legal defence, appealed the judgement of 28 January 2003 of the Sofia City Court on Administrative Case No. 882/2001 in that part which rejected the appeal versus the refusal by the Executive Director of the Roads Executive Agency, Sofia, given in letter No. 55-00-325/2 March 2001 in reply to request No. 55-00-325/22 February 2001 served by the Association for access to information about the contract signed by the Roads Executive Agency with the Italian company SPEA Ingegneria Europea for the design of Struma Highway, all appendices and annexes thereto, the reports, studies and designs prepared by SPEA Ingegneria Europea, as well as the documents certifying the payments made under the contract. It put forward arguments on the wrongfulness of the court judgement due to violation of the substantive law as cassation grounds for reversal within the meaning of Art. 286b, para 1, item (c) Citizens Procedural Code and requested that the judgement be reversed in its appealed part and the dispute be resolved on its merits, reversing the appealed refusal and obligating the respondent to provide access to the requested information.

The Executive Director of the Roads Executive Agency, Sofia appealed versus the judgement of 28 January 2003 of the Sofia City Court on Administrative Case No. 882/2001 in that part which reversed the refusal given in letter No. 55-00-325/2 March 2001 in reply to request No. 55-00-325/22 February 2001 served by the Association for access to information about the EIA report prepared in connection with the design of Struma Highway. The cassation appeal contained complaints on the court ruling in the context of wrong application of substantive legal provisions in the appealed part and requested its reversal, while rejecting the appeal of the Green Balkans Association in that part.

The judgement of the Sofia City Court on Administrative Case No. 882/2001 in that part which reversed the silent refusal of the Roads Executive Agency to rule on the information requested by the Green Balkans Association with requests Ref. Nos. 53-00-326/22 February 2001 and 53-00-327/22 February 2001 and referred the files back for application of the procedure under Arts. 29 and 31 APIA to the said requests and is enforceable.

The Public Prosecutor from the Supreme Administrative Prosecutor's Office gave a conclusion with reasons that the cassation appeals were unjustified.

The Supreme Administrative Court, a panel of its Fifth Division, found that the cassation appeals were admissible as filed within the time limits prescribed under Art. 33 SACA and served by duly authorised parties. Having examined them on merit, with a view to the cassation arguments put forward, the court accepted the following:

The court established the following facts in the case:

With a request Ref. No. 53-00-325/22 February 2001, the Green Balkans Association requested the Roads Executive Agency, Sofia to provide information related to the design of Struma Highway and the existing documents in that connection as follows: (1) the contract with the Italian company SPEA Ingegneria Europea; (2) the appendices and annexes to the contract; (3) the reports, studies and designs prepared in the course of the implementation of the contract; (4) the documents certifying the payments made under the contract; and (5) the EIA report prepared under the contract.

In accordance with letter Ref. No. 53-00-325/28 February 2001 presented in the courtroom and signed by the Project Director, the information

requested by the Association with the above mentioned request under Art. 24 APIA with regard to the feasibility studies and design of Struma Highway concerned the contractual relations of the Italian company and therefore the letter expressed disagreement with the provision of the said documents to third parties.

The Executive Director of the Roads Executive Agency sent letter No. 53-00-325/2 March 2001 to the Green Balkans Association, refusing to provide access to the information described in the above mentioned request of the Association, and put forward the arguments that it concerned the interests of a third party that had not given its consent with the provision of access to it, i.e. it invoked Art. 37, para 1, subpara 2 APIA, whereas with regard to the EIA report, the letter stated that the Environmental Protection Act introduced special arrangements and therefore the provisions of Art. 4, para 1 APIA were applicable and, for that reason, the access to the requested information was refused.

Given those facts, the Sofia City Court ruled with the appealed judgement that the refusal of the Roads Executive Agency to provide access to the information requested in request Ref. No. 53-00-325/22 February 2001 to the Green Balkans Association was lawful because that information concerned a third party that had not given its consent with providing access to it. The lack of consent constitutes grounds for refusal in accordance with the provisions of Art. 37, para 1, subpara 2 APIA. With regard to the EIA report, the court out forward its considerations that, insofar as the prerequisites under Art. 37, para 1 APIA were not applicable in order to refuse access, the refusal was unlawful and reversed it, giving instructions to provide access to the information requested by the Association.

With regard to the cassation appeal of the Green Balkans Association:

The social relations concerning the right of access to public information are regulated in the Access to Public Information Act (promulgated in The State Gazette, No. 55 of 2000). Public information, within the meaning of the said Act, is any information related to social life in the Republic of Bulgaria and giving the opportunity for citizens to form their own opinion on the activities of the authorities that have obligations under the Act (Art. 2, para 1 APIA). The authorities with the obligation to provide information under APIA are enumerated in Art. 3, paras 1 and 2 of the said Act. In accordance with the definition under Art. 54 of the Public Administration Act, the executive

agency is an administration to the relevant minister for providing administrative services to individuals and legal entities, as well as for performing activities and services related to the implementation of the activities of government authorities and the public administration, which is established by the primary legislation or a decree of the Council of Ministers. The executive agency is a legal entity supported by the budget and own revenues. As is seen in the legal definition, the Roads Executive Agency is, undoubtedly, a government body within the executive power system and hence it is an authority with obligations within the meaning of Art. 3, para 1 APIA.

The authorities under Art. 3, para 1 APIA have the obligation to provide information, which has been created within the purview of their competence and is available. The public information that meets the former requirement is divided into two types - official and administrative. The provisions of Art. 10 APIA read that official information is contained in the acts of the central and local government authorities in the discharge of their powers. The legal acts of government authorities, containing official information by definition, are legislative, general and individual. The access to the former is ensured through their promulgation in The State Gazette. The access to the rest is ensured under APIA, unless another manner is provided for explicitly. Hence the requested information in this case does not possess the features of official public information because it is not an act belonging to the category of those mentioned above but it relates to a contract outlining the contractual relations between the Roads Executive Agency and the Italian company.

Pursuant to Art. 11 APIA, administrative information is the one collected, created and stored in connection with the official information or in relations to the activities of the authorities and their administration.

According to the content of the request under Art. 25 APIA, the information requested by the Association refers to the contract signed with the Italian company for feasibility studies and design works for the implementation of the E-79 Sofia - Kulata project, part of which is the construction of Struma Highway as indicated in letter No. 53-00-468/10 May 2000 and therefore it should be defined ad administrative information created in connection with the activities of the Roads Executive Agency. Generally, the access to administrative public information is free, except for the cases explicitly mentioned in Art. 13, para 2 APIA, which provides for possible restriction of the access to such information, where the latter relates to the operational drafting of acts and has no importance or relevance of its own and also

where it contains opinions and positions in connection with existing or future negotiations conducted by the authority or on its behalf, as well as the related data. Further restrictions on providing access to public information are given also in Art. 17 and Art. 31, para 4 APIA, where the requested information constitutes a commercial secret or concerns a third party. The requested information concerns the business relations between the Roads Executive Agency and the Italian company. In this case, the parties are on equal footing and the information concerns the contractual rights and obligations, including the agreed prices, specific terms and conditions, timetables, and the related consequences. Therefore REA was right to ask its counterpart to give its consent with the provision of access to that information. Having received its refusal to give its consent, the Executive Agency refused to fulfill the request of the Association under Art. 25 APIA and provide access to the requested information in accordance with the existing law. The provisions of Art. 37, para 1, subpara 2 APIA state explicitly that there exist grounds for refusing access to public information, where the access affects the interests of a third party and there is no explicit consent given in writing by the third party with the provision of access to the requested public information. In this particular case, it was decided correctly that the affecting of the interests of the third party, which was a counterpart under the contract, was connected to the business relations between the parties to the contract, and its right to refuse to give its consent was justified by the fact that the content represented a commercial secret and its disclosure would create conditions for unfair competition. The definition of the term „unfair competition" under Art. 30, para 1 Protection of Fair Competition Act assumes that activities of the above mentioned type harm or may harm the interests of competitors in their interrelations or their relations with third parties. Therefore the cassation appeal is unjustified in its arguments that the disclosure would not result in unfair competition.

The cassation appeal is unjustified in its arguments that the refusal to provide access to the documents created in connection with the contractual relations between REA and the Italian company would prevent the opportunity for exercising public control over the fulfillment of the ensuing commitments for the company. The fulfillment of the commitments of the parties to the contract envisaged in the request under Art. 24 APIA is subject to inspection in the manner prescribed by law on part of the competent authorities, whereby the existence or absence of information on breach of law in the transaction is beyond the subject-matter of this administrative case. The financial operations of REA are subject to control by the authorised government bodies in the manner explicitly prescribed by law. The social

relations concerning the financial operations of government institutions are regulated in the Public Internal Financial Control Act, whose objective is to assess the lawfulness and the observance of the principles of efficiency, effectiveness and economy in the performance of financial operations by the authorities under Art. 4 PIFCA. The public internal financial control covers also the activities of persons financed from the central or local government budgets, as well as EU programmes, with regard to these resources. In the context of this legislation, the exercise of control over the spending of resources used to finance the construction of the said project should and can be ensured by the competent government authorities in the manner prescribed by law. Access to public information is aimed at enabling citizens to obtain information about the activities of the government authority but its beyond that purpose and scope to use it for finding out whether there are data of possible non-performance of contractual obligation (in the various forms envisaged in the law of contracts).

In the light of these considerations, the Sofia City Court was right in rejecting the appeal of the Green Balkans Association versus the refusal of the Executive Director of the Roads Executive Agency, Sofia under request No. 55-00-325/22 February 2001 served by the Association for access to information about the contract signed by REA with the Italian company SPEA Ingegneria Europea for the design of Struma Highway and the other related documents.

With regard to the cassation appeal of the Roads Executive Agency:

The cassation appeal gives detailed arguments that, insofar as there exist special arrangements for seeking, obtaining and disseminating the requested public information contained in the EIA report, the court ruled in violation of the provisions of Art. 4, para 1 APIA, reversing the refusal of the Executive Director given in letter No. 55-00-325/2 March 2001 in reply to request No. 55-00-325/22 February 2001 served by the Association for access to information and obligating him to provide access to the EIA reports.

The provisions of Art. 4, para 1 APIA read that the right of access to public information is exercised under the terms and conditions laid down in the said Act, unless another law provides special arrangements for seeking, obtaining and disseminating such information.

At the time when the appeal refusal was given, the procedure for making decisions on the environmental impact assessment of projects was regulated in the Environmental Protection Act (repealed) and Regulation No. 4 of 7 July 1998 on the Environmental Impact Assessment (repealed). The competent

authorities had the obligation to organise public discussion of the environmental impact assessment report with the participation of local government authorities, representatives of non-governmental organisations, the general public, and the natural persons and legal entities concerned. Art. 22, para 3 EPA (repealed) read that the persons under para 1 had to be informed by the competent authority through the mass media or in another appropriate manner not later than one month prior to the public discussion. *Ad argumentum* Art. 23a, para 2 EPA (repealed), no public discussion was required after the re-wording of the preliminary report and the preparation of the final EIA report. Pursuant to Art. 23b EPA (repealed), the competent authority had to make a decision after the discussion of the results of the assessment not later than one month after the completion of the procedure under Art. 23a. The decision was to be communicated in writing to the authorities that had commissioned the assessment under Art. 21 and published in the mass media or in another appropriate manner within seven days of its adoption. The parties concerned could appeal the decision before the respective regional court under the Administrative Procedures Act within 14 days of the notice under para 2. The decision on the environmental impact assessment of projects and activities that had not been started yet was valid for one year.

All this leads to the conclusion that the information concerning the environmental impact assessment of the project for the construction of Struma Highway can be obtained from the competent authorities in accordance with the special arrangements laid down in EPA (repealed). The cassation appeal puts forward the unjustified arguments that the procedure provided for the obligation of the administrative authority to disclose the EIA information but not for any terms and conditions for obtaining it upon request. Since the law explicitly envisages the opportunity for representatives of non-governmental organisations, the general public, and individuals and legal entities concerned to participate in the discussion of the preliminary EIA report and the subsequent opportunity for them to exercise their legitimate rights and interests, where they consider them to be affected by the decision of the administrative authority in connection with the environmental impact assessment, seeking legal remedy in court, their right to be informed is guaranteed and it ensues from the statutory obligation of the competent authority to provide information in the course of the procedure prescribed by law.

Undoubtedly, the requested information is public information of great importance, the access to which is regulated in the special law, i.e. EPA

(repealed). Therefore the appellant is justified to claim that the provisions of Art. 4, para 1, second sentence APIA should apply. The court was wrong in ruling that the refusal of the Roads Executive Agency to provide the EIA report to the Association under APIA was unlawful and in reversing it. This is a case of exception to the general rule under Art. 4, para 1 APIA, pursuant to which the provisions of the said Act do not apply, where another law provides for special arrangements for access to that information.

The appealed judgment should be reversed in that part and superceded by another, rejecting the appeal of the Green Balkans Association versus the refusal of the Executive Director of the Roads Executive Agency, Sofia given in letter No. 55-00-325/2 March 2001 in reply to request No. 55-00-325/ 22 February 2001 served by the Association for access to the EIA report prepared in connection with the contract signed between REA and the Italian company SPEA Ingegneria Europea.

Guided by the above considerations, the Supreme Administrative Court in its panel of the Fifth Division

HAS DECIDED:

REVERSES the judgement of 28 January 2003 of the Sofia City Court on Administrative Case No. 882/2001 in that part which has reversed the refusal of the Executive Director of the Roads Executive Agency, Sofia given in letter No. 55-00-325/2 March 2001 in reply to request No. 55-00-325/22 February 2001 served by the Green Balkans Association for access to the EIA reports and rules instead that it:

REJECTS the appeal of the Green Balkans Association versus the refusal of the Executive Director of the Roads Executive Agency, Sofia given in letter No. 55-00-325/2 March 2001 in reply to request No. 55-00-325/22 February 2001 served by the Association for access to the EIA report prepared in connection with the contract signed between REA and the Italian company SPEA Ingegneria Europea.

LEAVES IN FORCE the judgement of 28 January 2003 of the Sofia City Court on Administrative Case No. 882/2001 in that part, which rejects the appeal versus the refusal of the Executive Director of the Roads Executive Agency, Sofia given in letter No. 55-00-325/2 March 2001 in reply to request No. 55-00-325/22 February 2001 served by the Association for access to

information about the contract signed between REA and the Italian company SPEA Ingegneria Europea for the design of Struma Highway, all appendices and annexes thereto, the reports, studies and designs prepared by SPEA Ingegneria Europea, as well as the documents certifying the payments made under the contract.

The rest of the judgment is enforceable.

This judgment is not subject to appeal.

True to the original,
Secretary:

PRESIDING JUDGE: (signed) Milka Pancheva

MEMBERS: (signed) Vanya Ancheva
(signed) Julia Kovacheva

CASE

Association of General Practitioners
Veliko Turnovo

v.

National Health Insurance Fund

Association of General Practitioners
Veliko Turnovo

Ref. No. № 18/19 November 2001

To
The Director of the Regional
Health Insurance Fund
Veliko Turnovo

APPLICATION

by
The Association of General Practitioners
Principal office of business and address:
Veliko Turnovo

Mme Director,

This is to request you pursuant to Art. 24 APIA to provide the Association with the following information:

- Copy of Order No. RD-09-218 of 6 April 2001 of the Director of the National health Insurance Fund.

The preferred form of providing the information is on paper carrier.

Tuesday, 4 December 2001
Veliko Turnovo

Chairman of the Managing Board:
Dr. Georgi Bankov

REGIONAL HEALTH INSURANCE FUND - VELIKO TURNOVO

Ref. No. № 35-04-780/30 November 2001

To
Dr. Georgi Bankov
Chairman of the Managing Board
Association of General
Practitioners
Veliko Turnovo

To your Ref. Nos. 10/19 November 2001, 11/19 November 2001, 12/19 November 2001, 13/19 November 2001, 14/19 November 2001, 15/19 November 2001, 16/19 November 2001, 17/19 November 2001, 18/19 November 2001 and 19/23 November 2001

Dear Dr. Bankov,

This is to inform you that the applications for access to public information you have signed in your capacity of Chairman of the Managing Board of the Association of General Practitioners have been referred for reply to the National Health Insurance Fund - Sofia.

Director
RHIF:

NATIONAL HEALTH INSURANCE FUND

TO
DR. GEORGI BANKOV
CHAIRMAN OF THE MANAGING BOARD
ASSOCIATION OF GENERAL PRACTITIONERS
Veliko Turnovo

DEAR DR. BANKOV,

Pursuant to Art. 37, para 1, subpara 1 of the Access to Public Information Act and further to your request Ref. No. 18/19 November 2001, I refuse to provide Order No. RD 09-218/April 2001 of the NHIF Director due to the fact that this document constitutes an official secret.

The refusal to provide information is subject to appeal under Art. 40, para 2 APIA.

ACTING DIRECTOR OF NHIF:
ASS. PROF. DR. N. VASSILEV

TO
THE SOFIA CITY COURT
ADMINISTRATIVE COLLEGE
DIVISION III-A

WRITTEN DEFENCE

by **Janeta Dimitrova Dimova**, Legal Counsel
of **the Association of General Practitioners**
Veliko Turnovo
and
Alexander Kashumov, Attorney-at-law

Administrative Case No. 515/2002

Honorable Justices,

On the basis of the evidence collected in the case and the law, I request you to rule a judgement reversing both the silent refusal of the Director of the National Health Insurance Fund (NHIF) to make a decision on application No. 18/19 November 2001 of the Association of General Practitioners and, pursuant to Art. 14, para 2 Administrative Procedures Act (APA), the subsequent refusal given in writing in letter Ref. No. 90-00-9/27 December 2001. We would like to put forward the following arguments to support the appeal:

1. The requested information included in Order No. RD-09-218/6 April 2001 of the NHIF Director is public within the meaning of Art. 10 of the Access to Public Information Act (APIA). In accordance with these provisions, the acts of government authorities represent official public information. The same should be assumed to apply also to the acts of legal entities like NHIF since they have been issued as prescribed by law and give the will of an authorised legal entity. Furthermore, pursuant to Art. 2, para 1 APIA, this information could enable us to form an opinion on the activities of NHIF. As far as our information goes, the above mentioned order contains instructions and methodology for reporting health priority programmes, under which

medical doctors who have received advance payments must submit semi-annual reports and refund that portion of the down-payment which is in excess, depending on the amount of work done. We have received this information from the same sources, which has advised us of the number of the said Order.

2. The activities of the National Health Insurance Fund are regulated by law and implemented on the basis of its powers as laid down in the Health Insurance Act. In its essence, NHIF is a public fund involved in the spending of public resources to the benefit of the public (public healthcare), which activity is both a right and an obligation of NHIF as prescribed by law. Therefore NHIF is a public law entity within the meaning of Art. 3, para 2, subpara 1 APIA and hence it has the obligation to provide access to public information, where the latter is duly requested.

3. In letter Ref. No. 90-00-9/27 December 2001 the defendant claims that the information specified in the application represents an official secret, invoking Art. 37, para 1, subpara 1 of the Access to Public Information Act (APIA). This letter is a decision to refuse access to information by its nature within the meaning of Art. 38 APIA. Being such a decision, however, it does not meet the statutory requirements, i.e. the form of the decision laid down in the law has not been observed, the time limit for sending the answer has been exceeded, the procedural law has been violated by the failure to specify the factual grounds for the refusal, and the substantive law has also been violated by the failure to specify the legal grounds for the refusal.

4. Art. 37, para 1, subpara 1 APIA provides for three different grounds to refuse access to information: (i) where it is a state secret; (ii) where it is an official secret; and (iii) where the provisions of Art. 13, para 2 APIA apply. These provisions in fact refer to the specific legal grounds, i.e. to the legal provisions which describe a certain category of information as an official secret. However, no such reference has been indicated in the refusal by the Acting Director of NHIF. Without specifying it, the refusal is unlawful because, in such cases, there would be no obstacle to the respective authority or entity to subjectively define certain information as an official secret and thus to prevent the exercise of a fundamental constitutional right of citizens. Pursuant to Art. 7, para 1 APIA, access to information may be refused only where the information constitutes a secret protected by law. The interpretation of the Constitutional Court in its Judgement No. 7/1996 on Constitutional Case No. 1/1996 is in the same spirit - the right of each citizen

to be informed may be restricted only in cases prescribed by law, i.e. Acts of Parliament. But if the legal grounds for the refusal to provide access to information are not specified, it is impossible to understand even whether the alleged official secret is prescribed by law or, in contravention of the Constitution, it is envisaged in the secondary legislation or an individual administrative act. In the latter cases, the refusal will surely be subject to reversal as unlawful. *Ad argumentum* of the stronger grounds, where it is impossible to establish whether the refusal is bases on the primary legislation, the secondary legislation, or an individual administrative act or no act at all, the refusal must be reversed in all cases as unlawful due to failure to observe the statutory requirements.

5. The Access to Public Information Act is the general law, guaranteeing the right of each citizens of access to information, which is generated or stored by the authorities or entities with obligations under the said Act. It is based on Art. 41 of the Constitution and provides for the specific procedure to exercise this right - at the initiative of the authorities or entities with obligations under APIA or at the initiative of those entitled to exercise this right - through an application for access to public information. We are not aware of the Health Insurance Act or any other law regulating the activities of NHIF to have provided for special arrangements concerning the applications for access to information, special time limits, special decision-making procedures, etc. Hence the applicable law is APIA.

For these reasons, we request you to reverse the silent refusal of the defendant and the subsequent explicit refusal pursuant to Art. 14, para 2 Administrative Procedures Act (APA), obligating it to provide the information we have requested, and to award the legal costs in the form of payment of the state fee, to our benefit.

Yours truly, 1.
2.

JUDGEMENT

Sofia, 17 September 2002

THE SOFIA CITY COURT, ADMINISTRATIVE COLLEGE, DIVISION III-A held its public court session on the twenty-first day of June 2002 composed of:

PRESIDING JUDGE: ATANAS MUSORLIEV
MEMBERS: DONKA GENCHEVA, MILEN VASSILEV

in the presence of Kapka Lozeva as the Secretary and with the participation of Public Prosecutor Zhelev, heard the report by Junior Judge M. Vassilev on Administrative Case No. 515/2002.

Whereas:

The proceedings are conducted pursuant to Arts. 33 through 45 APA in conjunction with Art. 40 APIA.

The case was brought on the basis of the appeal by the Association of General Practitioners versus the silent refusal of the Director of the National Health Insurance Fund (NHIF) to provide access to the following public information: copy of Order No. РД-09-218/6 April 2001 of the NHIF Director.

The appeal includes complaints of the unlawfulness of the appealed silent refusal. It is claimed that the failure of the defendant to make a timely decision on the application for access to the above mentioned public information is a material breach of the procedural and substantive law. It is maintained that the requirement for giving the refusal to provide access to information in writing under Art. 15, para 2 APIA and Art. 38 APIA has not been observed. A violation of the substantive law as laid down in Arts. 2 and 3 APIA is also claimed insofar as the requested information is public within the meaning of the law.

For these deficiencies of the appealed silent refusal, the claimant requests the court to reverse it and obligate the defendant to provide access to the requested information, as well as to award the legal costs to its benefit.

The defendant challenges the appeal as unjustified and pleads its rejection in its entirety since NHIF has been established under a special law regulating

the procedure for disseminating information. Besides, the Order requested by the claimant was produced in the court room and thus the claimant has actually received the information.

The Public Prosecutor from the Sofia City Public Prosecutor's Office finds the appeal to be unjustified.

Having examined the appealed individual administrative act in accordance with the provisions of Art. 41, para 3 APA and having assessed the evidence and the arguments of the litigants in accordance with Art. 188, para 1 Civil Procedure Code (CPC), the Sofia City Court finds the following facts to have been established:

The Association of General Practitioners served application Ref. No. 13/19 November 2001 to the Director of RHIF - Veliko Turnovo pursuant t Art. 24 of the Access to Public Information Act in order to receive the following information on paper carrier: copy of Order No. RD-09-218/6 April 2001 of the NHIF Director. There is no dispute as to the fact that the application was submitted and registered with RHIF - Veliko Turnovo with Ref. No. 90-00-75002/21 November 2001.

The Director of RHIF - Veliko Turnovo sent letter Ref. No. 35-04-780/30 November 2001 to inform the applicant that the application for access to public information was referred to NHIF for answer.

There is no dispute between the litigants that the application was received at NHIF and the Director did not give an explicit answer.

Attached to the case is the requested Order No. RD-09-218/6 April 2001. As is seen from its content, it includes additional instructions on the application of the 2001 National Framework Agreement.

In the context of these facts, the court has reached the following legal conclusions:

The appeal was served within the prescribed time limits and it is admissible, while, examined on merit, it is justified.

The right to seek, obtain, and disseminate information is a basic human right. This right is enshrined in Art. 41, para 1 of the Constitution and it is

granted to any natural person or legal entity, protecting the right of both individuals and society as a whole to be informed. On the other hand, Art. 41, para 2 of the Constitution guarantees access of citizens to information from government authorities or institutions on issues of their legitimate interest.

According to the mandatory interpretation by the Constitutional Court given in Judgement No. 7 of 4 June 1996 (promulgated in The State Gazette, No. 55 of 1996), the right to seek and obtain information under Art. 41, para 1 of the Constitution includes the obligation of government authorities to provide access to information of public importance, the content of that obligation being subject to definition in the existing legislation. Such piece of legislation is the Access to Public Information Act (promulgated in The State Gazette, No. 55 of 2000).

Pursuant to Art. 4 APIA, each citizen of the Republic of Bulgaria, foreign national and legal entity is entitled to access to public information under the terms and conditions laid down in APIA, unless another law provides special arrangements for seeking, obtaining, and disseminating such information.

In this particular case, the claimant served the defendant an application under Art. 24 for obtaining a copy of Order No. RD-09-218/6 April 2001 of the NHIF Director. There is no dispute between the litigants that the defendant, the NHIF Director, did not reply to that application within the 14-days time limit under Art. 32, para 2 in conjunction with Art. 28 APIA and, therefore, there is silent refusal to provide access to information within the meaning of Art. 14, para 1 Administrative Procedures Act (APA).

It is disputed in this case whether APIA is applicable to it, insofar as the activities of NHIF and its bodies are regulated in a special law Health Insurance Act (HIA), whether the requested information is public, whether the defendant has obligations under APIA, and whether legal grounds for the refusal exist.

This court finds that both the NHIF Director and NHIF as an institution fall within the purview of APIA as entities obligated to provide access to public information. In accordance with Art. 3, para 1 APIA regulates the access to the public information generated or stored by central or local government authorities in the Republic of Bulgaria. Insofar as it performs certain powers with regard to the carrying out of the mandatory health insurance (Arts. 20 and 28 and Art. 105, para 2 HIA; Art. 6 of the NHIF Rules, etc.), the NHIF Director is undoubtedly not only a representative body of NHIF as a legal

entity but also and entity that has obligations under Art. 3, para 1 APIA. On the other hand, pursuant to Art. 3, para 2, subpara 1, APIA applies also to the access to the public information generated or stored by public law entities other than those under para 1, such as NHIF as an institution - Art. 6 HIA.

It is unjustified on part of the defendant to claim that APIA is inapplicable to this case, insofar as NHIF has been established under a special law, providing special arrangements for the access to information. It is true that Health Insurance Act (HIA) regulates some cases of access to information - See Arts. 63 through 69 HIA but they cover only to the relationships between NHIF, insured persons, insurers, and healthcare providers, while the claimant does not belong to any of these categories.

Public information within the meaning of APIA is any information related to social life in the Republic of Bulgaria, which enables persons to make an opinion of their own on the activities of the authorities or entities with obligations under the law, regardless of the material carrier of such information - Art. 2 APIA. Pursuant to Art. 2, para 3 APIA, the law does not apply to the access to personal information. The definition of personal information is given in § 1, subpara 2 of the Additional Provisions. In fact, any information related to the activities of the authorities or entities under Art. 3 APIA is public, unless it is personal. Therefore this court finds that the information requested by the claimant, i.e. Order No. RD-00-218/6 April 2001 of the NHIF Director is public within the meaning of Art. 2 APIA. The Order specifies some additional instructions on the application of the 2001 National Framework Agreement with regard to the payment of healthcare provides for their work. This information is public by nature because it relates to the NHIF activities for carrying out the mandatory health insurance. Art. 37 APIA specifies the grounds to refuse access to information as follows: (i) where the requested information constitutes a state or official secret; (ii) where the access affects the interests of a third party and the latter has not given its consent in writing; and (iii) where the requested information was made available to the applicant in the course of the preceding six months. None of these grounds is applicable to this case and the defendant makes no claims to this effect either.

In this context, the court finds that the administrative authority violated APIA by refusing silently to provide a copy of the requested Order because there existed all prerequisites for providing access to that information.

With a view to these facts, the silent refusal is unlawful and should be reverses as such, while the defendant should be obligated to provide access to the requested public information pursuant to Art. 41, para 1 APIA.

With this outcome of the dispute, the claimant should be awarded the legal costs for payment of the state fee in the amount of BGN 10 pursuant to Art. 64, para 1 CPC in conjunction with Art. 45 APA.

For these reasons, the Sofia City Court

HAS DECIDED:

REVERSES the silent refusal by the Director of the Health Insurance Fund to provide access to the following public information: copy of Order No. RD-09-218/6 April 2001 of the NHIF Director;

OBLIGATES the Director of the National Health Insurance Fund to provide the Association of General Practitioners, Veliko Turnovo, with access to the following public information: copy of Order No. RD-09-218/6 April 2001 of the NHIF Director;

SENTENCES the Director of the National Health Insurance Fund, Sofia, to pay the legal costs in the amount of BGN 10 to the Association of General Practitioners, Veliko Turnovo, 1, Arch. G. Kozarev St. pursuant to Art. 64, para 1 CPC.

This judgement is subject to appeal before the Supreme Administrative Court within 14 days of its notification.

PRESIDING JUDGE: (signed) ATANAS MUSORLIEV

MEMBERS: (signed) DONKA GENCHEVA
(signed) MILEN VASSILEV

**C/O THE SOFIA CITY COURT,
ADMINISTRATIVE DIVISION,
PANEL III-A**

**TO THE SUPREME
ADMINISTRATIVE COURT**

CASSATION APPEAL
by
THE NATIONAL HEALTH INSURANCE FUND
through its Attorney and Legal Counsel **Emilia Ivanova Toneva**

VERSUS:
THE JUDGEMENT OF THE SOFIA CITY COURT, DIVISION III-A
ON ADMINISTRATIVE CASE No. 515/2002

HONORABLE SUPREME JUSTICES,

This is to appeal entirely and within the prescribed time limits against the judgement of the Sofia City Court, Division III-A on Administrative Case No. 515/2002. We find this judgement to be in contravention to the substantive law and to have been rules in material breach of procedural rules, and therefore it should be reversed in its entirety.

The reasons for these conclusions are as follows:

I. MATERIAL PROCEDURAL BREACH

The court started the proceedings on the basis of the appeal by the Association of General Practitioners without checking the active legitimization of the appellant. There is no evidence in the case to prove whether such an association has been registered or not, who represents it, and, most generally, whether the person who submitted the appeal had the representative powers or the power of attorney to serve the appeal and to authorise the legal defence. Te court had to monitor the existence or lack of active procedural legitimization ex officio but it failed to fulfill that obligation. This breach is of

material importance and it provides sufficient grounds per se for the court judgement to be reversed and for the proceedings to be dropped.

II. CONTRADICTION WITH THE SUBSTANTIVE LAW

1. The access to public information is free under APIA, except for the cases, where the provision or dissemination of the requested information would bring about unfair competition or where the information represents a commercial secret (Art. 17, para 2). The Association requested access to information about an order, the attachments to which were instructions on the application of the 2001 National Framework Agreement with regard to the payment to healthcare providers for their work. The Association does not represent all healthcare providers and hence the access to that information provided to only some medical doctors would enable them to engage in unfair competition.
2. The court assumed that, although NHIF was a specific public law entity, it exercised some government functions and it was with regard to those functions that the court identified NHIF to a government authority. Pursuant to Art. 13, para 2 APIA, the access to public information may be restricted, where the information is only of operational importance to the authority. In this particular case, the issues covered in the above mentioned instructions refer only to the NHIF employees and have no importance of their own.

HONORABLE SUPREME JUSTICES, I request you to reverse the judgement of the Sofia City Court on Administrative Case No. 515/2002 for the reasons stated hereinabove and to award the legal costs, including the legal fees, to our benefit.

Encl.: Copy for the other party; Power of Attorney

Yours truly,

JUDGEMENT

No. 2203
Sofia, 11 March 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Division, at the court session held on the fourteenth day of January 2003 composed of:

PRESIDING JUDGE: EKATERINA GRUNCHAROVA
MEMBERS: MILKA PANCHEVA, DIANA DOBREVA

in the presence of Maria Popinska as the Secretary and with the participation of Public Prosecutor Penka Stefanova, heard the report by Presiding Judge EKATERINA GRUNCHAROVA
on Administrative Case No. 9504/2002.

The proceedings are conducted pursuant to Art. 33 et seq. of the Supreme Administrative Court Act (SACA).

The case was brought on the basis of the cassation appeal by the National Health Insurance Fund (NHIF) versus the judgement of 19 July 2002 of the Sofia City Court (SCC) on Administrative Case No. 515/2002, reversing the silent refusal by its Director to provide access to public information to the Association of General Practitioners, Veliko Turnovo and obligating the Director to provide the requested information.

No cassation grounds within the meaning of Art. 218b, item (c) Civil Procedure Code (CPC) in conjunction with Art. 11 SACA were specified. The complaints referred to „material procedural breach" and „contradiction with the substantive law". The essence of the complaints - SCC failed to establish the active legitimization of the appellant and violated the provisions of Art. 17, para 2 and Art. 13, para 2 APIA - leads to the conclusion that the cassation grounds within the meaning of Art. 218b, item (c) CPC in conjunction with Art. 11 SACA relate to material breach of procedural rules and violation of the substantive law.

The cassation appellant, while duly summoned, did not appear in the court room and did not state any opinion.

The defendant, the Association of General Practitioners („the Association"), Veliko Turnovo pleaded through its attorney that the SCC judgement be left in force. Its written defence was submitted.

The representative of the Supreme Administrative Public Prosecutor's Office expressed the opinion that the appeal was justified. Its considerations were put forward.

The cassation appeal was served within the time limits under Art. 33, para 1 SACA and it is procedurally admissible.

When examined on merit in accordance with the provisions of Art. 39 SACA, the cassation appeal is unjustified.

SCC examined the appeal of the Association versus the silent refusal by the NHIF Director to grant its request for access to public information - Order No. RD-09-218/6 April 2001 of NHIF. Having considered the objections raised, the court assumed that: both the NHIF Director and NHIF were among the authorities and entities with obligations to provide access to public information under Art. 3, para 1 APIA; the requested information was public within the meaning of Art. 2 APIA; there existed no grounds for refusal to provide the requested information within the meaning of Art. 37 APIA. The court gave detailed reasons for its legal conclusions, which this instance shares.

The judgement is correct.

The objection, stating that there was material breach of procedural rules because of failure on part of SCC to check the active legitimization of the appellant, is unjustified. Both the legal doctrine and court practices unambiguously show that the material procedural breach provides grounds for reversal of the judgement to the benefit of the party whose rights were affected and infringed upon rather than the rights of the other litigant. In this case, the court did not commit a breach of Art. 25, para 1 CPC in conjunction with Art. 45 APA by its failure to establish the active legitimization of the cassation appellant as it did not establish the active legitimization of the defendant under the cassation appeal. Hence, in this particular case, the cassation appellant cannot invoke these grounds for reversal since its rights have ever been affected in the proceedings. Furthermore and independently from that it should be noted that the defendant under the cassation appeal

submitted Certificate No. 2173/19 March 2002 in the proceedings, making it clear that it was registered as a legal entity pursuant to Art. 489 CPC.

The objection that the substantive law had been violated because the provision would lead to unfair competition, constituting grounds for refusal under Art. 17, para 2 APIA, is unjustified. The registration certificate of the Association reads that the Association will not engage in business activity. Unfair competition is possible only among enterprises engaging in business activities (ad argumentum of § 1, subpara 1 Protection of Fair Competition Act).

It is also unjustified to claim that the substantive law has been violated because the requested information was „only of operational importance" within the meaning of Art. 13, para 2 APIA and that it provides grounds to refuse access to it. On the one hand, the quotation of these provisions is unfair. It reads that the access to official information may be restricted, where it related to the operational drafting of acts and has no importance of is own. On the other hand, the provisions of Art. 13, para 3 APIA are inapplicable because there is no partial refusal to provide information in this particular case.

In view of these considerations, the above mentioned cassation grounds for reversal of the appealed judgement are non-existence and, being correct, the judgement has to be left in force. For these reasons and pursuant to Art. 40, para 1 SACA, the Supreme Administrative Court, Fifth Division

HAS DECIDED:

LEAVES IN FORCE the judgement of 19 July 2002 of the Sofia City Court (SCC) on Administrative Case No. 515/2002, reversing the silent refusal by its Director to provide access to public information to the Association of General Practitioners, Veliko Turnovo and obligating the Director to provide the requested information.

This judgement is final and it is not subject to appeal.

PRESIDING JUDGE: (signed) Ekaterina Gruncharova

MEMBERS: (signed) Milka Pancheva
(signed) Diana Dobreva

CASE

Kiril Terziiski

v.

Minister of Finance

TO
MR. MILEN VELCHEV
MINISTER OF FINANCE

APPLICATION
FOR ACCESS TO PUBLIC INFORMATION

From: **Kiril Dimitrov Terziiski**

Mr. Minister,

This is to request a copy on paper carrier of the agreement signed between the Bulgarian Government and the British consulting company Crown Agents.

In case the agreement contains any classified parts, I request you to provide partial access to information, i.e. to make available a copy of the agreement, where the clauses representing a secret protected by law to be deleted. I request you to observe the requirements set out in APIA to specify the factual and legal grounds for the classification of those parts of the agreements that have been classified and not made available to me.

Looking forward to receiving an answer within the time limits prescribed by law.

Yours truly,
Kiril Terziiski

MINISTRY OF FINANCE

DECISION

No. APIA-8

of 15 October 2002

The Ministry of Finance has received the application for access to public information by Kiril Dimitrov Terziiski, requesting a copy on paper carrier of the agreement signed between the Bulgarian Government and the British consulting company Crown Agents. The application also contains the request, in case the agreement contains any classified parts, to provide partial access to information, where the clauses representing a secret protected by law to be deleted.

Having examined the application, I have established the following: a party to the agreement with the British consulting company Crown Agents is the Ministry of Finance because the subject-matter of the agreement is to implement measures for improvement of the performance of the customs administration, while the Customs Agency is a secondary budget spending unit at the Minister of Finance who performs the overall guidance and control over the activities of the customs administration.

The agreement between the Ministry of Finance and the British consulting company Crown Agents is confidential, while the information therein is secret by its nature and classified as a whole, being a state secret. In this connection, the prerequisites under Art. 37, para 2 of the Access to Public Information Act are not applicable to provide partial access to the requested information and therefore the request should not be granted in this part. As to the legal and factual grounds for the classification of the information you have requested, you should keep in mind that the relevant legal framework existing at the time of the execution of the agreement provided for the relevant grounds.

For these reasons and pursuant to Art. 28, para 2 in conjunction with Art. 37, para 1, subpara 1 of the Access to Public Information Act,

I HAVE DECIDED:

To refuse a copy on paper carrier of the agreement signed between the Ministry of Finance and the British consulting company Crown Agents to be made available.

This decision is subject to appeal before the Supreme Administrative Court within 14 days of its receipt.

MINISTER

C/O THE MINISTER OF FINANCE

TO THE SUPREME ADMINISTRATIVE COURT OF THE REPUBLIC OF BULGARIA

APPEAL

by **Kiril Dimitrov Terziiski,**
Sofia

VERSUS
the refusal of the Minister of Finance
with ref. No. APIA-8 of 15 October 2002
under an application for access to public information

PURSUANT TO
Art. 40, para 1 APIA in conjunction with
Art. 5, subpara 1 SACA

Honorable Supreme Justices,

I hereby appeal within the prescribed time limits versus the refusal to provide access to public information by the Minister of Finance with Ref. No. APIA-8 of 15 October 2002.

On 2 October 2002, I filed an application for access to public information, requesting a copy of the agreement signed between the Bulgarian Government and the British consulting company Crown Agents. In the same application, I specified that, should the agreement contain any classified parts, to be granted partial access to information by deleting the clauses representing a secret protected by law.

On 17 October 2002, I received the refusal to provide access to public information by the Minister of Finance. In his decision the Minister of Finance claims that the requested information was classified information representing a state secret, invoking the provisions of Art. 37, para 1, subpara 1 of the Access to Public Information Act (APIA) as grounds for the refusal. The Minister referred to the same grounds for refusing also partial access to the requested information.

The decision on the refusal specified the following as legal and factual grounds for the classification of the requested information as a state secret: „...*you should keep in mind that* ***the relevant legal framework*** *existing at the time of the execution of the agreement provided for* ***the relevant grounds***".

The decision of the Minister of Finance to refuse access to public information is unlawful because it has been made in violation of the procedural and substantive law. The considerations for this conclusion are as follows:

Violation of the procedural law:
Pursuant to Art. 38 APIA, „*the decision to refuse access to public information shall specify* ***the legal and factual grounds for the refusal*** *under this Act, the date of the decision, and the procedure for appealing against it*". The reasons set out in the appealed refusal of the Minister of Finance use the words „the relevant legal framework" and „the relevant grounds". These words do not represent specification of the legal and factual grounds for a refusal within the meaning of Art. 38 APIA. Hence the administrative authority has committed a material procedural violation by failing to specify the reasons for its refusal.

Violation of the substantive law:

The decision on the refusal by the administrative authority (the Minister of Finance) has been made in violation of the substantive law as well. The reasons for this conclusion are as follows:

1. The requested information is public because it meets the prerequisites laid down in APIA, the existence of which defines certain information as public.

The information relates to social life in the Republic of Bulgaria. The requested information is contained in the agreement between the Bulgarian Government and the British consulting company Crown Agents. The subject-matter of the agreement is the implementation of measures aimed at improving the activities of the customs administration. These activities are performed by the customs administration, while the control and guidance are performed by the Minister of Finance.

Moreover, the requested information does not only relate to social life in Bulgaria but it also generates special public interest because the amount paid to Crown Agents from the state budget is equal to eight million pounds.

The information enables citizens to form an opinion of their own on the activities of the authorities which have obligations under the said Act. The requested information relates to the rights and obligations of the parties to the agreement. The Ministry of Finance is a party to the agreement and since the Ministry has obligations under APIA, the requested information will enable the citizens to form an opinion of their own on its activities.

The information is created or stored by an authority which has obligations under APIA. The requested information represents both information created by government authorities and information stored by government authorities within the meaning of Art. 3, para 1 APIA.

The appealed refusal prevents any conclusion that the requested information has been lawfully classified as containing a state secret. Hence the Minister of Finance must provide access to this information under APIA.

2. The right to seek and obtain information under Art. 41, para 1 of the Constitution includes the obligation of government authorities to provide access to information of importance to the public. Its restriction on the grounds specified in the second sentence requires that the circumstances related to considerations of national security or maintenance of the public order be established in legislation. This requirement applies also to the grounds on which citizens may be refused access by government authorities or institutions under Art. 41, para 2 of the Constitution. These grounds relate to the establishment of ***statutory regulation*** of the cases, in which the information constitutes a state secret or another secret protected by law on the grounds specified therein /Judgement No. 7 of 4 June 1996 of the Constitutional Court of the Republic of Bulgaria on Constitutional Case No. 1/ 1996).

In the appealed refusal, the Minister of Finance claimed that the requested information represented classified information, constituting a state secret. However, whether a specific information is classified, constituting a state secret, or not is not to be judged by an administrative authority because it is regulated by law. The law to specify the information classified as a state secret is the Protection of Classified Information Act (PCIA). Art. 25 PCIA gives the definition of information representing a state secret. The cumulative applicability of two prerequisites is necessary in order to classify certain information as representing a state secret. On the one hand, the information should have been defined in the list under Appendix No. 1 to PCIA and, on the other hand, the unauthorised access to it should threaten/harm certain interests. Furthermore, the law specifies the procedure for designating classified information, putting security signs, storing it, etc.

Consequently the mere statement that the requested information is classified information representing "a state secret" without any reference to specific provisions of PCIA and without specifying the category of information on the list under Appendix No. 1 to Art. 25 PCIA or the repealed *List of Facts, Information and Items Constituting a State Secret of the Republic of Bulgaria* makes the refusal by the Minister of Finance unlawful because it is impossible for the lawfulness of the refusal to be judged.

I REQUEST you to exercise our powers under Art. 41, paras 3 and 4 APIA by asking the defendant to produce evidence of the lawful classification of the information as representing a state secret.

I REQUEST you to reverse the decision of the Minister of Finance to refuse access as unlawful.

I REQUEST you to obligate the Minister of Finance to provide access to the requested information.

I REQUEST you to obligate the Minister to provide partial access to information, where you decide, having exercised your powers under Art. 41, paras 3 and 4 APIA, that part of the information is classified as representing a state secret.

I REQUEST you to sentence the Minister of Finance to pay the legal costs.

Encl.:
1. Application for access to public information,
2. Decision to refuse access to public information by the Minister of Finance, ref. No. APIA-8 of 15 October 2002,
3. Copy of the appeal and the attachments for the defendant.

Yours truly,

RULING

on the Course of Proceedings

Sofia, 20 June 2003

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at a session held in camera on the twentieth day of June 2003 composed of:

PRESIDING JUDGE: EKATERINA GRUNCHAROVA
MEMBERS: JANETA PETROVA, DIANA DOBREVA
in the presence of a Secretary and with the participation of the Public Prosecutor, heard the report by the Presiding Judge EKATERIA GRUNCHAROVA
on Administrative Case No. 3080/2003.

In fulfillment of the ruling recorded in the minutes of 3 June 2003, the Minister of Finance has sent to the requested document, 110 sheets, secret, to the classified registration office of the court with letter Ref. No. 0174/11 June 2003.

Pursuant to Art. 41, para 3 of the Access to Public Information Act, the court

HAS RULED:

ASCERTAINS that the document, 110 sheets, sent with letter Ref. No. 0174/ 11 June 2003 to the classified registration office of the court, is designated as „Secret".

The document sent with the above mentioned letter is to be returned to the Minister of Finance.

PRESIDING JUDGE: (signed) Ekaterina Gruncharova

MEMBERS: (signed) Janeta Petrova
(signed) Diana Dobreva

JUDGEMENT

No. 11682
Sofia, 15 December 2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, five-member panel, at the court session held on the fifteenth day of October 2003 composed of:

PRESIDING JUDGE: JANETA PETROVA
MEMBERS: MARINA MIKHAILOVA, JULIA KOVACHEVA

in the presence of Maria Popinska as the Secretary and with the participation of Public Prosecutor Svetlana Boshnakova, heard the report by Judge JULIA KOVACHEVA
on Administrative Case No. 3080/2003.

The proceedings are conducted pursuant to Art. 12 et seq. of the Supreme Administrative Court Act (SACA). The case was brought on the basis of the appeal by Kiril Dimitrov Terziiski versus Decision No. APIA-8 of 15 October 2002 by the Minister of Finance, which pursuant to Art. 37, para 1, subpara 1 of the Access to Public Information Act (APIA) refused to provide a copy on paper carrier of the agreement signed between the Ministry of Finance and the British consulting company Crown Agents. Complaints were made as to the issuance of the administrative act in violation of the substantive law and its reversal was requested, asking the court to obligate the authority to provide access to the requested public information pursuant to Art. 41, para 1 APIA.

The Minister of Finance as the defendant, through his legal defence, expressed the opinion that the administrative act was issued correctly and that the grounds for its reversal as set out in the appeal did not exist and therefore requested that the appeal be rejected as unjustified.

The public prosecutor from the Supreme Administrative Public Prosecutor's Office gave a conclusion with reasons attached thereof that the appeal was unjustified and it has to be rejected.

The Supreme Administrative Court, Fifth Division, found out that the appeal was procedurally admissible, giving been served within the time limits prescribed by Art. 13, para 2 SACA by a duly authorised party to do so. Having examined it on merit and assessed the arguments and objections of the litigants, as well as the evidence collected in the proceedings, the court established the following:

The claimant Kiril Dimitrov Terziiski filed application Ref. No. APIA-8 of 1 October 2002 to the Minister of Finance, requesting a copy on paper carrier of the agreement signed between the Bulgarian Government and the British consulting company Crown Agents. In case of the agreement contained any classified parts, the claimant requested partial access to that information, i.e. a copy of the agreement, where the clauses representing a secret protected by law were deleted.

The Minister of Finance issued Decision No. APIA-8 of 15 October 2002 pursuant to Art. 28, para 2 in conjunction with Art. 37, para 1, subpara 1 of the Access to Public Information Act to refuse a copy on paper carrier of the agreement signed between the Ministry of Finance and the British consulting company Crown Agents. The reasons for the decision read as follows: a party to the agreement with the British consulting company Crown Agents is the Ministry of Finance because the subject-matter of the agreement is to implement measures for improvement of the performance of the customs administration, while the Customs Agency is a secondary budget spending unit at the Minister of Finance. The agreement between the Ministry of Finance and the British consulting company Crown Agents is confidential, while the information therein is secret by its nature and classified as a whole, being a state secret. In this connection, the prerequisites under Art. 37, para 2 of the Access to Public Information Act are not applicable to provide partial access to the requested information and therefore the request should not be granted in this part. As to the legal and factual grounds for the classification of the information you have requested, you should keep in mind that the relevant legal framework existing at the time of the execution of the agreement provided for the relevant grounds.

The appeal versus the appealed administrative act put forward detailed arguments for the unlawfulness of the refusal due to violation of the substantive law and also because the term „confidentiality“ of the agreement was not specified as grounds for refusal under Art. 37, para 1, subpara 1 APIA; in violation of Art. 38 APIA no specific factual and legal grounds for the refusal to provide access to the requested public information were given;

the document was wrongly designated as „secret" due to the lack of the relevant statutory grounds both under the List of Facts, Information and Items Constituting a State Secret of the Republic of Bulgaria repealed with § 43 of the Transitional and Final Provisions of the Protection of Classified Information Act and the existing legal framework, i.e. Art. 25 PCIA and Appendix No. 1 to Art. 25 PCIA.

In the course of the proceedings, the court issued a ruling pursuant to Art. 41, para 3 APIA to ascertain that the document sent by the Ministry of Finance, i.e. the agreement between the Ministry of Finance and the British consulting company Crown Agents, has designated as „Secret".

In the light of those facts, the court finds the appealed decision to be unlawful and subject to reversal for the following reasons:

In accordance with Judgement No. 7 of 1996 of the Constitutional Court on Constitutional Case No. 1/1996, the right of each citizen to seek and obtain information under Art. 41, para 1 of the Constitution „is guaranteed with the obligations of government authorities to provide it". The Constitutional Court has stated explicitly that the content of the right of each citizen to seek and obtain information under Art. 41, para 1 leads also to the obligation to provide access to information, whereby the content of that obligation is subject to statutory regulation.

The social relations concerning the right of access to public information are regulated in the Access to Public Information Act (promulgated in The State Gazette, No. 55 of 2000). „Public information", within the meaning of the Act, is any information related to social life in the Republic of Bulgaria, enabling citizens to form an opinion of their own on the activities of the authorities which have obligations under the Act (Art. 2, para 1 APIA). In conformity with Art. 7 APIA, the right of access to public information cannot be restricted, unless the information is classified and representing a state secret or another secret protected by law. Para 2 (amended, The State Gazette, No. 45 of 2002) of Art. 9 APIA reads that, in the cases prescribed by law, certain official or administrative information may be declared to be classified information representing a state or official secret.

The procedure for granting access to public information is regulated in Chapter Three of APIA. Pursuant to Art. 24 et seq. of the said Act, access to public information is provided on the basis of an application in writing or an oral inquiry, while the required content is specified in Art. 25, para 1 APIA.

Art. 25, para 1, subpara 3 APIA states that the application should include a description of the requested information. As is seen in the content of the application for access to public information by the claimant under Art. 24 APIA, there is no description of the requested information. The general wording that the provision of the above mentioned agreement is requested cannot be presumed to meet the requirements under Art. 25, para 1, subpara 3 APIA, insofar as the agreement is the material exponent of the public information sought but it cannot be defined as such in accordance with the legal definition under Art. 2 APIA. In accordance with Art. 29 APIA, where the requested for access to information is worded too generally, the applicant is advised thereof and has the right to specify the subject-matter of the requested information. The failure to fulfill this obligation constitutes grounds for dropping the matter. Therefore the procedure under Art. 29 APIA had to be applied so that the applicant could specify the subject-matter of the requested information as the set of data he wanted to receive information about in order to form an opinion of his own as to the activities of the authority. Insofar as that was not done, the above mentioned lack of clarity of the application affected the content of the decision to refuse access which was appealed.

The appealed decision No. APIA-8 of 15 October 2002 by the Minister of Finance does not meet the requirements concerning its content under Art. 38 APIA. In accordance with its provisions, the decision on the refusal to provide access to public information has to specify the legal and factual grounds for the refusal under the said Act, the date of the decision, and the procedure for appealing against it. The appealed administrative act reads that the agreement is confidential and that the information therein is classified information as a whole, representing a state secret and therefore the authority, making reference to the provisions of Art. 37, para 1, subpara 1 APIA which read that grounds for refusal to provide access to public information exist, where the requested information is classified information representing a state or official secret, has refused to provide a copy of the requested agreement on paper carrier. The decision does not contain any data on the type or nature of the information which make it qualify as a state secret or the statutory grounds for defining it as such. The information representing a state secret is defined in Art. 25 of the Protection of Classified Information Act, which reads that a state secret is the information defined in the list under Appendix No. 1, the unauthorised access to which could threaten or harm the interests of the Republic of Bulgaria in connection with the national security, defence, foreign policy, or the protection of the constitutional order. The list of

categories of information subject to classification as state secrets contains an exhaustive enumeration of categories of facts and data. Therefore, having assessed that that the information contained in the above mentioned agreement belongs to the type envisaged in the list under Appendix No. 1 to Art. 25 PCIA, the administrative authority had to specify the category it fell into. The statement in the appealed decision that the information contained in the agreement belonged to the set of facts, information and data representing a state secret within the meaning of Art. 25 PCIA qualified its content without any relevant reasons for that.

The appeal put forward the arguments that the administrative authority had unlawfully invoked the provisions of Art. 37, para 1, subpara 1 APIA, insofar as the two letters Ref. Nos. APIA-2 of 11 March 2002 and 12 April 2002 as part of the correspondence between the administration of the Ministry of Finance and a third party in connection with a request to provide access to public information contained in the agreement between the Ministry of Finance and the British consulting company Crown Agents indicated that the document existed as of 11 March 2003, i.e. prior to the effective date of the Protection of Classified Information Act promulgated in The State Gazette, No. 45 of 30 April 2002 and entered into force on 4 May 2002. As of that time, the specification of any information as a state secret was regulated in the List of Facts, Information and Items Constituting a State Secret of the Republic of Bulgaria (repealed with § 43 of the Transitional and Final Provisions of PCIA). The claimant maintains that the requested public information does not belong to the category of facts and information specified in the said act and therefore the document as its material exponent has been wrongly designated as „secret".

For similar reasons - failure to specify the factual grounds for defining the information contained in the agreement as a state secret, - the court is not in a position to supplement the content of the act and examine its correctness by way of interpretation and application of the statutory provisions to the specific case. Moreover, in this case it should be noted that § 9 of the Transitional and Final Provisions of PCIA reads that any materials and documents designated as „Top Secret of Special Importance", „Top Secret" and „Secret" prior to the effective date of the Act shall be deemed to have been designated at the following levels of classification: „Strictly Secret", „Secret", and „Confidential" accordingly, calculating protection time limits as from the date of their creation under Art. 34, para 1. The heads of administrative units are required to re-examine and adjust the documents

containing classified information to the requirements of the law and the related secondary legislation within a year of the effective date of the Act. In accordance with the rule set out in Art. 31 PCIA, the designation of the document containing classified information with the relevant security level is determined by the person authorised to sign the document. Hence in the case alleged by the claimant that the agreement was signed and effective under the List of Facts, Information and Items Constituting a State Secret of the Republic of Bulgaria, the designation of the agreement between the Ministry of Finance and the British company Crown Agents as „Secret", which was observed by the court under Art. 41, para 3 APIA by virtue of § 9, para 2 of the Transitional and Final Provisions of PCIA, also had to be justified with the belonging of its content to any of the categories on the list under Appendix No. 1 to Art. 25, para 1 PCIA, for which, however, the law-maker provided a one-year time limit as from the effective date of the Act (4 May 2003) that has not expired yet.

The reasons set out in the administrative act represent a set of the factual and legal grounds for its issuance and their existence in the act enable the recipient to become aware of the will of the authority and seek remedy in case the recipient believes that there is violation of its rights and interests. The reasons are of material importance also for the court in awarding a correct judgement on the dispute. In this particular case, such reasons are lacking in the appealed decision. The court is not to seek and find the arguments that have led to the appealed refusal to provide access to public information by way of interpretation of provisions of APIA and PCIA and thus "supplement" the content of the act. This is to be done by the public law entity which has obligations under APIA, i.e. the Ministry of Finance through the Minister of Finance or a person designated under Art. 28, para 2 APIA. The lack of reasons put forward by the administrative authority as to the criteria and grounds to assume that the requested public information constitutes a state secret and the refusal to provide access to it to the applicant accordingly prevents the court from judging its correctness and to exercise effective control over the lawfulness of the appealed decision.

For these reasons, the appealed decision should be reverses as having been issued in violation of administrative procedural rules - Art. 12, subpara 3 SACA in conjunction with Art. 38 APIA. Pursuant to Art. 42, para 3 APA, the file should be referred back to the authority for making a new decision on the application by Kiril Dimitrov Terziiski, while taking into consideration the instructions of the court.

Guided by these reasons and pursuant to Art. 41, para 3 APA, the Supreme Administrative Court, Fifth Division

HAS DECIDED:

REVERSES Decision No. APIA-8 of 15 October 2002 of the Minister of Finance, refusing access to a copy on paper carrier of the agreement between the Ministry of Finance and the British consulting company Crown Agents pursuant to Art. 37, para 1, subpara 1 of the Access to Public Information Act;

REFERS the file back to the Minister of Finance for a new decision to be made on application Ref. No. APIA-8 of 1 October 2002 by Kiril Dimitrov Terziiski.

THIS JUDGEMENT is subject to appeal with a cassation appeal before a five-member panel of the Supreme Administrative Court within 14 days of its notification to the parties.

True to the original,
Secretary:

PRESIDING JUDGE: (signed) Janeta Petrova

MEMBERS: (signed) Marina Mikhailova
(signed) Julia Kovacheva

C/O THE SUPREME ADMINISTRATIVE COURT
FIFTH DIVISION
Administrative Case No. 3080/2003

TO
THE SUPREME ADMINISTRATIVE COURT
FIVE-MEMBER PANEL

CASSATION APPEAL

By: **MILEN EMILOV VELCHEV**,
Minister of Finance
Through Attorney **Sylvia Russanova**,
Power of Attorney No. 121 of 28 October 2002

VERSUS:
Judgement No. 11682 of 15 December 2003
of the Supreme Administrative Court,
Fifth Division
On Administrative Case No. 3080/2003

HONORABLE SUPREME JUSTICES,

We are not satisfied with Judgement No. 11682 of 15 December 2003 by the Supreme Administrative Court, Fifth Division on Administrative Case No. 3080/2003, whereby the three-member panel has reversed Decision No. APIA-8 of 15 October 2002 by the Minister of Finance, refusing to provide a copy on paper carrier of the agreement between the Ministry of Finance and the British consulting company Crown Agents. That court judgement referred the file back to the Minister of Finance for making a new decision on application Ref. No. APIA-8 of 1 October 2002 by Kiril Dimitrov Terziiski under the Access to Public Information Act.

Pursuant to Art. 33, para 1 of the Supreme Administrative Court Act (SACA) we appeal versus the whole judgement No. 11682 of 15 December 2003

on Administrative Case No. 3080/2003 of the Supreme Administrative Court, Fifth Division within the 14-day time limit prescribed by law.

We find the judgement of the three-member panel of the Supreme Administrative Court to be wrong due to violation of the substantive law - cassation grounds under Art. 218 b, item (b) of the Civil Procedure Code, applicable on the basis of subsidiarity also to the administrative process by virtue of the relegating provisions of Art. 11 SACA.

I find that the first-instance court has been wrong in the appealed judgement to assume that the refusal of the Minister of Finance is unlawful. According to the three-member panel, the appealed refusal is wrongly substantiated with the provisions of Art. 37, para 1, subpara 1 of the Access to Public Information Act. In this connection, the court has assumed that the Minister of Finance wrongly justified the refusal with the fact that the requested agreement was a document containing classified information. The reasons in the appealed judgement are wrong in stating that the administrative authority has failed to fulfill its obligation under Art. 29 APIA and therefore affected the decision to refuse access to public information.

It should be noted that the right of each citizen to seek, obtain and disseminate information is constitutionally guaranteed with the provisions of Art. 41, para 1 of the Constitution of the Republic of Bulgaria. Art. 41, para 1, the first sentence, reading that „Each person shall be entitled to seek, obtain, and disseminate information", regulates the so-called „freedom of information". The essence of this freedom boils down to prohibition on the state to restrict the free exchange of information in the community. Insofar as the freedom of information may entail some obligation of government authorities to provide such information, this obligation does not apply to all and each information at the disposal of the government.

The provisions of Art. 4, para 1 APIA give statutory opportunities to each citizen to have access to public information, while Art. 7, para 1 of the said Act reads that restrictions of this right may be allowed only in cases, where the public information constitutes a state secret or another secret protected by law. It should be remembered that, insofar as there is no constitutionally guaranteed right of citizens and legal entities to have access to classified information, there is no obligation of the authorities under Art. 3 of the said Act to provide access to such public information either.

These considerations lead to the only legitimate conclusion that, in the various cases, the obligation of government authorities to provide access to information of public importance cannot apply to any information. This is also the meaning of Judgement No. 3 of 25 September 2002 of the Constitutional Court of the Republic of Bulgaria on Constitutional Case No. 11/2002. The constitutional restrictions on the right to information relate to the obligation to respect other person's rights, as well as the right of the law-maker to introduce statutory restrictions.

The three-member panel has assumed wrongly that, being an authority with obligations under the law, the Minister of Finance had to ask Mr. Terziiski to adjust his application to the requirements of Art. 25 APIA. It is true that the application has to include the mandatory content set out in Art. 25, para 1, subparas 1 through 4. But it should also be noted that the application in its wording was not unclear. Moreover, the Minister of Financed issued his decision on the request to have a copy on paper carrier of the agreement between the Ministry of Finance and the British consulting company Crown Agents. Having referred to the provisions of Art. 29, para 1 APIA, reading that in case it is not clear what information is requested or the wording is too general, the applicant is advised thereof and has the right to specify the subject-matter of the application within 30 days, the three-member panel of the Supreme Administrative Court has issued a wrong judgement. The reasons is that the administrative authority found the application to contain an accurate and specific description of the requested information - access to the content of the agreement or those parts thereof, which did not constitute classified information. Hence the only legitimate conclusion that the provisions of Art. 29 APIA were not applicable to the Minister of Finance and consequently he had no obligations under the said Article.

The judgement is wrong, being ruled in violation of the substantive law. The grounds for refusal to provide access to public information are given in the provisions of Art. 37, para 1 APIA. Undoubtedly, subpara 1 is applicable to this particular case because this is information declared to be classified and constituting a state secret. Since the requested information constitutes a secret, the provisions of Art. 37, para 1, subpara 1 APIA are applicable to refuse access to it. A further argument on the disparity between the judgement of the first-instance court and the substantive provisions of Art. 37, para 1, subpara 1 is the ruling adopted in a court session held in camera on 20 June 2003, where the three-member panel ascertained that the 110 sheets sent

by the Ministry of Finance with letter Ref. No. 0174 of 11 June 2003 were designated as „Secret".

The reasons of the court judgement are wrong in the assumption that the refusal by the Minister of Finance is unlawful due to violation of administrative procedural rules, i.e. failure to observe the provisions of Art. 38 APIA. These conclusions are unlawful. The provisions of Art. 38 APIA specify the content of the decision to refuse access. In accordance with the said provisions, the decision to refuse access to public information has to specify the legal and factual grounds for the refusal under APIA, the date of the decision, and the procedure for appealing against it. Decision No. APIA-8 of 15 October 2002 specified both the factual and legal grounds for the refusal to provide Mr. Terziiski with access to the public information he requested. It goes beyond any doubt that the legal grounds can be found in the provisions of Art. 37, para 1, subpara 1 APIA. The only violation of Art. 38, if any, in the decision of the Minister of Finance is the failure to specify the authority before which the decision could be appealed and the time limits for serving the appeal but this violation is not of any material importance to claim that this deficiency leads to unlawfulness of the refusal by the Minister of Finance.

For these reasons, I request you pursuant to Art. 40, para 1, the second sentence of the Supreme Administrative Court to fully reverse Judgement No. 11682 of 15 December 2003 of the Supreme Administrative Court, Fifth Division on Administrative Case No. 3080/2003. Pursuant to Art. 40, para 2 SACA. I request you to decide the case on its merit, rejecting as unjustified the appeal of Kiril Dimitrov Terziiski versus Decision No. APIA-8 of 15 October 2002 by the Minister of Finance, whereby Mr. Terziiski was refused access to a copy on paper carrier of the agreement between the Ministry of Finance and the British consulting company Crown Agents pursuant to Art. 37, para 1, subpara 1 APIA.

Pursuant to Art. 63, para 4 Civil Procedure Code (CPC) in conjunction with Art. 11 SACA, the Ministry of Finance is exempted from paying the state fee for serving the cassation appeal.

Encl.: copies of the cassation appeal for the defendant and the Supreme Administrative Public Prosecutor's Office; Power of Attorney No. 121/28 October 2002.

LEGAL COUNSEL:

JUDGEMENT

No. 2113
Sofia, 09 March 2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Five-member panel, in a court session held on the thirteenth day of February 2004 composed of:

PRESIDING JUDGE: ANDREY IKONOMOV
MEMBERS: EKATERINA GRANCHAROVA, ALEXANDER ELENKOV, MILKA PANCHEVA, DIANA DOBREVA

In the presence of the secretary Rositsa Todorova and with the participation of the Public Prosecutor Ivan Lalchev heard the report by the presiding judge ANDREY IKONOMOV on administrative court case No. 38/2004.

The proceedings are conducted pursuant to Art. 33 et seq. of the Supreme Administrative Court Act (SACA) in connection to Art. 40, para. 1 of the Access to Public Information Act (APIA).

The case was brought on the basis of the cassation appeal of the Minister of Finance of the Republic of Bulgaria versus Judgment No. 11682 from December 15, 2003 of Supreme Administrative Court, three-member panel on administrative court case No. 3080/2003.

The cassation appeal is filed within the law-provided terms and is procedurally admissible.

The appealed judgment of the Supreme Administrative Court, three-member panel reversed Decision No. APIA-8/15.10.2002 with which the Minister of Finance withheld a copy of the contract between the Ministry of Finance (MF) and the British consultancy company Crown Agents using the grounds of Art. 37 para.1 of APIA. The three-member panel of SAC also returned the court file to the Minister and obliged him to reconsider his decision on information request No. APIA-8/01.10.2002 filed by Kiril Dimitrov Terziiski.

Unsatisfied by the decision of the first instance court, the Minister of Finance has appealed it through his attorney. The defendant believes that the decision is incorrect, as enacted in substantial breach of the material law, and pleads that the case be decided in substance, while the appeal of Kiril Terziiski against Decision APIA-8/01.01.2002 should be rejected, as it is groundless.

The attorney of the appellant claims that the cassation appeal is unjustified and pleads that the decision of the first instance court should be left in force.

The public prosecutor believes that the cassation appeal is unjustified.

In order to take a decision the five-member panel of the Supreme Administrative Court accepted all factual circumstances established by the three-member panel. Both sides had no objections on the established facts:

With information request No. APIA-8/01.10.2002 Kiril Terziiski has requested a copy of the contract, signed by the Bulgarian Government and the British consultancy agency Crown Agents. In case the contract contained classified information, the Minister of Finance was requested to provide partial access to the contract, by removing its parts, containing legitimately protected secrets. With Decision No. APIA-8/15.10.2002 the Minister of Finance on the grounds of Art. 28, para. 2 in connection with Art. 37, para. 1, item. 1 of APIA refused to provide the requested copy of the contract, because it was confidential, information contained in it was not to be disclosed, classified as a whole and constituted state secret. The grounds for classification were provided by the „corresponding normative acts that were in force at the time of the contract signing".

After examining the contract in camera, with a ruling on the case from 20.06.2003 the court established the existence of a classification mark „secret" on the 110 pages of the contract between the MF and the British consultancy agency Crown Agents.

Having established the above the first instance court has reached a correct conclusion.

The argument in the cassation appeal for a substantial breach of the law has been developed in two directions: the conclusion of the court for the applicability of Art. 29 of APIA was unjustified, since the information request is clearly formulated; and also the court is claimed to be wrong in concluding

that in issuing the appealed decision the minister has violated the provisions of Art. 38 of APIA.

The argument that Art. 29 cannot be applied in this case is justified. Obviously, by requesting a paper copy of the contract, Kiril Terziiski requested access to public information, contained in all provisions of the contract, rather than the set of 110 pages as a material carrier of public information. In this particular case the requestor wished to get access not to just any contract, but specifically to the one signed by Crown Agents and the Minister of Finance. Examining the behavior and the pleadings of both parties, the court can conclude that they have understood exactly access to what information had been requested. Taking the above into account, we believe that the decision of the first instance court is delivered in violation of the law.

The argument in the cassation appeal that the court has wrongly interpreted Art. 38 of APIA is unjustified. The conclusions of the first instance court are well founded. With the amendment of Art. 41 para. 4 of APIA (State Gazette issue 45/2002) the court was empowered to review classification decisions. This implies for an obligation for the administrative body to provide information about the time of classification and to support its decision with legal grounds. In this particular case, there is indirect evidence that on March 11, 2002 and on April 12, 2002 the contract had not been classified. This is why the Minister must follow the instructions of the court and specify when - before or after the adoption of the Protection of Classified Information Act (PCIA) - and on what grounds did he take the decision to classify the contract. In accordance to the law the three-member panel of this court has obliged the respondent to specify whether the contract contained information, which could be classified as state secret in the sense of the List of facts and circumstances, constituting state secret of the Republic of Bulgaria (promulgated in State Gazette issue 31/1990, now repealed). In case the contract had been classified after the adoption of the PCIA, the respondent had to point in his refusal to one of the state secret categories in the Amending List to Art. 25 para. 1 of PCIA.

In view of these considerations, the court believes that the cassation appeal is unjustified as a whole and the judgment of the first instance court should be left in force. The file should be returned to the administrative body for reconsideration of his decision,conforming to the interpretation of the law made by this court.

Pursuant to Art. 40, para. 1 of the SACA, the Supreme Administrative Court, five-member panel:

HAS DECIDED:

LEAVES IN FORCE judgment No. 11682/15.12.2003 on administrative court case No. 3080/2003 of the Supreme Administrative Court.

This judgment is not subject to further appeal

PRESIDING JUDGE: (signed) Andrey Ikonomov

MEMBERS: **(signed) Ekaterina Grancharova,**
(signed) Alexander Elenkov,
(signed) Milka Pancheva,
(signed) Diana Dobreva

ACCESS TO INFORMATION LITIGATION
IN BULGARIA
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