



**ACCESS TO INFORMATION
LITIGATION IN BULGARIA**

VOLUME 3

SELECTED CASES

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**ACCESS TO INFORMATION
LITIGATION IN BULGARIA**

Volume 3
Selected cases

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Dear readers,

*The third volume of the series of publications of Access to Information Programme Foundation - **Access to Information Litigation in Bulgaria**, is in your hands.*

What has happened that the court practice constitutes some of the most interesting stories about the implementation of Access to Public Information Act in Bulgaria is?

Firstly, there is no other institution to oversight and decide on the conflicts between the seekers and the providers of information, but the court. Precisely, that is the reason for the significance of the court practice for both those who implement the law and those who exercise their right under the law.

Secondly, the seeking and receiving of information has turned to be a hard struggle, in which the rules should be strictly followed, otherwise no success could be achieved. The court delineates the limits of the interpretations by its practices.

Positive results on the state of the administration were presented in the Annual Report of the Minister of Administration last year. In 2004, the administrative bodies, which are 268 in Bulgaria, registered 49,653 requests for access to information. Out of these total number of requests, 38,356 were submitted orally, and 11,29 were written. The minister reported that the refusals in regards to the information requests were only 469, while 190 requests were left with no consideration. One would get the impression that access to information is more frequently granted than refused. This is what the data of the Minister's report demonstrate. If we compare, however, the type of information that has turned contestable in Bulgaria and in other countries, we might doubt the positive results.

Do we have an easy and fast access to the information that institutions generate and store? What is the extent of accessibility to the public registers?

If transparency has become a second nature of the Bulgarian institutions, then is it possible that a draft of a law, submitted to the National Assembly, would propose, contrary to all that has been achieved during the last 15 years, the classification of a whole ministry-that of the Internal Affairs? No, it is not, and that is the reason why we need to exercise our right of access to information even more persistently, to the end, and should tell the people about our experience by books like this one.

Freedom of Information Act, or Access to Public Information Act, as it is called in Bulgaria, is not any of the laws that regulate the administrative reforms or any part of the relations between the citizens and the administration. This law is one of the basics of democracy, which supposes informed participation. The level of transparency of the institutions is indicative of the level of maturity of democratic life in the country.

Bulgarian FOI act was adopted before the adoption of Recommendation (2002)2 of the Committee of Ministers at the Council of Europe regarding access to official documents. While efforts are being made for bringing the law in conformity with the Recommendation of the Council of Europe, debates have started about the adoption of a Convention on Access to Official Documents. Freedom of information advocates' community is getting stronger and stronger.

It is becoming clear to everyone that the rational arguments about the widely determined exemptions from the right of access to information are decreasing. Precision has become a requirement not for those who seek information but for those who refuse it. It is incumbent on them to justify their refusals so the public right to know to be protected.

I hope that with this book we would contribute to the courage of those, who want to take part in the struggle for freedom of information, i.e. to feel as free people.

Gergana Jouleva, Executive Director of AIP

ACCESS TO INFORMATION

LITIGATION IN BULGARIA

2004 - 2005

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**ACCESS TO
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2004 - 2005**

**Alexander Kashumov
Kiril Terziiski**





SIGNIFICANCE OF LITIGATION UNDER THE ACCESS TO PUBLIC INFORMATION ACT

The Bulgarian Access to Public Information Act has not established an independent institution to overview its implementation. This fact corresponds to some extent with the time when the law was adopted - the year 2000. In countries, with more recently adopted access to (or freedom of) information acts, such institutions have usually been established. Whether this is a commissioner, committee, or ombudsperson, these institutions have specific oversight functions.¹ Access to information commissioners usually review complaints by citizens against violations by the authorities who are obliged to provide access to information. The oversight institutions deliver decisions, recommendations, instructions and orders, depending on the national laws. Besides, they are responsible for training the administration, assisting public officials in the process of the law implementation, and elucidating the right of information to the society. Oversight institutions also publish regular reports on the implementation of the freedom of information legislation.

The more recently adopted Personal Data Protection Act (2002) and Protection of Classified Information Act (2002) have established committees to work towards the laws' more effective implementation. The Personal Data Protection Committee reviews individual appeals, overviews the activities of the data controllers, delivers decisions and instructions. Similarly, the State Committee of Information Security oversees the implementation of the Protection of Classified Information Act.

It is obvious from the above facts, that there is a clear disbalance between the mechanisms of oversight of the Access to Public Information Act (APIA) implementation on the one hand, and the Personal Data Protection Act (PDPA) and the Protection of Classified Information Act (PCIA) implementation on the other hand.

We should note here an important principle regarding the relation between the right to information and the exemptions from this right. According to the interpretation of the Constitutional Court the right of everyone to seek, receive, and impart information, guaranteed by Art. 41

¹ The laws in Slovenia, Serbia, Bosnia and Herzegovina, and Mexico have established such institutions.

of the Bulgarian Constitution is principle, while the restrictions from this right are exceptions from this principle. The same interpretation can be found in the case law of the European Court on Human Rights regarding Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in the formulation of Art. 19 of the International Covenant on Civil and Political Rights. This principle is most clearly established in Recommendation (2002)2 of the Committee of Ministers of the Council of Europe on access to official documents to member states. Simply put, this interpretation endorses the principle that open, fair and accountable government is an intransient value of the civil society, while concealing certain activities of the public authorities should be done temporarily, by exception, be well motivated and with a specific legal aim.

In view of this situation, the court practice on the implementation of the APIA becomes of great significance. In Bulgaria, the courts are the only guarantee for the protection of the right to information access.² Court decisions give interpretations of some unclear legal provisions; certain decisions help establishing sustainable administrative practices and lead to predictability of the authorities when fulfilling their obligations to disclose information. We should also note in this respect the increased willingness of the administration to undergo trainings on the Bulgarian freedom of information legislation, including the presentation of specific cases and court decisions. Also, wider publicity of such cases in the media encourages citizens to defend their right to information. An inevitable result of the FOI litigation in Bulgaria is the implementation in practice of the narrow interpretation of access exemptions given by the Constitutional Court. The ultimate aim of FOI litigation is to gradually turn the authorities into open and accountable institutions, susceptible to critique. The effect for the citizens is an increased opportunity to exercise their rights and legal interests.

¹ However, this fact should not be simply considered as a deficiency of the practical implementation of the APIA. In countries with rich freedom of information traditions, like the Netherlands and the USA, for example, courts are also the only institutions, which oversee the implementation of the FOI laws.

COURT DECISIONS AND RULINGS ON COURT CASES, WHERE ACCESS TO INFORMATION PROGRAMME (AIP) HAS PROVIDED LEGAL ASSISTANCE IN 2004-2005

In 2004-2005 the courts have delivered fifty-two decisions and eighteen rulings on the proceedings on fifty-four cases, where AIP has provided legal assistance.

The rulings on the proceedings fall within two major categories: when the appeal is left without consideration by the court for some procedural reasons, or when the appeal has been filed to the wrong court. In the latter cases, the appeal was sent for review to the proper court.

From the fifty-two court decisions, twenty-four have been delivered by first-instance courts (twelve by the Sofia City Court and twelve by the three-member panel of the SAC). The Sofia City Court has reversed the information refusals in nine cases, while in three cases the appeal has been dismissed. Likewise, the SAC has reversed nine information refusals and has turned down only three appeals.

In twenty-eight cases the Supreme Administrative Court has delivered decisions on cassation appeals (seventeen decisions of three-member panels and eleven decisions of the five-member panels). In fourteen cases cassation appeals had been filed with the assistance of AIP, and in exactly the same number of cases - by public authorities. The court has upheld five cassation appeals of AIP and three cassation appeals, filed by the public authorities.

The statistics about the appellants (initially the requestors), the respondents and the grounds for refusal are particularly interesting.

Non-governmental organizations have appealed access to information refusals most often (in 20 cases), followed by citizens (19), and journalists (15).

Information was most often sought from central bodies of the executive power (in 29 cases). In seven cases information was requested from public-law entities³, different from the state bodies, in five cases - from the

³ The National Health Insurance Fund and the National Audit Office.

local administration, in seven cases - from the judiciary, and only in two cases - from a legal entity, financed by the state budget.

We should note that the appealed explicit (grounded) information refusals were more (32) than the silent refusals (22). The most frequently appealed refusal grounds were: information concerned the interests of a third party, whose consent for disclosure had not been received (in 9 cases), and „information had no significance on its own and was related to the deliberative process within the public authority“ (7).

INFORMATION SEEKERS

The legal team of Access to Information Programme has consulted more than 2500 freedom of information cases since the adoption of APIA in 2000. Over 90% of the cases dealt with violations or restrictions of the right to access government held information.⁴ The main categories of information seekers have always been citizens, journalists, and NGOs. In some cases, even public officials turn to AIP for assistance after having received an information request. They want to know how to correctly apply the law, so that their actions would not be appealed.

Information sought by citizens

In a number of cases, citizens seek information in order to solve a personal problem - like when they need to gather evidence in order to protect some other right (of ownership, or the awarding of **damages/compensation**). In other cases they want to know what lies behind a decision of a public authority, which affects them (why they are not eligible for compensation, whether they have been treated equally). In other cases, citizens simply want to „provoke openness“ of the institutions, by asking, for example, what was the value of goods, given by the president, the government and the Minister of Foreign Affairs for charity. In still other cases, citizens act to protect the interest of a community. An example of this is the request for the sanctions imposed on a company, which removed gravel from the bed of the Djerman river. The information request was provoked by the concern of some people

⁴ Much fewer have been the violations of the right to personal data protection, of the right to seek, receive, and impart information, and of freedom of expression.

who lived in villages near the river; they were worried, because after the gravel removal, earth (strata) had started to sink.

Sometimes, citizens seek information as result of two or more of the above-mentioned reasons. For example, someone might initially request information in order to collect some documents as evidence, and later - to learn what exactly lied behind a decision of a public authority (like, what has forced a company, which was undergoing a privatization procedure to go bankrupt). The combination between provoking openness and the protection of the interests of the community is also often met.

Sometimes citizens put in a lot of efforts in order to exercise their rights under the APIA. After initially being consulted by the legal team of AIP, they alone formulate their access to information requests and even file court appeals. Using the APIA, Mr. Karaivanov has collected a volume of information, which reveals wrongdoings in the management of the state-owned company *Brilliant - Krusheto*. Submitting those documents to the prosecution has lead to an indictment brought to the court. The efforts of the requestors sometimes include different „techniques“ for receiving information from two different institutions, which possess it. By comparing the answers of two identical requests filed in 2004, it turned out that according to the Cabinet a decision to build a nuclear power plant near Belene had been taken on 29-Apr-2004; while according to the Ministry of Energy and Energy Resources, such a decision had not been taken.

Information sought by non-governmental organizations

Non-governmental organizations constantly seek information in correspondence with their missions and goals. Some of them periodically request similar information in order to follow the implementation of a state policy, and to try to advocate for its improvement. For example, the *Center for Independent Living* annually files information requests, seeking information about public spendings and the state policy towards people with disabilities. It is interesting to note that information refusals have recently decreased, probably because institutions are already acquainted with the requests and are more prepared to provide information. Other non-governmental organizations actively seek information about specific events or decisions of the public authorities, which con-

cern them. For example, environmental organizations often actively seek information about a project or an initiative supported by the state. The National movement *Ecoglasnost* and the *Centre for Environmental Information and Education* have been seeking information about the construction of a nuclear power plant near Belene; *Green Balkans association, Plovdiv* is interested in the analyses of the privatization of *Sredna Gora Ltd*, and they also filed requests related to the Pirin National Park.⁵ Sometimes the goal of the requestors is to shed some light on specific questions: whether and how authorities have organized public discussions on large projects financed by international financial institutions. The *Center for non-governmental organizations in Razgrad* and *Public Barometer, Sliven* (a citizen watchdog organization) aim at improving the policies of openness within the local administration.

Information sought by journalists

Immediately before and after the adoption of the APIA, some of the journalists, working with Access to Information Programme were sceptical about the benefit of the law. Opinions were expressed that the law would restrict their right to receive information because it would establish a procedure and a response period.⁶

However, we have been witnessing a totally different process. Even journalists from some of the most influential media - both printed and electronic - have been using the APIA regularly. They have also been appealing refusals before the courts with quite a significant success. As a rule, those court cases are widely covered by one or more media and play a considerable role in altering the practices of public authorities towards greater transparency.

The first appeal against an information refusal filed by a journalist was of Alexey Lazarov of *Capital newspaper* in 2001. The journalist challenged the argument of the Council of Ministers that the transcript from its sessions

⁵ All these organizations and many others have filed requests on many various topics. We have only referred to some examples.

⁶ As it turned out, similar concerns have been expressed by the media in a number of countries of Central and Eastern Europe and Latin America, which have adopted freedom of information laws.

fall within one of the exemptions from public access - the one stipulated by Art. 13, par. 2, item 1 of the APIA. The success of Mr. Lazarov served as a stimulus for other journalists to use litigation in their fight for greater transparency of public institutions.⁷ Vassil Chobanov of *Radio New Europe* appealed a refusal of the Council of Ministers to disclose the transcript from another Cabinet session from 2003. In 2004 publicity of the Supreme Judicial Council (SJC) meetings was legally regulated. When the SJC refused to admit journalists to one of its next sessions, Mr. Chobanov and three other journalists - Bogdana Lazarova, Petya Vladimiova, and Elena Encheva⁸ - appealed the refusal before the Supreme Administrative Court. This case is historic not only because of the positive decision of the SAC (later implemented by the SJC), but also because it was the first access to information lawsuit initiated by journalists from different media.⁹

Hristo Hristov from *Dnevnik newspaper* is another journalist, who has turned for assistance to AIP. His investigation on the murder of the Bulgarian writer Georgi Markov in London in 1978 was hindered by the information refusals of the Minister of Interior and the president of the National Intelligence Services. The positive outcome of the lawsuit against the former and the book *Kill the Tramp*, which was published in 2005 and quickly received wide international recognition, serve as a message to all citizens to continue their fight for information.

Zoya Dimitrova from *Minitor newspaper* requested from the President information contained within a report of the security services on Bulgarian companies who traded with Iraq in the *Oil for Food* programme. The refusal of the President was appealed before the court. Another important case was the appeal of the electronic media *Vseki den* against a refusal of the Ministry of Foreign Affairs to disclose diplomatic notes, exchanged between Bulgaria and Spain in 1970. The notes discussed the statute of the former Prime Minister of Bulgaria, Simeon Sax-Coburg-Gotha in Spain. Access was provided after a decision of the Sofia City Court.

⁷ Case documents were published in *Litigation under the Bulgarian Access to Public Information Act*, Access to Information Programme, Sofia, 2002, p. 115-136.

⁸ From *Darik radio*, *Dnevnik newspaper*, and *Sega newspaper* respectively.

⁹ The four journalists were awarded the *Golden Key award* on the Right to Know Day ceremony organized on September 28 by AIP.

The Access to Public Information Act has been widely used by journalists seeking information related to their work. The law has turned out to be an effective tool, requiring public institutions to sustain high transparency standards. Pavlina Trifonova, a reporter from *24 Chassa* - one of the most influential national dailies, had been publishing a series of articles about the per diems of the ministers for their travels abroad before the practice of the Government Information Service to disclose information was abruptly ended in 2004. The refusal was appealed and after a court case, which enjoyed wide publicity, the Government Information Service was obliged to provide access to the requested information. Likewise, Tanya Petrova of *Sega newspaper* appealed a refusal of the Minister of Education and Science to disclose the decisions for the admission of additional students into Bulgarian elite high-schools. The Supreme Administrative Court reversed the refusal of the minister and obliged him to provide partial access to information, withholding only the names of the parents and the kids.¹⁰ Both public institutions provided the required information following the court decisions

Not only journalists from the central media appeal information refusals. In 2003, Diana Boncheva, editor-in-chief of the Yambol newspaper *Tundja*, has twice defended her right to information in court. In one of the cases, the Supreme Administrative Court reversed a refusal of the National Audit Office President to disclose information from the register of property owned by higher government officials, kept within his institution.¹¹

The fact that journalists exercise their right to information and especially the court cases is a serious incentive for the implementation of the law. Institutions prefer to implement their obligation and to protect themselves from constant critique. Citizens learn more about their right to information access and its potential, which encourages them to exercise it. The end result is pressure towards greater transparency of government. A side effect is that different media consolidate their efforts in cases when changes in freedom of information legislation are proposed; i.e. they consider the right to information as a component of freedom of expression and actively oppose any attempts to **worsen** its regulation.

¹⁰ Decision No. 9130 of 2004 delivered by the SAC, Fifth division on admin. court case No. 4544 of 2004.

¹¹ Decision No 3508 of 2004 delivered by the SAC, Fifth division on admin. court case No. 10889 of 2003.

CASES WHEN AIP PROVIDES ASSISTANCE

During the first year of the AIP implementation, a limited number of complaints against information refusals were referred to AIP. This is why we represented almost everyone, who wanted to appeal a refusal. However, it was clear that free legal assistance should be provided based on some criteria. As the number of people and organizations who sought assistance increased, this became a question of great practical importance.

The legal team has elaborated the following criteria for providing free legal assistance:

- whether litigation is likely to lead to an interpretation of the law, which would be crucial for its implementation;
- whether the requested information is of high public interest;
- whether the requestor is unable to cover the expenses for legal help.

In some of the cases, the first criterion is predominant; we hope that an interpretation of the law by the court would increase the scope of accessible information, narrow the scope of the exceptions, establish clear rules and clear obligations for disclosing certain categories of information. As a result of those cases, we have a clear interpretation on a number of questions: whether silent refusals are subject to appeal, whether public authorities are required to ground their decisions for classifying information as a state secret, whether the public interest of disclosure of public information about procurements should prevail.

In other cases, the second criterion is predominant. Examples of those are: the appeal against the refusal of the President to provide access to the report on Bulgarian companies who traded with Iraq; documents about the murder of the Bulgarian writer Georgi Markov; contracts between the state and foreign companies like *Crown Agents* and *Microsoft*; etc. A number of cases correspond to both of the first two criteria for providing legal help, like for example the *Crown Agents* case.

In some individual cases, *Access to Information Programme* files requests and appeals subsequent refusals. Like in the *Crown Agents* case, this is done after judging that a problem unites both of the above selection criteria.

MONITORED CASES

In most of the monitored cases, the legal team of AIP has at least partially provided assistance. Two important facts can be obtained from monitoring the court practice on FOI cases: what information held by public authorities is most often sought, and how the court resolves the questions posed by the refusals.

The practices of FOI litigation accumulated during the past few years allows us to identify some problems in receiving certain kinds of information, which should be made public. One of the problems is with access to contracts between the state and private companies, especially when the contracts concern large amounts of public spending, like Microsoft, Trakia Highway, Crown Agents, Spea Ingegneria. Questions have been raised about the applicability of the access exemptions, like the protection of third parties, trade secret, and state secret. In some cases when information about government project is sought, the great public interest is determined not only by the amount of public funds involved, but also because other rights need to be protected: the right to a clean environment and specifically the right of participation in the decision-making process.

Evaluations and reports about different inspection activities form the other large category of information sought. Environmental impact assessments (EIA) of large projects fall within this category. Access to the reports from evaluations, preceding the construction of a nuclear power plant near Belene turned out to be difficult. A protocol of the controlling authorities on noise measurements and documentation related to the accrediting hospitals turned out to be inaccessible. Reports on the implementation of contracts between public institutions and private companies have also been difficult to access. In all the above cases, public authorities refer to the exemption of Art. 13 Para. 2, item 1 of the APIA, arguing that the requested information had no significance on its own. Citizens, journalists, and NGOs have actively requested the reports of the Public Internal Financial Control Agency (PIFCA). The reports have been withheld by the agency on the basis of the third party exemption and the administrative secret exemption.¹²

¹² During 2005, the PIFCA has made efforts to elaborate internal rules for providing access to public information and to educate its officials on FOI; as a result, their policy towards publishing audit reports has been changing.

Opinions, standpoints, and positions expressed on different aspects of government, can also be included within the above information categories. Public authorities have applied the provision of Art. 13 Para. 2 item 1 of the APIA to withhold protocols of EIA public discussions; transcripts from sessions of the Cabinet, the Supreme Judicial Council and other collective bodies of power. Public authorities have refused access to protocols and positions expressed on public discussions on large projects with consequences on the environment, like the Lulin Highway, the Waste Management Center near Radnevo, the construction of the Vidin-Kalafat bridge over the Danube, and the expansion of the Sofia Airport.

Information, contained within public registers is also sometimes difficult to access. Some of the monitored cases raised questions about access to data from some registers, like the Register of property owned by higher government officials, the Register of hunters, and the Register of EIA experts, which contains their conflict of interests declarations. In practice, in addition to information from public registers, public authorities refuse access to various documents because they contain personal data of third parties: protocols determining administrative offences, decisions of the Minister of Education and Science for additional admission of high-school students. A truly peculiar decision was delivered by the Ministry of Foreign Affairs to a request for the diplomatic notes exchanged in 1970 between Spain and Bulgaria and concerning the status of the former Prime Minister Simeon Sax-Coburg-Gotha. The documents were withheld by the authority with the explanation that they would disclose personal data (public identity) of the Prime Minister.¹³

Some information requests have raised the question for accountability of public institutions before the public. They cover different subjects, like the per diems and other expenses of the Cabinet members made during their travels abroad, or information about the spendings of the National Health Insurance Fund.

Other interesting cases involve access to information, which has been classified before the adoption of the Protection of Classified Information

¹³ By a mistake, at that time, the expression social identity, given as part of the definition of personal data under the Data Protection Directive of the European Parliament and the Council 95/46/EC, was translated as public identity in the Bulgarian law.

Act. These cases raise the question of review of classified documents, as required by § 9 of the Final and Transitional Provisions of the PCIA.¹⁴ Information contained in the documents of the former security services is also sought actively by researchers and affected citizens.

Often requestors seek information, which could possibly reveal wrongdoings, affecting the society as a whole or its members. An example of this is the request for information contained within a report of the security services on Bulgarian companies who traded with Iraq in the Oil for Food programme. Another example is the report of the Supreme Prosecutor's Office on the usage of special investigative means. In the course of the legal proceedings, it usually turned out that the requested documents had not been created, were missing or have been created under questionable circumstances. This is why the protection of the right to government held information becomes not only a tool for interpretation of freedom of information litigation, but also for stimulating transparency, and preventing wrongdoings and corruption practices. In 2004, documents collected with the help of the APIA were used as evidence by the Prosecutor's Office, which has filed an indictment before the court

WHO HAS THE RIGHT TO PUBLIC INFORMATION?

A cursory glance at the question „Who has the right of access to public information“ would never suppose that the concept of clarity would emerge as a significant issue given the precise nature of the APIA wording which grants the right to request and to receive access to public information to everyone. By everyone, the meaning includes Bulgarian citizens, foreign national, stateless individuals (physical persons) or juridical person; everyone is empowered to invoke this right guaranteed by Art. 4, of the APIA. Thus, the APIA reflects the principle that no restrictions or discrimination should be made on the basis of any criteria relating to the applicants. Thus the concept expressed in the Recommendation (2002)2 of the Council of Europe, in accordance with Principle III, which states: „The Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any, including that of national origin.“

¹⁴ The secret Cabinet orders before 1989 are just one example of this.

This issue was raised as a result of a legal brief filed appealing the refusal of the Razgrad Mayor to provide access to information, requested by George Milkov, President of the local NGO - Center for Non-Governmental Organizations in Razgrad (CNGO).¹⁵

Briefly, the facts of the case are as follows:

Following the submittal of an application requesting access to public information, a letter was received, signed by the Municipality of Razgrad's Secretary, requesting that the NGO provide documentation showing its legal status, by submitting a copy of their Court Registration. The CNGO did not provide the Municipality with the requested documentation. On his part, the Mayor, remained mute, as far as the NGO's request was concerned, asking access to public information within the lawfully established 14 day time frame. Whereby, the NGO filed a legal brief with the Regional Court versus the Mayor of the Municipality, asking relief from the tacit /silent refusal. The Court in its turn stayed the appeal, without reviewing the case, dropping legal proceedings on the basis that tacit refusal was not evident. The Regional Court of Razgrad based their decision on the following argument: „In spite of the instructions given, the applicant has not provided the Mayor of the Municipality evidence as to their legal status (certificate attesting to their Court Registration), while the subjects entitled to access to public information are, in accordance with Art. 4 of the APIA, citizens, foreigners, individuals without nationality/ citizenship and legal entities/ persons; therefore, one association of citizens constitutes a legal person only when it is registered as such, in the appropriate register. Thereby in order to provide it with access to public information, it must provide evidence of its legal status, as a subject of the law.“¹⁶ In essence, the Court accepted the following contention, namely, the Mayor was requested with an improper application, given that the NGO did not provide any evidence of its legal status, was therefore under no obligation to respond to a non-request.

¹⁵ Association „Center for Nongovernmental Organization in Razgrad“ vs. the Mayor of Razgrad Municipality, No:78/2004, the Razgrad Regional Court: A.C. No: 3169/2005, SAC - 5th Division.

¹⁶ Decision No: 2/14-02-2005 Razgrad Regional Court.

With the aid provided by Access to Information to Program (AIP), the Regional Court's decision to drop proceedings was appealed before a Three Member Panel of the Supreme Administrative Court (SAC). The SAC repealed the decision as improper. In its adjudication, the Court gave the following arguments dealing with the contention that legal persons/ entities must provide evidence as to their legal status in any request for access to public information: „Access to public information is an immanent phenomenon of the civic society. Thus, Art. 41 of the Bulgarian Constitution dealing with access to information, explicitly begins with: 'Everyone has the right'. The constitutional provision necessitates a wider interpretation and application of the statutory norm expressed in Art. 4 of the APIA. This implies that even non-juridically established civic organizations can request and do have the right to access and to obtain any public information they may find of interest, regardless of the act that their entity may not be expressed, as such, in the above mentioned norm. This is particularly vital when the requested information deals with the activities of the governmental institutions. Hence, lack of a statutory norm, or any requirement, requesting the civic organizations to prove, or give evidence of, their status through their legal registration within the Access to Public Information Act. Such a requirement would be pointless given the condition that 'everyone has the right to search/ request and to receive information' (Art. 41, par. 1 of the Constitution) and that as a rule, all organizations are made up of members, which (at least a number of them) are physical persons; wherefore, every physical person has the right to access public information.“¹⁷

JURISDICTION OF PROCEEDINGS OF BRIEFS FILED AGAINST REFUSALS OF ACCESS TO INFORMATION

In accordance with Art. 28, Para. 2 of the APIA, the decisions for providing or refusing access to public information are taken or made by the institutions or appointed individuals working for the said institutions. They in turn, are required to inform the applicant, in writing, of their decision. The APIA has, in this manner, provided the institutions with the ability to delegate this duty to its respective departments or structures. This condition formulates only one possible eventuality faced by the administrative institutions. The APIA does not provide specific in-

¹⁷ Decision No: 3335/13-04-2005, SAC - 5th Division.

structions or requirements on the part of the institutions to designate the administrative office or structure that is to implement the access to information procedure, as is the case with the enacted legislations of other nation-states, or as it exists in the Protection of Classified Information Act, whereby the administrator in charge of security clearing of information is determined.

This precise situation has led to the extensive variety and variations within the administrative practice of implementations, which in turn has become dependent on another set of factors, like the size of the institutions, budgeting, etc., in carrying out their duties. As a result, in certain ministries, the Minister in charge has designated and delegated a specific section to provide the requested access to information. However, the Minister has assigned, and or empowered, his deputy to issue the refusals. These competencies are usually described within the by-laws, in the form of an order or internal regulation, dealing with the implementation of the APIA.

Given the above, the existence of discrepancies, between the individual or institution responsible for providing access to information as specified in the APIA, and the person or structure which has signed the refusal, thus barring access, is not that uncommon. In this connection, with the previous edition of the *AIP Access to Information Litigation in Bulgaria. Selected Cases. Volume 2*, we have noted the inconsistency and contradictions of the Court Practice, during 2003, in their adjudication on the briefs filed, objecting to the refusal issued by individuals who differ from the designated body. This practice was illustrated with the differing approaches taken by the SAC in the two cases that Access to Information Program has undertaken.¹⁸

In both cases, information was requested from the Council of Ministers (CM), and in both instances, the refusal of access to public information was signed by the director of the "Governmental Information Service" directorate, which the Prime-Minister had delegated rights, via an order, to respond to the requests for access to information.

¹⁸ Vasil Chobanov vs. MC (A.C. No: 1913/2003, SAC - 5th Division; A.C. NO:3559/2003, SAC, five member panel) and AIP vs. MC (A.C. No: 9898/2002, SAC- 5th Division; A.C. No:11234/2003, SC, five member pane).

In the one case, the Court accepted that the use of the lawmaker, within Art. 28, Para. 2 of the APIA, of the expression "its decision" unequivocally shows that the designated or delegated person, makes the decisions on its own name, and no in the name of the Institution that has empowered him/her. And because the director of the directorate, was not amongst the designated institutions pointed out in Art. 5 of the Supreme Administrative Court Act (SACA), whose decision could be appealed before the Supreme Administrative Court, the appeal was returned for a review to the Sofia Municipal Court.

The SAC, in the second case, in considering the appeal, accepted that the determination of the jurisdiction of the proceedings, either before the SAC or Sofia City Court (SCC), should be based upon the designated body obligated by the law (the collective institution or the individual state institutions) instead of the specific individual as stated in Art. 28, Para. 2 of the APIA and the administrative unit he/she is in charge.¹⁹

During 2004, this issue was explicitly resolved in the interpretative Decision No: 4 of 22-04-2004 of the General Council of the SAC justices. With the aforementioned decision, on the suggestion of the Deputy Prosecutor General of Bulgaria, the SAC made a pronouncement on the matter in question: „Appeals made objecting administrative act issued by the administration, whereby ministers, department heads, immediately subordinated to the Council of Ministers, or to the Regional Governors, empowered by, or delegated to exercise their powers, are subject to the jurisdiction of the SAC or to the respective Regional Court at the first instance level.“

In an analysis of the issue, the justices delineated in their decision the difference in exercising ones duties/ prerogatives when delegating authority, and the role of deputizing. In the former instance - delegation of authority and/ or powers, the option of a higher administrative body to pass or grant its own powers or authority by delegation to a subordinate body, is evident. The delegating authority has not permanently relieved itself (or abstracted from) its powers, but retains the rights to use, to decree or to enact, if it so chooses, to use the powers it has otherwise delegated.

¹⁹ Decision No: 10640/2511-2003, SAC - 5th Division.

In the latter instance - deputizing, the absent titular arranges his substitution with a subordinate, whereby the same subordinate exercises for a specified period the full powers and acts in the name of the titular.

Given these legal characteristics, the justices have pointed out that the authorship of the act, as a condition that determines the subject of the legal claims, corresponds to the natural institutional principle, which deems that acts of higher administrative bodies fall under the jurisdiction of SAC, while those issued by the lower administrative bodies fall within the jurisdiction of the respective Regional Court.

Given these considerations, the contention of the justices is as follows:

1. The claims or appeals made against the administrative acts issued by institutions, who have had delegated authority given them by Ministers, department heads, directly subordinated to the Council of Ministers, or to Regional Governors, to carry out some of the duties obligated by the statutory norms, are subjected to the jurisdiction of the Regional Court at the first instance level.

2. The claims or appeals made against acts issued by the deputies of ministers, department heads, immediately subordinated to the Council of Ministers, or to Regional Governors, on the basis of the specific deputizing order, are subjected to the jurisdiction of SAC at the first instance level.

FORMULATING THE REQUEST FOR ACCESS TO INFORMATION

The question of formulating the request for access to information has been settled with the statutory norm expressed in Art. 25, Para. 1, pt. 2 of the APIA, in accordance with which, a **description of the requested information** must be included. In effect with this normative disposition, the formalities set forth before the applicant, are reduced to a minimum. This is only natural, given that the administrative body has always been placed in a more beneficial position with respect to the citizen, in terms of knowledge of the information that is kept by the administration. Consequently, the applicant only has to describe the requested information, as best as he can, without having to point out enumerations, or titles of the documents, so long as it is done in a manner adequate for the institution to comprehend as to which information is being requested.

It must be understood that the eventual difficulties on the part of the applicant to formulate precisely the requested information, should not serve as an obstacle in actuating this right, namely that everyone has a right to access information. It is further developed in Art. 29, Para. 1 of the APIA, according to which „In cases, where it is unclear precisely what information is requested, or, in the case where it is very generally formulated, the applicant is informed and has the right to determine the subject of the requested access to information.“ In those cases of course, the 14-day time frame used in reviewing the application begins to run from the date of determining the information; with the applicant being granted a 30 day time-frame in so doing. More importantly, however, is that the institution can no longer ignore the application for access to information, even if it lacks clarity. On the contrary, the institution is obligated to inform the applicant, in order to determine and clarify the request.

The idea that the applicant must be maximally aided and facilitated by the institution in determining the requested information, can be found in the regulation dealing with the forms provided in applying for the requested access of information (Art. 26 of the APIA). In this respect, the law specifically gives the applicant the opportunity to use one or more of the request of access to information forms (Art. 26, Para. 2 of APIA). As such, the applicant has an opportunity to request, for example, a review in situ, and subsequently to determine the copies of which specific section or portion they wish to receive.

Within the aforesaid legal framework established by the APIA, the question as to the formulation of the application was raised in two of the cases taken up by the AIP. And while in the former edition of the the AIP collection of litigation, the question raised by the Court Decisions was described as „Access to documents - access to information,“ in the current two cases, the accent is focused on the clarity of the formulation of the request and the manner in which the requested information is described.

An interesting moment in the development of Court practice, is that with regards to the case dealing with the Center for NGOs in Razgrad, brought against the tacit refusal issued by the Mayor of the Municipality

of Razgrad,²⁰ the focus on the clarity of the formulation of the application was placed by the judicial panel in the Regional Court's decision to suspend the case. This took place without the defendant's (the Mayor's) position that there existed a lack of clarity.

With his application requesting access to information, the president of the CNGO had requested to review and read, *in situ*, the complete information pertaining to the public registers of the Municipality of Razgrad, volume number, name and line. Having observed this fact, the Regional Court made the spurious contention that due to the requirements of various laws, the Municipality maintained numerous registers, and access to such is regulated by the specific laws governing them, thus the APIA was inapplicable.²¹

It becomes apparent, however, that the justices have changed the focus from the subject of the request as it is evidenced by the requested access, which is restricted to the list of registers and the process of accessing them, rather than to the data contained within the registers.

Consequently, with the repeal, the Three member Panel of the SAC found this reasoning expressed by the Regional Court, to be improper, having examined in great detail the question of formulation of the requested access to information. The reasoning of the decision note the following: „In the application - the plaintiff has requested 'the entire available information relating to the public registers within the Razgrad Municipality - numbers, titles, procedure involved in using them.' Thus made, the request shows that the private plaintiff has requested to receive information as to what type of public registers the Municipality maintains and keeps, and requested to find out the procedural rules in accessing every one of them.“²² Further on, in their decision, the justices cited several laws, in accordance with which, the Municipality maintains registers which the Mayor regulates the procedures to their access. And ends with: „An analysis of the acting laws could indicate which public registers must be created and maintained by every Municipality, and which

²⁰ „Association 'Center for NGOs in Razgrad“ vs. the Mayor of the Municipality of Razgrad (a.c. No: 78/2004. Razgrad Regional Court, A.D. No: 3169/2005 SAC - 5th Division).

²¹ Decision No: 2/1402-2005, Razgrad Regional Court.

²² Decision No:3335/1304-2005, SAC - 5th Division.

of those require their access to be regulated by the Mayor of the given Municipality. Without doubt, the Mayor regulates access to the information contained within the registers through the administrative act which could be called a decision, an order, or an act, possessed of a specific title. This act, by definition is deemed to be official public information (Art. 10 APIA). It is in the community's interest for the Mayor to make public these acts - for instance through publication in the local media. If he has not made the information public, the question that arises is whether the claim made by the plaintiff is not without merit.²³ And given that the case before SAC was from a claim against a decision for dismissal, the SAC returned the case to the Regional Court for considering the case on merit.

Our second case in which the issue of clarity of the formulation of the request for access to information arose, was brought up by the Civic Association Public Barometer - Sliven versus the Director of the Public Internal Financial Control Agency (PIFCA).²⁴ With his application, the president of the Civic Association had requested a copy of two audits conducted by the PISCA of two academic institutions in Sliven, namely the local branch of the Technical University - Sofia.

One of the grounds for the refusal to access, given by the PIFCA, was based on the fact that the application did not contain concrete questions, i.e. - a description of the requested information. A particularly curious fact is that despite the lack of „clarity“ as to the requested information, the refusal includes secondary grounds for refusal, namely, administrative secrets.

In the lower Court, the PIFCA's refusal was confirmed by the judiciary panel of the Sofia City Court, which accepted the contention that the application requesting the information lacked a description of the concrete information being requested.²⁵

Subsequently, a Three member Panel of the SAC repealed the SCC's decision, as well as the PIFCA's refusal with the reasoning: „On the

²³ Ibid.,

²⁴ Civic Association „Community Barometer“ - Sliven vs. AISFC (A.C. No: 2001/2001, Sofia Municipal Court III-G panel; A.C. no: 5246/2002 SAC - 5th Division).

²⁵ Judgment issued on 0403-2002 by the SMC -III-G Panel (A.D. No: 2001/2001).

grounds of the statutory norm, Art. 25, Para. 1, pt. 2 of the APIA, the administrative body, should have enacted their obligation decreed by Art. 29, Para. 1 of the same Act, which requires (and enforces) that in the cases where the information requested is unclear, or whenever the request is very general, the applicant is informed and has the right to determine the subject of the requested information within a 30 day time frame. Given that the administrative body has not carried out the aforementioned legal duty, the same administrative body cannot make use of Para. 2 of Art. 29 of the APIA, and let it stay (the application) without consideration. In this sense, the refusal issued on the aforementioned grounds is unlawful. Furthermore, it is evident from the application itself, that it contains precise and concrete description of the requested information - access to the content of the two documents -audit, specified (individualized in pt. 1 and 2 of the same).²⁶

EXISTANCE OF INFORMATION

Generally, the applicant lacks knowledge as to the content of the requested information.²⁷ Sometimes, the applicant has no idea whether the information has been created or whether it exists. Nevertheless, the applicant knows what he needs to find out, but frequently has no idea in which document the information is contained or reflected.

The status of the administrative documentation frequently prevents the citizens without special consultation, to conduct their own search, in terms of the form in which the requested information exists, as well as, which is the competent institution in terms of creating and storing it. There is an absence of public registers of the documentation created by the public institutions, hence Art. 15, pt.2 of the APIA remains inactive. The rapid process of creation and closure, and the assignee process of the administrative bodies and their structures, contribute to the problem. As noted earlier, the scope of the legal consultations provided by *Access to Information Programme*, include questions as to where; from whom; and in which documents; the requested information is deposited and kept.²⁸

²⁶ Judgment No: 10539/2211-2002 SAC - 5th Division.

²⁷ See the Dissenting Opinion provided to the Decision in A.C. No:791/03 before the SAC, five member panel.

²⁸ Trials, on the basis of the APIA, Part II „Review“, pub. *Program Access to Information*, Sofia 2004, p. 40.

The practice of the SAC is stated in that "no enforcement of obligation can be made on the part of the administrative body to provide access to information, which, categorically has not been established to exist."²⁹ This position, expressed by the SAC, regards to court case in which, the Minister of Regional Development and Public Works keeps and maintains the annual reports and audits of the chairperson of the Water and Sewers System, Ltd., Sliven, for the years 1999, 2000, and 2001. According to the Court Panel „there lacks a normative act (legislative of sub-delegated legislative act) which obligates (the Minister) to maintain and keep, the information requested by the plaintiff, and since (the Minister) is not required to collect and maintain such information, he (the Minister) is not competent to respond to the request.“ The Court, including that of the higher instance, continued maintaining this argument, including it in its most recent practice. With Judgment, dated 2005, the Five Member Panel of the SAC, accepted that „the Supreme Judicial Council does not create the requested information and has no legal requirement to maintain it.“³⁰ The subject matter of this case was that the Supreme Judicial Council (SJC) refused to provide access to the annual activity reports of the General Prosecutor's Office for the period 2001, 2003 and 2003. The justices argue, that the normative requirements of the SJC, revolve solely around „the request and generalizing the information on the basis of which to prepare the annual activities report of the Courts, the Prosecutors and the Investigators' institutions.“

From the cited Judgments, it becomes clear that the Court limits its ex officio control to the normative/statutory acts, and does not extend it to the facts. Consequently, the Court verification extends as to whether a statutory obligation exists for the public institutions, whose refusal is appealed, to maintain and keep the information requested. But the Court disregards the issue as to whether the concrete information that is being requested is found and maintained in the given case. In certain cases however, the plaintiff, with difficulty may categorically prove the existence of specific information that is maintained by the defendant/ respondent. Consequently, it can be said that both parties to the trial, are not possessed of equal opportunities within the legal process.

²⁹ Judgment No: 9700/03 in (A.C. No: 2819/SAC - 5th Division).

³⁰ Judgment No: 4122/2005 in A.C. No:11355/04, SAC, Five Member Panel.

The existence of a statute or norm, establishing an obligation to create or to maintain information, is not always adequate in insuring its existence.³¹ In the case of *Iv. Ganchev vs. the Minister of Education and Science*, as it turns out, the necessary documents relating to the use for advertising purposes, space located in the central building of the Ministry of Education and Science, have not been prepared. In his case, the refusal was probably issued to hide the fact that such documents were never issued. The three member panel of the SAC made the decision that the refusal should be repealed and a copy/ transcript be sent to the MES obligating the administrative body to fulfill its duties in accordance with the APIA, as „the incorrect attitude with which the empowered, by the law, subject has treated ... the plaintiff is more than evident“ and thus did not satisfy his right to receive an adequate response, in keeping with the factual circumstances and with the law. The Five Member Court, repealed the above cited Adjudication, argued their position that providing a „remedy for the plaintiff renders pointless the return of the case as a transcript to the administrative body, serving as an informative means on the basis of Art. 3 of the APIA, which in effect has been done.“³²

The decision, in the above context, restricts the judicial control within the framework of an eventual refusal to the provision of existing information. Unfortunately, other obligations, decreed in the APIA, like duly informing the applicant that the requested information does not exist (Art. 33), or forwarding the requested access (Art. 32), are left outside the boundaries of the judicial control.

DESTRUCTION OF INFORMATION

In terms of actual practice, specific issues are being raised as to information that is kept and maintained in a given public institution. In the case of a refusal, issued by the head of the State Reserves, it was pointed out that in accordance with a certain decree, the time frame for maintaining and keeping the requested contractual agreement No:211/1998 had lapsed. Following the fact, that, the above named agency did not provide evidence to the Court indicating the grounds of their contention for the refusal, the justices argued „that the administrative body should

³¹ Court Cases, dealing with APIA, Part II „Review“, pub. *Program Access to Information*, Sofia 2004, pp. 41-42.

³² Decision No: 2383/03 of A.C. No:8518/03 of SAC, Five Member Panel.

have provided proof, that the requested contractual agreement has been destroyed following a decision made by a committee of experts, namely that it has been archived, providing data and indication as to its location within the archives.”³³

In the case that a loss of the requested documentation has been established, the administrative body, should have provided a protocol attesting to the event, and proceed to locating the responsible persons. „Unsubstantiated through evidence and groundless statements contending that the contractual agreement could not be found, is insufficient to serve as grounds for issuing the refusal of access to public information“ concludes the adjudication.

In reality, and in keeping with the principles of honest and transparent administration, rules for maintaining and archiving the documentation of public institutions must be accessible. At every turn, the protection of the right to accessing public information requires guarantees, that, a document whose current existence is questioned, be archived in the respective public institution, as this is the only means of avoiding possible abuse of such a contention.

CONSIDERATION OF THE PREFERRED FORM FOR ACCESSING INFORMATION ON THE PART OF THE APPLICANT

The obligation, of the administrative bodies, is to respect the preferred form of accessing information on the part of the applicant, in keeping with the rules stated in Art. 21, Para. 1 of the APIA. According to this statute, „The institutions are obliged to consider the preferred form with which access to public information is provided, with the exceptions shown in the following circumstances: 1. No technical possibility exists; 2. Is connected with excessive expenses in providing the information; 3. Leads to an unlawful processing of the requested information or to an infringement of copy rights.“ The existence of any of the foregoing eventualities would still not provide grounds for the institution to deny the requested information. Instead, the institution should enable to applicant to determine the form in which the information will be provided (Art. 27, Para. 2 of the APIA).

³³ Decision No: 9154/04 re: A.C. 4408/04 of SAC - 5th Division.

The applicability of the options provided in pt. 3 of Art. 27, Para. 1 of the APIA, as an issue dealing with the unlawful processing of information as a direct result of the requested format, as far as judicial practice is concerned, remains controversial. This precise option took place in the case³⁴ which the journalist Todor Yanakiev brought against the Prison Governance Department (PGD) at the Ministry of Justice, appealing against the decision of the Director of the Department to comply with the preferred format of the access to information. The following circumstances had to be established at the Court of First Instance, (SCC, through on interpretation of the hypothesis of unlawful processing of information, found in Art. 27, Para. 1, p. 3. The journalist had requested access to the prison records of a dissident repressed by the communist authorities in Bulgaria prior to 1989, on a paper carrier format via Xerox copies, stating that this was the only way to establish an in-depth, precise and objective opinion, based on the information found in these records. The information is necessary in order for the journalist to conduct his investigation as he was writing a monograph on the particular dissident. It was noted that the said journalist had been given access to the records in situ, with the possibility of taking notes. The basic ground of the refusal of access due to format, issued by the director, was that providing Xerox copies „... presupposes their free replication and distribution within the community, and raises well grounded fears of reprisals of satisfying undisclosed interests and persecution. As a result, the information should be provided in such a volume in such a manner, so that personal data of third parties are not accosted, without their expressed notarized permission.“ These third parties, as it was subsequently disclosed by the Department, were other prisoners, and employees of the prison administration, which, according to the Director, must be „... protected against unlawful interference in their personal and family life, and against violations of their dignity, honor, and good name.“

Given the actual circumstance, the court panel of the SCC, found the Director's refusal to provide the records as appropriate, and in keeping with the law. In order to reach their decision, the court accepted that the prison records constitute public information as defined by the APIA, in that it „... pertains to the administrative information, connected with

³⁴ *Todor Yanakiev vs. Chief of the Department „Execution of Penalty“* at the Department of Justice (A.C. No: 3167/2003, Sofia Municipal Court III-G panel; A.C. No: 3378/2004 SAC - 5th Division.

the activities of a specific state institution, as well as the fact that this information reflects a considerable period of the life of the dissident, public figure and citizen, repressed by the totalitarian authorities of Bulgaria prior to 1989, which leads to the conclusion, that these records are connected with the civil society in Bulgaria.³⁵ The next contention, made by the Court, that the requested paper carrier - i.e., Xerox copies, is unwarranted „... because these documents contain information, whose dissemination in an uncontrolled manner and within an unrestricted circle of subjects, threatens the rights of third parties by publicly revealing facts of their private lives or work-related duties, which is impermissible, in terms of the statutory requirements of Art. 5 of the APIA, barring any access to public information, that, could be directed against the rights and good name of third parties.“³⁶

In the above summary, the court panel found that the statute, Art. 27, Para. 1, pt.3 of the APIA, to be applicable, due to the fact that, „... providing copies of the requested documents via paper carrier, means as well as, removing them from the Department's archives, whereby the plaintiff could not guarantee that these records will not fall (including against his will) in the hands of third, unscrupulous persons, which could use them in a manner not intended at the time of their creation, and lead to dissemination of information, affecting the private life of work-related activities of other prisoners or prison administrators.“³⁷ The court, as well as the director in their refusals, have not elucidated as to the grounds of their decision, namely which specific information that is contained in the records or dossier, constitutes such sensitive data that would affect third parties; as well as how would third party rights be affected by providing copies that would damage their right to protection against unlawful meddling in their private and family life, and their right to protection from abuse to their honor, dignity and good name. This is especially pertinent, given that the applicant had been provided with access to the information, in the form of an in situ examination of the records.

Eventually, SAC repealed SCC's Decision, and returned the case for a Review at another panel. As part of the repeal, SAC contended that the argument that the protection of the interests of third parties, which data

³⁵ Decision from 23-012004, SMC III-G panel case No: A.C. 3167/2003.

³⁶ Ibid.,

³⁷ Ibid.,

may be contained in the requested records, is unconvincing, as well as that „... it is unclear as to how the plaintiff, could threaten civic order, if he were to receive Xerox copies of excerpts of the records.“³⁸ It was thus, in an indirect manner, that SAC extrapolated the necessity of consideration of damage, in those cases where a refusal to access is based on the preferred format, due to the possibility of unlawful manipulation of information. This means that a refusal must be argued, rather than be alluded, or by simply citing a statutory norm, like the referral to Art. 27, Para. 1, pt. 3 of the APIA. The administrative body, which uses the aforementioned statutory rule, expressed in their reasoning, should state precisely which interest and in what manner, damages would be incurred.

The three member panel of the SAC directed the following recommendations towards the Sofia City Court: „With a review of the case, it is recommended that the Court clarify the legal nature of the prison records; including, requesting from the Director of the PGD, why the dossiers which obviously have acquired an archive characteristic, have not been forwarded to the State Archives, in accordance with the procedures and conditions established by the State Archives Act. A wider inquiry into the currently active statutory rules or legislation shows no existence of a legal basis to withhold documents possessed of a possible historic value and which are state property (whereby the rule contends that state property serves to benefit communal interests)... Thereby, the Sofia City Court must proceed with an in-depth review of the character and essence of the so-called prison records...“³⁹

From the above exposition, the conclusion which must be drawn is that the formulation of Art. 27, Para. 1, pt. 3 of the APIA (in the hypothesis of improper processing/manipulation of information) is drawn hazily, given that neither in the APIA, nor in any other currently active statute, has there been made a legal definition of the concept „unlawful management“ of information. In comparison with the vagueness of the above hypotheses, the one dealing with the copy right law, again found in Art. 27, Para. 1, pt. 3, is formulated clearly, as it is treated in the Copy Right/ Author's Rights Law.

³⁸ Decision No:100058/02-12-2004, SAC - 5th Division

³⁹ Ibid.,

DECISIONS MADE ON THE MERIT. IMPLEMENTATION OF COURT DECISIONS

The issue of court decision implementation in terms of access to public information, is effective when made on merit. This is evidenced by the variations in the decisions one cases where: a). The Court reverses the refusal and returns it to the institution for a new pronouncement; or, b). The Court reverses the refusal, returns it to the lower Court for a review with obligatory instructions as to the interpretation and application of the law; or, c). Reverses the refusal and orders the institution to provide access to public information.

Up until 2004, the dominant cases constituted the ones where the Courts returned them to the institution for a new pronouncement. This fact is explained by the circumstances that most cases deal with tacit refusals, or refusals without expressed factual or legal reasoning. The Courts, in those cases, where the reasoning were not explicitly provided by the administrative body, accepted that they could not decide on merit.

During 2005, the disputes where the Courts decided on merit, considerably increased. This came about as a result of a better acquaintance, on the part of the administration, with the APIA, which in turn led to a greater number of explicit refusals based on the same act. Concurrently, the number of cases tried, on the basis of the Art. 41, Para. 1 of the APIA, led to an increase in such, where the Courts obligated the administrative bodies to provide access to the requested information. Thus in three⁴⁰ of the ten cases, included as addenda to this book, the Court decided on merit, ordering the respective institutions to provide access to the requested information. In every one of these cases, the Court decision invariably reads: Reverses the refusal and Orders the institution to provide access.

The decision issued by the SCC on the Case⁴¹ of the journalist Pavlina Trifonova vs. the refusal issued by the Director of the Government Information Service, to provide information dealing with the Ministers' trav-

⁴⁰ *Christo Christov vs. MI*; and the two cases involving *Lyubov Gousseva vs. Vidin Municipality*.

⁴¹ *Triphonova vs. GIS at MC* (a.c. No: 2860/2003 SMC III-Z panel; .c. No:10635/2004 SAC - 5th Division).

eling allowance on their official trips. The Court's decision,⁴² reversed the refusal, the right of the plaintiff to receive the requested information was accepted, and the Director of the Government Information Service was **ordered to provide it**.

The cases where the Courts refused to decide on merit should be noted. The Courts returned the case to the respective body for a review, with obligatory instructions in the interpretation and application of the law. This more often involves cases where the Court has found a lack of clarity in the refusal, or found the necessity of additional procedures within the process involved in providing the information, serving as stumbling blocks in decisions on merit. The Court's instructions as to interpreting and applying the law in some of the cases⁴³ are so detailed, that carrying them out would invariably lead, the respective institution, to providing the requested information.

As far as execution of the court decision is concerned, its implementation is a function of, and is dependent on the level of the administrative body within the administrative hierarchy. The higher the administrative body status within the hierarchy, the greater the percentage of implementation of the Court's decisions. It is conversely true of the lower levels in the hierarchy. Furthermore, the execution or implementation of a court decision is related as well, to the disposition of the said decision. Whenever the Court explicitly orders the administrative body to provide access to the requested information, they generally comply. However, whenever the Court returns the appeal for a review, then generally, the requested information is once again denied.

LIMITATIONS TO THE RIGHT OF ACCESS

Constraints or limitations to the right of access to information can be found in various acts. The most explicit and detailed constraints can be found in the Protection of Classified Information Act (PCIA) as of 2002, which creates regulations as to the so called state and administrative secrets. A definition of trade or business secrets, can be found in the

⁴² Decision No: from 23-08-2004 SMC -III-Z panel re:a.c. No:2860/2003.

⁴³ See Decision made by SAC on the case of Diana Boncheva vs.National Audit Office (included in this Review).

Protection of Competition Act. While those constraints or limitations dealing with Personal Data can be found in the Personal Data Protection Act (2002). The only limitations and constraints placed in the access to public information can be found in the statutes of the Access to Public Information Act, namely Art. 13, Para. 2: dealing with the operative instructions of the given act (opinions, positions, recommendations); Art. 13, Para. 2, pt.1, or with the process of negotiations - Art. 13, Para. 2, pt. 2.

Until the PCIA came into force, it was possible to classify information emitted by the state institutions indefinitely. The PCIA established a maximum duration of the protection of state secrets, lasting 30 years with the options of extending it to 60 years - a decision that could only be made by a commission, which is established in accordance with Art. 34 of the said Act.⁴⁴ Three time-frames for the classification of information exist. They correspond to the level of damage or threat, when protected information is disseminated. The classification time-frame for protecting administrative secrets and information lasts a maximum of two (2) years, according to Art. 13, Para. 2 of the APIA.

In terms of all constraints and limitations imposed on the right of access, receiving and dissemination of information, the Constitutional Court has elucidated on the matter that: „it is not a question of a choice between two contradictory principles, but for the application of an exception to the principle (the right to search for and to receive information), which exception is subjected to constrictive interpretation, to insure only the protection of competitive interests.“⁴⁵

This interpretation is applied by the Supreme Administrative Court in its practice, where the right to information is viewed as a principle, whereas the application of constrictions, as expressed in the Protection of Classified Information Act and in the Personal Data Protection Act, are treated as exceptions.⁴⁶

⁴⁴ State Commission for Security (Classification) of Information.

⁴⁵ Decision Constitutional Court No: 7/1996 re: CC No:1/1996, Sate Gazette No: 55/1996.

⁴⁶ Decision No: 9595/04 re: a.c. No:7897/04 of SAC, Five member panel in *V. Chobanov vs. Supreme Court Council*.

European standards regarding Access to Information exemptions

The applicable acts are the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention),⁴⁷ adopted by the Council of Europe member-states and the two Recommendations-Recommendation (81)13 and Recommendation 2002(2) of the Committee of Ministers. In separate cases, the European Court on Human Rights (ECHR) has ruled that that Article 10 of the Convention, which promulgates the right of everyone to receive and impart information, does not establish a positive obligation of the member states to provide access to information. The issue, however, is yet unsettled.⁴⁸ Nevertheless, the obligation of the state to provide access to information has been recognized by the case law of the ECHR under Article 8 of the Convention, which guarantees the right of private life. The obligation includes information about the personal life and the history of the individual,⁴⁹ as well as information about sizable government projects that could affect people's lives.⁵⁰ The problem with the obligation of the state to disclose information has been raised with the interpretation of Article 2 of the Convention, which guarantees the right to life, and of Article 6 of the Convention, which guarantees the right to fair and public hearing by an independent tribunal.⁵¹

⁴⁷ In short, European Convention for Human Rights.

⁴⁸ For further information, please, refer to Van Dijk, P. and G.J.H. Van Hoof. *Theory and Practice of the European Convention on Human Rights*. Sofia: Bulgarian Lawyers for Human Rights Foundation, 2000, p. 528; Case law concerning Article 10 of the European Convention on Human Rights, Council of Europe, 2001, p. 41 - 43; cf. Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, London, Dublin, Edinburgh, 1995, p. 379 - 380.

⁴⁹ Refer to the case *Leander v. Sweden* (26 March 1987) (<http://www.worldlii.org/eu/cases/ECHR/1987/4.html>), and the case *Gaskin v. The United Kingdom* (7 July 1989) (<http://www.worldlii.org/eu/cases/ECHR/1989/13.html>). The second case is related to access to documents about the adoption of the claimant.

⁵⁰ Refer to the case *Guerra v. Italy* as of 19 February 1998, related to access to information about pollution from chemical plants.

⁵¹ *Taskin v. Turkey* (10 November 2004); The Court did not consider violation of Article 2 of the Convention since it found that the state had not respected its obligation under Article 8 of the Convention to provide access to information.

Regardless of the debates about the appropriate implementation of Article 10 of the Convention related to issues of access to information,⁵² this norm is an applicable standard for the *locus communis* exemptions for each of the three aspects of the right to know—the right to seek, to receive, and to impart information. Such are the exemptions related to the protection of national and public security, the prevention of the leakage of secret information (state and administrative secret), protection of the reputation and the rights of the others (protection of personal data and trade secret). In regards to these restrictions of the right to receive and impart information, the three part test, as stipulated by Article 10, Paragraph 2 of the Convention, should be applied. Furthermore, the identical test under Article 8, Paragraph 2 of the Convention is applicable. The latter undoubtedly encompasses the obligation of the state to provide access to information.

According to the European standards, set by Recommendation (2002)2 and Articles 10 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, public institutions may limit the right of access information only if the limitations are set down in **law** and are **necessary** in the democratic society as **limitations** to the right of access in regards to the protection of certain interests. Recommendation (2002)2 lists ten categories of interests, which may justify the restrictions of access to documents.

In other words, the limitations to the right of access would be justified if the limitations are:

- set down precisely in law;
- proportionate to the aim of the protected one or more interests;
- necessary in a democratic society.

As stipulated by Recommendation (2002)2 and according to the practices of the European Court of Human Rights on Article 10 of the Con-

⁵² In recent cases, some judges from the European Court of Human Rights deem that Article 10 of the Convention establishes an obligation for the states to provide access to information. See the special opinion on the case *Roche v. UK* (19 October 2005).

vention, a limitation „necessary in a democratic society“ means that access to a document may be denied only if its content:

- **would harm** or **would be likely to harm** other protected interests,
- unless there is an overriding public interest in disclosure.

It is well known, that the provisions of the European Convention for Human Rights and Fundamental Freedoms are implemented directly and is given priority to the national legislation as stipulated by Article 5, Paragraph 4 of the Bulgarian Constitution. Recommendation (2002)2 has an important meaning for the interpretation of a number of terms in the access to/ freedom of information laws, as well as the laws stipulating the exemptions in the Council of Europe member states. The Recommendation has been quoted in the judgments of the Supreme Administrative Court and the Sofia City Court.⁵³

Court practices on the right of Access to Information exemptions

One of the most important issues that has risen during the five years' implementation of the Access to Public Information Act (APIA) in Bulgaria is related to the use of the limitations to the right of access to information and the finding of the balance between the right of access on one hand and the protection of other rights and legitimate interests on the other hand. This problem is much more important since the interpretation of the legal norms is in the authority of the court, which is the only body that oversees the lawfulness of the refusals under APIA. During the past years, the problem with the precision of the definitions of different types of exemptions (state secret, administrative secret, trade secret, etc.) has been set. The next question rises therein-what is the scope of the information that falls under the exemption and what are the mechanisms for the latter's exact definition? Thus, it becomes necessary that the frames of the legitimately protected interests that puts certain information under the category of restricted information be determined. The precision of setting these frames rises when a partial access is provided.

⁵³ Decision No: 4694/2002, SAC - 5th Division on Administrative Case No. 1543/2002; Decision on Administrative Case No. 1380/2004, Sofia City Court-Administrative Division, Panel 3-z.

In the light of these problems the court practices have given a narrowing interpretation of the exemptions related to state, administrative, and trade secret. The courts have given instructions for the provision of partial access to information. However, some problems persist

Open government. Access to Public Institutions

There is no law in Bulgaria that stipulates the meetings of the different collective bodies of power as public.⁵⁴ Ruling No. 7 of the Constitutional Court from 1996 about constitutional case No.1/ 1996 explicitly states that such publicity should be provided for each particular case according to the corresponding legal norm. Consequently, there is no understanding that all meetings are public in principle and the restrictions could be applied as an exemption to the principle. Debates about public access to the meetings arise even in the cases when the law explicitly states that they are public. This was the case with the refusal of the Supreme Judicial Council (SJC) to allow journalists to attend its sessions, a refusal that contradicted the adopted in 2004 amendment to Article 27 of the Judicial Act. Interestingly, the initial refusal was expressed by the factual restriction of the journalists to the session hall, which set the question about the procedure for the protection of the right to receive information. After the submission of a written request for access to the sessions and the receiving of no response within the legally prescribed time frames (tacit refusal), a statement violating the rights of the requesters was at hand. The challenge of this statement at the court led to the Judgement of a Five-member panel of the Supreme Administrative Court (SAC), which rejected the refusal of the SJC.⁵⁵

In the mentioned case, protection of the right of access to public information that is being generated during the SJC sessions and no record has been prepared yet has been sought. The Supreme Administrative Court remarks that the journalists have submitted a request for access to information in their deputy of representatives of the mass media. Such a request has been defined by the Constitutional Court as passive trans-

⁵⁴ Some legislations, Government in the Sunshine Act in the US, for example, stipulate that all meetings of the executive power bodies are public, unless an exemption that protects other rights or legitimate interests is not at hand.

⁵⁵ Decision No. 9595 as of November 19, 2004, Administrative Case No. 7897/ 2004.

parency. According to the court, the applicable legal norm is not APIA but the special provision of Article 27, Paragraph 3 of the Judicial Act. Since the panel of SAC has determined the relation between APIA and Article 27, Paragraph 3 of the Judicial Act as one of a general to a special law, the question remains whether the court assumes the right of access to information, stipulated by APIA, as one with a larger scope compared to the right of access to recorded information.⁵⁶

Access to public debates records. Preparatory documents exemption

No straightforward answer to the question whether the access to the records of the above mentioned meetings has been given yet. The Access to Public Information Act (APIA) contains the presumption that access to any form of information is possible, regardless of its type-it could be either official or administrative information. As a matter of fact, the only excuse for the existence of this terminology distinction between the two types of information is the specific exemption to the right of information stipulated by Article 13, paragraph 2 of APIA. Regarding the records of the meetings, the administrative bodies usually apply the exemptions under Article 13, paragraph 2, Item 1 of APIA since they consider the records as documents of no significance of their own (opinions, statements, recommendations) - the records were produced in the process of the preparation of the final act.

In some cases, the exemption has been broadly used. Thus, according to the minister of finance, company reports regarding a contract with the state have no significance of their own since they are prepared in the process of the preparation of the final act. The act under preparation is not specified but it is stated that on the basis of the information, „particular acts would be adopted , which would determine particular measures for the reform of the Bulgarian Customs Services.“⁵⁷ This view has

⁵⁶ Furthermore, SAC has noted in its practice under APIA that the right of access to information has a bigger scope than the right of access to documents.

⁵⁷ Decision for refusal with Reference No. APIA-6/ 2002 of the Ministry of Finance regarding a request for access to information submitted by Mr. N. Marekov (from AIP). He demanded the first three months report of the British Consultancy Company „Crown Agents“ in regards to the execution of the contract signed with the state without the required public procurement contest procedure.

been adopted by the court as well.⁵⁸ Another example for the broad application of the exemptions stipulated by Article 13 of APIA is the refusal of access to the records of public debates under the Environmental Protection Act (EPA).⁵⁹ In that case, the court rejected the refusal as unlawful, provided the public nature of such debates.⁶⁰

In interpreting the scope of Article 13, Paragraph 2, Item 1 of APIA, SAC has distinguished assessment from facts by assuming that the norm encompasses the former, but not the latter. In a particular case, when the documents about the accreditation of certain health centers have been demanded, the court found that Article 13, Paragraph 2, Item 1 of APIA may be applied since the information is about „a process of assessment under definite criteria with an amount of subjective input, which could be criticized in cases of objections. This process regards the interests of a third party-those of the assessed health centers.“⁶¹ The motivation of the judgment give the grounds for a conclusion that the court would have decide differently if the requested information was related „only to statistics, technical data that the experts have already known due to their work.“ Consequently, the court practice has marked the beginning of the distinction between „information of no significance of its own,“ as stipulated by the quoted norm, and „information of significance of its own,“ which remains out of the scope of the exemption.

Regarding the implementation of the exemptions under Article 13, Paragraph 2, Item 1 of the APIA towards the records of the sessions of the collective bodies, the court has not decided straightly on the attitude of the administration. Five-member panel of the Supreme Administrative Court rejected the use of the exemption by the Council of Ministers, when the latter refused access to the record of the first session of the

⁵⁸ Decision No. 162 as of January 12, 2004-SAC, Five-member panel, Administrative Case No. 8717/ 2003.

⁵⁹ Refusal of the Head of Administration at the Ministry of Environment and Waters at the request of Environmental Association „For the Earth.“ The association demanded access to the protocols from the public debates about projects financed by ISPA and the European Investment Bank.

⁶⁰ Decision of the Sofia City Court on Administrative Case No.3138/ 2004, did not come into effect.

⁶¹ Decision No. 1843/ 2004, Administrative Case No. 6255/ 2004-Supreme Administrative Court, Fifth Division.

government after the 2001 general elections. According to the court this exemption is inapplicable in the cases when the collective body has not adopted a final act.⁶²

Beyond the above mentioned cases, it is enough for the administrative body to quote Article 13, Paragraph 2, Item 1 of APIA in order to ground their decision for refusal of access to the records. No other arguments are required. Neither the **proportionality, nor the adequacy, nor the relevance** of the use of the restriction are considered. Nor the urgent necessity of public debate over the current issue. The Fifth Division of the Supreme Administrative Court rejected the argument of the plaintiff, who has challenged the refusal of the Council of Ministers to provide full access to the records of one of their meetings. The plaintiff has argued that that the refusal violates the aim of the law, which is to allow the public to have an adequate view, and to form a critical opinion on, the state of the society in which they live and on the authorities that govern them.⁶³ According to the judgment of the court, this adequate and critical view would be formed „on the basis of the quality and nature of the final act of the body, not on interstitially expressed opinion of one or two of its representatives. It is possible that a wrong assumption or a laical question, related to the essence of the debated question, would provoke the way of thinking of the representatives of the collective body and would help them take a lawful and right decision.“ Though the court discussed the argument upon its merits, it has not considered the particular case itself-what is the topic of the recorded discussion and what is the public value of it. This is a non-compliance with the requirements of Article 10, Paragraph 2 of the Convention for the existence of an urgent public necessity of the use of the exemption.

State and administrative secret

Among all other exemptions from the right of access to information and the right to receive and impart information, the restriction related to the protection of the national security required most urgently a legal regula-

⁶² Decision No. 4694/ 16-05-2002, Administrative Case No. 1543/2002. The court proceedings were started by a complaint of the journalists Alexey Lazarov from Dnevnik Daily and was supported by AIP.

⁶³ Decision No. 2811/ 28-03-2005, Administrative Case No. 7085/2004.

tion after the change of the regime.⁶⁴ The process of regulation was completed with the adoption of the Protection of Classified Information Act (PCIA) in 2002. The Act regulates two exemptions from the right to information-state and administrative secret

The second element of the three part test, stipulated by Article 10, paragraph 2 of the European Convention on Human Rights and Article 4 of Recommendation (2002)2-the exemptions to be used for the protection of certain rights and legitimate interests-is part of the definition of „state secret,“ provided by Article 25 of the PCIA. The norm specifies four legitimate interests. The text of the law does not clarify whether these interests are separate of each other or whether the interests of the defence and the external affairs coincide with that of the national security. It is even less clear which interests are protected as administrative secret since Article 26, Paragraph 1 of the PCIA give a general definition of „the state interests or other legitimate interests.“

The PCIA specified particular measures for the narrowing of the interpretations of the exemptions-a list of the categories of information subject to classification as a state secret⁶⁵ and a procedure for the adoption of lists of categories of information subject to administrative secret,⁶⁶ as well as the time frames of the classification period. The classification is done according to a stipulated procedure and by authorized officials.⁶⁷ The rule has been adopted that only documents, whose disclosure would harm or would bring to the harm of legitimate interests could be classified-Article 25 of the PCIA.

The PCIA, however, does not give enough mechanisms that would provide for the compliance with the requirement that state and administrative secret exemptions should be „necessary in a democratic society.“ The insidiousness at the implementation of the newly adopted PCIA in combination with the inherited culture of secrets in the public administration has led to the tendency of disproportional classification of documents. In this regard, the lack of well defined government (2001 - 2005)

⁶⁴ As it has been noted in the above mentioned Decision No. 7/ 1996 of the Constitutional Court on Constitutional Case No. 1/1996.

⁶⁵ Appendix to Article 25 of the PCIA.

⁶⁶ Article 26, Paragraph 4 of the PCIA.

⁶⁷ Pursuant to Article 31, Paragraph 1 of PCIA.

transparency policy and the bias for policy of secrecy, inherited by the totalitarian regime.⁶⁸

State secret

No practical implementation of the above quoted rule of harm (Article 25 of PCIA) has been detected yet. Public administration does not implement it in the process of classification and the court has not considered a case in which the lawfulness of the implementation of the rule in the process of classification with a security stamp to be considered. The oversight of the circumstance whether the classification has been done after a proper consideration of the harm that the disclosure might inflict is in the authority of the administrative court. This is so due to the provision of Article 41, Paragraph 4 of the APIA, according to which, in cases of refusal on the grounds of state or administrative secret, the court oversees the lawfulness of the classification in a closed session and delivers a judgment. Such an oversight has not been done by the court yet.

In terms of the relationship between the right of access to public information and the exemption related to the protection of the national security, the Constitutional Court has emphasized that „the matter is not related to the choice between two conflicting principles but between the implementation of an exemption from the one of them (from the right to seek and receive information). This exemption is subject to interpretation.“ In respect to the implementation of the above quoted binding interpretation of the Constitution, the legislator has entitled the court, provided by Article 41 of the APIA, to judge on the lawfulness of the classification with a security stamp (Paragraph 4, amended with the enforcement of the Protection of Classified Information Act, State Gazette, issue 45, 2002).

In its practice in the implementation of APIA, more particularly in cases of access refusals because of alleged state secret by the administrative body, the Supreme Administrative Court (SAC) has outlined specific obligations of the defendant. These obligations are related to the evidence that should be presented in court. According to SAC, the right of

⁶⁸ The latter has become evident by the slow oversight over the classified documents in the past (§ 9 of the Additional and Final Provisions of the PCIA), by the repeal of the Law on the Access to the Documents of the Former State Security Services and the Former General Staff.

the court to oversight the classification with the security mark (Article 41, Paragraph 4 of APIA) „implicitly suggest the obligation of the administrative body to provide information about the time of the classification and the grounds for it,“⁶⁹ „the type of the security mark and the time of its origination,“⁷⁰ „data about the nature and the type of the contained information that characterize it as a state secret and the respective legal ground that classifies it as such.“⁷¹

As a second guarantee for an efficient protection of the right of access to information, the court emphasizes that the legislator has stipulated that the refusal of access to public information should state legal and factual grounds for the refusal-Article 38 of APIA, which is a special law in regards to Article 15 of the Administrative Procedure Act.⁷² Furthermore, the mere statement of the respective category to which the information belongs (section and item) pursuant to the List of Categories-Application No. 1 under Article 25 of the PCIA-does not give sufficient grounds for refusal as required by Article 38 of APIA. Factual grounds for the classification of the information as state secret should also be presented. Otherwise, „the court would not be able to oversight the lawfulness of the refusal.“⁷³

The third guarantee for efficient protection of the right of access to information is stipulated by Article 41, Paragraph 3 of APIA. The provision entitles the court to request the necessary evidence, including the documents to which access has been denied, in order to exercise their privilege stipulated by Article 41, Paragraph 4 of APIA.⁷⁴

⁶⁹ Decision No. 2113 as of 2004, Administrative Case No. 38/2004-Supreme Administrative Court (SAC), Five member panel.

⁷⁰ Decision No. 3329 as of 2004, Administrative Case No. 4256/2003-SAC, Fifth Division, upheld in that part by Decision No. 10075 as of 2004, Administrative Case No. 4662/2004-SAC, Five member panel.

⁷¹ Decision No. 11682 as of 2003, Administrative Case No. 3080/2003-SAC, Administrative Case No. 3080/2003, upheld by the quoted above Decision No. 38/2004-SAC, Five member panel.

⁷² Decision No. 111 as of 2004, Administrative Case No. 7641/2003-SAC, Fifth Division, came into effect.

⁷³ Decision No. 9154 as of 2004, Administrative Case No. 4408/2004-SAC, Fifth Division, came into effect.

⁷⁴ This entitlement has been exercised by SAC, Fifth Division in Administrative Cases No. 3080/2003; No. 9898/2002; No. 4120/2004; and by the Sofia City Court in Administrative Case No. 642/2002.

The privilege of the court under Article 41, Paragraphs 3 and 4 of APIA

In *Access to Information Litigation in Bulgaria. Selected Cases. Volume 2*, we have presented the 2003 court practices established in cases of information refusals on the grounds of classified information as a state and administrative secret. The court has requested the particular information from the administrative body and, after reviewing it in chamber, has judged over the lawfulness of the security stamp, as well as over the lawfulness of the information refusal.

The two cases, in which the court has requested the information for review, are the case *AIP vs. the Council of Ministers* for access to the *Instructions for the Procedure of the Protection of the State Secret in the People's Republic of Bulgaria as of 1980*;⁷⁵ and the case against the refusal of the Minister of Finance to provide a copy of the contract with the British Consultancy *Crown Agents*.⁷⁶ What the two cases have led to was the review of the information by the court in chamber and the finding of a security stamp. No judgment on the lawfulness of the putting of the stamp has been delivered. The reason is the finding of stamps that have been put before the enforcement of the PCIA when no requisites of the stamp as a date, grounds, and authorized person, who has put the stamp, were required. No rectification about the date and the reasons for the classification stamp came from the institutions in these two cases. The two court panels of SAC assumed that the lack of motivation from the institutions about the criteria along which they have classified the information as a state secret obstructs the court to judge on the appropriateness of the stamp and to exercise their oversight over the lawfulness of the stamp and the refusal. Under these circumstances, it remains a debatable issue

⁷⁵ *AIP vs. The Council of Ministers* (Administrative Case No. 9898/2002-SAC, Fifth Division; Administrative Case No. 11243/2003-SAC, Five member panel). After the adoption of the PCIA in 2002, AIP challenged the refusal of the Governmental Information Services at the Council of Ministers to provide access, under the provision of APIA, to the classified *Instructions for the Protection of the State Secret in the People's Republic of Bulgaria*. The Instruction was adopted by the Council of Ministers in 1980. The proceedings that started in the court could be regarded as one of the stimuli for the Council of Ministers to reconsider § 9 of the Additional and Final Provisions of the PCIA and to declassify 1484 documents in the summer of 2004. The Instruction demanded was among these declassified documents.

⁷⁶ *Kiril Terziiski vs. The Minister of Finance* (Administrative Case No. 3080/2003-SAC, Fifth Division; Administrative Case No. 38/2004-SAC, Five member panel).

whether the court was right to refer the files of the cases back to the institutions for reconsideration, instead of obliging them during court proceedings to present all their grounds and evidences for claiming that certain information is classified.

In 2004, the court practices under Article 41 of the APIA have been developed by the appeal⁷⁷ against the second refusal of the Minister of Finance to provide a copy of the contract with *Crown Agents*. At that time, the refusal stated the date and the grounds for the classification of the already repealed *List of facts, subjects, and data, which constitute a state secret of the People's Republic of Bulgaria*. It also pointed out that the information had been reviewed and classified again under the procedures of the PCIA. The refusal contained a general statement that the contract fell under three particular hypotheses of the List of Categories-Application No. 1 under Article 25 of the PCIA, which stipulate the categories of information subject to classification as a state secret.

The first court instance-three member panel of SAC, requested the contract again but did not schedule a session after the *in chamber* review of the contract. Instead, the three member panel announced the case for judgment, specifying that before the delivery of the decision, the information would be reviewed under the stipulations of Article 41, Paragraph 3 of APIA. This led to the almost simultaneous ruling about the court proceedings regarding the review of the information *in chamber* and the delivering of the court decision itself. The court ruling asserted that the contract had been stamped *secret*, then this stamp had been crossed out and a new stamp was put-*confidential*. An authorized person had signed the document and had given the date and the grounds for classification-§ 9 of the Final and Transitional Provisions of the PCIA. The court justified⁷⁸ the classification, as well as the refusal itself, as lawful. The justices made the conclusion that if the information had been stamped, then it fell under the quoted categories of state secret; furthermore, if the information fell in these categories, then the security stamp had been lawful as well. The decision, however, was signed with the special opinion of the Chairperson of the court panel, who stated that

⁷⁷ *Kiril Terziiski vs. The Minister of Finance 2* (Administrative Case No. 4120/2004-SAC, Fifth Division; Administrative Case No. 592/2005-SAC, Five member panel).

⁷⁶ Decision No. 9472 as of November 16, 2004-SAC, Fifth Division.

the justification of the lawfulness of the security stamp had required the consideration of whether the information really fell under the quoted categories of state secret.

In the meanwhile, the above cited decision was rejected by a five member panel of SAC.⁷⁹ The latter assumed that the three member panel had not judged over the lawfulness of the security stamp along neither the concurrent, nor the repealed legislation. Consequently, the judgment of the lower instance court that the contract contained classified information was ungrounded since the court had been supposed to judge whether **the content of the contract constitute information that fell under the quoted categories of secrets.**

Furthermore, the second instance court ascertained violation of the court proceedings rules in the circumstance that after the court announced the case for judgment, the information was reviewed in a closed session. Thus, according to the judges, **the right of defense of the claimant had been violated** since he **could not get acquainted, before the end of the pleadings, with the facts and circumstances found by the court in a closed session.** Such a deliberation could be elaborated by the statement that the equality of the parties in the process had been violated since the lack of knowledge of the claimant about the findings of the court in the closed session deprived the former of the chance to form an opinion on the basis of these findings. Hence, the claimant was put undoubtedly in a disadvantageous position by the particular institution that always knew the information.

On the basis of these motivations, the case was referred for reconsideration to another court, which would decide on the lawfulness of the security stamp after considering whether the content of the contract fell under the state secret categories that had been stated by the administrative body.

Precisely, in such a consideration on the merits, according to us, lies the essence of what the legislator has stipulated in Article 41, Paragraph 4 of APIA-entitlement of the court to decide on the lawfulness of the security stamp. The opposite interpretation would mean that every time the court

⁷⁹ Decision No. 3875 as of April 28, 2005-SAC, Five member panel.

found a security stamp and the justification for its putting in the existing legislation, it would justify the classification. Such an interpretation could not be supported in the context of the effective texts of Article 41, Paragraphs 3 and 4 of APIA, neither by the existence of the above described court practices.

Protection of a third party interests

One of the most frequent exemptions from the right of access to information is related to the protection of a third party interests. The procedure for this protection is stipulated by Article 31 of APIA. The provision does not specify the types of interests and the cases in which they are subject to protection. The ambiguity becomes greater since different laws apply different terms. For example, Article 31, Paragraph 1 of APIA gives a hypothesis, which defines the demanded public information as „regarding to the interests of a third party, whose consent is required for the disclosure of the information.“ While, Article 37, Paragraph 1, Item 2 of APIA employs the phrase „access may affect the interests of a third party.“ The content of the exemption from the right of access to information, thus, could be determined by the interpretation of the quoted norms.

Article 41, Paragraph 1, sentence 2 of the Constitution states that the right of information „shall not be exercised to the detriment of the rights and reputation of others.“ Furthermore, Paragraph 2 of the same provision states that the right of access to information from state bodies and agencies may not be restricted if the information is not „a state or other legitimate secret, and does not affect the rights of others.“ Hence, the right of access to information may be only restricted for the protection of a third party right. That is why the requirement for the third party's consent, stipulated by Article 31 of APIA, does not give the latter unrestricted powers to dictate to the institutions the volume of the information they could provide.

In regards to these issues, in 2004, SAC delivered two successive judgments that reformulated the question as follows: „It is questionable when

⁸⁰ Decision No. 4716/ 2004, Administrative Case No. 8751/ 2003; Decision No. 4717/ 2004, Administrative Case No. 8752/2003-SAC, Fifth Division.

the consent of a third party is required. The wording of Paragraph 1 of Article 31 of APIA does not give a clear answer to the question when a third party's consent is required:

1. whether it is required when it is provided by the existing legislation?;
2. when a legitimate right or interests may be harmed;
3. or in any case, except the cases stipulated by Paragraph 5 of the text.⁸¹

Furthermore, the court panel assumed in their judgment that: „If the question about the violation of the rights and interests of the third party is set by the request for information, the current court panel assumes that no legitimate rights and interests of a private company as a third party may be harmed.“ This means that an interpretation has been adopted, according to which, the presence or the lack of claimed rights and legitimate interests of a third party is subject to the individual assessment of the administrative body in the process of decision-making about an access to information request. The adopted interpretation complies with the aim of Article 41 of the Constitution, which establishes the right of information as a principle, and its limitations as an exemption.⁸²

When another authority, or some of the obligated under Article 3, Paragraph 2 of APIA subjects, is a third party, no consent is required (Article 31, Paragraph 5). The common rights and the legitimate interests of the third parties that may be protected under the procedures stipulated by Article 31 of APIA are the so called *trade secret* with juridical persons, and the protected *personal data* with natural persons.

Most frequently, the protection of the rights of a third party is carried out by means of partial access provision-the name of the third party is blanked out in the copies of the documents that are provided to the requestor under the provisions of APIA. The proper implementation of APIA requires that a copy of the Tax Authorities Director's letter to a subject is

⁸¹ The graphic differentiation of the three options is ours. Compare the question considered in the 2003 Annual Report *Access to Information in Bulgaria*, Sofia: Access to Information Programme, 2004, p.14.

⁸² Actually, the requirement for the search for consent aims to decrease the efforts of the administrative body in the cases when such a consent is given.

disclosed after the name and address of the recipient are blanked out.⁸³ This requirement is valid for the copies of reports stating violations after the deletion of the names of the witnesses.⁸⁴ When the matter is about a trade secret, the information (for instance, a contract between a trade company and a body obligated under APIA) should be provided after the erasure of the special terms.

To the present, seldom cases of requested access to protected personal data have been registered in the practice. That is why a balance between the right of information and the right of personal data protection should be made. More frequently, the requesters demand access to information, which may be provided after the erasure of the names of the affected individuals in the particular documents.

Access to information that falls under the scope of the definition of *personal data*, according to § 1, Item 2 of the Additional and Final Provisions of APIA may be mostly demanded from public registers. Unfortunately, there are cases of refusal or partial refusal of access to information contained in such registers. A decision of the Supreme Administrative Court, regarding access to the public register in terms of information about the property of the persons of high government positions, revealed the inapplicability of the provision stipulated by the Protection of Personal Data Act (PPDA) in cases when the data is contained in a public register. The court grounded their judgment in Article 35, Paragraph 1, Item 2 of the PPDA. The problem about the balance between the right of access to information and the right of protection of personal data in cases when the requested information is public but is not stored in a public register remains unconsidered in the practices. Pursuant to Article 35, Paragraph 1, Item 2, the public interest from the access provision should override.

Trade secret

The question about the protection of the trade secret is raised when access to contracts between private companies and the state or the municipalities is demanded. Separate court decisions uphold the statement that the term *trade secret* has no legal definition.⁸⁵ Most probably, what is

⁸³ Decision No. 6017/ 2002, Administrative Case No. 10496/ 2001-SAC, First Division.

⁸⁴ Decision No. 9822/ 2001, Administrative Case No. 5736/ 2001-SAC, Fifth Division.

⁸⁵ Decision No. 115/ 2005, Administrative Case No. 5380/ 2004-SAC, Fifth Division.

meant is that the definition is not clear enough in regards to the citizens' right of access to public information, which establishes the obligation for information provision. The definition of the term trade secret is given by § 1, Item 7 of the Additional Provisions of the Protection of Competition Act (PCA), while the content of the delict, which constitutes the disclosure of the secret, is stipulated by Article 35. The use of the term with the aim of legal protection of the competition demonstrates that the purpose of the protection of a trade secret is the prevention from disloyal competition.

Trade secret may be claimed if the particular information is related to business activities (§ 1, Item 7 of the Additional Provisions of the PCA). Business relations that emerge between the parties of a contract may be regarded as such information.⁸⁶ Next, in order for a legitimate trade interests to be claimed, the disclosure of the information should create conditions for disloyal competition (pursuant to the definition of *disloyal competition* in Article 30, Paragraph 1 of the PCA).

The court assumed that the legitimate interests (trade secret) of the private company Chistota were not at risk when statistics data⁸⁷ and a copy of the contract between the company and the municipality regarding the treatment of stray dogs were demanded.⁸⁸ In the quoted decisions, the court emphasized the major public interest in the answers set by the requester - „The problems with the stray animals in the towns and villages are common for all citizens of the particular settlement. Hence, the requested information is, on one hand, regarding the reduction of the number of the stray animals and on the other hand, the humane methods of decreasing their population, as well as the ways of spending the allocated resources.“ At the same time, the court decisions state that the refusal of the administrative body, as well as the answer of the third party, lacks factual grounds for the implementation of the legislative restriction.

⁸⁶ Decision No. 118/ 2004, Administrative Case No. 5496/ 2003-SAC, Fifth Division, published in *Access to Information Litigation in Bulgaria. Selected Case. Volume 2*, Sofia: Access to Information Programme, 2004, pp. 214-222.

⁸⁷ The monthly financial reports regarding the treatment of the stray dogs in the town.

⁸⁸ Qtd. Decision No. 4716/ 2004, Administrative Case No. 8751/ 2003; and Decision No. 4717/ 2004, Administrative Case No. 8752/ 2003-SAC Fifth Division.

Balance of interests

No common rules for the application of balance of interests' mechanism are found in APIA. These are not found in the laws stipulating the exemptions from the right of access to information either. A requirement for such a balance comes from Article 41 of the Constitution, reasoned by the Constitutional Court,⁸⁹ and from Article 10, Paragraph 2 of the European Convention on Human Rights. The balance of interests is formulated in greater details by Recommendation (2002)2, which stipulates that the public institutions are obliged to disclose information that may fall under the exemptions when an overriding public interest is present.⁹⁰ In two cases, the legislation provides for the application of the balance of interests mechanism.

In some cases, the overriding public interest has been introduced by the law itself. For example, the *Public Disclosure of Property Owned by High Government Officials Act* has stipulated the establishment of a public register of the property and the income of these officials. Indeed, the publicity of such data exposes to a greater extent the private life of the higher state officials. However, the motive for the exercise of public control over public figures and the decency of the latter in terms of their exertion of public power comes first. In their decision regarding a refusal of access to that register, SAC, Fifth Division, emphasizes: This is a peculiar anticorruption measure, which may not be derogated by quoting the Protection of Personal Data Act (PPDA).⁹¹

In other cases, the legislation establishes the obligation for the public institutions to decide by themselves on the provision of information, whose disclosure is of overriding public interest. Such an obligation is established by Article 20, Paragraph 4 of the Environment Protection Act, which stipulates that information regarding the environment should be disclosed due to the considered great public interest. No cases of implementation of this text have been registered yet.

⁸⁹ In the Decision of the Constitutional Court No. 7/1996, Constitutional Case No. 1/1996.

⁹⁰ See Recommendation (2002) 2 of the Committee of Ministers of the Council of Europe regarding access to official documents and its Explanatory Memorandum, (http://www.aip-bg.org/eurolaw_bg.htm), as well as the Council of Europe Guide Access to *Official Documents*.

⁹¹ Decision No. 3508/2004, Administrative Case No. 10889/2003-SAC, Fifth Division.

Problems with the balance of interests

Balancing between the public interest from the disclosure of particular information and the public interest of its protection by means of limitations is among the major problems with the implementation of APIA. There is no clarity in the balancing of interests even in the traditional democratic legislative spheres like the protection of personal data and trade secret.⁹² For example, pursuant to Article 31 of APIA, when the third party interests are at risk, their consent is required. When such consent is not given, then partial access may be granted under the conditions determined by the third party (Paragraph 3). Precisely, in such cases of exemption, the balance of interests is of particular importance since data about public figures, as well as the interests of the private companies which contract with the state, may be considered.

The practices of SAC under Article 31 and the application of the balance of interests is contradictory. Access to information about public procurements, including signed contracts should not be denied, according to the court. The court panel has not seen the legitimate interest of the company in refusing the contract about the treatment of stray dogs and has ruled that the contract should be disclosed, regardless of the dissent of the company. According to the court, the administrative body is entitled to assess whether the interests of a third party are at hand. Though in another judgment regarding procedure issues, SAC has assumed that the consent of the third party, which determines the conditions for the granting of access, established the obligation of the administrative body to comply with these conditions.⁹³

The ultimate implementation of the *dictatorship of the third part* under APIA may bring to the limitation of the right of access to information to absurdly variable and may thwart the achievement of the main purpose of that right-guarantee of accountability and transparency in government.

⁹² The balance of interests is provided by the hypothesis of Article 19 only-when access is demanded from the mass media. Principally, AIP criticizes the obligation of the media under APIA since such an obligation blurs the main purpose of the law-to grant transparency of the institutions.

⁹³ *Access to Information Litigation in Bulgaria. Selected cases, Volume two*, Sofia: Access to Information Programme, 2004, p. 40.

INSTEAD OF CONCLUSION

The cases related to court proceedings under the Access to Public Information Act demonstrate several developments. On one hand, they reveal one effective law, which is implemented for the achievement of goals of public benefit like the achievement of more transparent public institutions, the establishment of a requirement for a greater accountability of the government to the society, raising important issues for public debate, participation of the citizens in the decision making process. On the other hand, different cases present separate individuals and events, which create the consistency of all that has been happening and make possible its comprehension as a story beyond the formalities of the legal articles and paragraphs. This story is about the active citizens, journalists, and organizations, which thanks to their persistency have succeeded in disclosing documents, in throwing light over particular events, to achieve changing of the practices of the public administration. In the plots of these stories, the judges always are present. They listen to the parties, consider the arguments, and deliver judgments in order to show publicly what the attitude of the administration in certain cases should be. In this variegation of different stories, one can see how a democratic society debates about the conditions under which it would govern itself.

The other direction, in which the cases lead, is the implementation of the law, the specification of the volume of public information, the obligations of the administration, and the rights of the citizens. If we compare the extent of accessibility of government held information in Bulgaria and in Sweden, Holland, or USA, for example, we would undoubtedly fall into a pessimistic mood. If we compare the achievements of the court practices at home and these in some developed democracies, we would stay silent again. We would find out that in these countries state contracts and all documents regarding their execution, as well as all information about the public institution employees and their work, are accessible. A lot of issues that are disputable in Bulgaria are indisputable in these countries.

Our public life, however, is here and now. That is why the developments in the sphere of the right of access to information is significant for the Bulgarian society. In this context, an impartial spectator could observe the changes during the years in the seekers of information, in these

obliged to provide it, and the court. The court cases are only a part of the developments in the area. We are all participants in this process, which has a specific goal-the increase of the transparency in the government. This is the only way the distance between the citizens and the government to be decreased. This is the only way the inequality, based on the knowledge about the activities of the authorities, to be erased or at least diminished. This is the only way to start thinking about the individual as a bigger and stronger than the institution, and the executors of public powers-as employees of the ordinary people.





**SELECTED
COURT CASES**



CASE

Vassil Chobanov

vs.

*The Supreme
Judicial Council*



Vassil Chobanov vs. The Supreme Judicial Council

*1st Instance Court - Administrative Case No. 7897/2004,
Supreme Administrative Court, 4th Division*

An amendment of the Judicial Branch Act provided that the sessions of the Supreme Judicial Council (SJC) were public. The amendment became effective as of April 9, 2004. However, the sessions remained closed and the SJC announced that they were going to interpret the term „public“. In May 2004, four journalists - Vassil Chobanov (Radio New Europe), Bogdanka Lazarova (Darik Radio), Elena Encheva (Sega newspaper) and Petya Ilieva (Dnevnik newspaper) - filed a request with the SJC demanding full access to the Council's next ten sessions. The request suggested that access be provided by means of a video camera and microphone, due to the limited capacity of the SJC conference hall.

The request of the four journalists had not been discussed at the following session of the SJC.

*The journalists challenged the **tacit refusal** before the Supreme Administrative Court (SAC). The Council did not send a representative to the single court hearing, and the judges adjourned for their final decision.*

*The ruling of the Supreme Administrative Court as of November, 19, 2004 reversed the tacit refusal by the SJC and returned the information request to the respondent for compliance with the law. The text of the decision stressed that **the concept of public** by definition means accessible to members of society. Therefore, the SJC has an obligation to ensure that their meetings are open to all members of society, including the media, who serve an important function by publishing information of public interest. The magistrates also stated that the choice of the specific information technology by which access to information is provided was in the authority of the public institution. The decision of the SAC was final.*

At the first SJC session following the court decision, all journalists were invited into the conference hall to attend the meeting. Subsequently, two cameras have been installed in the hall and journalists have access to the sessions by means of broadcasts in another room.



**TO THE SUPREME JUDICIAL
COUNCIL (SJC)**
Sofia, 9 Suborna Street

REQUEST
under Art. 27, Para. 3 of the Judicial Branch Act (JBA)
and Art. 41, Para. 2 of the Constitution

from Vassil Chobanov, *Radio New Europe*;
Bogdana Dimitrova, *Darik Radio*; Elena Encheva, *Sega Newspaper*;
Petya Vladimirova, *Dnevnik Newspaper*

Esteemed magistrates,

With regard to the attached texts of Art. 27, Para. 3 of the Judicial Branch Act and Art. 41, Para. 2 of the Constitution, as interpreted by the Constitutional Court (CC) in judgment No. 7 of 04-Jun-1996, on CC Case No. 1/1996 (published in State Gazette issue 55, 28-Jun-1996), we hereby refer to you our request for FULL ACCESS to the next ten (10) sessions of the SJC, as provided in the new text of the JBA. This may be achieved via the use of a camera and microphone in the council chamber, since we are aware that there is limited space in it for the public.

The new five-member committee of the SJC will need to provide an interpretation of the term „PUBLIC.“ In this respect, we would like to remind you of the following part of the interpretive decision of the CC on CC Case No. 1/1996: *„According to the Constitutional Court, an obligation to present information also follows from this right (under Art. 41). The specific substance of that obligation may not be designated otherwise, except for by legislative means. It is the legislature who, with a view to the spirit of this constitutional imperative, must identify the multitude of hypotheses that are necessarily subject to explicit articulation. The rest is up to the practice of representatives of state institutions and/or agencies. Moreover, there are a number of constitutional and legal provisions that guarantee public access or access by the mass media: Art. 82, Para. 1, first sentence (designating the sessions of Parliament as open); Art. 121, Para. 3 (designating the hearing of cases in all*

courts as public); and Art. 35, Para. 1 and 2 of the Internal Regulations for the Work of the National Assembly (regarding radio and television access to the sessions of Parliament)."

04-May-2004

Respectfully,

V. Chobanov
B. Dimitrova
E. Encheva
P. Vladimirova

**THROUGH THE SUPREME JUDICIAL
COUNCIL (SJC)****TO
THE SUPREME ADMINISTRATIVE
COURT
OF THE REPUBLIC OF BULGARIA****APPEAL**

by

Vassil Todorov Chobanov, *Radio New Europe*;
Bogdana Kuncheva Dimitrova, *Darik Radio*;
Elena Stefanova Encheva, *Sega Newspaper*;
Petranka Vladimirova Ilieva, *Dnevnik Newspaper*

AGAINST

Mute refusal by the Supreme Judicial Council

PURSUANT TO

Art. 27, Para. 3 of the Judicial Branch Act (JBA) and Art. 41, Para. 2 of the Constitution

Honorable Supreme Justices,

THE FACTS

The law amending the Judicial Branch Act (JBA) was published in Issue 29 of the State Gazette on 04-Sep-2004, and entered into force on the same date. The text of Art. 27 was supplemented with the addition of a new Para. 3, according to which „the sessions of the Supreme Judicial Council shall be public, with the exception of the instances in Art. 27, Para. 1, Provisions 6 and 7.“ After this requirement became effective, we, journalists from several media who report on the work of the judicial branch, stood in front of the chamber of the Supreme Judicial Council (SJC) at 9 Suborna Street every Wednesday (when the sessions of the SJC are held), waiting to be provided with the public access required by the law. The provision of such public access also assumes the provision of

access to the chamber and attendance of sessions by any parties who so desire, except in the instances pursuant to JBA Art. 27, Para. 1, Provisions 6 and 7. Such access was not provided to us: neither the possibility of just one of us being present at the sessions in question, nor even the possibility of facilitating our hearing the sessions by use of audio equipment, for example. In light of this situation, on 04-May-2004 we, the four complainants, submitted an explicit, written request to the SJC that we be granted access its next 10 sessions. This request was registered under No. 94-00-266/04-May-2004. After we submitted our request, the SJC held a session on 05-May-2004. As seen in Session Minutes No. 16 from the session held on 05-May-2004, no position was taken on our request at that session. Item 1 on the agenda was discussion of „application of an interpretation of the term ‘public’ with regard to the sessions of the Supreme Judicial Council and the rules for applying [that definition] by the Committee for the Preparation and Amendment of the Internal Guidelines of the SJC and its Administration“, as follows:

- *Admittance of journalists and citizens to be porent in hall until the adoption of the agenda.*
- *Appoints the administrative secretary of the SJC to study and evaluate the proposal of the Internet TV.*
- *Elects a committee of the following council members to attend the press-conferences along with the SJC speaker: prof. Alexander Vodenicharov, Rumen Andreev, and Radka Popova.*

As can be seen in the session minutes cited above, no other decision was pronounced regarding our request, neither on 05-May-2004 nor on 12-May-2004. Despite our presence in the SJC building on those dates, however, we were in fact denied access to its public sessions, since we were not allowed to be present at them.

VIOLATION OF THE LAW

In accordance with Article 41 of the Constitution, everyone has the right to seek, receive and impart information. The same right is also enshrined in Art. 10 of the Convention on Human Rights and Fundamental Freedoms and Art. 19 of the International Covenant on Civil and Political Rights. In accordance with CC Judgment No. 7/1996 on CC Case No. 1/1996, this right also applies to access to the public sessions of various institutions of state power. With its 2004 amendment of Art. 27 adding

the new Para. 3, the obligation was placed upon the SJC that it grant access to its sessions to everyone. This right may be curtailed only in order to protect the rights and interests enumerated in the second sentence of Art. 41, Para. 1, , and only in the types of circumstances indicated in Art. 27, Para. 3 of the JBA.

The SJC is obligated to grant the necessary access to its sessions, in meeting the right of every person to seek and receive information. In cases when it is necessary to apply limitations upon the right to seek and receive information, in accordance with the Constitution and the international agreements that are part of domestic law, the SJC must issue a formal decision to hold a session in closed chambers (e.g., under the circumstances in Art. 27, Para. 1, Provision 6 or 7). Only in such instances is it permissible for the constitutional right of every person to seek, receive and disseminate information to be curtailed, with respect to the sessions of the SJC.

Consequently, a decision by the SJC to limit public access to any of its sessions by holding it in closed chambers constitutes an individual administrative act in the sense of Art. 2, Para. 1 of the Administrative Procedure Act (ACA). Such an act affects the rights of citizens and organizations; specifically, the right to seek and receive information that is of public interest.¹

Given the lack of a detailed regulation of this issue within the JBA, the general law is applicable - the ACA. In accordance with Art. 13, Para. 1 of the ACA, the required notice of a decision must be issued no later than seven days following the receipt of a request. Since the SJC is a collective body, the provision in Art. 13, Para. 3 of the ACA is applicable, whereby the decision regarding a given request must be pronounced no later than at its first session following the expiry of the deadline in Art. 13, Para. 1; i.e., at the session held on 12-May-2004. We did not receive any answer to the request we made, and there is no information indicating that a decision had been made by the date indicated. In light of this situation we consider this to constitute a mute refusal, in the sense of the ACA. The lack of any explicit regulation regarding mute refusals in the JBA is immaterial, since in its absence the general law

¹ Since it falls under the definition in Art. 2, Para. 1 of the Access to Public Information Act (APIA).

regulating the matter is applicable, in accordance with Art. 46, Para. 2 of the Law on Normative Acts (by long-standing precedent of the Supreme Administrative Court).

This mute refusal is not in compliance with the law. In the first place, it is in contradiction to the procedural law: since the curtailment of the right to information may only take place by exception (CC Judgment No. 7/1996), it follows that a decision to that effect must be explicit and well-motivated, and made known to those to whom it applies. The applicable law has also been violated; this evaluation may be made because the true motivation for the refusal is ascertainable. From the decision in SJC Session Minutes No. 16 of 2004 it can be seen that according to the SJC, it is authorized to interpret the term 'public'. It can also be seen that it intended to interpret that term as „access by journalists and citizens to the building until the final adoption of the agenda.“

This conception is in clear violation of the law. First, the SJC does not have the authority to interpret the law. To accept that it did would mean that from now on the Parliament would also be able to interpret the term „public“ for its own purposes, municipal councils for theirs, etc.; *reductio ad absurdum*. Only the courts have the authority to interpret the law, in the course of their juridical activity. The SJC has even less authority to interpret a term that is already in use and clarified in CC Judgment No. 7/1996, and subsequently implicitly included in the text of Art. 41 of the Bulgarian Constitution.

Second, even if it did have the right to interpret that term, the SJC may not interpret it arbitrarily, but by the rules of interpretation established by existing legislation, court practices and legal theory. The interpretation indicated above is based neither on the law, nor on accepted legal doctrine. The SJC's discussions do not stop at the agenda of its sessions, for which reason there is no basis for the claim that public access to them may be curtailed for any reasons other than the protection of rights provided for by the Constitution, specified in Art. 27, Para. 3 of the JBA.

Third, the significance of the constitutional right of every person to seek and receive information entails the obligation that any curtailment of that right takes place only in defense of a competing right or interest. This requires specific evaluation in each individual case, especially since the law contains a presumption of the public nature of information, in

Art. 27, Para. 3. This presumption may be refuted, but there must be concrete motivations in each individual case, for which reason it is not permissible to refuse access to more than one session of the SJC at once. The mute refusal encompasses 10 sessions, in view of the subject of the written request submitted.

Due to and based upon the above, we request that the Supreme Administrative Court overturn the mute refusal of the SJC as not being in compliance with the law, and require the SJC to grant the requested access.

04-May-2004

Respectfully,

V. Chobanov
B. Dimitrova
E. Encheva
P. Vladimirova

TRANSCRIPT OF PROCEEDINGS**Sofia, 04-Nov-2004**

The Supreme Administrative Court of the Republic of Bulgaria, Fourth Division, at its session held on the fourth day of November 2004, composed of:

PRESIDING JUSTICE: TSVETANA SURLEKOVA

**PANEL MEMBERS: NINA DOKTOROVA
ADELINA KOVACHEVA
GALINA KARAGYOZOVA
DIANA GURBATOVA**

in the presence of court clerk Gorka Ivanova and with the participation of prosecutor Ognyan Atanassov heard the report of Justice ADELINA KOVACHEVA on Case No. 7897/2004.

At the hearing in question the following representatives appeared on behalf of the parties:

APPELLANT: Vassil Chobanov, summoned to appear in person, with legal counsel KASHUMOV.

APPELLEE: Supreme Judicial Council, summoned to appear, did not send a representative.

INITIATION OF PROCEEDINGS:

KASHUMOV: Let the proceedings begin.

THE PROSECUTOR: Let the proceedings begin.

In accordance with the provisions of Art. 107 of the Civil Procedural Code (CPC) on second reading, the court

DECLARES:

THE PROCEEDINGS ARE OPENED and the appeal of Vassil Todorov Chobanov against the mute refusal of the Supreme Judicial Council is read.

KASHUMOV: I support the appeal before the court. The subject of the appeal is the silent refusal of the request we submitted to the SJC for access to the council's sessions. We submit three records of minutes from sessions of the Supreme Judicial Council: extracts from Session Minutes No. 16/05-May-2004, the entirety of Session Minutes No. 17/12-May-2004 as it was published on the Internet, and thirdly Session Minutes No. 18/19-May-2004, also in its entirety.

THE COURT discloses that at the request of the Supreme Administrative Court (SAC), the SJC has submitted the request made on 04-May-2004 by Vassil Chobanov and other three journalists pursuant to Art. 27, Para. 3 of the JBA and Art. 41, Para 2 of the Constitution, as well as an extract from Session Minutes No. 15/28-Apr-2004 and an extract from Session Minutes No. 16/05-May-2004.

KASHUMOV: I do not object to the admission of the evidence submitted by the SJC. I request that the court permit the testimony of a witness with regard to the circumstances surrounding the factual hindrance of access by the appellant to a session of the SJC.

THE PROSECUTOR: The prosecutor asks that this request not be honored

IN ACCORDANCE WITH THE EVIDENCE, THE COURT

DECLARES:

that it ADMITS the written evidence submitted by the appellant as described above, as well as the evidence submitted as an attachment to letter No. 94-00-266/22-Oct-2004 from the SJC.

WITH REGARD TO THE REQUEST that a witness be examined, THE COURT finds that there are no grounds for such examination, since it is a mute refusal that is being appealed, for which reason it

DECLARES:

that it SHALL NOT HONOR the request that a witness be admitted.

THE SUPREME ADMINISTRATIVE COURT finds that the facts of the case have been made clear, for which reason it

DECLARES:

that THE PROCEEDINGS MAY BEGIN IN SUBSTANCE.

KASHUMOV: I request that the mute refusal of the SJC be overturned, and that the court issue an order recognizing the right of the appellant to attend the sessions of the SJC. In accordance with the text of Art. 27, Para. 3 of the JBA, the sessions of the Supreme Judicial Council are public. Securing public access also presumes the granting of admission to the chamber. On 04-May-2004 we submitted a written request to the SJC that we be admitted to its next sessions. An SJC session was held on 05-May-2004 and as seen in Session Minutes No. 16 no position was taken with regard to our request. Item No. 1 on the agenda was to discuss the proposal of interpreting the term 'public' with regard to the sessions of the SJC and the rules for its application by the Committee for the Preparation and Amendment of the Internal Guidelines of the SJC and its Administration. With regard to this agenda item a decision was made to accept proposal I, proposed by the temporary committee to draft the SJC Guidelines. As can be seen in the minutes from the SJC's sessions, neither on 05-May-2004 nor on 12-May-2004 was any decision discussed with regard to the request submitted by us. Thus it should be acknowledged that this constituted a mute refusal, which in any case was not in compliance with the law, since the journalists' access could not be limited and such a decision would be unlawful, since the SJC does not have the authority to assess the admissibility or inadmissibility of citizens and journalists into the chamber. I request that you reverse the decision under appeal.

VASSIL CHOBANOV: The issue is of a recognized constitutional right and the very fact that this act became effective with the coming into effect of the law.

THE PROSECUTOR: It can be seen from Session Minutes No. 16 of 05-May-2004, the Supreme Judicial Council decided explicitly to admit journalists and citizens into the chamber until the final adoption of the agenda, which is also the legal position - i.e., I find that there is no legal interest with regard to the request for access to the chamber during the session of the SJC. The SJC decision of 05-May-2004 cited above was made in the interest of ensuring increased order in the chamber. Analogous to the limitation of access to the chamber there is also such a limitation in place with respect to judicial proceedings; e.g., with regard to the capacity of

the chamber, maintaining order, etc. The journalists' access was not curtailed, it was simply specified that they, as citizens expressing their interest should take their places in the chamber up until the moment of the adoption of the agenda for the conduction of that particular session.

It is an issue of the technical and organizational activity of the SJC. As regards the request for an interpretation of the term 'public', on the one hand the appellants in their own request to the SJC No. 94-00-266/04-May-2004 insist that the SJC provide an interpretation of the term 'public', and on the other hand in their appeal before the SAC they explicitly emphasize that the SJC does not have the right to interpret the law; i.e., that in this case there is unquestionably no administrative act, in the sense of Art. 2 of the Administrative Procedure Act (ACA), which could harm any of the rights or interests of any citizens. For this reason I submit that this appeal should not be heard, as being procedurally inadmissible, even more so since in both of its decisions on 28-Apr-2004 and 05-May-2004 the SJC did not make any pronouncement on this request. It should not be heard due to a lack of legal interest, as well as the lack of a particular valid administrative act that could be subject to appeal.

KASHUMOV: The issue is of access to the entire session of the SJC. Therefore it should be acknowledged that only the matter of access up to the adoption of the agenda has been resolved, while that of the rest of the session is still under dispute.

THE SUPREME ADMINISTRATIVE COURT DECLARES that it shall pronounce its judgment within the prescribed deadline.

PRESIDING JUSTICE:

COURT CLERK:

DECISION**NO. 9595**

Sofia, 19-Nov-2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fourth Division, at its session held on the fourth day of November 2004, composed of:

PRESIDING JUSTICE: TSVETANA SURLEKOVA

PANEL MEMBERS: NINA DOKTOROVA
ADELINA KOVACHEVA
GALINA KARAGYOZOVA
DIANA GURBATOVA

in the presence of court clerk Gorka Ivanova
and with the participation of prosecutor Ognyan Atanassov
heard the report of Justice ADELINA KOVACHEVA on Case No. 7897/
2004

The proceedings were conducted pursuant to the second section, per Art. 5, Provision 2 of the Supreme Administrative Court Act (SACA).

The proceedings were initiated based upon the appeal filed by Vassil Todorov Chobanov of Radio New Europe against the mute refusal of the Supreme Judicial Council with regard to a request submitted for admission to its next ten sessions. The appellant's case argues that the refusal constitutes a contravention of the applicable law and is in violation of the administrative procedural rules, constituting grounds for reversal pursuant to Art. 12, Provisions 3 and 4 of the SACA.

The appellee has submitted a written opinion finding the complaint to be procedurally inadmissible, due to a lack of valid subject for appeal and of standing on the part of the appellant. Also provided is an alternate opinion, finding the appeal to be unfounded.

The prosecutor from the Supreme Administrative Prosecutor's Office who participated in these proceedings pronounced the appeal to be procedurally inadmissible. The motivation given for this finding is that the SJC

did make a decision to admit journalists to its sessions up to the adoption of the agenda, for which reason the appellant lacked any standing to file an appeal. The prosecutor also considers that the mute refusal does not retain the character of an administrative act.

This court finds that the appeal was filed by the proper party within the period prescribed in Art. 13, Para. 2 of the SACA. In ruling on its procedural admissibility, the court took into account the following:

The process was initiated on 04-May-2004, with the submission to the SJC of request No. 94-00-266, by Vassil Todorov Chobanov of *Radio New Europe*, Bogdana Kuncheva Dimitrova of *Darik Radio*, Elena Stefanova Encheva of *Sega Newspaper*, and Petranka Vladimirova Ilieva of *Dnevnik Newspaper*, that they be granted full access to the council's next ten sessions. They proposed that this access be provided via the use of a camera and a microphone, due to the limited capacity of the council chamber.

Also included in the request was the opinion that the council's committee should propose an interpretation of the term „public“.

At the session that it held on 05-May-2004, the administrative body did not make any pronouncement on the four journalists' request for access to its sessions. The only decision it made was to approve the first of several proposals, from the Temporary Committee to Draft the Guidelines for the Work of the SJC and its Administration, with regard to allowing the admission of journalists and citizens to the chamber up until the final adoption of the agenda.

The lack of pronouncement on the request submitted was presumed by the journalists to be a mute refusal, which they appealed in their complaint dated 19-May-2004. This appeal is admissible.

In accordance with the provisions of Art. 16, Para. 1 of the Judicial Branch Act (JBA), the Supreme Judicial Council determines the composition of and maintains the organization of the judicial branch. The decisions pronounced by it in its official capacity have the power of authority, and therefore are characterized as administrative orders. That they are subject to appeal is enshrined in the explicit legal standard set in Art. 5, Provision 2 of the SACA. This provision is clear and unambiguous: the Supreme Administrative Court examines complaints and ap-

peals of the decisions of the Supreme Judicial Council. The broad competence of the SJC encompasses different types of decisions and is regulated by Art. 27, Para. 1 of the JBA. It is no coincidence that in the third paragraph of precisely Art. 27, published in the State Gazette issue 29, 2004, the legislature introduced a new legal standard, according to which the council's sessions are public, excepting the cases in Para. 1, Provisions 6 and 7 of that same article. It is imperative. The adoption of that provision provided a legislative application of Art. 41, Para. 1 of the Constitution of the Republic of Bulgaria. In its judgment No. 7 of 04-Jun-1996, on CC Case No. 1/1996, the Constitutional Court provided an interpretation of the constitutional provision establishing the obligation of state institutions to provide information to all forms of mass media, because in this way the right of the individual and society to be informed is ensured.

The Supreme Judicial Council is the only institution capable of securing public access to the sessions it holds and in that respect the decisions pronounced by it have the power of official authority, for which reason they should be considered as administrative orders, in the sense of Art. 2 of the Administrative Procedure Act (APA).

In this specific case, the SJC was served with a request to pronounce just such a decision. Its failure to do so within the time period prescribed by law constitutes a mute refusal in the sense of Art. 14, Para. 1 of the SAP, and is subject to court review.

The issue has been raised in this case as to whether the appellant has any legal standing on the basis of which to file an appeal. The appellee's objection in this regard has two aspects: the first is the lack of harm to any personal rights and legal interests, and the second is that the administrative body did issue a decision to admit journalists only up to the adoption of the agenda for its sessions. These arguments are groundless.

An uncontested fact of this case is that the appellant is a journalist, representing the public media. He thus falls within the scope of those for whom the Constitution of the Republic of Bulgaria, in Art. 41, Para. 1, has designated as fundamental the right to seek, receive and impart information. In the cited judgment of the Constitutional Court it is specified that the media also fulfill a necessary public function, that of presenting information to society at large. In the fulfillment of their specific functions, the media ensure not only the right of the individual, but also

that of society as a whole, to be informed about matters that affect its interests.

The journalists submitted their request to be granted access in their capacity as representatives of the mass media, in order to gain access to information; the Constitutional Court has defined this as „passive transparency“. The mute refusal to provide it reflects directly upon the constitutionally protected right that is legislatively enshrined in Art. 27, Para. 3 of the JBA. That is also where the appellant's legal interest to appeal the refusal originates.

The appellee's claims that the decision pronounced by the administrative body in its Session Minutes No. 16 of 05-May-2004 granted journalists and citizens access to its sessions up to the adoption of the agenda for them are unfounded. It is clear in the way it is worded that all it accepted was the first of several options proposed by the Temporary Committee to Draft the Guidelines for the Work of the SJC and its Administration. This option provides for the admittance of journalists and citizens to SJC sessions up to the adoption of the agenda for them. This regards only the agreed-upon part of the draft for the organizational guidelines; no legal ramifications extend from these drafts.

In light of these considerations, the appellants do have grounds for appeal. Evaluated on merit, the court finds the journalists' complaint to be procedurally admissible.

The right to receive information per Art. 41, Para. 1 of the Constitution encompasses the obligation of state institutions to provide access to information of public significance. As the Constitutional Court has determined, the content of that obligation is subject to definition by legislative means. Thus, with regard to the activity of the Supreme Judicial Council, this definition is specified in the provision of Art. 27, Para. 3 of the JBA, which pronounces its sessions to be public, except under the two limitations specified - when rulings are made pursuant to Art. 27, Para. 1, Provisions 6 and 7. The law does not provide a definition of the term „public“ with regard to the SJC's sessions. The term is used once in the Constitution - in the sixth section, regarding „The Judicial Branch“ - in Art. 121, Para. 3, which indicates that the hearing of cases in all courts is public, except when provided otherwise by law. This is why it should follow from its generally accepted meaning, „accessible to the public.“ Viewed on this level, the Supreme Judicial Council's legal obligation is to

make its sessions accessible to the public, including the mass media, who fulfill the important function of reporting on matters of public interest. The choice of specific information technologies by means of which public access is provided in practice is at the discretion of the administrative body.

In submitting a request to the Supreme Judicial Council, the journalists were exercising their constitutional right, provided in Article 41 of the Constitution and in Art. 27, Para. 1 of the JBA, to be granted access to the administrative body's next ten sessions. The mute refusal in response to that request is in contravention of the applicable law, for which reason it is unlawful. There are grounds for its reversal in the sense of Art. 12, Provision 4 of the SACA. For this reason the mute refusal should be reversed and, pursuant to Art. 28 of the SACA in connection with Art. 42, Para. 3 of the APA, the case file should be returned to the Supreme Judicial Council with mandatory instructions for interpretation and enforcement of the law.

The appellee's arguments that making its sessions public in their entirety could possibly lead to the violation of the official secrets and/or personal rights of the magistrates are groundless. The public nature of the SJC's sessions is restricted, on the one hand by the standard set by the law itself, which excludes those instances named in Art. 27, Para. 1, Provisions 6 and 7 of the JBA. On the other hand, the Supreme Judicial Council is also obligated to comply with the provisions of Art. 41, Para. 2 of the Constitution, which restricts the right of access to information in cases of state secrets or other secrets protected by law, or when the rights of other parties may be infringed upon. This text has been codified in the Protection of Classified Information Act and the Personal Data Act. The balance to be struck between the principles of the right of access to information and of the protection of official secrets and private data is resolved in the cited Constitutional Court judgment. That judgment articulated the understanding that it is not a matter of a choice between two equal, opposing principles, but of exceptions to one principle (the right to seek and receive information). The exceptions are subject to a restricted interpretation, and exist only to ensure the protection of a competing interest.

Finally, there are no grounds for reference to the provisions laid out in the Access to Public Information Act (APIA). In accordance with Art. 1 of

that law, it regulates the societal relationships related to the right of access to public information, and has the character of a general law. The legal standard set in JBA Art. 27, Para. 3 states imperatively that the sessions of the Supreme Judicial Council shall be public, and has the character of a special law. The fact that the JBA stipulates that the council's sessions shall be accessible to the public covers a separate legal matter than that in the APIA's provisions regarding access to public information.

Guided by all of that stated above and on the basis of SACA Art. 28, in connection with APA Art. 42, Para. 3, the Supreme Administrative Court, in its five-member panel

HEREBY RULES:

that it **REVERSES** the mute refusal by the Supreme Judicial Council, with regard to request No. 94-00-266 of 04-May-2004, to grant access to the next ten sessions of the Supreme Judicial Council.

that it **RETURNS** the case with instructions to the Supreme Judicial Council that it comply with the obligatory directions with regard to interpretation of the law.

THIS JUDGMENT is not subject to appeal.

True to the original,
secretary:

PRESIDING JUSTICE: TSVETANA SURLEKOVA

MEMBERS: NINA DOKTOROVA

ADELINA KOVACHEVA

GALINA KARAGYOZOVA

DIANA GURBATOVA



CASE

Hristo Hristov

vs.

the Ministry of Interior



Hristo Hristov vs. the Ministry of Interior

*1st Instance Court - Administrative Case No. 1524/2003,
Supreme Administrative Court, 5th Division*

*2nd Instance Court - Administrative Case No. 8355/2003,
Supreme Administrative Court, Five-Member Panel*

Hristo Hristov, a journalist from Dnevnik daily newspaper, has made a several years' research of different archives in Bulgaria with the aim to collect documents that would reveal the true circumstances related to the murder of the Bulgarian dissident writer Georgi Markov. The latter was assassinated in London, September 1978.

*In regards to his investigation, Mr. Hristov served an application to the **Minister of Interior** for access to public information kept at the archives of the Ministry of Interior (Mol). Mr. Hristov wanted to study the **letter** files¹ of Radio BBC, Radio Deutsche Welle and Radio Free Europe over the period from 1970 to 1978, when the Bulgarian writer Georgi Markov worked for the three western radio stations.*

The minister refused to provide access to the demanded information, stating that an inquiry conducted had led to the conclusion that the Mol archives did not contain any information on the topic specified by the applicant.

*Hristo Hristov filed a complaint against the refusal of the Interior Minister with the Supreme Administrative Court (SAC). He submitted his application with the argument that the minister had not complied with the Instructions on the Procedure for Providing Access to Information Contained in the Mol Archives, which the minister himself had signed in order to provide access to the archive for the purposes of studies and research. Therefore, the minister should have provided access to the **letter** files on the three radio stations, in order to enable the applicant to do his research and determine for himself whether or not they contained information of interest to him.*

¹ Letter files are files of documents produced by the former State Security Services regarding the structure, staff, and the activities of different organizations and institutions.

On November 16, 2003, a three-member Panel of SAC rejected the complaint as unjustified. In its motivations, the court held that, in fact, the claimant wanted **uncontrolled access** to the Mol archives, while neither the Access to Public Information Act (APIA), nor the Mol Instructions provide for such unrestricted access to information.

Mr. Hristov attacked the judgment of the three-member panel of SAC before a five-member panel. His arguments were that APIA explicitly provided for in-house review of information as a possible form of access.

On May 4, 2004, the second instance court overturned the judgment of the first-instance court, as well as the refusal of the minister. The SAC referred the case back to the interior minister, **instructing him to provide the access** to the Mol archives. In its Judgment, the Court ascertained that Mr. Hristov's application was in compliance with the requirements under the APIA and the Mol Instructions, and comprised all of the requisites components, including a sufficient description of the requested information, the subject, and the purpose of the journalistic research.

In this regard, the court presumed that the evidence in the case had already proven that the requested information existed in the Mol archive and that the journalist had already read documents of the former State Security Services on the same topic.

The court judgment set a precedent by obliging an administrative body to provide unconditional access to the requested public information. As a result of the legal procedures, the journalist obtained access to the Mol archives and studied the documents of interest to him.

In the summer of 2005, a book by Hristo Hristov was published. „**Kill the Tramp: Bulgarian and British State Policies Related to the Case of Georgi Markov.**“ National and international media alike discussed the high quality of the investigation.

Transmittal No. 079

**TO
THE MINISTRY OF INTERNAL
AFFAIRS**

REQUEST

from
Hristo Hristov,
journalist from *Dnevnik* newspaper

Honorable Mr. Minister,

On the basis of Art. 4 of Interior Ministry Directive No. 1-113, of 24-Jun-2002, regulating access to information from the ministry archives, I wish to be granted access to study the intelligence files on the Radio Free Europe, Deutsche Welle and BBC radio networks, in order to research any material related to the Bulgarian writer Georgi Markov. The purpose is so that I may search through these archives, which have not been studied in this respect before, for documents about the writer, who worked for or in cooperation with those three radio networks at different times during the period from 1970 to 1978.

I intend to compile my research in a book that I am writing about the writer, which also includes research that I have carried out in the archives of the interior ministry, the foreign ministry, the courts and the Central Archives Administration at the Council of Ministers.

I hope that this request receives a favorable response, for which I thank you in advance.

Additional information, pursuant to Art. 9 of Interior Ministry Directive No. 1-113 of 24-Jun-2002:

1. Hristo Stanev Hristov, national identification, from the city of Etropole
2. Intelligence files on the BBC, Radio Free Europe and Deutsche Welle radio networks
3. Preferred format: paper copies

4. Topic: Georgi Markov's work for the foreign radio networks that were under surveillance by the State Security Agency (under the Communist regime).

14 October 2002
SOFIA

RESPECTFULLY YOURS,
(H. Hristov signature)

MINISTRY OF INTERNAL AFFAIRS

Re: Item Receiving No. 2291/15-Oct-2002

TO:
Mr. HRISTO HRISTOV
JOURNALIST AT DNEVNIK NEWSPAPER

DEAR MR. HRISTOV,

Following the receipt of your request for access to archival documents on the topic of „Georgi Markov's work for the foreign radio networks that were under surveillance by the State Security Agency“ and the specified intelligence files on the BBC, Radio Free Europe and Deutsche Welle radio networks, a search of the Interior Ministry archives was conducted.

We hereby wish to inform you that the archives of the Interior Ministry do not contain any documents on the topic indicated by you.

12-Nov-2002
Sofia

MINISTER OF INTERNAL AFFAIRS: (seal)

**THROUGH THE MINISTER OF
INTERNAL AFFAIRS**

TO

**THE SUPREME ADMINISTRATIVE
COURT**

APPEAL

from
Hristo Stanev Hristov,

AGAINST:

silent refusal from the Minister of Internal Affairs
with regard to an access to information request

PURSUANT TO

Art. 14, Para. 2 of the Interior Ministry Directive on Access to Information Contained in Documents from the Ministry Archives and Art. 5, Provision 1 of the Supreme Administrative Court Act.

Your Honors:

On 15-Oct-2002 I submitted an access to information request to the Minister of Internal Affairs, on the basis of Art. 4 of Interior Ministry Directive No. I-113, of 24-Jun-2002, regulating access to information contained in documents from the ministry's archives. In my request, I asked to be granted access to the intelligence files on the Radio Free Europe, Deutsche Welle and BBC radio networks, in connection with my research into material concerning the Bulgarian writer Georgi Markov, who worked for and in cooperation with those three networks at different times during the period from 1970 to 1978. I need this information in order to include it in a book about the writer, which I am preparing for publication.

I did not receive a response within the 30-day deadline provided by Art. 14, Para. 1 of the Directive.

This non-responsiveness on the part of the Minister of Internal Affairs constitutes a silent refusal. In accordance with Art. 14, Para. 1 of the Directive, the minister of internal affairs shall, within 30 days of the filing

of a request, either provide access to the information requested or refuse to do so and provide the reasoning for the denial.

The right of access to public information is guaranteed, with judicial review, in accordance with Art. 56 and Art. 41 of the Constitution of the Republic of Bulgaria, Art. 6, Provision 4 and Art. 40 of the APIA, and Art. 14, Para. 2 of Interior Ministry Directive No. I-113 of 24-Jun-2002. The minister's failure to respond to a request for access to public information in a timely fashion constitutes a silent refusal, which impaired my right of access to public information and is subject to court review (per ruling by five-member panel of the Supreme Administrative Court in Case No. 6393 of 2001).

This refusal by the Minister of Internal Affairs is in material nonconformity with both the procedural and applicable material laws.

1. Nonconformity with procedural law(s): Art. 15 of the Administrative Procedure Act (APA), Art. 38 of the APIA and Art. 14, Para. 1 of the Interior Ministry Directive.

The law requires that the appropriate institution respond in the form of a decision, which either provides or refuses to provide the requested administrative document(s) and gives the reasoning for its decision (Art.15 Para.1 of the APA). Such a decision obviously does not exist in this case. Art.15 Para.2 of the APA makes it compulsory that the act of refusal be documented in written form. The written form is also required for such a refusal in the provisions of the *lex specialis*, Art. 38 of the Access to Public Information Act (APIA), whereby the refusal decision must also indicate the legal and factual basis for the refusal. The same requirement is also provided by Art. 14, Para. 1 of the Interior Ministry Directive. These legal requirements were not complied with at all, which is a significant violation of the law's procedural provisions.

2. Nonconformity with the applicable law(s)

The information requested is public, in the sense of Art. 2, Para. 1 of the APIA, because it is related to public life in the Republic of Bulgaria, and if provided to me would allow me to formulate my own opinion regarding the activity of the Ministry of Internal Affairs. In addition, the information I seek does not fall within the restrictions in Art. 13 Para. 2 and Art. 37 of the APIA, and there is no legal obstacle to my receiving it.

The Minister of Internal Affairs is also obligated to provide access to the information I requested in accordance with Article 4 of the Directive. According to that provision, everyone has the right to access information from archival documents for scientific study, publishing and research activity. The information I requested is necessary with regard to a documentary, journalistic study that I am currently conducting about the Bulgarian writer.

Usually, in archives such as the Interior Ministry archives, it is highly likely that there is a significant amount of information in the so-called „intelligence files“ that has been classified as secret. Both the Access to Public Information Act and the Protection of Classified Information Act (PCIA) require that refusals to grant access to such information include the reasoning behind the denial. When refusing to grant access, the institution is required to present evidence of the existence of the conditions in Art. 25 of the PCIA, as well as evidence that a „classified“ seal has been affixed. In addition, the respective institution is required, in accordance with §9 of the preliminary and final provisions of the PCIA, to determine whether, according to the security [classification] level, the information should be declassified ex lege. And in the end the burden of proof that such circumstances exist rests with the appellee, per Art. 41, Para. 3 of the APIA.

On the basis of all of the above, I request that the court pronounce the refusal of the Minister of Internal Affairs to provide the information requested as unlawful, and that it obligate the same to provide access to the information requested. I request that I be awarded compensation for my legal expenses.

Particular Request: I request that the court require, on the basis of Art. 41, Para. 3 of the APIA, that the appellee present the required evidence that the information is classified as a state secret.

Attachments:

1. Request.
2. Directive No. I-113 of 24-Jun-2002, regulating access to the information from the archives of the interior ministry, issued by the Minister of Internal Affairs.
3. A copy of this complaint for the appellee.

Respectfully yours,

**TO THE SUPREME
ADMINISTRATIVE COURT**

REQUEST

from
Hristo Stanev Hristov

Honorable Presiding Justice,

Within the period established by law, I submitted a complaint to the Supreme Administrative Court against a silent refusal from the Minister of Internal Affairs, with regard to a request for access to information contained in the Interior Ministry archives. According to my information, the complaint case file is in the possession of the Ministry of Internal Affairs.

I request that you officially demand that the file be forwarded to the court.

Attachment: copy of the complaint

Respectfully yours,
(Hristo Hristov sig.)

WRITTEN ARGUMENTS

Hristo Stanev Hristov,
complainant in Case No. 1524
on the 2003 docket of the
Supreme Administrative Court,
Fifth Division

Honorable Justices,

In my capacity as a journalist, I have been studying various information archives in Bulgaria over the past several years, in order to gather documentation and clarification of the truth regarding the Bulgarian writer Georgi Markov, who was assassinated in London in September 1978. To that end, I have studied a significant portion of the Communist party archives at the Central Archives Administration of the Council of Ministers, the archive of the Ministry of Foreign Affairs, the archive of the Supreme Court of Appeals (the 1992 court case of the Supreme Court Military Tribunal vs. the former director of the First Central Bureau of State Security, Gen. Vladimir Todorov (ret.), for his destruction of part of the dossier on Georgi Markov), as well as the Bulgarian Telegraph Agency's archive, which contains the top-secret „S-2“ bulletins, reporting on „enemy“ propaganda against the People's Republic of Bulgaria during the totalitarian era.

During 1999-2000, I was granted access by the minister of internal affairs to the archives of the [Communist-era] State Security Agency (SSA), which are maintained by the Interior Ministry. I was afforded the opportunity to familiarize myself with the SSA structure and to study the so-called official archives of several former SSA directorates and the Interior Ministry secretariat (which contain the administrative orders and minutes of the sessions of the ministry's leadership body during the period from November 1989 to February 1990, when the SSA ceased to exist as a structure). These official archives contain hundreds of inquiries, annual reports and analyses by various SSA bureaus regarding all sorts of matters, among them the security risk control (surveillance) of the intelligentsia, „hostile“ emigration, the activities of the centers of Western ideological subversion, and cooperation among the various individual departments of the SSA in that regard. In these official archives, I discovered a significant amount of material dating from the 1970s, which di-

rectly concerned the writer Georgi Markov and up until that moment had not been known, even to the investigative and prosecution officials who investigated his death. Part of the material that I discovered in all of the archives named above became public knowledge via their publication in the form of investigative journalism articles and a film broadcast on Bulgarian National Television in 2001, based upon rigorously documented facts and witness statements.

Due to physical impossibility and insufficient time, I was unable to conduct a review of all of the archives of the Ministry of Internal Affairs (MIA) that could, in some way or another, shed some light on the actions taken by SSA officials against Bulgarian emigres, including Georgi Markov. For this reason, in a letter dated 14-Oct-2002 I submitted a request to the minister of internal affairs that I be granted access to the intelligence files on the Radio Free Europe, Deutsche Welle and BBC radio networks, in connection with my research of material concerning the writer Georgi Markov. (In general terms, an intelligence file comprises information from an investigation conducted by SSA officials regarding some sort of organization or institution, for the purpose of gathering overt and operational information about the structure, activity, membership/staff and their functions. Part of the information compiled on foreign radio stations regarded their various sections, the organization of their work, the number of programs, their angle and the number of their listeners, as well as analysis of their content; for example, the percentage of programs containing anti-communist or anti-Semitic sentiments, what audience they intended to reach, etc.). In my letter to the minister, I explained that the research would be included in a book that I am currently writing.

I did not receive a response within the 30-day deadline, pursuant to Art. 14, Para. 1 of Directive No. 1-113 of 24-Jun-2002 regulating access to information contained in documents from the archives of the MIA, as a result of which, on the last day of the designated time period I submitted a complaint/appeal regarding this silent refusal to the Supreme Administrative Court (SAC), via the MIA. Only after my reaction did I receive a response, in a letter postmarked 05-Dec-2002 (submitted to the court case file). The letter itself was registered by the MIA under Reference No. 14449 on 04-Dec-2002, and was most likely signed and back-dated to 12-Nov-2002 by the minister. In it I was informed that following a search conducted by the MIA's Directorate of Information and Archives (DIA),

it had been established that there were no documents there regarding the topic indicated by me, „the activity of Georgi Markov in the foreign radio stations that were under State Security surveillance.“

I feel that this approach, taken by the minister and his administration, was subjective, improper and led solely to the drastic restriction of access to the archive of the former SSA and the right of every citizen to conduct scientific study, publication and research activity in it, per Art. 4 of Interior Ministry Directive No. 1-113, of 24-Jun-2002.

The fundamental goal of any research is precisely to establish, via study, whether or not there are any facts on a given issue in the respective archives. I feel that it is proper and logical for the person who has requested access to reach his or her own conclusions after getting acquainted with certain documents. In this particular case, even failure to uncover anything significant in the archival documents I requested would still constitute useful information, since I would indicate in my study that I had not find any facts in the documents provided to me that could support one conclusion or another. From this standpoint, I did not request that the minister and his subordinates at the DIA to interpret the information contained in the intelligence files for me, according to purely subjective criteria, and then make a pronouncement as to their content, in this way determining the outcome of my study. Such logic would mean that the interior minister could refuse to provide information all the time, using the convenient excuse of a „lack of information“, whether or not any individual citizen or institution had requested access.

In essence, access to information in the official archive of the former SSA, which is held at the interior ministry, for the purpose of studying certain materials, is achieved in the following steps:

1. The minister consents, in principle, to the research being conducted.
2. The requestor is given a special pass to enter the MIA reading room in the ministry building, where he or she signs a declaration agreeing to follow the internal working rules.
3. In the reading room, employees of the Information and Archives Directorate allow the requestor to use the so-called logbooks, in which the contents of individual archival items are briefly, but sufficiently clearly, described - reports, notes, accounts, etc. - as well as each item's log number, date of issue and number of pages, including a check-mark if

they have been destroyed, with the date of destruction and the entity that carried out the destruction. There are separate logbooks for each of the central bureaus of the SSA and the interior ministry secretariat, each marked with the number or the respective archive in which they had initially been kept.

4. By reading the descriptions of the archived documents in these logbooks, the requestor gets an idea of which documents have a bearing on his or her work, and notes them down on a special form to request them. The staff of the DIA fulfill that order within a few days, and only when they have been delivered can the requestor look over the archival material, in the DIA reading room. Each archived document includes a check-out card that the user completes when reviewing it (thus it can thus be established when and by what reader a given document has been seen). The user may take notes, and may make copies of what he or she needs, if he or she has requested to do so in advance. At this stage the DIA employee may refuse to provide a certain archival item, if it bears no relation to the research. For example, if I were to request, hypothetically, archival material from the intelligence file on the for the year 1980, it would be entirely logical and proper for me to be denied access to such documents, for the simple reason that Markov was already dead in 1980 and no longer working for the BBC, and since such a request was not included in my original declaration regarding my research, in which I had explicitly limited the period that I was interested in as documents dating from 1970 to 1978. The same would be true if I were to request a document from the mid-1960s, since at that time Markov had not yet left Bulgaria, nor had he worked with the three Western radio networks. A refusal would also have been appropriate if I had requested the intelligence file on Voice of America, since Markov never worked for that station. I could request these things in a new application to the minister, if I could make a good enough argument to support such a request. I am describing this whole procedure in order to give the court a realistic idea of the specifics about the archive, and so that it may conclude that with a formal answer the minister of internal affairs may, without particular difficulty, make access to this archive impossible - a policy which he has followed consistently since he has been heading the ministry.

I consider it unlawful that the minister of internal affairs used the topic of my request as the reason for his refusal. In Art. 25 of the Access to Public

Information Act, the legislature clearly enumerated the required elements that must be contained in a request for access to public information. In it, the requestor is not required to explain why he or she wants the information in question, but simply to indicate what it is. Interior Ministry Directive No. 1-113 of 24-Jun-2002, which was never made public, contains additional requirements for those who wish to study the ministry archives. In Art. 9, Provision 1 of the Directive, they are required to indicate „the topic, plan and purpose of the research.“ Indeed, other institutions also have such requirements. For example, the Central National Archive also requires indication of the topic being studied before access is provided, but this is only used as a general framework, a basis on which to direct and orient the requestor towards particular archives - not as a basis for refusal, as in this case with the MIA. To clarify, when I was working in the Central Archives Administration of the Council of Ministers, I had formally indicated my topic as „Georgi Markov and the SSA“, but on the basis of that I was provided with all of the „B“ (secret) decisions of the politburo of the Central Committee of the Bulgarian Communist Party (BCP), which were in some way related to the activity of the MIA and the SSA during the period 1944-1990, something which at first glance has nothing to do with the writer Georgi Markov. But it was precisely the study of these decisions that clarified the interconnected relationship between the regime and the repressive functions that were assigned to SSA officials, and their analysis in the context of the writer's assassination. In another instance, at the end of 2002 the minister of internal affairs granted me access to the confidential annual reports of the Bulgarian embassy in London, covering various periods related to the Markov case, and those were provided to me in full, not just the parts concerning the writer. I was thus afforded the opportunity to get an overall impression about state policy here as a whole, and the changes in it after 10-Nov-1989, with regard to this case. Actually, in terms of studying archival material, it is precisely such an overview and understanding that serves to guarantee the ability to conduct objective, comprehensive research of true value. What is more, study of the official archive of the SSA regarding various aspects of the Markov case is exceptionally important, given that the files on the operations conducted against the writer by the SSA's Sixth and First Central Bureaus, which numbered 16 volumes, disappeared from the archives of the MIA and the First Central Bureau in 1990. Reading through this archive is the only possible way to restore a realistic picture of the true role played by the BCP and the SSA in this case.

Minister Petkanov did not state in his letter that he was refusing access because the intelligence files I requested had been destroyed. Nor, in reviewing this case, did the MIA's legal counsel submit such an argument. If that were indeed the case, but the MIA did not state so clearly, the ministry would have submitted as evidence the documentation ordering and confirming the destruction of the intelligence files in question. Therefore, such files do exist.

I am obligated to clarify one very significant detail. In the past, the activities of the various divisions of the SSA overlapped to a certain degree. As a result of this, intelligence files were maintained on the various „hostile“ radio stations by at least three of the SSA's seven central bureaus:

- the Sixth Central Bureau, since its main function was to combat ideological subversion;
- the First Central Bureau (intelligence), which was supposed to neutralize the activity of the West's ideological centers of hostile propaganda, which is what the BBC, Deutsche Welle and Radio Free Europe were considered to be at that time; and
- the Second Central Bureau (counter-intelligence), which was responsible for the surveillance of foreign intelligence activity being conducted on Bulgarian territory, including that by persons representing the radio stations mentioned; i.e., this bureau could not carry out its function without having some notion of the structure, functions and employees of those radio stations.

In my request, I did not specify exactly which SSA bureau's intelligence files I wished to study, precisely so that my access would not be limited only to certain material. As the court can see in the evidence submitted, there is proof that such intelligence files exist in at least two of the three SSA bureaus named. The first proof is found in an excerpt from the book „From Sixth to Sixth“, written by a former employee of the Sixth Bureau, Boncho Assenov. Not only does the author explain what an intelligence file consists of, he indicates that he maintained such a file with regard to Radio Free Europe, and he even admits that in it he collected material about the writer Georgi Markov. Although this is just a claim made by the former SSA employee in his documentary book, I consider it to have far more merit than the claims made by the MIA that such information does not exist - even more so, since at the time of the hearing of the lawsuit I filed, the court could see for itself the incompetence of the

interior ministry's counsel, who stated only that he/she was not familiar with the material to which I requested access.

The second proof is a copy of a letter from Gen. Rumen Toshkov, the chief of the National Intelligence Service (NIS), which took over the archives of the former SSA's First Central Bureau (FCB), dated 27-May-1991 with Reference No. 3590, to the director of the National Investigative Service (which at the time was conducting the investigation into the writer's death), in which it is clearly stated that information on Georgi Markov existed in the FCB archive, and that the information was held in intelligence files. Although they are not indicated by name, these are doubtless the intelligence files on the radio networks that Markov worked for. The rest of the copies of SSA archival documents that have been submitted as evidence in this case should lead the honorable court to the idea that there was a categorical link between the activity of the three radio stations, Georgi Markov and the SSA's interest in them. That is, the conclusion is that the intelligence files on the three radio networks, either directly or indirectly concern the activity of Georgi Markov.

It is interior ministry practice, when a given citizen asks to review his own dossier, that in addition to the central archive, MIA's Directorate of Information and Archives (DIA) determines whether the person had been under surveillance by the FCB via correspondence with the National Intelligence Service. This is because the archive of the former SSA's intelligence bureau (the FCB) is not maintained under the DIA. The DIA does, however, respond to citizens' requests regarding whether they had been under surveillance by the FCB. This is the only way that has been established by which the NIS may request any information whatsoever, in connection with the public interest or private interests. Because of the nature of its activity, the NIS has no reception or service to which citizens may submit requests or complaints. The only possible way to correspond with it is by the mechanism described above, via the MIA and its DIA, and that is exclusively in relation to matters concerning the archives of the former FCB. That is also the only way that I as a journalist can request access to archival material held by the NIS regarding the case of the writer Georgi Markov, which is of significant public interest, and the discovery of the truth about which was a state policy priority, included among the duties of former presidents Zhelev and Stoyanov.

However, the DIA and the minister did not take this approach in my particular case. It is clear from the reply I received from the minister that

the DIA did not, in response to my request, undertake the necessary review of the intelligence files on the three radio stations held at the NIS, which definitely exist. I wish to emphasize that this is purely a matter of information from the archives of a structure which, until the changes in Bulgaria, was one of the most secret parts of the structure of the MIA, and respectively of the SSA. These archival documents do not constitute classified information, in the sense of the Protection of Classified Information Act (PCIA) (promulgated in State Gazette No. 45, 30-Apr-2002) and have no bearing whatsoever on national security. The information in them also does not constitute a state secret under the currently effective Appendix 1 to Art. 25 of the PCIA, the List of Categories of Information Subject to Classification as a State Secret. In addition, a decision by the National Assembly [parliament] (State Gazette No. 86, 21-Oct-1994) accepted that information about the organization, methods and means used in the fulfillment of the specific duties of SSA entities, as well as information about the agents of those entities, regarding or related to the period prior to 13-Oct-1991, is not a state secret. Thus, this is a matter of information that should be provided, pursuant to the Access to Public Information Act. The SAC's full five-member panel ruled to this effect in Decision No. 974 of 05-Feb-2003.

As a whole, the problem of access to the archive of the former State Security Administration consists mainly of the fact that it continues to be under the control of the interior ministry, and respectively the minister of internal affairs, as well as the lack of desire of a series of governments to provide broad public access to it, including for the purpose of studying it as a part of the nation's history, especially as the executive branch implements the legislative measures passed by the parliament to that effect. In Art. 13 of the Act on Access to Documents of the Former State Security Administration (State Gazette No. 63, 06-Aug-1997), it was explicitly stated that within one year from the law's taking effect, the SSA's documents must be transferred to the Central National Archive. This was not done by the previous government. In April 2002, the current parliamentary majority repealed the Act on Access to Documents of the Former State Security Administration and the Former Intelligence Bureau of the General Staff (State Gazette No. 24, 13-Mar-2001), when it adopted the Protection of Classified Information Act (PCIA). The government claimed then, and continues to claim, that in this way the mediation of the commission on dossiers was removed and every citizen afforded direct access to SSA documents. It is specified in Art. 33, Para. 2

of the PCIA that „within a period of one year following the expiry of the period for which information is classified, it shall be turned over to the National Archive, unless provided otherwise by a special law.“ There is no special law regarding the archives of the former SSA, and the general matter that the court may consider is whether there is any legal basis for the minister of internal affairs to have control over archival materials and access thereto, when there is no period of classification, it is not classified information, nor does it have anything to do with the current security services or police service or their current operational archives? Because such usurpation of this archive does not serve the public interest but rather political interests, and this usually leads to such drastic situations in which the right to information proclaimed in the Constitution is subjugated to this kind of individualistic, subjective decision, which is what I consider to be my dispute with Minister Georgi Petkanov.

Honored justices: led by this reasoning, I request that you reverse as unlawful the refusal of the minister of internal affairs to grant access to the intelligence files on the BBC, Deutsche Welle and Radio Free Europe radio networks, compiled by various SSA directorates and located in the MIA archives. I request that you order the minister to initiate correspondence with the NIS concerning the intelligence files on the three radio stations, which are maintained as part of the archive of the former FCB, in order to make in-depth study of them possible and to shed light on the case of the writer Georgi Markov, about which the truth still has yet to be told.

RESPECTFULLY YOURS,
(H. Hristov sig.)

9-Apr-2003
SOFIA

TO: THE SUPREME ADMINISTRATIVE COURT FIFTH DIVISION

Re: Admin. Case No. 1524 of 2003

WRITTEN REMARKS

from attorney Alexander Emilov Kashumov
legal counsel for the complainant

Honorable Justices:

I hereby request that you reverse the refusal being appealed for nonconformity with the law. I am adding the following items to the evidence submitted during the hearing:

1. With regard to the argument by the appellee's legal counsel that the refusal under appeal does not constitute an individual administrative act, the conclusions of the Supreme Administrative Prosecutor's representative were submitted during the court session; I share those conclusions, and in accordance with the law and with established precedent regarding institutional acts, refusals are also issued as such; since they have an effect on somebody's rights, they constitute individual administrative acts, as defined in Art. 2, Para. 1 of the Administrative Procedure Act (APA).
2. The argument by the appellee's legal counsel that there was no silent refusal, is invalid. Failure to respond within the deadline for access to information requests constitutes a silent refusal, as defined in Art. 2, Para. 1 of the APA, and as such is subject to judicial review. Ruling No. 8645 of 16-Nov-2001 by the five-member panel of the SAC, on Admin. Case No. 6393 of 2001, 5-member panel, was also to that effect.
3. Also invalid is the argument that the complainant had no legal standing, per the cited Ruling No. 9190 of 2002 by the five-member panel of the SAC. The factual circumstances were completely different in the cited case, since the information requested was submitted during proceedings in the case, at the time of their hearing in court. An analogous claim, that the complainant's legal interest has thus been

satisfied, cannot be made without the requested access to information having been provided. For this reason, the court's conclusion in the cited ruling, that „the administrative institution itself thus reversed its own refusal and provided the complainant with access to the document, thereby removing the legal interest in asking for the right to such,“ is also totally inapplicable in this case. On the contrary, it is clear due to the very arguments agreed upon by the court in that ruling, that when the administrative institution has not reversed its own refusal, the legal standing of the requestor remains.

4. In issuing the decision that is being appealed, the minister of internal affairs refused to grant the complainant with the information access requested, claiming that the ministry's Directorate of Information and Archives possessed no archival documents on the topic specified. In this reply the minister incorrectly interpreted the information access request, in which the appellee and his subordinates were not asked to do the research on behalf of the requestor. In the text of his request, it can be seen that Mr. Hristov expressed the following intention: „I wish to be granted access to study the intelligence files on Radio Free Europe, Deutsche Welle radio and BBC radio.“ He specified the topic of his research, in compliance with Art. 9, Provision 1 of Directive No. 1-113 of 26-Jun-02, the text of which he was familiar with. Thus, in the decision under appeal the appellee did not respond with regard to the information requested (the intelligence files on the three radio stations), but rather only about part of it, which in the ministry's estimation was „on the topic of 'the activity of Georgi Markov'...“ Thus the administrative institution improperly made a pronouncement on a matter that it had not been called upon to address, and the refusal under appeal should be reversed.
5. It can be seen in the above-cited text of Mr. Hristov's request, which expresses his intentions, the form of information access that he asked for. He requested „access to study.“ In accordance with Art. 10, Provision 2 of the Directive mentioned above, with which, as he indicated, Mr. Hristov had previously been familiar, access to information is provided in the Common Reading Room in the main building of the MIA. Article 11 of the Directive lists the formats in which information may be accessed. Systematic reading of the provisions of Art. 10 and Art. 11 of the Directive leads to the conclusion that no matter

what form of information access you prefer, the provision of the information takes place in the reading room mentioned. Therefore the reading (study) of the respective documents would be a preliminary phase in the provision of access in all other forms, besides that of viewing them (which is equivalent to reading, study). This interpretation is also supported by the administrative practice in the provision of information, pursuant to the Act on Access to Documents of the Former State Security Administration and the Former Intelligence Bureau of the General Staff and the National Archives Act. Along these same lines, it can also be seen in the request he submitted that Mr. Hristov asked to study the information contained in the respective documents, in order to determine which of them to copy.

6. The main subject of this dispute has two aspects: whether any information regarding Georgi Markov exists in the files on the three radio networks held by the interior ministry, and whether the complainant requested access to this information. The written evidence submitted in this case has established that such information does exist in the intelligence files in question; it has also been established that the subject of the information access request was different, with a broader scope. Besides that, however, although in the background, there is another subject of the legal dispute, as to which law is applicable here: the APIA or the National Archives Act. No evidence has been submitted in this case to show that the information falls under the purview of the latter. Moreover, the applicable statute in any case, as well as the highest-level one, is that in Art. 41 of the Constitution, as interpreted by the Constitutional Court (CC) in CC Decision No. 7 of 1996: the right to information may only be restricted by law, and even then only in order to protect another, also constitutionally protected interest or right, and may only be applied on those grounds provided in the Constitution. The provision of access to the information sought by the requester would not be detrimental to any such interest or right, as can be seen from the time period to which the requested information pertains vis-a-vis the time frames in the PCIA, as well as the fact that information similar in content has previously been provided to the requester by the minister of internal affairs.

Respectfully yours,
Alexander Kashumov

DECISION

No. 7476
Sofia, 16-Jul-2003

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court (SAC) of the Republic of Bulgaria, Fifth Division, in a court session held on the eighth day of April, two-thousand-three, in a panel comprised of:

PRESIDING JUSTICE: ANDREY IKONOMOV
PANEL MEMBERS: ZAHARINKA TODOROVA, TANYA RADKOVA

and in the presence of court stenographer/reporter Madlen Dukova and with the participation of the public prosecutor Nadezhda Doychinova, heard the report of Justice Tanya Radkova on Admin. Case No. 1524 of 2003.

Proceedings in this case were initiated upon a complaint from Hristo Stanev Hristov, of the city of Sofia, against the silent refusal of the Ministry of Internal Affairs (MIA) in response to an information access request made pursuant to Art. 14, Para. 2 of the Interior Ministry Directive on the Provision of Access to Information Contained in Documents from the MIA Archives. He claims in this complaint that the silent refusal is in material breach of the procedural and applicable material laws, since the form required per Art. 38 of the Access to Public Information Act (APIA) was not complied with, that it is in nonconformity with the material law because the requested information is public in the sense of Art. 2, Para. 1 of the APIA, that the right to information is guaranteed by the provisions of Art. 41 of the Constitution of the Republic of Bulgaria, and that the refusal should have included the reasoning behind it and that the institution is obligated to provide proof of the existence of circumstances per Art. 25 of the Protection of Classified Information Act (PCIA). He requests that the refusal under appeal be reversed, and prevails upon the court to order the minister of internal affairs to provide access to the information requested.

In the course of the proceedings, a letter from the minister of internal affairs was submitted, dated 04-Dec-2002, with Issuance No. I-14449, containing a reply to the complainant that says in response to his

request for access to archival documents on the topic of „the activity of Georgi Markov at foreign radio stations“, a search of the ministry's Directorate of Information and Archives (DIA) showed that no archival documents on the topic indicated were being kept at the ministry.

In the course of the proceedings, the legal counsel for the complainant stated that he was appealing not only the silent refusal but also the subsequent explicit refusal by the interior minister, and requested that they be reversed. He elaborated the argument that the complainant should be allowed to study for himself whether there is any information such as that sought by him; i.e., to ascertain for himself that there is no such information, which „is also information.“ He also prevails upon the court „incidentally“ to pronounce the text of Article 9 of the Directive as unlawful, without indicating any basis for this.

The appellee to this complaint, the minister of internal affairs, states via his legal counsel that he considers this complaint to be procedurally inadmissible, due to a lack of individual administrative act per the definition in Art. 2 of the Administrative Procedure Act (APA), and in the second place due to the lack of standing on the part of the complainant due to the satisfaction of his request by the issuance of a reply from the institution, pursuant to Art. 33 of the APIA.

The counsel from the office of the Supreme Administrative Prosecutor submitted the opinion that there did indeed exist an explicit refusal, not a silent one. The explicit refusal was in conformity with the law, since there is no evidence that the requested information does in fact exist.

The complaint is procedurally admissible, since it was submitted within the deadlines stipulated in Art. 14, Para. 1 of the Directive and Art. 13, Para. 2 of the Supreme Administrative Court Act (SACA). There was not a silent refusal, in light of the subsequent decision pronounced by the institution in the letter cited above. That document constitutes an individual administrative act and is subject to appeal as an explicit refusal.

In order to reach a decision on the merit of the complaint, the court has accepted the following:

The applicable laws in this case are the material and procedural provisions of the APIA and the MIA Directive Regulating Access to Information Contained in Documents from the MIA Archives. The court cannot

rule „incidentally“ on the lawfulness of the provisions of Art. 9 of the Directive, since that issue does not fall within the competence of this court.

With regard to the facts in this case, the court has found the following:

The complainant submitted a request to the minister of internal affairs, which he indicated he was submitting pursuant to Art. 4 of the Directive. In the request, he asked that he be granted access to study the intelligence files on the Radio Free Europe, Deutsche Welle and BBC radio networks, in connection with research of material concerning the Bulgarian writer Georgi Markov. According to the content of the request, the complainant's intention was to seek out documents about the writer in the as-yet unresearched archives, for the period between 1970 and 1978, during which the writer worked for and in cooperation with the three radio stations. The complainant indicated that his preferred means of access to the information was by copying on paper, and that his topic was „the activity of Georgi Markov at the foreign radio networks that were under surveillance by the State Security Agency.“ In the course of the proceedings the complainant and his legal counsel put forward the argument that the institution had erroneously interpreted the information access request that he submitted. In it, the appellee was not requested to conduct research on the requestor's behalf, and therefore the appellee did not in fact respond with regard to the information requested; that is, it responded on a matter it had not been called upon to address.

In essence, the complainant's claim in this regard is that he should, in practice, have been afforded unlimited access to the MIA archives, so that the complainant could check for himself whether any information existed on the topic of his request and subsequently determine either that it did not exist or if it did, to decide himself what part of it to copy in printed form. This claim cannot be supported, since neither the APIA nor the Directive provides for such a manner of providing information. Both regulations require that the request contain a description of the information being sought (Art. 25, Para. 1, Provision 2 of the APIA and Articles 7 and 9 of the Directive) and the preferred form in which the information should be provided (Art. 26, Para. 1 of the APIA and Art. 11 of the Directive), but do not stipulate any possibility for the requestor to determine for himself whether or not information exists. Only the entity that is subject by law to provide access to public information shall determine the

existence, or lack thereof, of the information specified in a request (Art. 32 and 33 of the APIA and Art. 17, Para. 1 of the Directive). In fact, even the request itself, as can be seen from its content, is not of the nature that has been claimed during these proceedings. The complainant is improperly substituting the subject of the dispute in this regard, which has been delineated as limited to the requested access to information and the response received from the institution. To agree that every requestor may, on his own, review all of the documents held by an entity subject to provide information, in their entirety and without restriction, including the entirety of the MIA archives, is contradictory to the purpose of the statutes and regulations cited, and would constitute an abuse of rights, in terms of possibly inflicting unfair harm upon the rights of others.

With regard to the arguments presented, it should be borne in mind that the right to information, as stipulated in Article 41 of the Constitution of the Republic of Bulgaria, is not unlimited. It cannot be directed against the rights and good reputation of other citizens, nor against national security, public order, public health or public morals. Inasmuch as freedom of information may include some obligation on the part of state institutions to provide some, it does not apply to any and all information in the state's possession. In various circumstances the obligation of state institutions to provide access to information of public significance may not be extended to all types of information. Constitutional Court Decision No. 2 of 2002 also shares this interpretation. The restrictions on the right to information enshrined in the Constitution are concerned with the obligation to take into account the rights of others, as well as the right of the legislature to enact such restrictions by law.

With regard to the lawfulness of the refusal being appealed:

In accordance with Art. 33 of the APIA, when an institution does not possess the requested information, it shall inform the requestor to that effect. In this case, the request was for access to public information. Per the definition in Art. 9 of the APIA, public information is that which is held by official institutions and their administrations. In order to provide such access, however, it is necessary for such information to exist in fact, in the form usual for that purpose; printed on paper, on film, diagrams, and so forth. Access cannot be required to the public information being sought, if the entity subject to provide it objectively does not possess such material. In this particular case, there is no evidence establishing

that the information requested does in fact exist. The complainant's claim that the evidence submitted in these proceedings indicates that the appellee does have the requested information, or at least an indication that it exists, is unfounded. The complainant submitted a copy of a letter from the National Intelligence Service (NIS) in this regard. According to the content of the letter, the file on Georgi Markov, which is listed in the NIS general catalog, was turned over by the First Central Bureau of the State Security Administration (SSA). In this particular case, the legal basis for the issuance of the Directive is Art.125b of the Ministry of Internal Affairs Act. Pursuant to this provision, the ministry's Directorate of Information and Archives accepts, registers and processes documents generated by the services and directorates of the MIA and creates archives for their temporary or permanent storage, and the ministry's archives are under the management of the interior minister, via the Directorate of Information and Archives. The Directive applies only to the MIA archives, and does not pertain to the archives of the First Central Bureau of the SSA, which, as can be seen in the letter submitted to the court, are held by the National Intelligence Service. On the other hand, the APIA is not applicable to information held in the National Archives of the Republic of Bulgaria (Art. 8, Provision 2 of the APIA), and the complainant's claim is that there is no evidence that the information falls under the purview of the national archives. However, that argument does not prove that the information does in fact exist, in the possession of the appellee. On the contrary; the evidence put forward by the complainant indicates that the information requested may be sought from other institutions, separate from the appellee: the Ministry of Foreign Affairs and the National Intelligence Service.

In view of the evidence and arguments submitted, an institution cannot be obligated to provide access to information, when it has not been determined that such information exists in its possession. In light of these circumstances, the refusal under appeal stands as lawful, in conformity with the applicable regulations. The refusal was issued by the competent institution, with no substantial violation of the procedural rules. The argument that a refusal may be valid only in the presence of the circumstances per Art. 25 of the PCIA does not lie within the purview of this particular case. Such an argument would have been relevant if the refusal had in fact been made due to the requested information's being classified or constituting a state secret, but such circumstances were not present in this case.

Given all of the significant circumstances in the case, the court finds the complaint unfounded and grounds for its dismissal.

Led by all of the above and in accordance with Art. 40, Para. 1 of the SACA, the Supreme Administrative Court, Fifth Division, hereby pronounces the following

DECISION:

The complaint of Hristo Stanev Hristov, from the city of Sofia, against the minister of internal affairs' letter Issuance No. I-14449 of 04-Dec-2002, refusing access to public information, is hereby DISMISSED.

This decision may be appealed before the five-member panel of the Supreme Administrative Court, within a period of 14 days following its issuance.

True to the original,

PRESIDING JUSTICE: (sig.) Andrey Ikonov:

PANEL MEMBERS: (sig.) Zaharinka Todorova, (sig.) Tanya Radkova

**THROUGH THE SUPREME
ADMINISTRATIVE COURT, FIFTH
DIVISION**

**TO
THE SUPREME ADMINISTRATIVE
COURT, FULL FIVE-MEMBER PANEL**

RE: ADMIN. CASE NO. 1524 OF 2003

APPEAL

from

Alexander Emilov Kashumov, attorney
legal counsel for the complainant on Supreme Administrative Court
(SAC) Admin. Case No. 1524 of the year 2003
Hristo Stanev Hristov

AGAINST:

Decision No. 7476 of 2003 by the SAC, Fifth Division on Admin.
Case No. 1524 of 2003.

PURSUANT TO

Art. 218b, Para. 1, Section(c) of the General Procedure Code (GPC)
and Art. 11 of the Supreme Administrative Court Act (SACA)

Honorable Justices:

I hereby appeal, within the prescribed term, Decision No. 7476 of 2003 by the three-member panel of the SAC. I feel that this decision was handed down in violation of the applicable laws and procedural rules, which is grounds for reversal on appeal, pursuant to Art. 218b, Para. 1, Section(c) of the General Procedure Code (GPC), as well as Art. 11 and Art. 35, Provision 4 of the SACA. The violations are as follows:

1. It was a substantial violation of the applicable procedural rules for the court to refuse to rule as to the conformity of the provisions of Art. 9 of the Directive submitted to the court, regulating access to information in documents from the interior ministry archives, which was probably issued by the minister of internal affairs. According to the three-member panel of the SAC, „court cannot rule incidentally on the lawfulness of the

provisions of Art. 9 of the Directive, since that issue does not fall within the competence of this court.” At the same time, the court did accept it to be an applicable law, as can be seen in the appealed decision. Failure to rule on the lawfulness of the specified statute is in violation of Art. 15, Para. 2 of the Statutes and Regulations Act (SRA), which explicitly entrusts the courts with the authority to apply the highest-level text in the event of a contradiction between regulatory guidelines or an order or directive, on the one hand, and a law - including the Constitution - on the other. This interpretation, according to which every court, in the course of hearing a specific legal dispute, is competent to apply Art. 15, Para. 2 of the SRA, is supported by rich, long-standing and unidirectional judicial precedent.¹ The claim by the three-member panel of the SAC, that the complainant did not indicate any grounds for finding the text of Art. 9 of the Directive to be in contradiction with the law, does not absolve it of its official obligation to enforce Art. 15, Para. 2 of the SRA. This is so, because in issuing its decision, the court must officially seek out and enforce the law, regardless of the arguments presented by the parties to the case; this procedural activity also includes the enforcement compliance with Art. 15, Para. 2 of the SRA. That statute has two aspects: the first is that it forbids the application of a lower-level statute that contradicts another, higher level one, and the other is that it requires the application of the higher-level statute rather than that of the lower-level one that contradicts it. This is why the text of Art. 15, Para. 2 of the SRA officially empowers the court to enforce it, by forbidding the enforcement of a lower-level statute that does not conform with a higher level one, and requiring the enforcement of the higher-level one. Failure to fulfill this obligation constitutes a substantial procedural violation and provides grounds for the case being returned for a new hearing, in order

¹ Decision No. F-49 of 30-Apr-1992 on F. Case No. 21 of 1992, Fifth Civil Division; Ruling No. 114 of 28-May-1991, on Civil Admin. Case No. 419 of 1991, Third Civil Division, reported by Presiding Justice L. Tanchovski; Decision No. 4439 of 30-Jul-1999, on Admin. Case No. 1604 of 1999, SAC First Division, reported by Justice Sonya Yankulova; Decision No. 1302 of 25-Mar-1998, on Admin. Case No. 655 of 1997, SAC, reported by Justice Bisserka Kotseva; Decision No. 5286 of 13-Nov-1998, on Admin. Case No. 540 of 1997, SAC, reported by Georgi Alexandrov; Decision No. 810 of 30-Dec-1997, on Admin. Case No. 158 of 1997; Decision No. 4322 of 28-Jul-1999, on Admin. Case No. 513 of 1999, SAC First Division, reported by Justice Sonya Yankulova; et al.

to overturn the first-instance finding regarding the conformity of the MIA Directive with the APIA, pursuant to Art. 15, Para. 2 of the SRA.

The fact that there exists a specific mechanism for defense against sub-legislative statutes that are in nonconformity with the law does not exhaust the obligations and competence of the court with regard to the application of Art. 15, Para. 2 of the SRA, as can also be seen in the practice of the courts since the SACA came into effect. To accept otherwise would mean to find it acceptable to apply the law improperly, even though it is well-known, in all other cases except those in proceedings in an appeal or complaint against a statutory text; it would mean making a radical change in court precedent established over many years, and result in an entirely new and incorrect interpretation of Art. 15, Para. 2 of the SRA, without it actually having been changed at all.

The text indicated by the complainant, from Art. 9 of the cited MIA Directive, is in total nonconformity with the SRA, due to the following:

A. In the Directive, the top-level institution is giving instructions only to the officials subordinate to it, pursuant to the application of a given statutory regulation (Art. 7, Para. 3 of the SRA), and may not impose obligations upon other persons, especially citizens, which is precisely what Art. 9 does.

B. If the Directive gives instructions on the application of the APIA (which is not explicitly stated in it, but could possibly be extrapolated upon analysis of it), it is not possible for a lower-level regulation, which is not even a statutory one, to impose obligations on citizens who are not specified in this law; as opposed to Art. 6, Para. 1 of the Directive, which repeats Art. 25, Para. 1 of the APIA verbatim, Art. 9 imposes requirements upon the requester that do not exist in the APIA.

C. The text of the Directive lacks any indication of who issued it, for what purpose it was issued or for the enforcement of what regulatory statute it was issued, which would indicate that it is void. From the very start it is an administrative document of unclear character, with which, taken along the course of historical interpretation, the minister of internal affairs has attempted to replace, in part, the Act on Access to Documents of the Former State Security Administration and the Former Intelligence Bureau of the General Staff, which was repealed in 2002.

2. The three-member panel of the SAC incorrectly assessed the circumstances of the case, which led to the issuance of a court decision that

envisioned other, nonexistent circumstances, and is in violation of Art. 188, Para. 2 of the GPC. In the appealed decision, the court incorrectly interpreted the complainant's claims to be that „he should, in practice, have been afforded unlimited access to the MIA archives,“ that he wished to „check for himself whether or not the information existed“ and that he had made „an improper substitution of the subject of the dispute, delineated as limited to the requested access to information.“

In fact, the complainant requested that he be granted access to the information specified in his request: the contents of the so-called intelligence files of the three radio stations mentioned, which were generated by the archive of the former State Security Administration, and pertaining to a certain specific time period. Their existence is not disputed by the minister of internal affairs. The practice is to request access to the information in this archive in precisely such a manner; not only by this, but by other readers as well, because the only current purpose of this archive is for it to be read, just as people read in a library. The appropriate conditions for this have also been provided, with areas for reading, copy machines, etc.

To this request for access to information, the minister of internal affairs replied (after the expiration of the term prescribed by the law) that a check had been conducted and that no information on the topic indicated by Hristo Hristov had been found.

This administrative decision by the minister of internal affairs was appealed in court, because the complainant considered it to be a covert denial of access to information. Its unlawfulness stems from the fact that the minister of internal affairs incorrectly interpreted the topic indicated by the requestor as an element of the description of the information sought. The complainant claimed that this is not the established practice for working in the archive and that he had, in response to other requests, received the requested documents. After reading those, he requested others, etc., and throughout this entire process nobody ever inquired as to the nature of the topic regarding his interest in the information .

The complainant feels that the fact that the minister of internal affairs took his topic into account as part of the description of the information he requested is due to the provisions in Art. 9 of the cited Directive. In specifying the topic of his access request, he was fulfilling the requirement in that regulation; he was not describing the information he was

requesting (just as a reader who requests a certain book from the library may be interested in a specific topic, but does not request access only to certain passages, but rather to the whole book).

This incorrect interpretation of the factual background thus led to the issuance of a flawed decision.

3. The applicable laws were improperly applied in the appealed decision. The three-member panel of the SAC stated that the APIA does not provide for the visual review of documentation as a form of information access, which is incorrect; Art. 26, Para. 1, Provision 1 of the APIA explicitly provides for this method of access. Of course, this is a form to access to existing information, and not a means for verification by the requestor of the fact that the requested information exists; however, as has already been noted, no request for verification of the existence of the requested information was submitted.

In light of and on the basis of all of the above, I request that the court reverse the appealed decision and return the case for a new hearing; or, if the court finds otherwise, that a new decision on the merits of this case be issued in place of the appealed one.

Respectfully yours,

(legal counsel for the complainant)

DECISION

No. 4046
Sofia, 04-May-2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court (SAC) of the Republic of Bulgaria, Five-Member Panel, in a court session held on the twenty-first day of November, two-thousand-three, in a panel comprised of:

PRESIDING JUSTICE: NIKOLAY URUMOV
PANEL MEMBERS: PENKA IVANOVA, SREBRINA HRISTOVA,
VESSELINA KALOVA, BOYAN MAGDALINCHEV

and in the presence of court stenographer Rossitsa Todorova and with the participation of public prosecutor Angel Angelov, heard the report of Justice Boyan Magdalincev on Admin. Case No. 8355 of 2003.

These proceedings were held pursuant to Art. 33, Para. 1 of the Supreme Administrative Court Act (SACA).

This case was initiated by an appeal from Hristo Stanev Hristov of Sofia, against Decision No. 7476 of 16-Jul-2003, on Admin. Case No. 1524 of 2003, by the Fifth Division of the SAC. The appeal claims the decision was improper, since in reaching it the court committed significant violations of the procedural rules and of the applicable laws: Art. 32, Para. 1 of the APIA, which is grounds for reversal per Art. 218b, Para. 1, Note 3 on First and Second Proposed Amendments to the General Procedure Code (GPC) as well as Art. 11 of the SACA.

The minister of internal affairs, represented by his legal counsel, submitted the argument that the appeal is groundless. He considers that the determination with regard to Art. 23 of the SACA, regarding the nonconformity of the sub-statutory regulations with higher-level statutes, may be made within the jurisdiction of this court - the five-member panel of the SAC - and not by the three-member panel of the same court. For this reason, he finds groundless the request made to the three-member panel of the SAC, that it rules incidentally on the conformity of Art. 9 of Direc-

tive No. I-11324 of Jul-2002, regulating access to information from documents in the archives of the interior ministry, with the provisions of the Access to Public Information Act (APIA).

Counsel from the office of the Supreme Administrative Prosecutor submitted its determination that the appeal is well-founded. It found to be unlawful the conclusion by the three-member panel of the SAC, that it could not make a prejudicial pronouncement as to Art. 9 of Directive No. I-113 of 24-Jul-2002 being contradictory to the provisions of Art. 15, Para. 2 of the Statutes and Regulations Act (SRA), Art. 5, Para. 1, 2 and 5, as well as Art. 41, of the Constitution of the Republic of Bulgaria, and the Constitutional Court's Interpretive Decision No. 7 of 1996. It is not permissible to introduce additional requirements in a sub-statutory regulatory document, different from those established by law; this is even more so, when the sub-statutory regulation has not been published. In addition, the prosecutor considers with regard to the merits of this case that the information sought by the appellant exists, and that access thereto was unlawfully denied.

The appeal was filed within the time period stipulated in Art. 33, Para. 1 of the SACA and is admissible. It is found to have MERIT.

The initial subject of the complaint in Admin. Case No. 1524 of 2003 before the Fifth Division of the SAC was the silent refusal by the minister of internal affairs - and subsequently the explicit one, manifested in letter No. I-14 449, dated 04-Dec-2002 - to respond to Request No. 229, of 15-Oct-2002, for access to information in documents from the MIA archives of the intelligence files on the Radio Free Europe, Deutsche Welle and BBC radio networks, in connection with research on material concerning the writer Georgi Markov, who worked for and in cooperation with the three radio stations during different periods between 1970 and 1978. An incidental request was also made for the repeal of Art. 9 of MIA Directive No. 1-113 of 24-Jul-2002, regulating access to information contained in documents from the ministry's archives, due to its being in contradiction with Art. 25, Para. 1 of the APIA.

In the decision that is the subject of the present appeal, the three-member panel of SAC found that the proceedings pertained to the Access to Public Information Act (APIA). The request for the repeal of Art. 9 of the

specified directive was dismissed, due to the circumstance that in accordance with Art. 23 of the SACA, the three-member panel of the SAC is not the competent court to make such a determination. With regard to the merit of the case, the court found the complaint to be unfounded. The provision to the complainant with unlimited access to the MIA archives, and his desire to determine for himself whether information existed on the topic sought by him, including copying on paper format if he did determine it to exist, was found contradictory to the request made by him in the application of 15-Oct-2002. Access to such information could only be granted in the event that it exists. In the absence of such in the archive, which was the grounds for the refusal, the administrative institution had objectively and in conformity with Art. 33 of the APIA refused to provide it, and had informed the requestor of this, thereby rendering the silent refusal and the explicit one that followed it lawful, for which reason the court dismissed the complaint submitted against it.

That decision by the three-member panel of the SAC is in nonconformity with the law.

The three-member panel of the SAC found, with proper reasoning and in line with the evidence presented in the case, that the proceedings brought before it pertained to the APIA and that the resolution of the dispute should be sought on the basis of the provisions of that law. The matter concerns a request for public information, held by a state institution, concerning the public life in the Republic of Bulgaria and giving its citizens the ability to formulate their own opinions regarding the activity of the entities subject to the law. Pursuant to Art. 4, Para. 1 of the APIA, every Bulgarian citizen has the right of access to public information, under the conditions and in the manner stipulated by that law, unless another law provides a special means for seeking, receiving and disseminating such information. In the absence of other rules being imposed to that effect in the Ministry of Internal Affairs Act (MIAA), and under the condition that the information requested would be detrimental to the rights of third parties, national security, or any other protected secret as provided in the Protection of Classified Information Act, the right of access to public information is unlimited.

While making a proper classification of the dispute, the court drew its legal conclusions in contradiction to the evidence presented in the case,

which led to an improper application of the applicable laws and to the court's decision being unfounded.

The request made by the appellant to the minister of internal affairs, expressed in his application registered on 15-Oct-2002 under No. 2291, was for „access to information contained in documents from the MIA archives... for study of the intelligence files on the Radio Free Europe, Deutsche Welle and BBC radio networks, in connection with research of material concerning the Bulgarian writer Georgi Markov...., who worked and cooperated with the three radio stations at different times between 1970 and 1978.“ In conformity with the requirements of Art. 25, Para. 1 of the APIA and Art. 7, Para. 1 of the interior minister's Directive No. I-113 of 24-Jun-2002, his request contained all of the required elements, including a sufficient description of the information being sought, the topic and the purpose of his journalistic investigation. The silent refusal and the subsequent explicit one, manifested in a letter from the minister of internal affairs, under No. I-14449, dated 04-Dec-2002, were given with the reasoning that the Directorate of Information and Archives at the MIA "did not possess any archival documents" on the topic specified by the requestor.

Pages 35 to 50 of the documentation submitted in this case contain written evidence that support that determination, and simultaneously necessitate legal conclusions different from those accepted by the administrative institution. The documents in question are Information Report No. 5947, dated 03-Jul-1978, by the chief of the Seventh Department of the Sixth Bureau of the SSA; an SSA Analysis of Foreign Propaganda Against the People's Republic of Bulgaria in 1977, Receiving No. 5127, dated 12-May-1978; and a letter, Transmittal No. 3590, dated 27-May-1991, from the National Intelligence Service of the Presidential Administration of the Republic of Bulgaria to the director of the National Investigative Service, which up to this time is within the structure of the interior ministry. From the contents of these documents, to which the complainant, according to his own testimony, had previously had access in the course of his journalistic investigation of the topic, it is clear that information on the topic of the request is indeed held in the MIA archives. All of the documents described above were generated by former structures of the MIA, and in accordance with the law the information in them is held in the MIA archives. Whether the information existed in the MIA

archives at the time of the request, or had been destroyed or transferred to another archive, is another matter. These documents do, however, establish beyond a doubt that in any case, such information did exist in the MIA archives, and pursuant to Art. 7, Para. 1 of the APIA, in the absence of any obstacles under that text and Art. 5 of the APIA, that administrative institution could not restrict access by the complainant to that information, since his right to such is unrestricted. In the event of the absence of the information from the MIA archives at the moment of the request, in accordance with Art. 32, Para. 1 of the APIA the administrative institution is required to conduct an in-depth verification of the current whereabouts of the same and to forward the request to the institution holding the information. In this case, the minister of internal affairs did not fulfill this obligation, imposed upon him by Art. 32, Para. 1 of the APIA, but rather simply indicated that „archival documents on the topic specified by you are not kept in the DIA of the MIA,“ in violation of the law, thereby rendering his refusal unlawful. In pronouncing its decision, the three-member panel of the SAC did not comply with the requirements of the APIA and dismissed the appellant's complaint against the interior minister's refusal, thus pronouncing the same in violation of the applicable laws, thereby necessitating its reversal. In its place, in accordance with Art. 41, Para. 1 of the APIA, a new decision should be issued on the matter of the case, in which the minister of internal affairs is ordered to provide the complainant with access to the public information requested.

The court does not share the appellant's conclusions, set forth in his appeal, regarding the authority of the three-member panel of the SAC to rule as to the lawfulness of Art. 9 of the interior minister's Directive No. I-113 of 24-Jun-2002, regulating access to information contained in documents from the ministry archives. Indirect judicial review in verifying the lawfulness of an individual administrative act does not confer the ability to repeal a sub-statutory regulatory document or an individual text therein, for nonconformity with a regulatory document of a higher level. The existing legal framework does not permit the three-member panel of the SAC to pronounce a regulatory document or an individual text therein to be unlawful. Pursuant to Art. 23 of the SACA, such a determination is within the exclusive authority of the five-member panel of the SAC. If the court, in reviewing the lawfulness of an individual administrative act, finds that a sub-statutory regulatory document or certain provisions thereof

are contradictory to a higher-level regulatory document, in accordance with Art. 15, Para. 2 of the Statutes and Regulations Act (SRA), the court shall apply the higher-level regulation, but shall not effect the repeal of the unlawful sub-statutory regulatory document or text.

In light of all of the above, this court finds that the decision by the three-member panel of the SAC was issued in violation of the applicable laws and should be reversed, and in its place a new decision issued on the matter of the dispute, reversing the silent refusal and the subsequent explicit one, manifested in letter Reg. No. I-14 449, dated 04-Dec-2002, by the minister of internal affairs, to provide the complainant with access to the MIA archives regarding the public information requested, and ordering him to provide the complainant with such access.

Led by all of the above and in accordance with Art. 40, Para. 2, Sentence 2 of the SACA, as well as Art. 41, Para. 1 of the APIA, the Five-Member Panel of the Supreme Administrative Court hereby pronounces the following

DECISION:

Decision No. 7476 of 16-Jul-2003, on Admin. Case No. 1524 of 2003, by the Fifth Division of the Supreme Administrative Court, which dismissed the complaint of Hristo Stanev Hristov of the city of Sofia against the silent refusal by the minister of internal affairs and the subsequent explicit one, manifested in letter Reg. No. I-14449, dated 04-Dec-2002, to provide access to public information in the MIA archive for research of the intelligence files on the Radio Free Europe, Deutsche Welle and BBC radio networks during the period 1970-1978 on the topic of „the activity of Georgi Markov at the foreign radio stations under surveillance by the State Security Administration,“ is hereby REVERSED, and in its place the following is ORDERED:

The silent refusal by the minister of internal affairs and the subsequent explicit one, manifested in letter Reg. No. I-14449, dated 04-Dec-2002, to provide Hristo Stanev Hristov from the city of Sofia with access to public information in the MIA archive for research of the intelligence files on the Radio Free Europe, Deutsche Welle and BBC radio networks during the period 1970-1978 on the topic of „the activity of Georgi

Markov at the foreign radio stations under surveillance by the State Security Administration," is hereby REVERSED as unlawful, and the minister is hereby ORDERED to provide him with access to the MIA archives with regard to the public information requested.

The Ministry of Internal Affairs is hereby ORDERED to pay to Hristo Stanev Hristov the expenses incurred for court and filing fees, in the amount of 35 leva.

This decision is not subject to appeal.

True to the original,

PRESIDING JUSTICE: (sig.) Nikolay Urumov

PANEL MEMBERS: (sig.) Penka Ivanova, (sig.) Srebrina Hristova,
(sig.) Vesselina Kalova, (sig.) Boyan Magdalinchev



CASE

Yurii Ivanov

vs.

***the Public Internal
Financial Control
Agency***



**Yurii Ivanov vs.
the Public Internal Financial Control Agency**

*1st Instance Court - Administrative Case No. 2001/2001,
Sofia City Court, Administrative Division, Panel 3-g*

*2nd Instance Court - Administrative Case No. 5246/02,
Supreme Administrative Court, 5th Division*

In March 2001, Mr. Yurii Ivanov, a Chairperson of the Civil Association „Public Barometer“ in the town of Sliven, filed a request with the Director of the Public Internal Financial Control Agency (PIFCA). Mr. Ivanov demanded copies of two audit reports issued after PIFCA inspections in two higher education schools in Sliven, branches of the Technical University of Sofia.

With a written decision, the director of PIFCA refused access to the demanded information. The director stated that the submitted application did not contain particular questions, i.e. description of the requested information. Furthermore, the director's decision was on the merits since he refused the information on the grounds of administrative secrets. The text of the decision quoted the provision of the State Internal Financial Control Act (SIFCA), which stipulated that the oversight bodies were obliged to keep secret any information that had been obtained during their work.

Mr. Yurii Ivanov challenged the refusal before the Sofia City Court (SCC). On March 4, 2002, the court dismissed the complaint and ruled that the refusal was justified. According to the court, the request did not give the necessary description of the demanded information and the requester had not defined the nature of his demand. The grounds for the PIFCA director's refusal, stating that the information fell under the category of the administrative secrets, were not discussed by the court.

The Supreme Administrative Court (SAC), as a higher instance court, overturned the judgment of the SCC and returned the information request to the PIFCA Director for reconsideration with a decision as of November 22, 2002. The court ruled that the request contained accurate and precise description of the demanded information. Furthermore, if the administration of the public body could not define the information that was demanded, it had the obligation to inform the requester, who had the right to specify his request in within thirty

days. Since the public body had not complied with this legal requirement under Article 29, paragraph 1 of the Access to Public Information Act, the body could not use the possibility stipulated by Paragraph 2 of the same provision, namely to leave the request unconsidered. In their judgment, the Supreme Administrative Court pointed out that no particular provision of the SIFCA stipulated the requested information as administrative secrets.

**To: Director of the Territorial
Directorate for Public Internal
Financial Control Agency,
City of Sliven**

REQUEST

for ACCESS to INFORMATION

from Yuri Ivanov Ivanov
Chairman of the civic association Public Barometer

Dear Mrs. Chenkova:

In accordance with the Access to Public Information Act, I hereby request to be granted access to the following information:

1. The final report on the financial audit of the Sliven College of the Sofia Technical University for 1999.
2. The final report on the financial audit of the Engineering Education Faculty of the Sofia Technical University for 1999.

I wish to receive the information requested in printed format, on paper.

Respectfully yours,

(Yuri Ivanov)

**REPUBLIC OF BULGARIA
PUBLIC INTERNAL FINANCIAL CONTROL AGENCY - SOFIA
TERRITORIAL DIRECTORATE - SLIVEN**

**To:
YURI IVANOV IVANOV
CHAIRMAN, PUBLIC BAROMETER
CIVIC ASSOCIATION
City of Sliven**

Dear Mr. Ivanov:

In response to the request you submitted for access to information, we wish to inform you of the following:

- In accordance with Art. 21, Para. 8 of the Guidelines for the Implementation of the Public Financial Control Act (PFCA), as regards Article 20 of the State Financial Supervision Act (SFSA), the final audit report consists of four (4) identical copies: one for the audited institution, one for the prosecutor, one for the principal and one for the auditing service. This is an imperative regulation, and it is the duty of state financial supervision officials to uphold it strictly.

Based upon the rules cited above, the Sliven territorial directorate is not able to provide the information to you.

- In accordance with the SFSA, the Territorial Directorate for Public Internal Financial Control (TDPIFC) in Sliven is not a legal entity, but rather a division of the Public Internal Financial Control Agency (PIFCA). Structural divisions do not have the right to provide information to outside users without the permission of the PIFCA. In light of this, matters regarding the provision of information should be handled between the PIFCA and the Public Barometer civic association.

- In accordance with the requirements for official correspondence, we wish to inform you that your letter does not fulfill the conditions for identification:

- there is no issuance number on stationery of the legal person (the association);

- there is no signature and seal of the requesting association.

We are certain that your request will be handled at the appropriate hierarchical level,

Respectfully yours,

DIRECTOR

TDPIFC SLIVEN

REPUBLIC OF BULGARIA
Public Internal Financial Control Agency

Sofia,
06-Jul-2001

TO:
MR. YURI IVANOV,
CHAIRMAN OF THE
PUBLIC BAROMETER CIVIC
ASSOCIATION, SLIVEN

CC:
TDPIFC-SLIVEN

Dear Mr. Ivanov:

In response to the request you submitted for public information regarding the final report from the financial audit of the Sliven College of the Sofia Technical University for 1999 and the final report from the financial audit of the Engineering Education Faculty of the Sofia Technical University for 1999, the Public Internal Financial Control Agency (PIFCA) has reached the following decision:

In accordance with Art. 9, Para. 3 of the Public Financial Control Act (PFCA), the only entities authorized to inform the public about the activity of the PIFCA are its director and the Minister of Finance. These officials may only provide information with regard to which there is no legislation that provides for seeking any sort of liability.

In the information access request addressed to the director of the Territorial Directorate in Sliven, you requested any existing information regarding certain audit reports. In contradiction to the requirements in Art. 25, Para. 1, Provision 2 of the Access to Public Information Act (APIA), your request does not contain specific questions; i.e., a description of the information sought.

There are no provisions in the PFCA regulating the mechanism for providing originals or copies of audit reports to citizens. Meanwhile, PIFCA officials are also obligated to safeguard official secrets, in accordance with Art. 12, Para. 1 of the PFCA.

In light of the above, we consider the provision of audit reports to citizens to be unlawful. In the event that you should further specify your request with regard to the information to which you wish to be granted access, in accordance with Art. 37, Para. 2 of the APIA, the authorized PIFCA officials will reply in the manner provided for by law.

Director:

**THROUGH
THE DIRECTOR OF PUBLIC
INTERNAL FINANCIAL CONTROL
AGENCY**

**TO: THE SOFIA CITY COURT
ADMINISTRATIVE DIVISION**

APPEAL

from

Yuri Ivanov Ivanov

Chairman, Public Barometer civic association

Sliven

AGAINST:

DECISION No. 24180025 of 06-Jul-2001, refusing access to information

PURSUANT TO

Art. 40, Para.1 of the Access to Public Information Act (APIA) and Art. 33 of the Administrative Procedure Act (APA)

Honorable Justices:

In March 2001, I submitted a written request, in accordance with Art. 24, Para. 1 of the APIA, in which I requested that I be provided with a copy of two audit reports: one for the audit conducted of the Sliven College of the Sofia Technical University in 1999 and one for the audit conducted of the Engineering Education Faculty of the Sofia Technical University in 1999.

On 05-Jun-2001, I received a refusal decision from the director of the Public Internal Financial Control Agency's territorial directorate (TDPIFC) in Sliven.

On 16-Jul-2001, I submitted a new request for access to the same information. I received a decision refusing to provide the information requested. In this decision, I was refused access to the information requested, based upon certain conclusions that were presented in detail.

The decision by the Director of the PIFCA to refuse to grant me access to this public information is injurious to my fundamental rights, and was issued in significant contradiction to the procedural and applicable material laws and the purpose of the law.

I. With regard to the argument that „the request does not contain specific questions“: It is obvious in the wording of Art. 25, Para. 1, Provision 2 of the APIA that the legislature has provided citizens and legal persons with greater possibility, when seeking access to information, to describe the information being sought. This possibility guarantees their right of access to public information in cases when they are unable to identify the exact documents in which they are interested. The burden of specifying exactly which document then falls upon the entity subject to the law, which in contrast to the requestor is in a position to identify it with ease. In this particular case, however, the subject of the request - i.e., the information requested - was clearly and unambiguously designated, encompassing the entire contents of the specified audit reports. Also indicative of this is the fact that the previously submitted request, with identical content, did not raise any questions regarding the specificity of the request, as seen in the decision with transmittal no. 127, dated 29-Mar-2001, from the director of the TDPIFC in Sliven. Similarly, the argument in the decision under appeal, that the Public Financial Control Act (PFCA) lacks a mechanism for the provision of copies of audit reports, obviates the claim of the request's ambiguity.

II. With regard to the argument that the PFCA lacks any standards for regulating a mechanism for the provision of originals and copies of audit reports to citizens: The PFCA is not the only regulatory statute that the officials of the PIFCA are obligated to obey. The APIA recognizes the right of every citizen and legal person to access public information and establishes a corresponding obligation on the part of every entity subject to the law, which includes state officials, to provide such information in the format requested by the requestor, including in a copy of a document. The APIA also enumerates the procedural rules for provision, which are to be applied in every case of providing access to information, unless established otherwise by a special law. Since the PFCA does not provide a separate procedure for the provision of information, the latter must be provided in accordance with the APIA. The requirement that four (4) original copies of the report be prepared may not in any way be inter-

preted as a limitation on copying the report or its disclosure in another manner. The purpose of that legal provision is entirely different: it makes it mandatory that the report be submitted to the interested parties and institutions, without their having to request it.

III. With regard to the argument that the law forbids the provision of the information requested: The PFCA does not specify that audit reports are official secrets. Since the audit reports are documents issued by a competent institution in the fulfillment of its authority, they contain **official information**, per Art. 10 of the APIA. In accordance with Art. 3, Provision 4 of the PFCA, PIFCA officials are obligated to safeguard official secrets, which become known to them in the course of or as a result of their fulfillment of their official duties. Accordingly, the information first of all must constitute an official secret, and second of all to have been learned in the course of or as a result of fulfilling official duties. The cases in which certain information constitutes an official secret must be provided for by law, pursuant to the imperative provisions of Art. 7, Para. 1 of the APIA. Although it does use the term „official secret“, the PFCA does not provide specific criteria for the cases in which the information constitutes an official secret. Accordingly, the meaning of „official secret“ as used in Art. 3, Provision 4 of the PFCA is elaborated in the laws in which such concrete categories of official secret are provided, with a view to the protection of the rights and interests specified in Art. 41, Para. 1 of the Constitution (see Art. 3 of the APIA). Interpretation of Art. 3, Provision 4 and Art. 12, Provision 3 of the PFCA, as well as the nature of the activity of the institutions governed by the PFCA, indicate that the obligation to maintain confidentiality exists for the purpose of protecting the rights and legal interests of third parties, not those of the PIFCA officials themselves. These rights and legal interests are protected by the law in the form of the so-called „commercial secrets“ provided for in the Protection of Competition Act, the confidentiality provided for in the Tax Procedure Code, the secrecy of know-how, patents, et al. Nowhere is it clear that the requested audit reports contain precisely such specific categories of information as to constitute an official secret. The opposite, however, is certainly true; they do contain a number of categories of information that are in no way secret, such as the fact that an audit of the above-mentioned enterprise was conducted, that this was undertaken on certain grounds and by certain officials, the time in which the audit was conducted, and the observations made by the respective competent

official (e.g. any shortfalls discovered, indications of crimes committed, etc.). These categories of information are for the most part of public interest, and that is precisely the purpose of the APIA - to give citizens the ability to formulate their own opinions on matters concerning public life and the activity of the entities subject to the law (Art. 2, Para. 1 of the APIA).

IV. Such an interpretation also follows from comparison of the State Financial Supervision Act (SFSA, repealed) with the PFCA. The repealed law, which also provided for the obligation to safeguard official secrets, also provided, in the explicit provisions of Art. 15, Para. 2, the possibility for the provision of information contained in an audit report, following the conclusion of the audit. At the time of the enactment of the SFSA (repealed), the APIA had not yet been enacted. Its enactment obviated the necessity of reproducing the provisions of Art. 15, Para. 2 of the SFSA in the new PFCA, because currently the APIA proclaims the principle of the accessibility of public information - information generated by state institutions, and especially of official public information (Art. 10 of the APIA), which the audit reports also represent.

On the basis of all of the above, I respectfully request that the court REVERSE the refusal by the Director of the PIFCA to provide me with access to the requested audit reports, as unlawful due to contradiction with the procedural and applicable material laws and to resolve the case on its merit in accordance with Art. 41, Para. 1 of the APIA, as well as Art. 42, Para. 2 of the APA.

Attachments:

1. copy of request for access to public information
2. copy of letter No. 127, dated 29-Mar-2001
3. copy of letter Transmittal No. 24180025, dated 06-Jul-2001, containing the decision refusing to provide access to information
4. copy of this complaint and written evidence, for the appellee
5. receipt for payment of state fees

Respectfully yours,

TO:
SOFIA CITY COURT
ADMINISTRATIVE DIVISION III-J

RE: Admin. Case No. 2001 of 2001

WRITTEN ARGUMENTS

From:
Alexander Emilov Kashumov, attorney
legal counsel for the complainant

Honorable Justices:

I request that you honor this complaint and reverse the appealed refusal for nonconformity with the law, in your deliberations on the merit of this case. The director of the Public Internal Financial Control Agency (PIFCA) issued the refusal unlawfully and injured the right of the complainant to access public information, due to a violation of the applicable law. The information requested does not constitute an official secret, nor is there any other legal obstacle to providing access thereto, based upon the conclusions elaborated in the complaint, as well as the following:

1. During the court session the legal counsel for the defense stated that certain parts of the audit report, access to which the complainant had requested, do not constitute a secret and that there is no obstacle their being provided to the complainant. That conclusion has the quality of an admission in court, although only partial, of the obligation on the part of the PIFCA to provide part of the information requested..
2. The defense's claim that the complainant's request for access to public information did not contain a specific description of the information being sought is groundless.
 - A. This is so first of all because the information being requested is very clearly specified: the request is for access to the information contained in two specific, existing documents, generated in the audits of two legal

persons, which are specified exactly and indicated clearly in the complainant's application. The idea embodied in Art. 25, Para. 1, Provision 3 of the APIA is that the applicant must clearly specify the subject of his request, in order for the subject to be clear to the respective entity subject to the law; not to indicate details, which obviously could not be known to him in advance. The very essence of the access to information law is that the applicant should become more knowledgeable regarding the information he requested after his right to it has been fulfilled.

B. As can be seen from the correspondence between the PIFCA and the complainant, submitted as evidence for this case, neither the director of the TDPIFC in Sliven nor the director of the PIFCA displayed any doubts or hesitation on the matter of exactly which audits were the ones regarding which information had been requested. The former, in his letter dated 29-Mar-2001, under Transmittal No. 127, did not even raise the question of specifying the information request. Moreover, if it had not been clear to him what information the complainant was requesting, the appellee would not have been in a position to claim that he could not provide the information requested due to its being an official secret. Since there is, however, an existing refusal based on those grounds, the appellee clearly did understand precisely which information was being sought.

3. The defense's claim that the requested audit reports constitute an official secret is unfounded. The text of Art. 3, Provision 4 and Art. 12, Provision 3 of the PFCA specifies, although with insufficient precision, what information constitutes a secret under this law and may not be disclosed. It is stipulated in those provisions that official secrets concern information that has become known to PIFCA officials in the course of or as a result of the performance of their official duties. Thus it follows that only information received by PIFCA officials, but not the information generated by them, may be classified as official secrets. Accordingly, the findings and conclusions in the audit report lie outside the possible scope of classification as secret, and should be freely accessible. The same also applies to the time, place and name of the subject of the audit and the authorized official who conducted it, as well as any violations or criminal acts discovered in the audit.

4. Similarly, not all information that becomes known to PIFCA officials is an official secret. A variety of data of this sort is public; for example, the

name, headquarters and address, capital holdings (if any) and name of the representative of the legal person that was audited. In this particular case, the other data received from the audited entities is also public. The audited entities in this case are the Sliven College of the Sofia Technical University and the Engineering Education Faculty of the Sofia Technical University. As can be seen in the state budgets for the years 1998-2001, the Technical University of Sofia is financed by the national budget. Therefore the Sofia Technical University, as a legal entity, is required under Art. 3, Para. 2, Provision 2 of the APIA to provide information. Similarly, in accordance with Art. 31, Para. 5 of the APIA, its permission is not required in the capacity of an affected third party in order for information to be provided by the PIFCA.

5. The content of Art. 3, Provision 4 and Art. 12, Provision 3 of the PFCA should be interpreted in accordance with the Constitutional Court's interpretation of Art. 39-41 of the Constitution, in CC Decision No. 7 of 1996, in Constitutional Case No. 1 of 1996. According to it, „the restriction of these rights [including the right to information] is permissible for the purpose of protection of other, also constitutionally significant rights and interests, and may occur only on the grounds provided for in the Constitution,“ which grounds must „be applied restrictively and only to ensure the protection of a competing interest“ (CC Decision 7 of 1996, III.). The only rights and interests that could possibly be protected as official secrets, since the audits were conducted back in 1999, are the rights of the respective natural and legal persons, as afforded to them by law. Thus it follows that in cases when the law recognizes a person's right to personal or commercial confidentiality with regard to certain data pertaining to that person, it is lawful for the right of others to access that data to be restricted. This is not a restriction that should be imposed at all costs, but only after failure to obtain consent, pursuant to Art. 31 of the APIA. Another issue here is that it is highly unlikely that the audit reports contain any information, the disclosure of which would lead to unfair competition (which is the essence of a commercial secret), and even less likely that they would contain the private data of any natural persons.

6. None of these legal requirements were complied with. An easier approach was taken; no interpretation was made of the term „official secret“ as used in the PFCA, no assessment was made of the information contained in the two audit reports for the purpose of separating out in-

formation constituting a secret (if such exists at all) from that which is accessible. Based upon this assessment, from both a factual and legal standpoint, the entity subject to the law should have provided access - whole or partial - to the information requested, in the requested form of access. If it were indeed determined to grant partial access, as is claimed by the legal counsel for the defense, then the appropriate sentences and passages falling under that restriction should have been excised from the copies of the documents.

7. The director of the PIFCA issued the refusal in violation of the applicable law, as he failed to provide the complainant with either whole or partial access to the requested information, he issued a refusal not only in violation of the law and in deviation from the spirit of the law, as seen in the claim of the ambiguity of the request in the application. The claim of the existence of an official secret was unsupported by the specification of what sorts of facts contained in the audits constituted such a secret, nor was were any protected rights or interests specified, as required by the Constitutional Court. If we were to accept the concept that audit reports should not, in principle, be provided to the public, then the main activity of PIFCA officials would fall outside the necessary societal transparency and oversight, in violation of the fundamental purpose of the APIA, as extrapolated from Art. 2, Para. 1 of that law.

In light of and based upon all of the above, I respectfully request that the court reverse the refusal as unlawful, and that the case file be returned to the appellee for the pronouncement of a new decision, along with mandatory instructions for the application of the law.

Respectfully yours,

DECISION

Sofia,
04-Mar-2002

IN THE NAME OF THE PEOPLE

The Sofia City Court, Administrative Division, panel III-J, in a public session on the twelfth of February, two-thousand-two, in a panel consisting of:

PRESIDING JUSTICE: ANELIYA MARKOVA

PANEL MEMBERS: MILENA ZLATKOVA, PETAR GUNCHEV

In the presence of court stenographer Sonya Petrova and public prosecutor Nastasova, the court convened to hear Admin. case No. 2001 on the docket for the year 2001.

Judge Markova reported that in order to reach its decision, the court took into account the following:

These proceedings are being conducted pursuant to Art. 40 of the Access to Public Information Act (APIA).

The appellant, civil association Public Barometer, via its chairperson, Yuriy Ivanov, claims that its request for access to the audit reports of the audit conducted in 1999 of the Sliven College of the Sofia Technical University (STU), as well as the one regarding the Engineering Education faculty of the same university, was denied unlawfully.

This is why the complainant has requested that the court reverse the refusal by the Public Internal Financial Control Agency (PIFCA) and to rule on the substance of the case.

The defendant, the PIFCA in the city of Sofia, is contesting the complaint. Compensation for legal expenses is not being sought.

The court, following its consideration of the arguments of the parties to the case and the written evidence submitted, has determined that the following facts regarding the dispute have been established:

The civic association Public Barometer submitted a request to the director of the Territorial Directorate for Public Internal Financial Control Agency in the city of Sliven, that it be granted access to public information, in the form of the audit report of and audit conducted in 1999 of the Sliven College of the STU, as well as information about the same university's Engineering Education faculty, also for 1999.

On 29-Mar-2001, the director of the Territorial Directorate for Public Internal Financial Control Agency (TDPIFC) in the city of Sliven replied to the requestor, to the effect that the territorial subdivisions of the PIFCA are not Legal Persons (LP) and do not have the authority to release information to outside parties without the permission of the Agency. In the same letter, it is stated that the request did not fulfill the requirements of the law, since it was not on the stationery of a LP and had no transmittal number, and also lacked the authorized signature and seal of a LP.

The director of the PIFCA has stated that the territorial subdivisions of the PIFCA are not authorized to inform the public about the activity of the Agency. The only ones who have that authority are the director of the PIFCA and the Minister of Finance. He agreed that the request for access to information did not contain the required elements per the provisions of Art. 25, Para.1 of the APIA, for which reason the refusal to provide the information requested in it was in conformity with the law.

In a letter addressed to the requestor, with No. 2418-0025 and dated 06-Jul-2001, the director of the PIFCA informed him once again that his request did not contain the required elements per the provisions of Art. 25, Para.1 of the APIA, and that in view of the special procedures set forth in the Public Internal Financial Control Agency Act (PFCA), the requested information could not be provided.

Dissatisfied with the above mentioned refusal, the chairman of the association submitted a complaint, on the basis of which the present proceedings have been initiated.

With regard to the factual circumstances thus established, the court has determined the following, with regard to the legal nature of the dispute:

No evidence was submitted in this case as to when the refusal under appeal was made known to its addressee. This is why, and also with a

view to the explicit request made to the defendant's legal representative during the court hearing, that the case file be submitted in its entirety, the court accepts that the complaint was submitted within the period stipulated in Art. 37, Para. 1 of the Administrative Procedure Act (APA), applicable under the referring principle in Art. 40 of the APIA.

In accordance with Art. 3, Para. 1 of the APIA, the same is applicable for access to public information that is generated or held by state officials or local government officials, as well as the entities specifically indicated in Para. 2 of the same article.

The PIFCA is indisputably a state authority, as established under the PFCA. The legal definition of the term "public information" is provided in Art. 2, Para. 1 of the APIA.

The procedures for access to public information are laid out in Section Three of the APIA. In accordance with Art. 24 of the same law, access to public information is to be provided on the basis of a written or oral request. In this case, the complainant submitted a written request. The required elements that such a request should contain are enumerated in the provisions of Art. 25, Para. 1 of the APIA.

It is evident in the request itself that the same simply indicates that information is being sought regarding the audit reports on the Sliven College and the Engineering Education faculty of the STU, without specifying exactly what information. On the other hand, the request itself is not signed by Yuriy Ivanov, who is indicated as being the Association's representative. In actuality, the provisions of Art. 25, Para. 1 of the APIA do not contain a requirement that the request be signed, but in view of the generally established principle not only of administrative law, we cannot accept that the signature of the requestor, or the representative thereof, is not a necessary and mandatory element. These omissions from the request were ascertained by its addressee, the director of the TDPIFC, who indicated as much in his letter dated 29-Mar-2001. The omissions from the request submitted were not corrected in the course of the proceedings with the administrative official. They cannot, however, be corrected in the procedure of the court review pursuant to Art. 38 of the APIA. For this reason, the court has also not given orders to that effect. With regard to the completeness of the information submitted, it should be noted that the complaint submitted to the court was also incomplete.

After notification of this was made, the omissions were corrected. A clear difference can be seen, however, between the signature on the copy of the complaint on the basis of which the present proceedings were initiated, and that submitted stamped with the seal of the Association; this may be established even without having any special knowledge pursuant with regard Art. 157, Para. 1 of the CPC.

The director of the TDPIFC fulfilled his obligations under Art. 8 of the APA, by forwarding the access to information request to the director of the PIFCA. For its part, the official subject to Art. 3 of the APIA fulfilled his obligation under Art. 29 of the APIA to inform the requestor that the subject of the information requested should be specified.

In the refusal being appealed in this case, No. 2418-0025, dated 06-Jul-2001, the director of the PIFCA simultaneously indicated that: the request did not contain the elements required by Art. 25, Para. 1, Provision 2 of the APIA, while also issuing a decision on the substance of the request.

In accordance with Art. 29, Para. 2 of the APIA, if the requestor fails to specify the subject of the public information being requested within 30 days, the request shall not be considered at all.

As is evident in the circumstantial part of the complaint, on the basis of which the present proceedings were initiated, it does in itself indicate that the request for access to public information was submitted in March of 2001, while the decision under appeal was issued on 06-Jul-2001; i.e., after the expiration of the period stipulated in Art. 29, Para 2, as well as of the additional period given in the types of cases provided for in Art. 30 and Art. 31 of the APIA.

This is why the director of the PIFCA was correct in his determination that the request did not fulfill the requirements of Art. 25, Para. 1 of the APIA. This is also why the decision being appealed was pronounced as being correct and lawful.

In view of all of the above, and of the authority vested in the court, as granted by Art. 41 of the APIA, the complaint shall be dismissed as unfounded, with regard to the part that requests a reversal of the refusal being appealed, and not reviewed at all with regard to the part in which a decision on the substance of the request is sought; the latter, because

the provisions of Art. 42, Para. 2 of the APA are not applicable in this particular case.

LED BY ALL OF THE ABOVE, THE SOFIA CITY COURT HEREBY PRONOUNCES THE FOLLOWING

DECISION:

The complaint from the civic association Public Barometer, represented by Yuriy Ivanov of the city of Sliven, regarding the refusal to provide access to public information embodied in letter No. 2418-0025, dated 06-Jul-2001, from the director of the PIFCA in the city of Sofia, is hereby DISMISSED as UNFOUNDED.

The request for a pronouncement on merit SHALL NOT BE REVIEWED.

This DECISION is subject to APPEAL before the SUPREME ADMINISTRATIVE COURT of the Republic of Bulgaria, within a 14-day period from the time the parties have been informed of its publication.

PRESIDING JUSTICE:

PANEL MEMBERS:

THROUGH
THE SOFIA CITY COURT
ADMINISTRATIVE DIVISION III-j

TO
THE SUPREME ADMINISTRATIVE
COURT (SAC) OF THE REPUBLIC OF
BULGARIA

On Admin. Case No. 2001 of the year
2001.

APPEAL

from

Attorney Alexander Emilov Kashumov,
representing the association Public Barometer,
complainant in Admin. Case No. 2001 of the year 2001.

AGAINST

Decision on Admin. Case No. 2001 of the year 2001 by the Sofia City
Court (SCC), Administrative Division III-j

ON THE BASIS OF:

Art. 33-40 of the Supreme Administrative Court Act (SACA)

Honorable Justices:

On the basis of Art. 218b, Para. 1, Item „c“ of the Civil Procedural Code (CPC), as well as Art. 11 of the SACA and Art. 33-40 of the SACA, I hereby appeal Decision No. 1826, dated 26-Feb-2002, in Admin. Case No. 6234 from the docket for 2001 of the Supreme Administrative Court, Fifth Division. The decision was issued in violation of the applicable laws.

1. In its decision, the court did not make any pronouncement with regard to the fundamental issue in the case: that regarding the lawfulness of the administrative decision being appealed, as a whole. According to the court, the complainant's request was not taken into consideration at all by the defendant, the director of the Public Internal Financial Control Agency (PIFCA). However, this factual basis was assumed by the court in

error; on the contrary, the evidence presented in the case, including the document being appealed, which constituted a decision to deny access to information, indicates that the substance of the request was indeed considered and that access to public information was refused. Since the substance of the request was taken into consideration, however, it could not simultaneously have been dismissed without consideration on the basis of Art. 25, Para. 3 of the APIA. For this reason, the conclusion that the defendant lawfully declined to consider the complainant's request is also incorrect.

2. In the decision we are appealing, it is stated that the request was submitted with no signature, although there was no evidence to that effect presented in the case. On the contrary, if it had indeed not been signed, that would have been mentioned in the refusal document being appealed, and it would have been emphasized before the court by the defendant. The copy of the request that was submitted in this case by the complainant is identical in content to the one submitted to the PIFCA, but it is a computer print-out and not a photocopy, for which reason it does not include a copy of the signature. In violation of his obligations under Art. 39, Para. 1 of the Administrative Procedure Act (APA), the director of the PIFCA did not forward the contents of the administrative case file to the court, but only the attachments to the complaint. This is why the signed request is missing from the court case file. Therefore, there are no basis in the evidence presented in this case for the court's conclusion that the defendant lawfully declined to consider the complainant's request due to its being unsigned.

3. Separately from the preceding argument, I feel that the question of the lawfulness of the refusal decision being appealed does not include the matter of whether or not the request for such a decision was signed. Given the existence of a reasoned refusal to provide access to information, the question of whether or not the defendant needed to make a decision regarding the request is moot. At issue in this case is the lawfulness of the refusal decision being appealed, and the resolution of that question is in the interest of both the complainant and the director of the PIFCA, who has shown with his extensive defense of his position on the matter that this dispute is significant to him with a view to future application of the law. It is within the jurisdictional authority of the administrative court to review the lawfulness as a whole of the administrative decision being appealed, and to make a pronouncement regarding all of the

arguments suggested in it, given as grounds for the refusal, in light of the requirements of Art. 41, Para. 3 of the APA.

4. The assumption in the decision we are appealing that the request did not fulfill the requirements of Art. 25, Para. 1, Provision 2 of the APIA, is not in conformity with the law. Notification under Art. 29 of the APIA requesting specification of the subject of the request is not made at the subjective discretion of the entity subject to that law, but when a description of the information being requested is missing. The request for a copy of a particular audit report, which is probably about 20 pages long, was sufficiently clear to enable the director of the PIFCA to determine what information was being sought. The purpose of the standards set forth in Art. 25, Para. 1, Provision 2, is to provide clarity for the entity subject to the law.

5. The court did not discuss the matter of whether all of the information contained in the requested audit report falls under the scope of official confidentiality, as established in Art. 3, Para. 4 and Art. 12, Para. 3 of the Public Financial Control Act (PFCA). According to the text of those provisions, Agency officials are obligated not to disclose facts and circumstances that become known to them during and due to their execution of their official duties. Every single audit report, however, contains both such data as well as information generated by officials of the PIFCA. The latter clearly do not fall within the scope of that which the law defines as official secrets.

6. With a view to the clarification of the matter of whether the entirety of the information contained in an audit report constitutes an official secret, the court should, in accordance with Art. 41, Para. 3 of the APIA, have requested a copy of the audit report for its review.

7. According to Constitutional Court Decision No. 7 of 1996, restrictions on the right of access to information are permissible only for the purpose of the protection of other rights and interests that are also constitutionally guaranteed. That is why the subject of this case is the determination of whether or not the intention in this instance was the restriction of the right of access to information for that purpose provided for in the Constitution. In order to determine this, it should have been clearly established which right(s) or legal interest(s) would have been endangered or infringed upon in the event of the provision of access to the audit report.

8. The audit report also obviously contains some information, the disclosure of which would not infringe upon anyone's rights. At the same time, if it were indeed established that the restriction of the right of access to information was in this instance intended to protect a given right of the legal person being audited, then the matter of whether or not the person was asked to consent to the provision of the requested information, in accordance with Art. 31, Para. 2 of the APIA, should also have been pursued. At the same time, it should have been established whether or not the third (audited) party had the right to withhold consent, or if there were grounds for the applicability of Art. 31, Para. 5 of the APIA, wherein the law's authors determined that in certain cases the public interest in the disclosure of public information is of greater significance than the interest of the person in question to keep the information confidential.

9. In the course of the proceedings before the 3-member panel of the SAC, the defendant did not present any evidence of the existence of any right or interest being protected via the restriction of the right of access to information. He is obligated to do so, however, in his capacity as an official who is subject to the APIA, and the court conducting the review of its conformity with the law is obligated to pursue the matter, because "the restrictions (exceptions), to which these rights may be subjected, shall be applied restrictively, and only in order to secure the protection of a competing interest," according to Constitutional Court Decision No. 7 of 1996.

In light of and on the grounds of all of the above, I hereby respectfully request that the Court reverse the decision by the 3-member panel of the SAC cited above, and to rule on the substance of the case, by reversing the refusal from the Ministry of Finance.

Particular request: I request that the court officially demand the submission of the audit report, access to which was refused, and that it be safeguarded in such a manner as to prevent the complainant from learning its contents.

Respectfully yours,

(legal counsel)

TO:
THE SUPREME ADMINISTRATIVE
COURT OF THE REPUBLIC OF
BULGARIA, FIFTH DIVISION
Re: Admin Case No. 5246 of 2002

WRITTEN ARGUMENTS

by
Alexander Emilov Kashumov, attorney
legal counsel for the complainant

Honorable Justices:

In addition to those indicated in the complaint, I hereby submit the following arguments:

1. With regard to the SCC's claim that the requestor's signature was missing:

There is no claim on the part of the defendant in this case to the effect that the access to information request was not signed.

There is no signed request with a receipt number in the case file, because the director of the Public Internal Financial Control Agency (PIFCA) did not fulfill his obligation to send the complaint, along with the entire case file, to the court. In this way, the director of the PIFCA violated the provisions of Art. 39, Para. 1 of the Administrative Procedure Act (APA). For this reason, the complainant submitted a computer print-out of the request as evidence for the court case.

The director of the PIFCA pronounced a decision with regard to the request, and refused access to the information requested; he did not decline to review the request due to its being unsigned.

The claim that the access to information request was not signed was made in the March letter from the director of the Territorial Directorate

for Public Internal Financial Control (TDPIFC) in the city of Sliven; however, the document being appealed in this case is not that letter, but rather the July refusal letter from the director of the PIFCA.

Therefore, the determination made by the Sofia City Court (SCC) that the defendant lawfully declined to review the request due to its being unsigned has no basis in the evidence presented in this case.

2. With regard to the SCC's claim that the request did not meet the requirements of Art. 25, Para. 1, Provision 2 of the Access to Public Information Act (APIA):

This determination reached by the SCC is not in conformity with the law. The application of Art. 25, Para. 1, Provision 2 of the APIA is possible, when a request is submitted that lacks a *description of the information being sought*. In accordance with Art. 25, Para. 1, Provision 2 of the APIA, access to information requests must contain a description of the information being sought. The information may be described via a description of the information itself, or via a description of the document(s) containing it; i.e., by requesting a specific document. That is only possible in cases when it is clear to the requestor in which document the information he seeks is incorporated. In the present case, the requestor requested a copy of an audit report. From the request formulated as such it is clear that the requestor wished to receive access to the information contained in the audit report.

In this particular instance one official document was requested, which is unambiguously indicated as the audit report. In accordance with Recommendation (2002) 2 of the Council of Europe Committee of Ministers to the member states, with regard to access to official documents, Section V, Provision 5, *„The public authority should help the applicant, as far as possible, to identify the requested official document, but the public authority is not under a duty to comply with the request if it is a document which cannot be identified.“* The cited provision eliminates the state official's obligation to satisfy the request when the document cannot be identified. The recommendation's aim in this sense corresponds with that of the APIA. However, in this particular instance the circumstances are different, since the request identified the document containing the information being sought.

Therefore, the determination reached by the SCC, that the request did not meet the requirements of Art. 25, Para. 1, Provision 2 of the APIA, was not in conformity with the law.

3. With regard to the argument made by the defendant in the document being appealed, and later during the court hearing, that there are no standards or regulatory mechanisms in the State Internal Financial Supervision Act (SIFSA) regarding the provision of originals or copies of audit reports to citizens:

The APIA regulates the procedure for the provision of access to official public information. The information contained in the audit report indisputably meets the definition of public information given by the legislature in Art. 3 of the APIA. Since the SIFSA does not stipulate a particular procedure for the provision of information, the information must be provided in accordance with the provisions of the APIA.

4. With regard to the argument made by the defendant in the document being appealed, that PIFCA officials have the obligation to maintain "official confidentiality" in accordance with the SIFSA:

At the last court hearing in this case I submitted a letter, Transmittal No. 24-0000-42, dated 15-May-2001, from the director of the PIFCA to the directors of its Territorial Directorates. In this letter, the director of the PIFCA gave instructions for the provision of information related to audit reports in the event of interest from the media. From the letter I submitted it is clear that not all of the information contained in the Agency's audit reports is confidential. If it were confidential, then the director of the PIFCA, who best knows the particulars of the information in the audit reports, would not have issued instructions to the Territorial Directorates on how to provide this information.

With respect to all this, the complainant wishes to be provided with at least that information in the audit report, to which public access is allowed.

Respectfully yours,

DECISION**No. 10539****Sofia, 22-Nov-2002****IN THE NAME OF THE PEOPLE**

The Supreme Administrative Court (SAC) of the Republic of Bulgaria, Fifth Division, in a court session held on the thirtieth day of September, two-thousand-two, in a panel comprised of:

PRESIDING JUSTICE: ALEXANDER ELENKOV

PANEL MEMBERS: MARINA MIHAYLOVA, VANYA ANCHEVA

in the presence of court stenographer Iliana Ivanova and with the participation of public prosecutor Anna Bankova, heard the report of Justice Marina Mihaylova on Admin Case No. 5246 of 2002.

Proceedings were initiated in this case on the basis of Art. 33 and subsequent provisions of the Supreme Administrative Court Act (SACA), in response to an appeal filed by the Public Barometer civic association of the city of Sliven against a decision issued by the Sofia City Court (SCC) on 04-Mar-2002, in Admin. Case No. 2001 of 2001.

The appeal contains complaints regarding procedural violations of Art. 218b, Para. 1, Section „c“ of the Civil Procedural Code (CPC).

The defendant, the director of the Public Internal Financial Control Agency (PIFCA) in Sofia, via his legal representation, has submitted an argument that the SCC decision was inadmissible, since it was pronounced on a complaint whose deadline had passed, and alternatively for the groundlessness of the present court appeal.

An interested party in the case, the Sofia Technical University (STU), considers the appeal to be unfounded, and the SCC decision under appeal to have been correct.

The representative from the office of the Supreme Administrative Prosecutor supported the argument for the groundlessness of the present court appeal and the correctness of the court decision being appealed, as the

prosecutor considers it to have been issued in compliance with the provisions of the applicable laws.

The appeal was filed with the court within the time period stipulated in Art. 33, Para. 1 of the SACA; it is admissible, and it is found to have MERIT for the review of its substance.

With the decision being appealed here, the Sofia City Court (SCC) dismissed a complaint filed by the civic association Public Barometer, of the city of Sliven, against a refusal to provide access to public information, expressed in letter No. 2418-0025, dated 06-Jul-2001, from the director of the PIFCA in the city of Sofia; the court did not honor the request that it review and rule on the substance of the case. With regard to the facts, it was established in the case that the chairman of the civic association Public Barometer had submitted a request to the director of the Territorial Directorate for Public Internal Financial Control (TDPIFC) in the city of Sliven, for access to public information, as constituted by an audit report regarding an audit conducted on the Sliven College of the Sofia Technical University (STU) and an audit report regarding an audit conducted on the Engineering Education faculty of the STU. The director of the Sliven TDPIFC replied to the requestor in letter No. 127, dated 29-Mar-2001, to the effect that the territorial directorates do not have the status of legal persons and as such are not authorized to release information to outside parties without the consent of the Agency. The same letter also indicates that the request failed to meet the requirements of the law, due to the lack of a transmittal number and the lack of an authorized signature and seal of the requestor. In letter No. 2418-0025, dated 06-Jul-2001, the director of the PIFCA informed the requestor that his request did not fulfill the requirements of Art. 25, Para. 1, Provision 2 of the Access to Public Information Act (APIA); the letter states that the request did not contain specific questions - i.e., a description of the information being sought. In addition, the letter cited above provided as reasoning for the refusal to provide the information requested the fact that officials of the PIFCA are required to safeguard official confidentiality, in accordance with the provisions of Art. 12, Para. 1, Provision 3 and Art. 3, Provision 4 of the PFCA. Having accepted the facts as such, the SCC found that the subject of the complaint was precisely the cited refusal by the director of the PIFCA, which it found to be lawful. According to the SCC, the information request was submitted with omissions that were

not corrected in the course of the administrative procedure, namely: the requestor's signature was missing, and the request did not contain a description of the specific information being sought. Despite this, the director of the TDPIFC fulfilled his obligation under Art. 8 of the Administrative Procedure Act (APA), by forwarding the request to the director of PIFCA. For his part, the official subject to the law per Art. 3 of the APIA fulfilled his obligation under Art. 29 of the law, that he inform the requestor that he should specify the subject of the information being sought. In the refusal that was appealed, director of PIFCA simultaneously indicated that the request did not contain the required elements per Art. 25, Para. 1, Provision 2 of the APIA, and also made a pronouncement on its substance. In cases when the requestor fails to specify the subject of the information sought within the period stipulated in Art. 29, Para. 1 of the APIA, then pursuant to Para. 2 of the same law, the request should not be reviewed/considered at all. In this particular case, the requestor did fail to do so, in view of which the SCC reached the conclusion that the request did not meet the requirements of Art. 25, Para. 1, Provision 2 of the APIA, and that for this reason the refusal to provide the information requested had been correct and lawful.

Thus issued, the decision was incorrect, due to violation of the applicable laws; this is grounds for reversal, per Art. 218b, Para. 1, Section „c“ of the CPC. The SCC was correct in its determination that letter No. 2418-0025, dated 06-Jul-2001, constituted a refusal by an official subject to Art. 3, Para. 1 of the APIA to provide access to the information sought by the requestor. However, the conclusions regarding the lawfulness thereof were not correct. The following reasons were given as grounds for the refusal: 1. that the request did not fulfill the requirements of Art. 25, Para. 1, Provision 2 of the APIA; i.e., it did not contain a description of the information being sought, and 2. that officials of the PIFCA are required to safeguard official confidentiality, in accordance with Art. 12, Para. 1, Provision 3 and Art. 3, Provision 4 of the PFCA, for which reason such information should be requested on the basis of Art. 37, Para. 2 of the APIA, from the authorized officials of the PIFCA.

In invoking the provisions of Art. 25, Para. 1, Provision 2 of the APIA, the administrative official should have fulfilled his obligation under Art. 29, Para. 1 of the same law, under which, in the event that it is unclear what information is being sought, or when the request is formulated in a vague

manner, the requestor must be informed thereof and has the right to specify the subject of the information being sought within a period of 30 days. Having failed to fulfill this obligation under the law, the administrative official cannot use the possibility granted him per Art. 29, Para. 2 of the APIA, to decline to consider the request. In this sense, the refusal issued by him on those grounds was unlawful. In addition, it is evident in the request itself that it contains a precise, specific description of the information being sought: access to the contents of two documents, which are audit reports, individually enumerated as items 1 and 2 of the request.

The second reason given for the refusal to provide the information requested, regarding the claim that the information constitutes an official secret, is also unacceptable, and as written is groundless. Art. 37, Para. 1, Provision 1 of the APIA provides grounds for the denial of access to public information when the information requested constitutes a state or official secret. In this particular case, it is claimed in the refusal that the information sought by the requestor constituted an official secret, with reference to the provisions of Art. 12, Para. 1, Provision 3 and Art. 3, Provision 4 of the PFCA. In accordance with Art. 3, Provision 4 of the PFCA, „in conducting state internal financial supervision, [agency] audit officials shall apply the principle of the safeguarding of official confidentiality: the non-disclosure and non-dissemination of information that becomes known to them during or due to the fulfillment of their official duties, unless provided otherwise by law.“ The text of Art. 12, Para. 1, Provision 3 requires that in performing their official duties, agency officials not disclose facts and circumstances that become known to them during or due to their fulfillment of their official duties. From the phrasing of these two legal provisions it is evident that they do not pertain to the prohibition envisioned in Art. 37, Para. 1, Provision 1 of the APIA, forbidding the disclosure of public information when it constitutes an official secret. Those provisions only apply to the obligations of the agency's audit officials in the course of or arising from their duties. Consequently, the appealed refusal did not cite a specific provision of the PFCA, pursuant to which the information requested constituted an official secret, and for which reason access to it could not be provided.

The third area in which the appealed refusal did not conform to the law is in its violation of the provisions of Art. 37, Para. 1, Provision 2 and

Art. 31 of the APIA. In the request submitted to the officials subject to Art. 3 of the law, it is specified that access is being sought to audit reports about a college and a faculty of the Sofia Technical University; i.e., the information pertains to a third party, in the sense of the cited provisions. When public information is requested that pertains to a third party (a physical or legal person), and the explicit written consent of the same for the disclosure of the public information has not been obtained, that is grounds for refusal to provide it; this is the argument inherent in the provision of Art. 37, Para. 1, Provision 2 of the APIA. In Art. 31, Para. 1 of the same law, a possibility is provided for the extension of the deadline per Art. 28, Para. 1, when the public information requested pertains to a third party and it is necessary to obtain the consent of same for its release; in Para. 2 the respective official is obligated to request the explicit written consent of the third party within a specified time period. The remainder of the requirements for carrying out the procedure for the provision of public information regarding a third party are enumerated in Para. 3-5 of Art. 31 of the APIA. In the appealed refusal, these statutory requirements are not mentioned at all, despite the fact that the matter pertains precisely to information being sought which affects the interests of a third party; namely, the Sofia Technical University.

The conclusion drawn by the defendant in the present appeal, that the SCC ruled on a complaint the deadline for which had expired, thus making its decision inadmissible, is groundless. There is no evidence in this case as to when the appealed refusal from the director of the PIFCA was made known to the complainant, for which reason the time period for appeal per Art. 40, Para. 2 of the APIA and Art. 37, Para. 1 of the APA had not begun to lapse. In view of this, the complaint should be considered as having been filed within the deadline, and in this sense the SCC was correct to make a pronouncement on the substance of the dispute. The decision issued by that court is thus not invalidated by inadmissibility.

Considering all of the above, the appealed decision of the SCC should be reversed, and instead this court shall issue another decision on the substance of the case, in which it reverses the refusal in letter No. 2418-0025, dated 06-Jul-2001, and remands the case file to the administrative institution in question for a new review, in accordance with the instructions of the court.

Led by all of the above, on the basis of Art. 40, Para. 2 of the SACA, the Supreme Administrative Court, Fifth Division, hereby issues the following

DECISION:

The decision issued by the Sofia City Court on 04-Mar-2002, on Admin Case No. 2001 of the year 2001, is hereby **REVERSED** and in its place, the following is **IMPOSED**:

The refusal in letter No. 2418-0025, dated 06-Jul-2001, from the director of the Agency for State Internal Financial Supervision, is hereby **REVERSED**.

The case file is being **REMANDED** to the administrative institution for a new review, in accordance with the instructions of the court, given in the opinion regarding this judgment.

This DECISION is not subject to appeal.

True to the original,

PRESIDING JUSTICE: (sig.) Alexander Elenkov

PANEL MEMBERS: (sig.) Marina Mihaylova, (sig.) Vanya Ancheva



CASE

Lyubov Guseva

vs.

*the Municipality
of Vidin I*



Lyubov Guseva vs. the Municipality of Vidin I

*1st Instance Court - Administrative Case No. 35/2003,
Regional Court of Vidin*

*2nd Instance Court - Administrative Case No. 8752/2003,
Supreme Administrative Court, 5th Division*

Ms. Lyubov Guseva, a member of the board of directors of the Animal Protection Society in Vidin, filed an information request to the Mayor of Vidin, demanding access to the contract between the municipality of Vidin and Chistota Ltd. The requested contract pertained to the activities of the private company, financed from the municipality budget, regarding the limiting of the population growth of stray dogs in Vidin.

*The Mayor of Vidin refused to disclose the requested information, stating that it fell in the scope of the **third party interest** exemptions. A letter by the executive director of Chistota Ltd., signifying his dissent to the information disclosure due to bad relations with the requestor, was attached to the mayor's written refusal.*

Lubov Guseva challenged the refusal before the Regional Court of Vidin (RCV), grounding her complaint in the fact that no permission was required from the private company as the specified activity was financed by public funds and the company responsibilities under the contract were in public interest. Therefore, Ms. Guseva quoted Article 31, Paragraph 5 of the Access to Public Information Act (APIA) in her complaint.¹

The Regional Court of Vidin Decision as of June, 27, 2003 reversed the decision of the mayor and obligated him to provide access to the requested information. In the motivation of its ruling, the court stated that the mayor's assumption that the requested information was pertaining to third party interests and refusal on the basis of the third party dissent was contrary to the law. The requested information had fallen in the scope of Article 31, Paragraph 5 of APIA and thus it was public.

¹ According to the text of Article 31, Para.5 of APIA, the consent of the third party is not required when it is an obliged body and the information it holds is a public information.

The mayor appealed against the judgment of the RCV before the Supreme Administrative Court (SAC). The higher instance court upheld the ruling of the regional court, developing the arguments about the unlawfulness of the mayor's refusal.

The decision of the Supreme Administrative Court as of May 25, 2004 upheld the decision of the regional court. In their judgment, the supreme justices ruled that the decision of the first instance court to reverse the refusal of the mayor was right, though SAC did not agree with the regional court grounds. SAC did not agree with the conclusion of the regional court that the hypothesis under Article 31, Paragraph 5 of APIA was applicable-the municipality company Chistota Ltd was a private company and was not an obliged body under the APIA. Nevertheless, the mayor's refusal, according to the supreme justices, was unlawful. Even if the demanded contract had contained information, pertained to the trade secret category, the contract could have been disclosed regardless of the dissent of the third party by the enforcement of Article 31, Paragraph 4 of the APIA-namely, providing partial access to information.

VIDIN MUNICIPALITY

**DECISION
TO DENY ACCESS TO INFORMATION**

On the basis of Art. 28, Para. 2 of the Access to Public Information Act, I have hereby

DECIDED:

On the basis of Art. 37, Para. 1, Provision 2 of the Access to Public Information Act and in response to letter with receipt No. 26-00-1297, of 28-May-2002, from the Director of Chistota Ltd. (municipal street-cleaning company),

I hereby deny the request of Ms. Lyubov Viktorovna Gusseva,

to be provided with access to the information she requested, in request letter with receiving No. 3-02-1139 of 11-Apr-2002. This refusal is in conformity with the requirements contained in Art. 37 of the Access to Public Information Act.

This decision may be appealed, in accordance with the procedure in the Administrative Procedure Act.

Date: 03-Jun-2002

Mayor:
(Dr. Ivan Tsenov)

WRITTEN DEFENSE

From attorney Ralitsa Nedyalkova,
legal representative of Lyubov Viktorovna Gusseva
in her capacity as a member of the Board of Directors
of the non-profit organization Vidin Association
for the Protection of Animals and a representative of same per Admin.

Case No. 35/2003 on the docket of the Vidin District Court (VDC)

YOUR HONORS, DISTRICT COURT JUDGES,

There is cause for this appeal, and we ask that you issue a judgment to that effect in favor of the complainant, bearing in mind the following circumstances:

In the first place, in neither the decision being appealed nor in the court procedure has the defendant under this appeal denied the fact that the information requested by my client is public in nature, and has rather simply denied access to it on the basis of Art. 37, Para. 1, Provision 2 of the Access to Public Information Act (APIA).

The specific administrative document being appealed, the Decision to Deny Access to Information, Reg. No. P - 02 - 687/04-Jun-2002, by the Mayor of the Municipality of Vidin, is unlawful, due to its being in violation of the applicable law. At issue is a request for access to a contract between the Vidin Municipality and Chistota Ltd. of Vidin, regarding the organization and financing with municipal funds of public activity to limit the population of stray dogs in the city of Vidin, as seen in my client's request, submitted in this case. Under this contract, Chistota Ltd., in its capacity as a municipal company, conducts activity in the public interest and using public resources, making it subject to the APIA and thus obligated to provide, and not hinder, access to the information requested - even more so, since Art. 31, Para. 5 of the APIA explicitly states that third-party consent is not required in cases when that party is subject to the APIA and information regarding it is public in nature according to that law.

In light of the above, the mayor of the Municipality of Vidin was not required to request the consent of the third party, Chistota Ltd. of the city of Vidin, considering the circumstance that the obliged body has intentionally and formally taken the third party's place in the legal relationship between it and the party requesting information. The actions undertaken in requesting explicit written consent had no legal grounds, and serve to conceal the obliged body's true purpose; namely, that of restricting my client's access on a formally specified basis and not to provide the information requested.

The refusal being appealed is also unlawful because it does not conform to the spirit of the APIA; namely, the provision of free access to any information connected with public life in the Republic of Bulgaria, that enables its citizens to form their own opinions regarding the actions of entities subject to the law - in this case, the Municipality of Vidin. This conclusion follows necessarily from the formal indication of the legal basis for the refusal - Art. 37, Para. 1, Provision 2 of the APIA - even though in this case it is clear that Art. 31, Para. 5 of the APIA applies. Despite this, analysis of the law indicated as the legal basis for the refusal indicates the necessity that two cumulative preconditions be met: that the information requested affect the interests of a third party, and that this party has not given its explicit, written consent for the provision of same. In accordance with the second sentence in Art. 41, Para. 1 of the Constitution of the Republic of Bulgaria, any third (physical or legal) person may express valid negative consent to the disclosure of data about them, only if in doing so they are exercising their subjective rights. In this particular case, it is clear in the attached written response from the director of Chistota Ltd. of the city of Vidin, receiving No. 26-00-1297 of 28-May-2002, that the second precondition contained in Art. 37, Para. 1, Provision 2 of the APIA was not met. What violation of a subjective right could there be, since the director of the „affected third party“, Chistota Ltd. of the city of Vidin, expressed negative consent to provide the information requested, basing that refusal on the fact that the company had bad relations with the complainant, for which reason it would not give its consent? In this particular case, however, despite having received this response, the obliged body according to the APIA - the mayor of the Municipality of Vidin - refused to grant access to my client, since he found that reply to be a fully adequate basis for the legal grounds indicated in the decision to deny access.

The information presented supports the conclusion that in light of the reply received, there were no grounds for the replacement of the third party, Chistota Ltd. of the city of Vidin, in the legal relationship between the information requestor and the obliged body under the APIA; rather, this was aimed at restricting the right of my client to access to information. This is also in contravention of the spirit of the law, and in itself constitutes grounds for the repeal of the specific administrative action being appealed.

In light of all of the above, we ask that you find that there are grounds for this appeal and that you issue a decision repealing the Decision to Deny Access to Information, issued by the Mayor of the Municipality of Vidin, Reg. No. P-02-684/04-Jun-2002 since it is unlawful, and that you return the case file to that institution and require that it provide the information requested.

We also ask that you award compensation for the legal expenses incurred in this case.

Respectfully yours:
(Legal Counsel for the Complainant)

DECISION

City of Vidin, 27-Jun-2003

The civil division of the Vidin District Court, in open session on the twenty-seventh day of May, two-thousand-three, composed of:

PRESIDING JUDGE: DIANA MARINOVA

PANEL MEMBERS: BORIS NIKOLOV, ASSEN STOYANOV

in the presence of court stenographer V. Bogdanova and district public prosecutor K. Kirilov, convened to hear administrative case No. 35 on its docket for 2003 as reported by Judge Marinova and to issue a decision. The court took into consideration the following:

The hearing proceeded per the Administrative Procedure Act, Art. 33 and the following provisions.

Its purpose was to examine the complaint filed by Lyubov Viktorovna Gusseva, member of the Board of Directors of the Vidin Association for the Protection of Animals, located in the city of Vidin, and empowered by the organization's chairman, Kostadin Ivanov Kostov, against Decision No. 3-02-1141/04-Jun-2002 by the Municipal Mayor of the city of Vidin, denying access to information.

The complainant submits that the issuance of that decision did not comply with the requirements of the APIA, since the consent of a third party was not necessary in order to permit access to the information requested, as was claimed in the refusal by the Municipal Mayor of the city of Vidin. The complaint requests that the decision be pronounced unlawful and reversed, and that the Municipal Mayor of the city of Vidin be ordered to provide the information requested.

No representative of the appellee, the Municipality of the City of Vidin, presented any argument regarding this complaint.

The prosecutor pronounced the opinion that the complaint is groundless and should be dismissed.

Having familiarized itself with the issues raised in the complaint, the opinion of the prosecutor and the evidence presented in the case, the District Court considers the following facts to have been established:

The Municipal Mayor of the city of Vidin was approached by the complainant in Request No. 3-02-1139/11-Apr-02, in which she requested information regarding the contract between the Municipality of the city of Vidin and the municipal company Chistota Ltd. of the city of Vidin for the capture of stray animals in the city of Vidin. In connection with this request, a letter was sent to the Director of Chistota Ltd., of the city of Vidin, in which the company was informed that a request had been filed in connection with the company's activity and stating that it should give its explicit, written consent for the provision of the information requested. The Director of Chistota Ltd. of the city of Vidin sent a reply, in which he declined to consent to the information being provided, giving the reason that the company had bad relations with the complainant. In issuing the decision currently under appeal, the Municipal Mayor of the city of Vidin denied access to the information requested, on the basis of Art. 37, Para. 1, Provision 2 of the APIA and the reply from the Director of Chistota Ltd., of the city of Vidin.

That decision was unlawful.

The Municipal Mayor of the City of Vidin unlawfully [accepted] that the requested information affected the rights of a third party and refused to provide the information in light of that third party's lack of consent. In this situation, Art. 31, Para. 5 of the APIA is applicable, since the information requested was public in nature and third-party consent was therefore not required for its disclosure.

The decision under appeal should be reversed via the issuance of a decision ordering that the Municipal Mayor of the City of Vidin provide access to the public information requested, and the appellee of this complaint shall pay the expenses incurred by the appellant, in the amount of 200 levs.

In light of the circumstances presented before it, the District Court pronounced the following

DECISION:

REVERSES Decision No. 3-02-1141/04-Jun-2002 by the Municipal Mayor of the City of Vidin, and hereby ORDERS the Municipal Mayor of the City of Vidin to provide access to the information requested in Request No. 3-02-1139/11-Apr-2002, submitted by Lyubov Viktorovna Gusseva from the city of Vidin.

This decision may be appealed before the Supreme Administrative Court, within a period of 14 days from its being issued to the affected parties.

PRESIDING JUDGE:

PANEL MEMBERS:

Municipality of Vidin

THROUGH
THE VIDIN DISTRICT COURT

TO
THE SUPREME ADMINISTRATIVE
COURT

APPEAL

By the Municipality of Vidin,
represented by Municipal Mayor, Dr. Ivan Tsenov Nikolov

AGAINST

Decision No. 95 of 27-Jun-2003, on Admin. Case No. 35 from the docket of the Vidin District Court for 2003.

Honorable Administrative Justices,

Within the period stipulated by law, I hereby appeal before the court the Decision referenced above, which I request that you reverse as incorrect and issued in violation of the relevant procedural rules and in violation of the applicable law.

The District Court found that the appealed decision, denying access to public information, was unlawful and not in conformity with the intention of the law. In these proceedings, the Vidin District Court (VDC) did not take into account the fact that the denial of access to information was issued in the manner prescribed by the law. In the refusal being appealed, the grounds on the basis of which the decision was made to refuse access were explicitly specified. The provisions contained in Art. 4, Para. 1 of the APIA give every citizen of the Republic of Bulgaria the legal ability to have access to public information, while Art. 7 of the same law provides that exceptions to this rule may be allowed only in such cases as provided for by law. It was precisely in conformity with the provisions of the law that the decision to deny access, currently under appeal, was issued. The decision contains the factual and legal grounds for that refusal. In addition, the intent of the administrative institution in issuing such a

refusal was the protection of the interests of a third party, who did not consent to the provision of the information requested.

Due to all of the above, after you have discussed the evidence in this case individually and in its entirety, I request that you issue a Decision reversing Decision No. 95 of 27-Jun-2003, on VDC Admin. Case No. 35/2003 and issue a Decision dismissing the complaint as groundless.

Attachment: Copy of the complaint.

Respectfully:
Ivan Tsenov

DECISION

No. 4717
Sofia, 25-May-2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, in a session held on the twenty-seventh of January, two-thousand-three, in a panel composed of:

PRESIDING JUSTICE: MARINA MIHAYLOVA
PANEL MEMBERS: ZAHARINKA TODOROVA, TANYA RADKOVA

in the presence of court stenographer Madlen Dukova and with the participation of prosecutor Nadezhda Doychinova, heard the report of Presiding Justice Marina Mihaylova on Admin. Case No. 8752 of 2003.

Proceedings were initiated in this case, per Art. 33 and the following provisions of the Supreme Administrative Court Act (SACA), with an appeal filed by the mayor of the Vidin municipality against a decision issued on 27-Jun-2003 by the Vidin District Court, on its Admin. Case No. 35 of 2003.

The complaint in the appeal regards violations committed of Art. 218b, Para. 1, Section C of the Civil Procedure Code (CPC). During the court session the legal counsel for the appellant submitted the opinion that the lower court's decision was unacceptable - grounds for its reversal, per Art. 218b, Para. 1, Section C of the CPC.

The appellee, Lyubov Viktorovna Gusseva, in the person of her legal counsel, objected to the appeal and claimed it to be without merit.

The representative of the Supreme Administrative Prosecutor submitted its opinion that the appeal is without merit and that the decision under appeal had been correct.

The appeal was filed within the applicable deadline, per Art. 33, Para. 1 of the SACA. It is admissible, but reviewed on its merit is GROUNDLESS.

The court decision under appeal reversed Refusal No. 3-02-1141/04-Jun-2002 from the mayor of the municipality of Vidin to grant access to information, and the case file was returned to the administrative institution with orders that it provide the public information sought in Request No. 3-02-1139/11-Apr-2002, submitted by Lyubov Viktorovna Gusseva, a member of the Board of Directors of the Vidin Association for the Protection of Animals. As far as the facts, it was established that on 11-Apr-2002 Lyubov Viktorovna Gusseva, a member of the Board of Directors of the Vidin Association for the Protection of Animals, submitted a request to the mayor of the municipality of Vidin for access to information regarding the contract between the municipality of Vidin and the municipal company Chistota Ltd. Of the city of Vidin regarding the capture of stray animals in the city of Vidin. Upon receipt of the request, the mayor of the municipality of Vidin sent a letter to the director of Chistota Ltd., in the city of Vidin, in which he informed the firm that on the basis of Art. 31, Para. 2 of the Access to Public Information Act (APIA), its explicit consent would be required for the disclosure of the information to the requestor. In a letter dated 28-May-2002, the director of Chistota Ltd., in the city of Vidin informed the mayor of the municipality of Vidin, that on the basis of Art. 31, Para. 2 of the APIA, he did not consent to the disclosure of the information requested, "due to deteriorated relations with Mrs. Gusseva." In his refusal dated 04-Jun-2002, currently under appeal, the mayor of the municipality of Vidin denied access to public information, citing the text of Art. 37, Para. 1, Provision 2 of the APIA.

In light of these factual circumstances, the district court found legal grounds for its conclusion that the denial of access to public information had been unlawful. The court determined that the refusal did not have anything to do with the rights of a third party, for which reason the provisions in Art. 31, Para. 5 of the APIA were applicable - the information requested was public in nature, and third-party consent was not necessary. The refusal was reversed on the basis of the grounds indicated, and the case file was returned to the administrative body with orders that it provide the information requested.

The appellate court finds the decision reached by the lower court to be admissible and correct.

The objection that the court's decision was inadmissible is connected with the representation of the complainant before the district court; that she had filed the complaint on behalf of the Vidin Association for the Protection of Animals, without having the right to represent it in court.

In accordance with the provisions of Art. 18, Para. 1 of the CPC, legal persons shall be represented in the courts by persons who have the right to represent them by law. It is clear from the registration certificate of the Vidin Association for the Protection of Animals that it is legally represented by Kostadin Ivanov Kostov. Lyubov Viktorovna Gusseva is a member of the board of directors of that organization and does not represent it legally. In a power-of-attorney dated 16-Sep-2002, the legal representative of the organization empowered Gusseva to represent it before all institutions, organizations and other entities on the territory of this country, with regard to the entirety of the association's activity. Under this power-of-attorney, Lyubov Gusseva in turn empowered the attorney Nedyalkova to represent the organization in court, as seen in the power-of-attorney document submitted in this case. The attorney, Nedyalkova, took part in the court proceedings at the district court, as the legal counsel for the Vidin Association for the Protection of Animals. The court finds that in order to constitute valid legal counsel in the proceedings, it is sufficient to state that the action is being undertaken on behalf of another party. It is not necessary for the legal counsel to have representative powers. Such powers are a condition that must be met in order for the represented entity to be bound by the legal consequences of the action and for the court to permit representation of the entity in the proceedings. Even in the absence of official representative powers, procedural representation may not be annulled by the court. Actions undertaken in the proceedings may be upheld and included as valid in the proceedings. In this case, an attorney took part in the case, representing the organization pursuant to Art. 20, Section (a) of the CPC. The specific nature of the administrative proceedings should also be taken into account, since it requires that the court summon the institution that issued the decision or order to the court proceedings, as well as the complainant and all other interested citizens and organizations (see Art. 41, Para. 2 of the APA). The proceedings were initiated with the administrative institution

by Lyubov Gusseva, who is the appellant in the complaint submitted to the district court, for which reason the court was required to summon her in this case, regardless of whether she represented the organization or participated on her own behalf. For this reason the appeal was not procedurally inadmissible, and therefore the decision pronounced upon it is not inadmissible.

The decision under appeal was correct, although not on the basis of the reasoning presented in it.

The definition of the term „public information“ is provided in the text of Art. 2, Para. 1 of the APIA, according to which: „public information, in the sense of this act, is any information connected with public life in the Republic of Bulgaria, which gives citizens the ability to formulate their own opinions regarding the activity of those who are subject to the law“ (as specified in Art. 3 of the APIA). Given the evidence in this case, the court finds that the information requested meets that definition, is public in nature and that the entity subject to the law, who should provide the information, is the mayor of the municipality of Vidin. The issues connected with stray animals in populated areas are common to all citizens of the town in question, and the information sought in the request for access to information is connected on the one hand with controlling the number of stray animals and on the other, with the humanitarian approach to controlling their population. These matters are of significant public interest.

The legal grounds that the administrative body gave for its refusal to provide the public information requested were in the text of Art. 37, Para. 1, Provision 2 of the APIA, which states that there are grounds to deny access to public information when that access would affect the interests of a third party, whose explicit written consent has not been given for the provision of the public information requested. The instances in which the interests of a third party are protected are set forth in Art. 31 of the APIA. The third party may be a state institution, a commercial enterprise or any other legal person or physical person. In many cases, the right of the third party to be protected competes with another protected right: that of commercial secrets in the case commercial enterprises, that of state or official secrets in the case of state institutions, or that of personal data in the case of physical persons. The issue in question is when the

consent of the third party is required. The text of Para. 1 of Art. 31 of the APIA does not provide a clear answer as to when the consent of the third party is required: 1. whether such consent is required when that is provided by the applicable legislation; 2. when it affects [could harm] a protected right or interest; or 3. in all instances, excepting those stated in Para. 5 of the text. In this specific case, Para. 5 could not be found applicable, given the fact that the third party in question is a commercial enterprise and therefore not included in the scope of those entities subject to the law in the sense of Art. 3 of the APIA. The obligation provided in the law that the public information be provided is thus not applicable. If it is a question of whether the request affected the rights of legal interests of the third party, this panel finds that it does not affect such legal rights and interests of the commercial enterprise that is the third party. The request sought access to the contract between the municipality and the municipal company Chistota Ltd., of the city of Vidin. If there is any information related to the company's commercial secrets, then the information could be provided regardless of whether the third party consented, by applying the provision in Art. 31, Para. 4 of the APIA, according to which the information may be provided in such an amount and manner as not to disclose information regarding the third party.

On the other hand, both the [mayor's] refusal and the reply from the third party lack any factual basis upon which the legal standards cited by the administrative institution - the texts of Art. 38 of the APIA and Art. 15, Para. 2, Provision 3 of the APA - could be found applicable. The requirement that such reasoning be provided constitutes one of the guarantees of the lawfulness of any administrative decision; the reasoning allows those who address the administrative institution to understand its deliberations, and on the other hand allows for the review of the lawfulness of the decision. In this case, the refusal in question indicated that it was issued on the basis of a lack of the preconditions for the provision of the requested access to public information, pursuant to Art. 37, Para. 1, Provision 2 of the APIA, without listing any specific considerations that would require the restriction of free access.

In light of all of the above, this court finds the decision under appeal to be well-grounded and issued in compliance with the requirements of the applicable laws, and without any material violations of the procedural rules, and thus upholds that it should remain in force.

In light of all of the above, and in accordance with Art. 40, Para. 1 of the SACA, the Supreme Administrative Court, Fifth Division, hereby pronounces the following

DECISION:

The decision of 27-Jun-2003, issued by the Vidin District Court on its Admin. Case No. 35/2003, REMAINS IN FORCE.

This DECISION is not subject to appeal.

True to the original,

PRESIDING JUSTICE: (sig.) Marina Mihaylova

PANEL MEMBERS: (sig.) Zaharinka Todorova, (sig.) Tanya Radkova

M.M.



CASE

Lyubov Guseva
vs.
*the Municipality
of Vidin II*



Lyubov Guseva vs. the Municipality of Vidin II

*1st Instance Court-Administrative Case No. 128/2003,
Regional Court of Vidin*

*2nd Instance Court - Administrative Case No. 3351/2004,
Supreme Administrative Court, 5th Division*

*Ms. Lyubov Guseva, a member of the board of directors of the Animal Protection Society in Vidin, sent a written application to the mayor of Vidin in which she requested access to all available information relating to the previously announced and concluded public procurement procedure. The subject of the contract was the **reduction of the number of stray dogs in the town of Vidin**. More precisely, Ms. Guseva requested information about the total number of bidders, the number of bidders who qualified to participate in the tender and their proposals for meeting some of the compulsory conditions for participation in the tender (qualified staff, equipment and technology for the dogs' capture, transportation and isolation, and the pricing of their bids).*

*The mayor issued a **written refusal** with no legal grounds specified, but rather containing the explanation that the requested information (regarding the applicants' bids) pertained to information of an economic nature, which was related to the preparation of the mayor's administrative actions and had **no significance of its own**.*

*Ms. Guseva challenged the refusal before the Regional Court of Vidin (RCV) on the grounds that it had indicated no legal or factual basis. Nor had the text of the decision quoted legal motives for the refusal. The „information of economic nature,“ as stated in the mayor's refusal, did not fall under any category of exemption to the APIA under which the public right to information was restricted. Part of the information requested - that regarding the winners of the procurement competition - was even subject to publication under the provisions of the **Public Procurement Act (PPA)**.*

Decision, as of December 10, 2003, of the Regional Court of Vidin rejected the information refusal as unlawful and referred the case back to the mayor of Vidin, requiring him to provide access to the requested information which, according to the court, pertained to the selection of a contractor by the municipality and the conditions under which the procurement contract was to be executed.

*The Mayor of Vidin Municipality appealed the judgment of the regional court before the Supreme Administrative Court. The appeal restated the arguments that had been provided in support of the refusal. The appeal also contained the statement that the refusal had been issued on the basis of protecting **third-party interests**; specifically, those of the participants in the PPA procedure.*

The October 20, 2004 judgment of SAC upheld the decision of the regional court, rectifying it in its part that obligated the mayor to provide access to information about the winning bidder and the terms of the public procurement contract since that information had been published and was not the subject of the request). Instead, SAC ruled that the mayor should provide access particularly to the requested information.

*The ratiocinations of the court regarding the **commercial secret** and the offers of the selected contractors deserved special attention.*

TO
THE MAYOR
OF THE MUNICIPALITY OF VIDIN

REQUEST FOR ACCESS TO INFORMATION

From Lyubov Viktorovna Gusseva,
member of the board of directors of the Vidin Association
for the Protection of Animals

HONORABLE MR. TSENOV,

Pursuant to the Access to Public Information Act, I hereby request that I be provided with any existing information connected with the open procedure announced in Decision No. 1 of 17-Mar-2003 by the Mayor of the Municipality and subsequently carried out, for the awarding of a public procurement order for the limitation of stray dogs in Vidin, and more specifically:

1. How many candidates participated in the bidding procedure, how many of the bids qualified to be evaluated and rated, which of them qualified to be evaluated and rated, and which candidate's bid came in first place.

2. Regarding the qualified and rated bidders, I wish to receive the following information:

A) per item 6 of the conditions:

- what nature of qualified personnel were proposed by the candidates, and the number of personnel;
- what type of equipment and technology the bidders had at their disposal for the humane capture and transportation of the dogs, what type of space, buildings and shelter they had for that purpose and where they are located, as well as what sort of plan they proposed for their investment intentions.

B) per item 7 of the conditions:

- what evidence was provided by the candidates of their ability to meet the quality requirements for this tender.

C) per item 8 of the conditions:

- what type of prices were offered by the bidders for the capture, housing and appropriate care (feeding, veterinary medical procedures, euthanasia, etc.), for [each] one dog.

I would like to receive the information I have requested in printed format.

Respectfully yours,

16-Jun-2003

Municipality of Vidin**TO:**

Lyubov Viktorovna Gusseva
Member of the Board of Directors
Vidin Association for the Protection
of Animals
Vidin

Mrs. Gusseva,

The information you requested in your Request for Access to Public Information, Receiving No. 26-00-2065, dated 17-Jun-2003, cannot be provided to you, for the following reason(s):

That information concerns the bids of candidates who participated in a tender pursuant to the Public Procurement Act, which by their nature involve data of an economic nature. In addition, the information is connected with the contracting party's operational preparations for conducting the tender, and thus has no inherent significance of its own.

MAYOR:

(Dr. Ivan Tsenov)

THROUGH
THE MAYOR
OF VIDIN MUNICIPALITY

TO
THE VIDIN DISTRICT COURT

APPEAL

From: Lyubov Viktorovna Gusseva - Board Member of the VAPA,
Vidin;

Against: Decision denying access to information, dated 01-Jul-2003, by
the Mayor of Vidin Municipality, registration index no. and date 26-00-
2065/002003

Pursuant to: Art. 40, Para. 1 of the Access to Public Information Act and
Art. 33 of the Administrative Procedure Act

HONORABLE DISTRICT COURT JUDGES:

On 17-Jun-2003, I submitted a request for access to public information, receiving No. 26-00-2065, to the Mayor of Vidin Municipality, in his capacity as being subject to receive such requests, per the APIA. In my request, I asked that I be provided with information connected with the public procurement bidding procedure announced in Decision No. 1 of 17-Mar-2003 by the Mayor of Vidin Municipality and subsequently conducted, for the following purpose: Limitation of the number of stray dogs in Vidin. I requested information regarding: 1. How many candidates participated in the bidding procedure, how many of them qualified to be evaluated and rated, which of them qualified to be evaluated and rated, and which candidate's bid came in first place? 2. Regarding the qualified and rated bidders, I requested information regarding item 6 of the preliminary conditions stipulated in the Public Procurement Act (PPA, published in the State Gazette, Issue 30 of 2003), namely: what nature of qualified personnel and what total number of personnel were proposed

by the bidders; and in addition, what type of equipment and technology did the bidders have at their disposal for the humane capture and transportation of the dogs, what type of space, buildings and shelter did they have for this purpose and where were they located? 3. What evidence was provided by the candidates of their ability to meet the requirements in item 7 of the preliminary conditions? and 4. What type of prices were offered by the bidders for the capture, housing and appropriate care (feeding, veterinary medical procedures, euthanasia, etc.), per (one) dog, in accordance with item 8 of the published conditions for this public procurement order?

On 07-Jul-2003, I received a refusal to provide me with the information requested.

I am hereby and in a timely fashion appealing the Decision Refusing Access to Information of 01-Jul-2003 by the Mayor of Vidin Municipality, registration index No. 26-00-2065/01-Jul-2003, as an unlawful individual administrative act. I also request that you reverse the decision, taking into account the following circumstances:

1. The refusal being to grant access to public information, which is now being appealed, was issued without conformity to the format prescribed by law. In the first place, „DECISION“ is the term recognized by law for an act in which an entity subject to the APIA, pursuant to which public information has been requested in the manner prescribed by that law, issues its determination. As seen in the attached copy of his refusal, the Mayor of Vidin Municipality formatted it as a letter, and not as a refusal in conformity with the format recognized by the law. Regardless, however, of the lack of the title prescribed by the law, the act currently under appeal concerns my rights and is subject to judicial review.

In the second place, regardless of the formality of the insufficient title, the act does not include the remaining attributes prescribed in Art. 38 of the APIA; namely, the legal and factual grounds for the refusal, the date upon which the decision was made and the manner in which it may be appealed. As seen in the refusal, it does not indicate any factual or legal grounds for its issuance, nor is the manner in which it may be appealed specified. For these reasons, I ask that you find that this act was issued in violation of Art. 38 of the APIA, as well as Art. 15, Para. 2, Provision 3 of

the APA, since it does not conform to the format prescribed by the law, in itself independent grounds for the reversal of the refusal currently under appeal.

2. The act currently under appeal is unlawful, due to its lack of conformity with the spirit of the law; namely, the following principle, upheld in the APIA: free access by citizens to public information, with restrictions to that right to access by exception only, and only in the circumstances explicitly provided for by law. Among his scant reasoning for the refusal - if you accept that it may be qualified as such - the Mayor of Vidin Municipality indicated that the request concerned data of an economic nature, connected with operational preparations of the contracting party with regard to its conducting of the tender. The first of those grounds, regarding „data of an economic nature“, is not provided in the APIA as a basis for refusal to provide information; as seen in the refusal itself, the Mayor of the Municipality could not find any legal text to which he could refer as the legal grounds for it. Part of the information I requested is public in nature, and subject to recording in the Public Procurement Register maintained by the Public Procurement Directorate in the administration of the Council of Ministers. In accordance with Art. 6 of the Regulations on Maintaining the Public Procurement Register, the register is public and there are no grounds for denying me access to that information.

The second reason indicated for the refusal - namely, that my request concerned „information connected with the operational preparations of the contracting party with regard to its conducting of the tender“ - could qualify as grounds for the restriction of access to information, pursuant to Art. 13, Para. 2, Provision 1 of the APIA, although the entity subject to that law did not indicate this in his refusal. In your review of the lawfulness of this refusal, I ask that you consider that even if that legal basis had been specified, there is a lack of factual grounds for its applicability, which also renders the refusal unfounded, since the principle upheld in Art. 13, Para. 1 of the APIA is that access to official public information shall be free and unhindered. With that in mind, it is clear that the refusal currently under appeal was issued by an entity subject to the APIA, in violation of the law. With this failure to provide the reasoning behind it - with no legal or factual grounds whatsoever indicated as the basis for refusal - the intent of the Mayor of Vidin Municipality was to refuse the informa-

tion requested, and not to provide it. This is, in essence, contradictory to the spirit of the APIA, and in itself grounds for the reversal of the act currently under appeal.

In addition, it is clear from the lack of sufficient reasons for the decision to refuse access and the request for access that was submitted that the entity subject to the APIA did not undertake the required efforts, pursuant to Constitutional Court Decision No. 7 of 1996, in Constitutional Case No. 1 of 1996, to strike the necessary balance between competing rights and legal interests, in as much as such exist in this case; even more so, since part of the information requested was public in nature. If the abovementioned efforts had been made, then the Mayor of Vidin Municipality would have fulfilled my request for access, in accordance with the conditions in Art.7, Para.2 of the APIA. One more circumstance supports my claim; that is the fact that the refusal was formal, and its only purpose was to deny my request.

In light of all of the above, I request that the Decision to Refuse Access to Information, dated 01-Jul-2003, by the Mayor of Vidin Municipality, with registration index no. and date 26-00-2065/002003, be reversed as unlawful, and that the case file be returned to the institution, and the institution ordered to provide the information requested.

I also request that the Municipality of Vidin be officially required to append the case file concerning my Request, Receiving No. 26-00-2065, of 17-Jun-2003

Attachments:

1. A copy of this complaint for the appellee.
2. A copy of the refusal decision.
3. Registration documents of the VAPA (Vidin Association for the Protection of Animals).
4. A receipt for payment of the state filing fee.

Respectfully Yours:
Lyubov Gusseva

DECISION No. 188

City of Vidin, 10-Dec-2003

IN THE NAME OF THE PEOPLE

In a public session, held on the twentieth day of November, two-thousand-three, the Vidin District Court, division, in a panel composed of:

Presiding Judge: Boris Nikolov

Panel Members: Assen Stoyanov, Iliya Iliev

in the presence of court stenographer V. Bogdanova and District Public Prosecutor Marussya Ilieva reviewed the case reported on by Judge Assen Stoyanov, Case No. 128 on the docket for 2003. In order to reach a decision, the following was taken into account:

These proceedings are of an administrative nature.

They were initiated with the submission of a complaint from Lyubov Viktorovna Russeva from the city of Vidin, against the refusal of the Mayor of the Vidin Municipality to provide access to the information requested, regarding the contract for the limitation of the number of stray dogs that was concluded pursuant to the open public procurement procedure announced in Decision No. 1/17-Mar-2003 and subsequently conducted. The complaint requested that the refusal decision be reversed and that a decision be issued ordering that the requested information be provided.

The appellee in the complaint was duly summoned, but did not appear or submit an argument and did not present any evidence regarding the reason for the refusal.

The representative of the office of the Vidin District Prosecutor expressed the opinion that the complaint is unfounded.

After reviewing the refusal from the Vidin Municipality with regard to its lawfulness and whether the applicable and procedural rules were complied with in its issuance, as well as whether it achieves the goals pursued

by the law, the court considers the following facts to have been established:

In Decision 1/17-Aug-2003, published in issue 30/2003 of the State Gazette, the Mayor of the Vidin Municipality invited prospective bidders to participate in an open tender for the public procurement of the following service: Limitation of the number of stray dogs in Vidin. With regard to this announcement in the State Gazette, the complainant, in her capacity as a member of the Board of Directors of the Vidin Association for the Protection of Animals, submitted a request, registered in the Vidin Municipality under No. 26-00-2065/17.06.2003, for access to information regarding the number of bidders who participated in the public procurement procedure, as well as details regarding the equipment and personnel of the winning bidder, evidence of its ability to fulfill their duties under the contract, and prices offered for the capture, housing and appropriate care, veterinary medical procedures, euthanasia, etc., for one dog. On 1-Jul-2003, in letter No. 26-00-2065, the Mayor of the Vidin Municipality refused access to the information requested, because it concerned the offers of the bidders who participated in a PPA procedure, which by their nature constitute information of an economic character, which also concerns the operative preparation by the contracting party of its conducting of the tender, and with no inherent significance of their own. Unsatisfied by this refusal, Gusseva submitted the complaint that is the subject of this case.

This court finds that there were no grounds to refuse to grant the complainant access to information regarding the procedure announced in Decision No. 1/17-Mar-2003 and to what extent the bidder who won the tender and to whom the fulfillment of the public procurement order was entrusted met the conditions for participation. The facts regarding the fulfillment of the order by the bidder who won the tender have nothing to do with classified information, and the refusal to grant access to the information was unlawful. In addition, rather than refusing access in the form of a decision, as required by law, the complainant's request was answered in an ordinary letter, which the court considers to be a refusal in written form. For this reason the mayor's refusal should be reversed, and access should be provided to the requested information regarding the conditions under which the winning bidder is fulfilling the public procurement order entrusted to it.

The Vidin District Court, in light of all of the above and pursuant to Art. 42 of the APA and Art. 41 of the APIA, hereby pronounces the following

DECISION:

The refusal to grant access to information by the Mayor of the Municipality of Vidin, as embodied in letter No. 26-00-265/01-Jul-2003, is hereby **REVERSED**, and the Mayor of the Vidin Municipality shall be required to provide access to the public information requested by Lyubov Viktorovna Gusseva, from the city of Vidin, concerning: with whom the Mayor of the Municipality of Vidin signed a contract for the fulfillment of the public procurement order per Decision No. 1 of 17-Mar-2003, and under what conditions. The information shall be provided in accordance with the provisions of the APIA.

This decision may be appealed before the Supreme Administrative Court, within a period of 14 days from the date of its being announced to the parties involved.

PRESIDING JUDGE:

PANEL MEMBERS:

MUNICIPALITY OF VIDIN**THROUGH**
THE VIDIN DISTRICT COURT**TO**
THE SUPREME ADMINISTRATIVE
COURT**APPEAL**

From the Municipality of Vidin,
represented by the Municipal Mayor,
Dr. Ivan Tsenov Nikolov

AGAINST:

Decision No. 188 of 10-Dec-2003, on Admin. Case No. 128 from the docket of the Vidin District Court (VDC) for 2003

Honorable Administrative Justices:

I hereby appeal before you, within the time period designated by law, the Decision cited above. I ask that you overturn that decision as incorrect and issued in violation of material procedural rules and in violation of the applicable law.

The District Court found that the subject of the complaint, letter No. 26-00-2065/01-Jul-2003 refusing access to public information, was unlawful and contradictory to the spirit of the law. In these proceedings, the Vidin District Court did not take into account the fact that the denial of access to information was made in the manner prescribed by the law. The document in question contained the specific grounds on which the refusal was based. In addition, it states that the information requested concerned the offers of bidders in a procedure under the Public Procurement Act (PPA), which by their nature are economic in character. It is also connected with the operational preparations undertaken by the contracting party in conducting a procedure in accordance with the PPA,

and thus has no inherent significance of its own. The text of Art. 4, Para. 1 of the APIA provides every citizen of the Republic of Bulgaria with the legal means to obtain access to public information, while Art. 7 of the same law provides that restrictions to this right may be permitted only in cases when this information constitutes a protected secret in the circumstances provided for by law - and this is provided for in the PPA. It was precisely in conformity with the provisions of the law that the subject of the complaint, letter No. 26-00-2065, of 1-Jul-2003, which the court accepted as a decision to refuse access, was issued. The same contains the factual and legal grounds for the refusal. In addition, in issuing such a refusal the administrative institution intended to protect the interests of the third parties who participated in the PPA bidding procedure. In this case, it was not a matter of classified information, as was claimed in the Vidin District Court's decision. It is specified in Art. 57 of the Public Procurement Act as to which institutions exercise supervisory control under the law. The information requested by the complainant in her request for access is information of an economic nature, regarding the firms participating in the bid procedure, and for that reason was not provided to her.

Due to all of the above and following your discussion of the evidence presented in this case individually and in its entirety, I request that you issue a decision overturning the entirety of Decision No. 188 of 10-Dec-2003, on VDC Admin. Case No. 128/2003, and that you issue a decision that dismisses the complaint as groundless.

Attachment:

A copy of the complaint and a copy of the request for access.

DECISION

No. 8459
Sofia, 20-Dec-2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, in a session held on the twentieth of September, two-thousand-four, in a panel composed of

PRESIDING JUSTICE: ALEXANDER ELENKOV

PANEL MEMBERS: VANYA ANCHEVA, YULIYA KOVACHEVA

in the presence of court stenographer Iliana Ivanova and with the participation of Public Prosecutor Marussya Mindileva, heard the report of Justice Yuliya Kovacheva on Admin. Case No. 3351 / 2004.

Proceedings in this case we conducted in accordance with Art. 33 and the following provisions of the Supreme Administrative Court Act. They were initiated with an appeal filed by the mayor of the Vidin municipality against Vidin District Court Decision No. 188, issued on 10-Dec-2003, in that court's Admin. Case No. 128 of 2003. The appeal claims that the court order is improper, due to its having been issued in violation of the applicable law, and asks that it be reversed, that the essence of the dispute be resolved and the complaint against the disputed administrative act can be dismissed.

The appellee in this appeal, Lyubov Viktorovna Gusseva, via her legal representation before the appellate court, argued that the lower court's decision was correct and asked that it remain in force.

The representative from the office of the Supreme Administrative Prosecutor submitted its reasoned conclusion that this appeal has merit.

The Supreme Administrative Court, panel of the fifth division, finds that this appeal is procedurally admissible, as it was filed within the required time period pursuant to Art. 33, Para. 1 of the SACA and by a party

having cause to file it. In order to make a pronouncement on the appeal's substance, the court considers the following to have been established:

In the decision under appeal, the Vidin District Court reversed the refusal issued by the mayor of the Vidin Municipality to provide access to public information, announced in letter No. 26-00-2065, dated 01-Jul-2003, and ordered that the administrative institution provide access to the information sought by the complainant, Lyubov Gusseva, regarding the following: with whom the Vidin Municipality had concluded a public procurement contract, pursuant to Decision No. 1 issued by the mayor on 17-Mar-2003, and under what terms and conditions.

The following factual circumstances have been established in this case:

Proceedings in the lower court were initiated with a complaint filed by Lyubov Viktorovna Gusseva appealing the refusal issued by the mayor of the Vidin Municipality, announced in letter No. 26-00-2065, dated 01-Jul-2003, to provide access to the public information in Request Receiving No. 26-00-2065 of 17-Jun-2003. In that request, the complainant had sought to be provided with any available information regarding the open bidding procedure, announced in Decision No. 1, issued by the mayor of the Vidin Municipality on 17-Mar-2003, and subsequently conducted, for the awarding of a public procurement contract for the limitation of the number of stray dogs in the city of Vidin, as follows:

1. How many candidates participated in the bidding procedure, how many of the bids qualified to be evaluated and rated, which of them qualified to be evaluated and rated, and which candidate's bid came in first place.
2. Regarding the qualified and rated bidders, the following information was sought with regard to each of them:
 - what qualified personnel were proposed by the candidates, and the total number thereof.
 - what type of equipment and technology the bidders had at their disposal for the humane capture and transportation of the dogs, what type of space, buildings and shelter they had for that purpose and where they are located, as well as what sort of plan they proposed for their investment intentions.

- what evidence was provided by the candidates of their ability to meet the quality requirements for this tender.
- what prices were offered by the bidders for the capture, housing and appropriate care (feeding, veterinary medical procedures, euthanasia, etc.), for [each] one dog.

The administrative institution provided the following reasoning for its refusal: first, that the information concerned the bids of participants in a tender pursuant to the Public Procurement Act (PPA, repealed in State Gazette issue 28 of 2004), and by its nature was economic in character; and second, that it concerned the contracting party's operational preparations for conducting the tender, and thus had no inherent significance of its own.

In light of these facts, the lower court found the refusal by the mayor of the Vidin Municipality to be groundless, inasmuch as the information being sought was not classified, and besides that the refusal document did not conform to the requirements regarding form and content, per Art. 28, Para. 2 and Art. 38 of the Access to Public Information Act (APIA), and reversed the refusal as unlawful.

The appeal before this court enumerates several complaints of incorrectness of the lower court's decision. It claims that in contradiction to the court's finding, the refusal by the mayor of the Vidin Municipality was indeed well-founded, pursuant to Art. 37, Para. 1, Provision 1 of the Access to Public Information Act. That provision concerns information regarding third parties, and refusal to provide it in the interest of protecting that party's interests. A reversal of the court's decision was sought on the basis of that having indeed been the case, such that the initial complaint against the disputed refusal should be dismissed.

With regard to the factual and legal circumstances that have been established, the court decision under appeal was correct in the end result, in the part in which it reversed the refusal from the mayor of the Vidin Municipality to provide access to the public information being sought. In the part in which the mayor of the Vidin Municipality was ordered to provide access, pursuant to Art. 41, Para. 1 of the APIA, to the information regarding with whom a contract to fulfill the public procurement was signed and under what conditions should be reversed, due to incor-

rect application of the applicable law. The reasoning in this regard is as follows:

In accordance with Art. 3, Para. 1 of the Access to Public Information Act (APIA), the law applies to public information that is generated or held by state institutions or local government institutions in the Republic of Bulgaria. The definition of the term „public information“ is provided in Art. 2, Para. 1 of the APIA, and it encompasses all information connected with public life in the Republic of Bulgaria that gives citizens the ability to formulate their own opinions regarding the actions of those entities subject to the law.

In accordance with Art. 35, Provision 4 of the Veterinary Medicine Act (VMA), municipal mayors are to organize the capture and isolation of stray dogs and secure the financing needed to undertake the required veterinary measures, stipulated in the regulations of the Ministry of the Environment and Waters. They are also required to organize the establishment and operation of the shelters for stray dogs, and they have the right to exercise supervisory control over existing shelters - per Art. 138 and Art. 140 of the Instructions for the Application of the Veterinary Medicine Act. In light of the powers afforded to the municipal administrations in this area of public life by this regulatory framework, information regarding the fulfillment of their duties is, in the terms set forth in Art. 2, Para. 1 of the APIA, public in character. The entity that is required to provide it is the mayor of the respective municipality. The problems related to the homeless animals in areas populated by humans are common to all of the citizens residing in those areas, for which reason the methods and means used to address those problems are matters of high public interest. This is why the information regarding the announcement of a public procurement tender for a contractor to limit the number of stray dogs constitutes public information, which is generated and maintained by the mayor of the Municipality of Vidin, in his capacity as an entity subject to Art. 3, Para. 1 of the APIA. According to the definition of the term in Art. 11 of the APIA, it is of an official nature. In accordance with Art. 13, Para. 1 of the APIA, access to official public information shall be free and unfettered, and may be restricted only in the presence of the circumstances enumerated in Art. 37, Para. 1, Provisions 2 and 3 of the APIA.

Art. 13, Para. 2 of the APIA provides that access to public information may be restricted, when the information: 1. is connected with the operational preparation of official acts and has no independent significance of its own (opinions and recommendations, prepared by or for an official institution, advisory opinions and consultations); 2. contains opinions and positions regarding current or prospective negotiations conducted by an administrative institution or on its behalf, as well as reports connected with them, and was prepared by the administration of the respective institution. The information that was the subject of the complainant's request could not be considered applicable under Provision 1 or 2 of Art. 13, Para. 2 of the APIA. The number of candidates who submitted bids for participation in the announced tender pursuant to the PPA (repealed), the number that were taken into consideration and the number who qualified, as well as the identity of the bidder who came in first place, are enumerated in the official documents issued by the institutions that participated in conducting the open tender pursuant to Art. 34 and subsequent provisions of the PPA (repealed), and constitute elements of the factual make-up thereof, with independent legal significance to its lawfulness. The information on the total number of candidates who submitted applications to participate in the announced tender pursuant to the PPA, which is the subject of Item 1 in the request made by the appellee, is of a statistical nature and is held by the contracting party: the municipality's mayor. In as much as no particular method of publicizing that information is provided for in the PPA, there is no barrier to its provision being sought by means of the APIA. The information about which candidates' bids were accepted for consideration and the order in which they qualified are contained in the report of the commission appointed by the contracting party. In that document, three of the bidders are listed as qualified and the first-place bidder is named as the winner of the contract, pursuant to Art. 43 of the PPA (repealed). The lawmakers guaranteed that the principle that the participants be informed would be upheld, by requiring that the commission provide the information in a timely manner upon request by any bidder in the open tender. The document does not, however, have any legal impact of its own, and the information contained in it falls under the category of Art. 13, Para. 2, Provision 1 of the APIA, with respect to persons who were not participants in the open tender. On the basis of the commission's report, the contracting party announces the top three qualifying bidders and names the candidate in first place as having won the tender. These decisions are

individual administrative acts, in the sense of Art. 2 of the Administrative Procedure Act (APA). In this case, orders to this effect, pursuant to Art. 45 of the PPA, were issued (or will be issued) by the mayor of the Vidin Municipality, within the scope of his competence in his capacity as the contracting party in a public procurement contract, for which reason, as an entity subject to Art. 3, Para. 1 of the APIA, he is obligated to provide access to the information contained in them (or "generated" by them, as defined by Art. 11 of the APIA), in accordance with the restrictions provided by law regarding access to private information. In light of the above, the administrative institution did not have grounds to refuse access to the public information being sought in Item 1 of the request from the appellee in the present appeal on the basis of the restrictions in Art. 13, Para. 2 of the APIA. The information sought was official in nature and of independent significance, and there is no barrier to its being provided to the requester in the manner provided by law. In this context, the court's judgment that the reasoning behind the refusal under appeal was the ban on providing access to classified information (without its being designated as a state or official secret) does not correspond with the facts in the case and was incorrect. Inasmuch as it did not, however, to a change in the final finding of the unlawfulness of the administrative act of refusal, this inconsistency in the legal reasoning does not constitute grounds for reversal of the court's decision.

The information request that was the subject of Item 2 of Lyubov Gusseva's request was by its nature a request to be provided with the bids of the qualifying candidates. By its nature the bid, prepared and submitted by each of the participants in the tender procedure, constitutes a proposal to enter into a contract, as defined in the general provisions of Art. 13 of the Obligations and Contracts Act, in accordance with the particular requirements imposed in a special law. This conclusion is also supported by the legal definition of a „bid to fulfill a procurement order,“ given in § 1, Provision 14 of the Supplementary Provisions of the PPA (repealed): „a detailed description of the organization, means and time period proposed for the fulfillment of the order.“ The documentation on the proceedings in every public procurement tender is maintained by the contracting party, per Art. 35, Para. 3 of the PPA. The PPA provided explicit requirements regarding the submission and winning of the bid by the participants with regard to upholding one of the fundamental principles in the holding of a public tender, defined in Art. 9, and that is the guar-

antee of maintaining the trade secrets of the candidates and their bids. With regard to the special rules introduced in the law for the protection of trade secrets, it follows that up until the conclusion of the procedure by the signing of a contract with the winning bidder, the information contained in the bids is not public in character and may not be received by third parties not participating in the administrative proceedings. In such circumstances, the restriction provided for in Art. 7, Para. 1 of the APIA should apply, whereby restrictions on the right to access to public information are permissible when the information constitutes a state or other protected secret, in the cases provided for by law. In the event that the procedure had concluded, with a contract having been signed with the winner, the bids of the qualified candidates would no longer have been protected by the law and in conformity with the regulations in the APIA and the restrictions on access to public information set forth in that law, they should have been provided to the requestor. There is no information in this case as to what phase the public procurement tender had reached at the time of the submission of the request and at the time of the issuance of the refusal. It is also not possible, from the content of the disputed refusal from the mayor of the Vidin Municipality, to draw a conclusion as to whether or not the announced tender procedure had concluded. The factual grounds cited, that the procedure had been in the phase of operational preparation of documents, are unclear, inasmuch as they could refer to different times during the procedure and therefore could apply to different legal conditions. In this context, the court was correct in its determination that the disputed refusal did not fulfill the requirements of Art. 38 of the APIA. Legal grounds for refusal pursuant to Art. 37, Para. 1, Provision 2 of the APIA applies in the absence of explicit written consent from a third party, whose interests are affected by the provision of access to the information sought. Since the institution considered that the information concerned the interests of a third party, it should have informed that party what information was being sought and, depending upon the response, issued a decision pursuant to Art. 34 or Art. 38 of the APIA. In the event, this procedure was not followed by the institution pursuant to Art. 28 of the APIA, for which reason the issuance of a refusal on those grounds was not lawful.

The administrative institution's refusal that was appealed was unlawful, due to its violation of the administrative procedural rules and the applicable provisions of the Access to Public Information Act, for which rea-

son the lower court was correct to reverse it. The subject of the request, which was answered with the refusal that was subsequently appealed, is information of a different character, access to which is stipulated by the existence of the respective legally relevant circumstances specified earlier. This is why the administrative institution should have made a reasoned pronouncement with regard to each of the points in the request. The lack of reasoning from the administrative institution as to the criteria and grounds for its refusal to grant the requestor access to the requested public information hindered the court's ability to exercise effective control over the lawfulness of the disputed administrative act and is grounds for the reversal of same. The part of the court decision being appealed that reversed the mayor's refusal to provide access to the information and returned the file to the institution in order to answer the request in accordance with the court's instructions was correct and should remain in force.

It was incorrect of the court to require, in the decision under appeal, that following the return of the case file the administrative institution should provide information regarding with whom a public procurement contract was concluded and under what terms and conditions. Such information was not the subject of the request, and in accordance with Art. 55, Para. 2, Provision 3 of the PPA and Art. 15 of the Regulation on the Public Procurement Register. Information in the register may be accessed freely; such access is provided on the Internet site of the Council of Ministers, per Art. 26 of the Regulation on the Public Procurement Register. Since both the Public Procurement Act and the Regulation on the Public Procurement Register provide special means for obtaining and providing such information, which guarantee the public nature and accessibility to every citizen of any data of interest, the conditions and means for access to public information stipulated in the Access to Public Information Act are applicable, per Art. 4, Para. 1 of the APIA. That part of the decision was therefore not in conformity with the law and should be amended. Based upon Art. 40, Para. 2 of the SACA, a different decision should be issued in its place, which, pursuant to Art. 41, Para. 1 of the APIA, orders the administrative institution to provide access to the public information requested by Lyubov Viktorovna Gusseva in Request No. 26-00-2065 of 17-Jun-2003, in accordance with that law.

In light of all of the above, the Supreme Administrative Court, Fifth Division, hereby pronounces the following

DECISION:

Vidin District Court Decision No. 188 of 10-Dec-2003, on its Admin. Case No. 128 of 2003, is hereby **REVERSED in part**: the part in which the mayor of the Vidin Municipality was ordered to provide to Lyubov Viktorovna Gusseva, after the return of the case file pursuant to Art. 42, Para. 3 of the APA and Art. 41, Para. 1 of the APIA, access to the public information sought in Request No. 26-00-2065 of 17-Jun-2003, as to with whom the Vidin Municipality concluded a public procurement contract pursuant to Decision No. 1, issued by the mayor on 17-Mar-2003, and under what terms and conditions, and instead rules the following: that the mayor of the Vidin Municipality is hereby **ORDERED** to provide access to the public information requested by Lyubov Viktorovna Gusseva in Request No. 26-00-2065 of 17-Jun-2003, in compliance with the APIA and in accordance with the instructions given in the court's reasoning for the present decision.

The remainder of Vidin District Court Decision No. 188 of 10-Dec-2003, on its Admin. Case No. 128 of 2003, **SHALL REMAIN IN FORCE**.

This DECISION is not subject to appeal.

True to the original,

PRESIDING JUSTICE: (sig.) Alexander Elenkov

PANEL MEMBERS: (sig.) Vanya Ancheva, (sig.) Yuliya Kovacheva



CASE

Kiril Terziiski

vs.

*the Ministry
of Finance*



***Kiril Terziiski vs. the Ministry of Finance
(Crown Agents contract) II***

*1st Instance Court - Administrative Case No. 4120/2004,
Supreme Administrative Court, 5th Division*

*2nd Instance Court - Administrative Case No. 592/2005,
Supreme Administrative Court Five-Member Panel, 2nd Tribunal*

*second-time 1st Instance Court -Administrative Case No. 4596/05,
Supreme Administrative Court, 5th Division (different panel)*

*In 2003-2004, two successive rulings of the Supreme Administrative Court (SAC) rejected the refusal of the Minister of Finance to provide to Kiril Terziiski a paper copy of the contract between the ministry and the British consulting company **Crown Agents**. The contract was signed between the government and the consultancy for assistance in the reform of the Bulgarian Customs Services and the Ministry of Finance was to pay around 25 million BNL (8,132 million pounds). The justices found that the lack of any grounds as to why the requested contract constituted a state secret prevented the court from reviewing the lawfulness of the refusal and exercising effective judicial control over the minister's decision to deny information access. The file was returned to the finance minister for reconsideration of the information request.*

In April 2004, the Minister of Finance issued a new written refusal of access to information. It stated that the contract had been classified as a state secret as early as it was signed in December 2001. This classification was noted by the Information Security Department of the ministry and had been based upon the repealed List of Facts, Subjects and Other Information Constituting State Secrets. The minister insisted that the contract still contained information, classified as a state secret, even after the adoption of the Protection of Classified Information Act (PCIA) in 2002. Information contained in the contract fell under the scope of three of the categories from the list appended to the PCIA that stipulated the type of information that was to be classified as a state secret.

Mr. Kiril Terziiski challenged the refusal before the SAC, with the main argument that the minister had not indicated what kind of information was contained in the contract, making it impossible for the court to assess whether it really fell under the scope of exemptions under the PCIA. The plaintiff requested that the court exercise its authority under the Access to Public Information Act (APIA) and request for inspection both the contract and the decision to classify it.

At a court hearing, the justices ordered the finance minister to present the contract for inspection **in camera**. Furthermore, in order to speed the legal proceedings, the court agreed to hear the case, but assured the parties that a judgment would be delivered only after a review of the documents.

The court reviewed the contract and determined that the first page of the contract had been stamped with a security seal reading secret, and that the stamp was later crossed out and the document stamped with the security seal **confidential**. An authorized official had signed below the new stamp, also indicating the grounds for classification under the PCIA - overview of documents that had been classified under the repealed statute.

The three-member panel of the SAC rejected Kiril Terziiski's complaint with a decision as of November 16, 2004. The judges stated that the contract had been lawfully classified as a classification stamp had been put on it and the minister had affirmed that information contained in the contract fell within one of the exempt categories of state secrets listed in the written refusal. The presiding judge, however, delivered a dissenting opinion. He held the opinion that the information in the contract fell outside the scope of either of the quoted categories of exemption.

The court decision upholding the lawfulness of the information refusal was challenged by the AIP legal team, before a five-member panel of the SAC. The plaintiff argued, per Art. 41, Para. 4 of the APIA. Instead, the judges had adopted the view that just because a security stamp was present, it must have been affixed in conformity with the law. The first-instance panel had not even considered the question of whether information contained in the contract had any relation to the interests protected by Art. 25 of the PCIA, nor whether any harm could result from the contract's disclosure.

A five-member panel of the SAC repealed completely the decision of the three-member panel with a ruling as of April 28, 2005. The magistrates ruled that the three-member panel had not fulfilled its obligation to review the classification decision. Thus, the assumption of the three-member panel that the contract contained classified information was ungrounded. Furthermore, the third-member panel had reviewed the contract in chamber after the closure of the pleadings and by this action had violated the right of the claimant to defend since the latter could not have get acquainted with the points of facts that had been established. The case was referred back for judgment to another three-member panel.

THROUGH
THE MINISTRY OF FINANCE

TO
THE SUPREME ADMINISTRATIVE
COURT OF THE REPUBLIC OF BUL-
GARIA

APPEAL

from
Kiril Dimitrov Terziiski

AGAINST

Decision of the Minister of Finance
No. APIA-8/25-03-2004

PURSUANT TO

Art. 40, Para. 1, of APIA, in connection with Art. 5, pt. 1 of the SACA

Your Honors, if it pleases the Court,

I appeal in a timely fashion the Refusal of Access to Public Information made by the Minister of Finance with a decision No. APIA-8/25-03-2004.

Decision No: 2113/04 of the Administrative Case No: 38/04 of a Five member panel of the Supreme Administrative Court, which repeals the Refusal of the Minister of Finance to provide access to the contractual agreement entered into between the said Minister and the consultancy firm „Crown Agents,“ was upheld by Decision No: 11682/15-12-2003 of Admin. Case No: 3080/2003 of the same court. The judicial decision contains obligatory provisions and instructions as to the enforcement of the law. The Court also accepts that the norm, Art. 41, pArt. 4, of the APIA „implicitly supposes an obligation for the administrative organ to provide data whenever security marking is undertaken, on the basis of which act it has been construed.“ The Court also accepts that the „Ad-

ministrative body must determine whether the same body possesses fact, information and /or objects which constitute State Secrets according to the letter of the extant List of Facts, Information, and Objects, which Constitute State Secrets of the People's Republic of Bulgaria (pub. in the Official Gazette No. 31/1990), repealed, or information contained thereof, in the aforementioned List of Categories of Information, in accordance with the Addendum No 1, of Art. 25, Para. 1, of the Protection of Classified Information Act (PCIA), and Subjected to the Classification under State Secrets." Furthermore, „it is apparent that, by requesting a copy on paper carrier, Terziiski, has requested access to public information that is contained within the clauses of the contractual agreement."

With the subsequent decision No: APIA-8/25-03-2004. the Minister of Finance once again refuses access to the said information. He states that the said agreement with „Crown Agents," Great Britain, was signed on 29-11-2001, and entitled „Measures in Aid of the Reforms of the Bulgarian Customs Administration." The contractual agreement was marked „secret" on 18-12-2001 on the basis of the fact that the information contained therein, in its entirety, is subject to pt. 24 of the repealed List of Facts, Information and Objects, which Constitute State Secrets by the Republic of Bulgaria. According to the Minister of Finance, information contained within the contractual agreement, on the basis of the Protection of Classified information Act (PCIA), is subjected to pts. 2 and 3, of Section III, and pt. 14 of Section II of the List, - Addendum to Art. 25 of the PCIA. Partial or segregable portions of the agreement cannot be provided.

The Refusal is an abrogation of the law. No information as to the content of the clauses is provided, contramanding the instructions of the Court. It is only thus that one can discern whether the information falls in the hypotheses of the PCIA. On the basis of art. 8, of the Contract and Obligations Act (COA), it can be seen that the contract is an agreement between two or more parties, in order to establish, create, or quit, a legally binding tie between the said parties. The contractual agreement, as well is known, establishes the rights and th obligations set forth by the parties; the subject/object matter; the duration/performance; the conditions; default; encumbrances; and other specified modalities. These elements construe the information basis which by definition precludes them from being subjected to the exigencies of the classified Lists. Further, certain

discrepancies in the volume of the categories enumerated in the first and second Lists appear. An actual and concrete examination of the said agreement, within the barred access to the information content, makes the application of pt. 2 Section II of the List toward art. 25 of the PCIA, appear illogical. The implementation of the agreement, would presuppose research or some form of scrutiny, but which type is specified as a fact/point in the agreement? According to pt. 3 of the same Section, access to information is explicitly restricted on the basis of preventing threat of damage to significant state economic interests. Consistent with past practice of the Supreme Administrative Court, the administrative act according to art. 38 of APIA, is treated as the sole, legal and factual basis/grounds in publishing/dissimination it. The factual grounds must be delimited from the contention contained within the Appealed act. Consequently, the said grounds must be based on specific and truthful facts, which either give credence (or at least appear logical) to a Denial. A Denial which violate a constitutionally guaranteed right, whose purpose is to serve , not just the individual, but society as a whole.

As shown by the Supreme Administrative Court, a characteristic peculiarity of the cases dealing with infringement upon the access to public information, the the impossibility of the seeker of information, to adequately realize his defense, due to the inaccessibility of the requested information. This creates difficulties in implementing Court control. Hence is the extreme importance of the right granted to Court by art. 41, par. 3 of the APIA, to scrutinize and examine the information whose access is being denied. Thus we ask the Court to assess the denied information of the basis of its content, in order to determine the actual normative security status. We ask the Court, that, in the case where an improper classification of the said agreement is determined, that the Court exercise the powers granted it by art. 41, par, 4, and to rule on the legality of the security marking.

In view of, and on the aforementioned grounds, we ask the Court to recognize my right to access public information contained within the clauses of the contractual agreement enacted between the Ministry of Finance and crown Agents; and to recognize the improper classification marking „secret stamped on the said agreement; and to repeal the „Denial“ issued by the Minister of Finance, thereby requiring him to provide

the requested public information in the form requested and as specified by the APIA.

Attached:

1. Decision No:APIA-8/25.03.2004 of the Ministry of Finance.
2. Copy of the Appeal with another provided for the Respondent.

With Respect:

RULING
On the Course of the Proceeding

Sofia -10-11-2004

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division at an in camera hearing held on 10-11-2004 with the following members:

PRESIDING JUDGE: Alexander Elenkov

MEMBERS: Vanya Ancheva, Julia Kovacheva,

With stenographer and with the participation of the Public Prosecutor, heard the report made by Judge Vanya Ancheva on Administrative Case No: 4120/2004.

These proceedings are based on art. 195, par. 1 of the Civil Procedural Codex (CPC) in connection with art. 41, par. 3, of the Access to Public Information Act (APIA).

In compliance with the Ruling dated 18-10-2004, the Finance Minister in a letter dated 25-10-2004, has sent the requested evidence - original specimen of the contractual agreement dated 29-11-2001, entered into by the Ministry of Finance and Crown Agents for Oversea Governments & Administrations Limited, Great Britain, with registration No: 0101/18-12-2001, consisting of 110 pages, A-4 format paper body (carrier).

In conjunction with the expressed statutory order of art. 41, par. 3 of APIA, the Supreme Administrative Court, 5th Division,

RULED

Finds, that the requested document, dated 25-10-2004 consisting of 110 pages, and entered (registered) in the secured administrative section of the Court, contains the following security markings:

- 1.) On the first (cover) page of the upper right hand corner, the security marking „secret“ has been stamped, over which a horizontal bar/line has been drawn.
- 2.) A new security marking has been placed, entitled „confidential“ and signed by the administrator, Y. Dimitrova, whereby the new security

classification is argued on the basis of § 9 of the Transient and Conclusive Provisions of the Protection of Classified Information Act (PCIA), and dated 20-09-2004. This marking has been duly registered within the administrative section of the Ministry under document reg. No:0101/18-12-2001.

The said document is to be returned to the Minister of Finance.

True with the original,

Presiding Judge: (s) Alexander Elenkov

Panel members: (s) Vanya Ancheva, (s) Julia Kovacheva

DECISION**No: 9472**

Sofia 16-11-2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at its public hearing held on the eighteenth day of October, two-thousand-four with the following members:

PRESIDING JUDGE: Alexander Elenkov

MEMBERS: Vanya Ancheva, Julia Kovacheva

With Stenographer: Ilyana Ivanova and with the Participation of the Public Prosecutor, Nicholay Nicholov, heard Judge Ancheva's report pertaining to the administrative Case No: 4120/2004.

The process is based on Art. 12 and so forth, of the Supreme Administrative Court Act, in connection with Art 40. pArt. 1 of the Access to Public Information Act (APIA).

This process has been formed on the Complaint filed by Kiril Dimitrov terziiski, from Sofia, against the Decision No: APIA-8/ 25-03-2003, issued by the Minister of Finance, which Refuses Access, via a paper carrier, of the contractual agreement, enacted between the Ministry of Finance and the British consultancy firm, „Crown Agents“ and entitled „Measures in Aid of the Reform of the Bulgarian Customs Administration.“

The complaint maintains that the Refusal violates both the substantive as well as the procedural rules. The plaintiff further maintains that the requirements for the issuing of the decision have to be met. Neither has the administrator pointed the legal contentions of his Refusal, via paper carrier, beyond basing it on a blanked referral to the List of Categories of Information, Subjected to the Classification „State Secret“ - Addendum No: 1 toward Art. 25, Section II, pt. 14; and Section III, pt. 2 and 3 of the Protection of Classified Information Act (PCIA, published in the Official Gazette, No:45/30-04-2002). In view of the expressed objections

argued with concrete conclusions, expressed in the Appeal, the plaintiff requests Reversal of the Refusal, with the Finance Minister being obliged to provide the requested information. The defendant, through his representative, granted with power-of attorney, objects the Appeal.

The representative of the Supreme Administrative Prosecutor submitted his motives, deeming the appeal justifiable, in view of the lack of factual grounds motivating the Refusal.

The Supreme Administrative Court, Fifth Division, having examined the evidence of the said case ruled that the Appeal be procedurally admissible, timely filed, proper, possessed of a right and interest in the appeal. Review on merit is deemed inadmissible.

The plaintiff, Kiril Dimitrov Terziiski, has submitted a request No:APIA-8/1-10-2002, on the grounds of Access to Public Information Act to the Minister of finance, asking for the contractual agreement entered into by the Bulgarian Government and the British consultancy firm „Crown Agents“ be provided via a paper carrier. Following the repeal of the initially given Refusal of the requested access to public information based on concern that the aforementioned contractual agreement is confidential in character, Decision No: 11682/15-12-2003 on Adm. Case No. 3080/2003 before a Three member Panel, confirmed with Decision No:2113/9-03-2004, on Admin. Case No:38/2004, before a Five Member Panel of the Supreme Administrative Court, the case has been returned for a new commentary on the basis of request of access.

With the current appeal of the Minister of Finance's decision, the plaintiff, has been informed that the contractual agreement, containing the desired public information has been stamped with the security marking „secret“ and contains classified information - state secret subjected to classification - List of Categories of Information, Subjected to classification as State Secrets - Addendum No:1, toward Art. 25, Section II, pt. 14; and Section III, pt. 2 and pt. 3 of the Protection of Classified Information Act (PCIA), according to which and on the basis of Art. 37, Para. 1, pt. 1 of the APIA, a copy of this document cannot be provided. As it has been pointed out, the information contained within the contractual agreement, in its entirety, falls under the category, constituting state secrets, as a result of which, the conditions for admissibility of the request for access

to public information are not evident, both in terms of providing the contractual agreement in its entirety, via paper carrier, as well as in providing it in segregable portions.

When determining the evidence provided in this process, the Refusal issued by the Finance Minister No: APIA98/25-03-2004, in response to the request for access to public information submitted by Terziiski is lawful.

As for those subjected to Art. 3, Para. 1, of APIA, which the Minister of Finance in his capacity as a central individual body of the executive branch possessed with special competency, (see Art. 25, Para. 1 of the Administrative Act, published in the Official Gazette, No:130/5-11-198) regulating the provision for access to information emanating from the area of their competency, and is deemed individual, is in evidence. The public information which responds to the first criteria is categorized as belonging to two groups: official and administrative. Official, is that information which is contained in acts of the State Institutions, as well as in the act of the institutions of the local government in carrying out their duties (argued in Art. 10 of APIA). The normative acts of the state institutions which by definition are deemed to contain official information, which can be classified as normative, general and specific. Access to said information is assured for the former and is published in the Official Gazette. For the remaining information, access is obtained on the basis specified in the APIA, unless another means (a regime) is not specifically ordained. Given these qualitative characteristics, the information, that Kiril Terziiski has described in his request, lacks the markings of the official public information. Instead, with the requested information does not fall into the afore mentioned categories; it deals with access to a contractual agreement, arising out of the civil relations between and Finance Minister and the British consultancy firm.

The second category of information, in keeping with the definition under Art. 11 of APIA, is administrative. This is information, which is gathered, created and kept in connection with the Official Information, as well as in the course of the activities undertaken by the institutions and their administration. According to the content of the request based on Art. 25 of the APIA, the information requested by the plaintiff pertains to the contractual agreement, entered into on 29-11-2001, between the

British consultancy firm „Crown Agents“ entitled „Measures in Aid of the Reform of the Bulgarian Customs Administration.“ Consequently, it follows that plaintiff, Terziiski, has attempted to obtain administrative information, involving the activities of the Ministry and objectified in the ensuing contractual agreement of 29-11-2001.

In order to deny access to the contractual agreement, the administrative body contends that the aforementioned agreement has been stamped with a security marking and contains classified information, namely, state secrets as defined by Section II of the Addendum No:1, toward Art. 25 of the Protection of Classified Information Act (PCIA): „Information, Related to Foreign Policy and Internal State Security;“ pt. 14. „Information Pertaining to the Organizational-Technical and Program Security of the Automated Information Systems or Nets Belonging to the State and Local Institutions and Their Respective Administrations;“ and according to Section III: „Information Dealing with Economic Security of the State;“ pt. 2 and 3: „Research Activities of Significance to the Interest of the National Economy, Ordered by the State Institutions;“ and „Information Dealing with the Technical, Technological and Organizational Decision, Whose Publication Would Provide a Threat to Important Economic Interests of the State.“ On the basis of these circumstances, and on the information contained, the requested access to information, based on Art. 37, Para. 1, pt. 1 of the APIA is Denied.

The arguments provided in the appeal before this Court, based on the afore cited normative acts, contend that the Refusal is unjustified, unlawful, given the lack of expressed factual circumstances, where the validity of the contention with regards to the content of the information, of the said agreement, cannot be checked. The secret nature of the content cannot be determined and from there the conformity or compliance with the law in executing the Refusal.

Given the factual conditions of the basis of Art. 41, Para. 3 of APIA, this Court has ordered the Minister of Finance within a seven (7) day period, from the date of the Court hearing, to provide an actual photocopy of the first page of the contractual agreement, or the portion thereof, that contains the security marking, in order to determine his contention that the document is marked as containing classified information. He is ordered, as well, to provide evidence, as to which public official and on

what basis, has placed the marking on the said contractual agreement. The Minister has complied with the order, in that the Court has been presented with an original specimen. In compliance with Art. 41, Para. 3 of APIA, in an in camera hearing, the present judicial panel has ascertained that, upon the contractual agreement entered on 29-11-2001, by the Ministry of Finance and the British consultancy firm „Crown Agents“ entitled „Measures in Aid of the Reforms of the Bulgarian Customs Administration,“ has been stamped with the security marking „Confidential,“ whereby the date of the classification and the name of the public official have been noted.

With the ensuing changes in the legislation, and more specifically in Art. 41, Para. 4 of APIA (pub. in the Official Gazette No: 45/2005) the Court has been given the right to exercise control over the process of security marking. This presupposes a reciprocal requirement on the part of the administration to provide the Court with data as to when and on what grounds such markings are carried out. The Minister of Finance has stated that, in accordance with the instructions given by the Court, as well as those earmarked in Art. 41, Para. 3 of the APIA, the security marking of the contractual agreement took place on 18-12-2001, on the grounds of pt. 24 of Sect. III „Information of Economic Character,“ based on the „List of Facts, Information and Objects“ which make up State Secrets of the Republic of Bulgaria (pub. Official Gazette No:31/1990, and repealed with § 43 of the Transitive and Conclusive Rules of the Protection of Classified Information Act (PCIA). In compliance with the requirements of § 9 of the PCIA, the said agreement was marked as „Confidential“ by an employee of the section, Protection of Information at the Ministry of Finance.

Classified Information, according to the content of the PCIA is this information that represents state or administrative secrets, as well as, international classified information (argued in Art. 1, Para. 3 of the PCIA). The legal definition of the concept of State Secrets is given by Art. 25 of the PCIA, according to which, State Secrets consists of information, determined by the list of application Addendum No: 1, in which the unregulated access thereof, would create risks for, or damage to, the interests of the Republic of Bulgaria, in connection with national security defense, foreign policy, or defense of the Constitutionally established order.

The purview of § 1, pt. 14 of the Additional Provisions of the PCIA, defines the concept of „interest of the Bulgarian Republic, connected with national security, whose defense is a constitutional and legislative priority; whereas with the Lists of Categories of Information, the information liable to classification as state secrets, is thoroughly detailed, having enumerated the categories of facts and information, grouped in three divisions:

1. Information dealing with defense of the state;
2. Information dealing with foreign policy and internal security;
3. Information dealing with the economic security of the state.

Within the context of the definition of Art. 25 of the PCIA, the classification of a given information like „state secret“ presupposes the cumulative existence of three prerequisites: belonging to the list, the possibility of damage or threat of damage in connection with specified protected interests. The purpose of special protection of information, classified as state secret, it of serve and guarantee the goals and priorities of national security, and not simply as means of barring access to specific information and data. Hence, in this concrete instance, according to this content and unison with the instructions of Section II of Chapter V of the PCIA, and the substantive conditions expressed in the law, on the basis of which it follows that the content of the contractual agreement is marked as classified information.

In the contested Refusal, it is noted that the information in its entirety contained within the said agreement falls into the category of classified information, constituting state secrets. The contractual agreement, entered into by the British consultancy firm „Crown Agents“ is with the following subject „Measures in Aid of the Reform of the Bulgarian Customs Administration,“ consisting of an agreement between two parties whose purpose is to create, change or stop a legal relation (Art. 8 of the Contracts and Obligations Act). Implementation of the agreement (containing mutual obligation) deals with the type, character and application of these measures; while their means of organization predetermines their effectiveness, as a result of which, the elements of this agreement cannot be commented in the appeal of the Refusal, or within the present decision, to the extent that they represent information that is secured/classified by the law.

The object of this contractual agreement can be found cited in its title (and is made public); it is shown that the entirety of the information found in its clauses possessing the character of classified information, constitute state secrets. This condition is determined, as well, by the security marking, stamped on its paper carrier. The circumstances that this classified information is marked categorically means the following:

1. A document has been created over which a security marking is placed.
2. The substantive content and classified information is subjected to specified level of security classification, to be protected, as determined by the PCIA, and acts dealing with its application; and
3. Access to be given to other administrative units on an as „need to know“ basis - argued in Art. 33 of the Rules of Application of the PCIA (RAPCIA, approved by a Decree of the Council of Ministers No:276/2-12-2002, pub. in the Official Gazette, No:115/10-12-2002. Under these conditions free access on the basis of Art. 13, Para. 1, of the APIA is excluded.

The decision that is appealed makes a referral to the ensuing clauses of the List appended to Art. 25, of the PCIA. It points out that the requested public information consists of information pertaining to the organizational, technical and the program security of the automated information systems or networks of the state administration and contains: research of significance to the interests of the national economy, ordered by various state institutions, information dealing with technical, technological and organizational decisions, whose public access threatens with damage important economic state interests. (Section II, pt. 14, and Section III, pt. 2 and 3 of the List.) The lack of serious motivation expressed in the findings and consideration section of that decision in terms of the content of the stated norms (given the clear existence of the qualificatory information criteria) creates an insignificant breach of the requirements pertaining to the process and which in no way reflects on its conformity with the law.

The plaintiff maintains that, in view of the lack of factual considerations of the clauses of the said contractual agreement, one is unable to determine whether the requested public information falls under the categories of the enumerated facts and information constituting state secrets; thereby leading to an improper classification on the paper carrier. Such a complaint is unfounded.

Given the existence of unquestionable evidence, which give credence to the institution's contention as to the classification of the information and in view of the identifying the information as belonging to the List of Categories of Information subjected to the classification as state secrets-Addendum No:1, toward Art. 25,II, pt. 14, and Section III, pt. 2 and 3 of PCIA, it follows that the request for access No:PCIA-8/1-10-2002, submitted on the basis of the PCIA, constitutes State Secrets, which Refusal conforms with the law.

Given the conditions that the clauses of the said agreement have not been disclosed, the plaintiff is not in a position to determine the extent to which his requested information falls within the applicatory field of Art. 25 of the PCIA, thereby basing his request on the absence of classified information. In accordance with Art. 25 of the PCIA, one of the elements of the categories of information, consisting state secrets, is its appurtenance to the List of Categories, which is unquestionable and it is thus that the administration bases its argumentation. Any further revelations or dissemination of the said agreement would harm the interests of the state. The repercussions are connected with the foreign policy, internal security, economic security, which are exposed to the level of threat of damage. Given the extensive evidence as to the reasons for the marking, namely that the factual content and obligations contain classified information, the state institution's motivation for the Refusal is in compliance with the law. No legal requirement exists for the minister to provide classified information given Constitutionally guaranteed criteria pertaining to national security in all its variety (foreign policy, internal security and economic security). Once the requested information has been classified, it becomes evident that the refusal to accessing it, has been explicitly foreseen by the Constitution in its section, Art 41, Para. 1, phrase 2, dealing with National Security considerations. Thus, as long as the right to access to classified information on the part of the citizen does not exist, it follows that the right to access to documents containing such information, does not exist as well.

While it is true that with the decree in Art. 4, Para. 1, of the PCIA, in keeping with Art 41, of the Constitution of the Republic of Bulgaria, namely, grants guaranteed access to public information, and constitutes lawful, regulated possibility for any citizen of the Republic of Bulgaria, to have such access, this right however is not absolute. Given various hy-

potheses, the obligation of the state institutions to provide significant public information cannot refer to any and all information. The interpretation in this sense is given by Decision No: 3/25-09-2002, with Constitutional Decision No:11/2002, and No7/4-06-1996 in accordance with Const. D. No:1/96 by the Constitutional Court. In its motivation, the Constitutional Court, accepted that limitation in the right to gaining access to public information as permissible with view to securing other, constitutionally guaranteed rights and interests; and that the limitation could take form only for the purposes and motives expressed within the Constitution. Thus with Art. 41, Para. 1, phrase 2, the Constitutional legislator, explicitly enumerated the competitive interests in gaining information. While, Para.2 states that the citizens have the right to information obtainable from a state institution, or office, on issues which form their lawful interest, if the information does not contain state or any other protected by the law secrets, or does not affect third party rights. Analysis of Art. 41, of the Constitution shows that the legislator is uniquely competent to determine whether a concrete information is publicly significant, thereby deciding whether to ensure in a lawfully established manner, access to such information. The limitation in any case requires the establishment, via legislation, the condition which refer to protection of competing interests. The PCIA contains norms which limit the right to access, receiving, and disseminating information - argued in Art. 7, in connection with Art. 5 of the aforementioned act.

Rendering Art. 41, Para.1, phrase 2, of the Constitution within Art. 5 of the PCIA, the interests that are deemed protected are comprehensively enumerated, namely: national security, public order; the right and good name of the individual; national health and morals. Following the decree of Art. 7, the legislator expressly has regulated the limitations of the right to access, formulating state, other, protected and expressed by the law secret. Therefore, the limitations to access to public information are permissible in terms of securing other, constitutionally guaranteed rights, which constitute these and the hypotheses of the aforesaid case.

It should be noted that the legal organization of the classification (Art. 3, Para. 3 of the PCIA) regulates that a given collection of materials and/or information subjected to various levels of security clearance, is marked with the highest level of that classification, corresponding to the highest level marking given on any one part of the said materials of group of

documents forming one whole. This infers that any document or collection of such, are accessible only at the highest level of security classification. In such cases, the segregable access to information, is not permitted, given that its entirety has been marked as secured.

In view of this, the requested segregable access is unfounded, in that, the said agreement constitutes one act, whose body, a paper carrier, consists of 110 pages of paper, A-4 format, with each one page deemed to be in the framework of the „confidential“ marking. Consequently, partial information as to its content is inadmissible.

Given the above motivation, the Appeal, objecting to the Minister of Finance's decision, is unfounded as the decision has been made by the competent institution in keeping with the substantive law and the administrative rules of procedure, and in keeping with the purpose of the law. As a result the submitted Appeal is unfounded, and should be overruled.

Led by the foregoing and in accordance with Art. 28 of the SACA in conn. with Art. 42, Para.1, 4th hypothesis, the Supreme Administrative Court, Fifth Division

Pronounces

That it dismisses the Appeal by the Plaintiff, Kiril Dimitrov Terziiski, versus the Minister of Finance's Refusal No: APIA-8/25-03-2004, to provide access to public information via a paper carrier of the contractual agreement entered into by the Minister of Finance and the British consultancy firm „Crown Agents.“ This Decision is subjected to a Cassation Appeal before a five member panel of the Supreme Administrative Court within a 14-day period from the time the information is disseminated to the parties concerned.

True with the original,
Secretary:

Presiding Judge: Alexander Elenkov
Members: Vanya Ancheva,
Julia Kovacheva

**Dissenting Opinion
by the Presiding Judge
Alexander Elenkov**

Cause for Refusal of access to public information is present, when the requested information is classified information whose content construes state or administrative secrets (Art. 37, Para.1, pt.1 APIA). As a corrective measure to this rule aiming to protect the obligation expressed in Art. 3 of the APIA to those subjected to classifying information, from classifying such, with the sole purpose of formulating a Refusal of the requested access, the legislator has passed the following norms expressed in Art 41, Para. 3 and Para. 4 of the APIA which states: that in the event of an Appeal of a Refusal to access to public information, on the basis of art 38, Para. 1 and Para. 4 of the APIA, the Court, in an in camera hearing can request from the administration the necessary evidence, thereby rule or adjudicate on compliance with the law, of the Refusal and on the security markings. With Decision No: APIA-8/dated 25-03-2004, the Minister of Finance has refused to provide a copy, via paper carrier, to the plaintiff, of the contractual agreement entered into by the parties on 29-11-2001 and titled „Measures in Aid of the Reform of the Bulgarian Customs Administration.“ The parties to the said agreement are the Minister of Fiance and the British consultancy firm „Crown Agents.“ The motives of this Refusal are exhausted with the following: „the information in its entirety contained in the aforementioned agreement,“ falls under the category of information, formulating state secret in accordance pt. 24 of Section III „information of Economic character, of the List of Facts, Information and Objects which formulate State Secret of the Republic of Bulgaria.“

Pt. 24 of the Section „Information of Economic Character“ of the Repealed §43 of the Transient and Conclusive Rules of the PCIA, Lists of Facts, Information and Objects, which construe State Secrets of the Republic of Bulgaria, reads: „Information dealing with Organizational, Technical and program Security of Automated Systems Used in Managing the Information of the Ministries and Other Institutions, Including Higher Bodies of State Authority and Administration.“

In the motives of the Appealed Refusal, the Minister of Finance, has assumed that the contractual agreement of 29-11-2001 constitutes classi-

fied information, in accordance with pt. 14, of Section II „information, dealing with foreign policy, and internal security of the State“ of the List of Categories of Information subjected to the classification as State Secrets (Addendum No:1 toward Art. 25 of PCIA). The text of pt. 14 reads: „Information Dealing with Organizational Technical and Program Security of the Automated Information Systems and Nets Belonging to the State Administrative Powers and Local Administration.“

In the motives of the Appealed Refusal, the Minister of Finance has further assumed that the said agreement of 29-11-2001 construes classified information in accordance with pt. 2 and pt. 3 of Section III „information dealing with the Economic Security of the State“ appurtenant to the same List of the Categories of Information subjected to classification as State Secrets (Addendum No: 1, toward Art. 25 PCIA). The text of pt. 2 reads: „Research of a particular significance to the interests of the state economy, ordered by the state institutions;“ and the text of pt. 3 reads: „Information pertaining to technical, technological and organization decisions, whose public proclamation, dissemination, may threaten with damage important economic interests of the state.“

From a factual point of view, it was vital to clarify the meaning of the concept „organizational-technological security of the automated system for administrating and/ or information“ and „program protection of the automated systems for administering and/or information,“ „important economic interests of the state.“ (In accordance with pt. 3 of Section III of the currently active Addendum No: 1 toward Art. 25 PCIA.) From a legal point of view, a check of the initial marking „secret“ was necessary to see whether the marking was placed in accordance with the rules established by the unpublished, but now de-classified „Procedural rules for the organization of the work in securing state secrets of the Republic of Bulgaria.“ This is an imperative requirement of Art. 41, Para. 4, PCIA, requiring the Court, in an in camera hearing to adjudicate on the matter as to whether the security markings are in compliance with the law. This was necessary because it is apparent that the aforementioned agreement dated 29-11-2001, entitled „Measures in Aid of the Reform of the Bulgarian customs Administration:“

a. does not construe information dealing with organizational -technical information (and) program security of the automated systems for administering and information of the ministries and other institutions, as well as

the higher bodies and the state power and the administering in accordance with the meaning of pt. 24 of the repealed List of Facts, Information and Objects, which make up State Secrets of the Republic of Bulgaria, respective of pt. 14 of the presently valid addendum toward Art. 25 of the PCIA.

b. does not construe „research with important significance of the national economy,“ ordered by the State administration (according to the meaning of pt. 2 of Section III „Information, connected with the state economic security“ of the same List of Categories of Information, subjected to the classification as state secrets- Addendum No:1 toward Art. 25 of the PCIA.

c. does not construe information dealing with technical, technological or organizational decisions, whose dissemination would threaten or damage important, economic state interests (according to the meaning of pt. 3 of Section III „Information connected with the state economic security“ of the same List of Categories of Information, subjected to classification as state secrets, Addendum No. 1 toward Art. 25 of the PCIA).

If the contractual agreement of 29-11-2001 is none of the above, then it follows that there exists a lack of a legal basis to declaring it classified information.

Prepared: A. Elenkov, Presiding Judge

**TO THE SUPREME ADMINISTRATIVE
COURT**
Five Member Panel

CASSATION APPEAL

of Kiril Dimitrov Tersiski,
Plaintiff,
represented by Alexander Kashumov, Attorney-at-Law

AGAINST

Judgment No: 94272 of 16-11-2004
of Administrative Case No: 4120/200

PURSUANT TO

Art. 33 and so on of the
SACA

If it Pleases the court, Your Honors,

I appeal the Judgment made by the Three Member Judicial Panel of the Supreme Administrative Court of the aforementioned case. The adjudication made is in breach of the procedural and substantive law and is unfounded - Art. 218, Para. 1b „v,“ of the Civil Procedural Code (CPC), in connection with Art. 11 of Supreme Administrative Court Act (SACA).

1. The Court has reached the conclusion, that, the Refusal issued by the Administration, namely the Finance Minister, is lawful, without conducting duely the procedures required by the law. This case involves the question of imperative requirements emanating from Art. 41, Para. 4 of APIA, for the court to take in hand, the control of the legality of the process of secrecy markings. Insuring such control presupposes exercising scrutiny both on the procedural grounds, as well as, on the substantive grounds required in the marking of a document as classified.¹ The intent of the law makers in formulating the norm expressed in Art. 41,

¹ This act, giving rise to a legal ramification - the security classification markings of a document, represents nothing more than an imperative expression or will, directed to specific legal consequences, namely placing the relevant information under the specific regime of the PCIA.

Para. 4 of the APIA is apparent, namely the establishment of lawful guarantees including via the means of court control, when the constitutionally guaranteed right to access information is restricted in view of the protection of national security and civil order undertaken as a state or as administrative secrets. The subsequent Dissenting Opinion expressed by the Presiding Justice Alexander Elenkov, of the three member panel, was based in that he uniquely scrutinized the substantive argument of the legal ramifications of the marking classification. The failure of the Court to conduct the specified procedure, which has been imposed upon them as a requirement, and given that the plaintiff had made such a request, represents a significant breach of the procedural rules.

2. The judgment breaches the substantive law. Following the Court's findings that three conditions must be present, in order for a given document be classified as state secrets, in accordance with Art. 25 of the PCIA, namely:

- 1). affecting protected interest;
 - 2). existence of damage or threat of damage;
 - 3). appurtenance to the list in accordance with Art. 25 of PCIA;
- the court limits itself, singly on whether the procedural instructions of classified markings have been followed, in connection with the contractual agreement. In order to ascertain the legal cause of the Refusal, it is necessary to scrutinize all factual and legal cause, shown therein. Therefore the following must be scrutinized:
- Does the dissemination or revelation of information affects any of the interests enumerated in Art. 25 of the PCIA;²
 - If it affects them, damages may ensue, or threat of such damage thereof, including the Minister of Finance's definition of such damage;
 - Clarification and scrutiny of the content of the cited categories of information Art. 25 of the PCIA in the Refusal, as was stated in the Dissenting Opinion attached to the Judgment.³

² Even more so, when the activities of the Finance Minister, per se, are not connected with defense foreign policy, or the protection of the constitutionally established order.

³ Anything less would mean that these „sacral“ phrases, behind which the administration hides, based on its subjective views or desires, acquire newer and yet newer definitions and content at any given time. The lawmakers placed this activity in under court scrutiny, in order for the Courts to exercise control. This implicitly requires the administrative body to clarify before the Courts, the content that fall within the categories of the List.

These issues have not been scrutinized nor explored, with the sole exception as to whether a security marking has been stamped on the document. This constitutes a breach of the substantive law.

3. The judgment accepts that once a security marking has been stamped on the front page of the contractual agreement, segregation of the revelations given to the Plaintiff is impossible, given that according to Art. 30, Para. 3 of the PCIA, when a collection of documents forming one unit, is classified, then the classification marking of the unit follows the highest classification assigned to any one of the parts. This statutory interpretation of Art. 30, Para. 3 of the PCIA is improper. First, it contradicts everyday logic, even when certain data contained in the said agreement have been given publicity as to: the parties; the price; in general terms its object; and its duration. Secondly, and not any less important, is that such interpretation contradicts Art. 41 of the Constitution, thereby making it inadmissible. According to the Judgment of the Constitutional Court No:7/1996 re: CC No: 1/1996 in the aspect of interpreting the aforementioned Art. 41:

„And here, as in every singular instance in connection with interpreting of the limitations, it is necessary to emphasize that their application - independent of the fact that it might be in the defense of another constitutionally admitted interest, it should be based on the understanding that it is not a question of choice between two contradictory principles, but concerns the application of an exception to the principle (the right to search and receive access to information) which exception is subjected to restrictive interpretation.“

The statutes of Art. 7, Para. 2, and Art. 37, Para. 3 of the APIA, further develop the principles illuminated by the Constitutional Court's interpretation. Its field of Application is imperative to all institutions, required to provide access to information, not legal possibilities. Access to the entire information contained within a given material, in this case - a copy of the contractual agreement - can be denied only upon an examination of this possibility, and upon the presentation of legal and substantive arguments, which in this case has not taken place.

The norm within Art. 30, Para. 3, of the PCIA, even if interpreted in the manner of the SAC, Fifth Division, cannot serve as a justification of the overruling the complaint against the Refusal in terms of providing segregable access. In accordance with Art. 15, Para. 2 of the Statute Act,

the courts apply higher standing (general) normative acts, i.e. - the Constitution, and not a possible contradictory lower standing (specific) act. Furthermore, the meaning of the norm found in Art. 30, Para. 3 of the PCIA, has little in common with the one attained by the Court. The requirement of stamping a security marking on a document, consisting of a collection of such, serves the sole purpose of providing information in that within the collection, there is a document marked secret, requiring care, and the protection of such a document. To accept the contradictory point of view, is to accept the possibility of securing information beyond the scope of the criteria established by Art. 25 of PCIA, in a random and arbitrary manner. Practically, this would mean that any document, void of state secrets, would be treated as classified not only within the compendium of documents, but its copies, existing outside the compendium as they contain the same information. Such interpretation is absurd and evidently countermands the Constitution, because it permits for any information to be classified, without it in any manner affecting or regarding legitimate rights or interests.

4. The Judgment is unfounded due to the following:

It postulates that state secrets are evident, when the three requirements in Art. 25 of the PCIA are cumulatively present. However, further on, the judgment accepts as being evident „unquestionable evidence“ establishing the contention of the institution that it involves classified information. Such evidence in the course of these proceedings has not been made evident - neither affecting legitimate interest;⁴ nor damage or threat of damage; or being an appurtenance to the List described in Art. 25 of the PCIA. What has been established instead, is the security marking. Therefore, given a true premise regarding the burden of proof and the initial evidence, the Court has made an erroneous, and fallacious reasoning from the premises. I find no substantial difference between „security markings“ (following the issuance of the Refusal) and the respondent's (defense) testimony at the court hearing. It is immaterial, whether a statement is made by a party to this process, outside or during the Court hearing, since it does not possess procedural value. It, by itself, cannot serve as evidence; no more than the appealed administrative act serves as sufficient evidence for its own legal basis.

⁴ Nor expressedly specifying which is the precise interest.

5. The refusal of the Court to obtain evidence from the Minister of Finance, in his deviation from the letter of the law in issuing his Refusal, is yet another procedural violation.

Given the aforementioned cause, please Overrule the judgment issued by the Supreme Administrative Court, Fifth Division, and provide a new Judgment, in favor of this appeal.

With respect:

DECISION

No: 3875
Sofia, 28-04-2005

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Five Member Panel - II Collegium, at a Court Hearing held on the tenth day of March, two-thousand-five, with the following members:

PRESIDING JUDGE: Stefka Stoeva

MEMBERS: Svetlana Ionkova, Vesselina Teneva, Juseppe Rodgieri, Mariana Dereva

With Stenographer: Maria Poinska, and with the participation of the Public Prosecutor: Nickolay Chiripov,

heard the report made by Judge Svetlana Ionkova on Adm. Case No: 592/2005.

With Judgment, dated 16-11-2004, on Admin. Case No: 4120/2004 of the Supreme administrative Court, Fifth Division, Overruling the Appeal brought by Plaintiff, Kiril Dimitrov Terziiski, against the Refusal No: APIA-8/25-03-2004, issued by the Minister of Finance, to provide access to public information via a paper carrier copy of the contractual agreement signed between the Minister of Finance and the British consultancy firm „Crown Agents.“ The decision is signed by the Presiding Judge with a Dissenting Opinion stating that the said agreement does not represent classified information in accordance with the meaning of the PCIA.

The aforesaid Judgment has been appealed before the Cassation court by Plaintiff, Kiril Dimitrov Tersisky. The Appeal has been submitted in a timely manner. The Plaintiff asks for the Decision to be Overruled, as having been made in an inadmissible infringement/breach of the substantive law, is in significant violation of procedural law, and on the grounds that it is unfounded.

The defendant of this Cassation appeal deems it unfounded.

The representative of the Supreme Administrative Public Prosecutor proposes that Judgment be overruled due to numerous violations of the substantive and procedural law.

The Supreme administrative Court considered the Cassation Argument in terms of the evidence provided in this case and determined the following:

The Supreme Administrative Court, Fifth Division, accepted that the Refusal is justifiable, as it related to classified information, in accordance with the „List of Categories of Information Subjected to Classification as State Secrets,“ Addendum No:1 toward Art. 25 of the PCIA, which access is restricted according the Art. 41 of the Bulgarian Constitution, Art. 5, and Art. 7 of the APIA.

The Ruling of the Supreme Administrative Court, Fifth Division, has been made in violation of the substantive law and is in considerable violation of the procedural rules.

With the request No:APIA-8 from 01-10-2002, the plaintiff, Kiril Dimitrov Terziiski, asked for access to public information which required for a copy of the contractual agreement between the Bulgarian Government and the British consultancy firm, „Crown Agents,“ be provided via a paper carrier.

With Decision No: APIA-8/25-0302004, the Minister of Finance denied access to the requested public information on the grounds of pt. 24 of Section III „Information of Economic Character“ from the List of Facts, Information and Objects, which Constitute State Secrets of the Republic of Bulgaria (repealed); pt. 14 of Section „Information, Dealing with foreign Policy and Internal State Security“; pt. 2 and 3, of Section „Information Dealing With Economic Security of the State“ from the „List of Categories of Information, Subjected to Classification as State Secrets;“ Addendum No. 1 toward Art. 25 of the PCIA-Protection of Classified Information Act.

In accordance with Art. 41, Para. 3 of the APIA, in the incidents of appeal of a refusal to access to public information, Art. 37, Para. 1, pt. 1 of the APIA (classified information), the Court may ask to obtain evi-

dence, in camera. In keeping with Para. 4 of the said norm, in this case, the Court adjudicated on the legality of the refusal and the Security Marking. The Supreme Administrative Court, Fifth division, gathered evidence according to Art. 41, Art. 3 of the APIA, in an in camera hearing held on 10-11-2004. The Court established the security marking on the said contractual agreement, based on the repealed „List of Facts, Information and Objects, Which Constitute State Secrets of the Republic of Bulgaria;“ as well as on the grounds of the „List of the Categories of Information, Subjected to Classification as State Secrets,“ Addendum No:1 toward Art. 2 of the PCIA. In violation of the instructions of Art. 41, Para. 4 of the APIA, the Three Member Panel of the Supreme Administrative Court, did not adjudicate on the legality of the Security Marking on the grounds of the valid, as well as on the basis of the repealed normative act, thereby making their contention that the said agreement, contracted to between the Minister of Finance and the British consultancy firm „Crown Agents“ subject of this action, as classified information subjected to restrictive access, is unfounded. Furthermore, access to information of said agreement had been granted on a segregable portion to third parties as early as 2002 via written inquiry. (The letter was provided as evidence before the Three Member Panel, as well as before the five Member Panel of this Court). It follows that the court should have made a pronouncement as to whether the content of the said agreement contains information of organizational-technical nature and program security of the automated information systems or nets of the state administrative bodies, local governments and their administration; whether it represents research of particular significance to the national economy, ordered by the administration, and whose dissemination would threaten with damage important economic state interests; and whether the security marking of „secret“ and „confidential“ is in keeping with the instruction decreed in § 9 of the Transient and Conclusive Provisions of the PCIA.

At a hearing, held on 18-10-2004, the Supreme Administrative Court, Fifth Division, precluded oral arguments, having deemed the case classified, and announced that it would adjudicate following their consultation. On 10-11-2004, the Three Member Panel of the Supreme Administrative Court had gathered evidence in camera, on the grounds of Art. 41, Para. 3 of APIA. There is evident substantive violation of the procedural rules, as following the preclusion of the oral arguments, the Court proceeded to adjudication on the grounds of Art. 186 of the Civil Proce-

dures Code, thereby preventing the undertaking of proscribed procedures and gathering of evidence, which is expressly indicated in the Access to Public Information Act. The right to defense of the Plaintiff was violated, given that with the in camera hearing, the plaintiff was prevented from becoming acquainted with facts and circumstances prior to the oral arguments phase of the trial.

The adjudication of the Supreme Administrative Court, Fifth Division, should be overruled on the grounds of Art. 218b, Para. 1, b. „v“ of the Civil Procedural Code in connection with Art. 11 of the SACA. On the basis of Art. 40, Para. 2 of the SACA, it follows that the case be returned to the same court for a Review with another panel.

On the grounds of the aforementioned considerations, the Supreme Administrative Court, in its five-member panel

HEREBY RULES:

that it Repeals in its entirety the judgment of 16-11-2004, on Admin. Case No: 4120/2004 of the Supreme Administrative Court, Fifth Division.

True with the Original

Presiding Judge: (s) Stevka Stoeva

Members: (s) Svetlana Ionkova, (s) Veselina Teneva, (s) Juseppe Rodgeri,
(s) Mariana Decheva

CASE

Kiril Karaivanov

vs.

*State National
and
Wartime Reserves
Agency*



***Kiril Karaivanov vs.
the State National and Wartime Reserves Agency***

*1st Instance Court - Administrative Case No. 4408/2004,
Supreme Administrative Court, 5th Division*

In connection with a year-long investigation of violations of the law related to the activities of the state-owned company Brilliant Ltd., situated in the village of Krusheto, and the State National and Wartime Reserves Agency (SNWRA), Mr. Karaivanov had collected a considerable amount of information and needed three more documents, which were of particular importance to the case. He submitted an application to the SNWRA requesting among others a copy of the contract between the SNWRA and Brilliant Ltd, (including log number and date of signature).

Mr. Karaivanov received a written refusal from the chairman of the SNWRA, who claimed that the agency did not possess the contract since the time for its storage had expired in April 2002, according to the internal record keeping rules for the agency's overt auctions.

The new refusal was also challenged before the Supreme Administrative Court (SAC), on the grounds that the chairman of the SNWRA had not provided in it the factual grounds to support the statement that the contract requested was not at his disposal. The refusal failed to explain whether the contract had been destroyed or sent to another place for storage (the National Archive, for example).

At a court session, the legal counsel of the agency claimed that the requested contract had been terminated in 1999, that the document could not be found in the agency archive, and that there was no record of its destruction or transfer to the National Archive.

The November 9, 2004 judgment of the SAC repealed the refusal and referred the file back to the agency for reconsideration of the information request. The court presumed that the statement that the contract could not be found was unsupported by evidence and did not give grounds for denying access to the

information. The SNWRA would need to present evidence either that the contract had been destroyed after the approval of an expert committee, that it had been archived and data noted that would facilitate finding its current storage place, or that it had been lost and the required certification statement been filed to that effect.

The SAC decision referred the file back to the SNWRA for reconsidering the refusal of information along another point included in Mr. Karaivanov's request. He had demanded copies of four receiving manifests, which were refused on the grounds of state secret. That second part of the SAC decision was in accord with its own practices that institutions should always provide factual grounds as criteria and grounds for classification of any information as a state secret. The mere statement that the information contained in the document constituted a state secret did not conclusively identify the information as such. Every public institution should ground their statement that the demanded information is a state secret. The lack of such motivation did not allow the court to verify the lawfulness of the statement that particular information is a state secret.

State Reserve

To
Mr. Kiril Dimitrov Karaivanov
Sofia

Re: Access to Information application with receipt No. RD. 00-1955 of 22-July- 2003 and Decision No. 111 of 09-Jan-2004 of the Supreme Administrative Court of the Republic of Bulgaria

Dear Mr. Karaivanov,

With an access to information application, registered under No. RD 00-1955 of 22-July-2003 you have requested access to the following documents from the State Reserve:

1. Copy of a contract, registered under No. 211 of 03-Aug-1998 between the State Reserve and *Brilliant Ltd-Krusheto*.
2. Copy of a document, proving that 838 tons of raw (unrefined) olive oil has been supplied by *Kambana 1889 JSC*, Burgas within the terms of Order No. III-100-7, issued on 14-Jan-2000 by the Director of the State Reserve.
3. Copies of Preliminary reports No. 1 of 31-Jan-2000, No. 2 of 03-Feb-2000, No. 3 of 05-Feb-2000 and No. 1 of 29-Jun-2001.

In response we should inform you of the following:

The State Reserve does not possess a copy of Contract No. 211 signed on 03-Aug-1998, between the agency and *Brilliant Ltd-Krusheto*. The internal rules for documentation processing within the *Food Storage Department* of the State Reserve only require that contracts be kept for 3 (three) years after their expiration date. Contract No. 211 of 03-Aug-1998 was ended with a redemption of a pawn made on 22-Apr-1999, meaning that the requirement for keeping the contract expired in April, 2002.

The supply and substitution of the raw (unrefined) olive oil by *Kambana 1889 JSC*, Burgas has been registered in an Acknowledgement of Receipt No. 1 of 24-Jan-2000. This document has been marked with a security seal, because it contains classified information and is subject to classifi-

cation under the *List of State Secret Categories* - Appendix No. 1 to Art. 25 of the Protection of Classified Information Act. Pursuant to Art. 37, Para. 1 item 1 of the Access to Public Information Act, a copy of this document cannot be disclosed.

Copies of Preliminary reports No. 1 of 31-Jan-2000, No. 2 of 03-Feb-2000, No. 3 of 05-Feb-2000 and No. 1 of 29-Jun-2001 will be disclosed personally or sent by post as soon as you deposit the amount of 4 Leva (the equivalent of 2 Euro) to the account of the State Reserve.

**Director of the State Reserve:
(Yovcho Yovchev, engineer)**

**THROUGH THE DIRECTOR OF THE
STATE RESERVE****TO
THE SUPREME ADMINISTRATIVE
COURT****APPEAL**

by
Kiril Dimitrov Karaivanov

AGAINST

Information refusal of the Director of the State Reserve, contained within letter No. Rd-00-226 of 05-Jan-2004

PURSUANT TO

Art. 40 Para. 1 of the Access to Public Information Act in relation to Art. 5 item 1 of the SACA

Honorable Supreme Judges,

THE FACTS

On 07-Apr-2004, I received a response with outgoing register No. RD-00-226 of 05-Apr-2004, signed by the Director of the State Reserve - an authority subordinate to the Council of Ministers. The letter was written in compliance with decision of the Supreme Administrative Court No. 111 of 2004 and in response to access to information application No. RD-00-1955 of 22-Jul-2003. The Director of the State Reserve has informed me that copies of the requested receipts would be disclosed, but at the same time, other documents requested with the same application would be withheld.

1. In the first place, one of the arguments of the refusal is that Contract No. 211 of 03-Aug-1998, signed by the Director of the State reserve and *Brilliant Ltd* in the village of Krusheto was no longer available at the institution. The refusal refers to the internal rules for keeping the documentation of the State Reserve, which stipulate that the contracts related to the

activities of the *Food Storage Department* should be kept for three years after their expiration date. The letter also states that Contract No. 211 of 03-Aug-1998 „was ended with a redemption of a pawn made on 22-Apr-1999, meaning that the requirement for keeping the contract expired in April, 2002.“

2. Furthermore, the State Reserve Director has informed me that Acknowledgement of Receipt No. 1 of 24-Jan-2000, which proved the substitution of non-refined oil, is a state secret pursuant to Art. 25, Section II, item 10 of the *Attachment List* to PCIA. By reason of the above, the requested document has been withheld.

3. On the third place, the request formulated within item two of my application has been left with no reply, which constitutes a silent refusal for disclosure. I had requested a copy of a document, proving that *Kambana 1889 JSC* has the exchanged 838 tons of raw olive oil within the contracted terms.

Contradiction of the refusal to the law

The decision contained in the above letter is a refusal in the sense of Art. 38 of the APIA. The letter clearly contains a decision of a competent authority, which is an executive body obliged to respond to information requests in the sense of Art. 3, Para. 1, hypothesis I of the APIA. Pursuant to Art. 56, in relation to Art. 120, Para. 2 of the Bulgarian Constitution and Art. 41 of the APIA, in relation to Art. 5, Para. 1 of the SACA, the information refusal is appealable before the SAC, because it violates my right to information (specifically, my right to seek access to public information).

1. In the first place, the refusal to provide access to Contract No. 211 of 03-Aug-1998 is unlawful. The decision does not refer to any factual grounds, which is a requirement of Art. 38 of APIA. In order to prove that the contract was no longer kept at the institution, the Director of the State Reserve should have at least explained what had happened with it; since he had - at least implicitly - agreed that the document had previously been available. To me it is still unclear whether the contract had been destroyed, or had been transferred to another location, for example, to the National Archives. In case the contract had indeed been trans-

ferred, the authority should have referred to the transfer decision and its date. In case the document had been destroyed, the decision had to indicate the date of destruction and refer to a decision of the National Archival authorities pursuant to Art. 9 of the National Archival Fund Act. Also, the refusal is not backed up with legal arguments; the assertion that the term for keeping the contract has been regulated by an internal document has not been supported by any quotes from the internal rules of the State Reserve. It is not clear who and when had adopted these internal rules, and whether they had been published anywhere. In view of these arguments, the refusal is unlawful, because it is not supported by sufficient legal and factual arguments. Thus, it does not guarantee the rights of the applicant and allows for no effective judicial review.

2. The refusal is unlawful also in its part, where the State reserve withheld access to the Acknowledgement of Receipt No. 1 of 24-Jan-2000. No arguments have been provided; no facts support the assertion that information contained within the receipt falls within one of the listed categories and - if disclosed - would harm or would be likely to harm one of the protected interests enumerated in Art. 25 of PCIA. The quoted category is too broad and requires some specification in the refusal, which is an **individual** normative act and should be based on specific reasoning. The State Reserve Director should have explained the reasons for his classification decision - what specific information was contained in the Acknowledgement of Receipt but was lacking in other similar documents. I have been provided access to Order No. III-100-7 of 14-Jan-2000, which regulates the exchange and allocation of raw olive oil. I believe that the requested document - which registers the receipt of 838 tons of olive oil - has been signed as part of the implementation of the Order. The decision of the authority should have made clear how information contained in the receipt differed from the Order and why it had to be classified as state secret.

3. Regarding the tacit refusal of the request contained within item 2 of my application - the letter of the State Reserve Director does not explain whether the Acknowledgement of Receipt is the document (and the only document) proving that the **exchange** of 838 tons of non-refined oil has been completed in time. Furthermore, the letter suggests that this document has registered the **allocation**, rather than the **exchange** of 838 tons of olive oil; consequently, this is not the document I had requested. In

view of these facts, the silent refusal is in serious contradiction with the law - it contains no reasoning and is not in the form required by the substantive and the procedural law.

Special request

Based on the above arguments, I request that the honorable judges REVERSE the refusal of the State Reserve Director as contradictory to the law and OBLIGE the authority to disclose all requested information.

Enclosures:

1. Copy of the application for information access;
2. Copy of letter No. RD-00-226 of 05-Apr-2004;
3. Copy of Order No. III-100-7 of 14.-Jan-2000;
4. Copy of letter No. RD-00-1955 of 10-Jun-2003;
5. Copy of the complaint for the respondent;
6. Receipt for Payment of judicial fees.

Yours respectfully:

TO
THE SUPREME ADMINISTRATIVE
COURT
FIFTH DIVISION
In relation to admin. case No. 4408
of 2004, scheduled for hearing on 25-
Oct-2004 at 9 a.m.

REQUEST

OR

Kiril Dimitrov Karaivanov
complainant

Honorable Supreme Judges,

1. I hereby submit and request that you accept the following written evidence: four receipts for the transfer of refined olive oil and the corresponding letter for their disclosure in response to an access to public information request.

Significance of the documents for the case: the four receipts have been issued as part of the implementation of Order No. III-100-7 of 14-Jan-2000 regarding the transfer of refined olive oil.

The fact that these receipts have been disclosed to me in response to an information request show that they do not contain state secret. This is an indication, that the requested receipt does not contain state secret either. The requested document (Acknowledgement of Receipt No. 1 of 24-Jan-2000) is related to the implementation of the same order - it treats the allocation of raw (unrefined) olive oil and its substitution with refined olive oil.

2. The refusal of the State Reserve Director to provide access to the information contained within Acknowledgement of Receipt No. 1 of 24-Jan-2000 is unlawful for a further reason, besides those, already emphasized

in my complaint. There is no connection between the argument of the authority, according to whom the receipt

„reflects the substitution of raw (unrefined) olive oil by Kabmana 1889 JSC, Burgas“

and the legal grounds for the refusal - Section II, item 10 of the Appendix List to Art. 25 of PCIA, covering:

„information about budget funds and property of the state, allocated and used for special purposes, relating to national security.“

The lack of this connection leads to the logical conclusion that the information contained in Acknowledgement of Receipt No. 1 cannot be classified as state secret. Furthermore, the authority has not provided any evidence in support of his position - neither a classification decision, nor any other proof, showing that there was a classification procedure, or any substantive legal argument for a possible classification.

Enclosures:

1. Acknowledgement of Receipt No. 1 of 31-Jan-2000;
2. Acknowledgement of Receipt No. 2 of 03-Feb-2000;
3. Acknowledgement of Receipt No. 3 of 05-Feb-2000;
4. Acknowledgement of Receipt No. 1 of 29-Jun-2001;
5. Letter of the State Reserve Director, No. R.D. 00-226 of 13-May-2004.

Respectfully yours:

DECISION

**No. 9154
Sofia, 09-Nov-2004**

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at its session held on the twenty-fifth day of November 2004, composed of:

PRESIDING JUDGE: ALEXANDER ELENKOV

PANEL MEMBERS: VANYA ANCHEVA, YULIA KOVACHEVA

in the presence of the court stenographer Iliana Ivanova and with the participation of the public prosecutor Lyubka Stamova heard the report of justice VANYA ANCHVA on Administrative Case No. 4408 of 2004.

Proceeding in this case were pursuant to Art. 12 et seq. of the Supreme Administrative Court Act (SACA) and in relation to Art. 40 par. 1 of the Access to Public Information Act (APIA).

Kiril Dimitrov Karaivanov filed a complaint against letter No. RD-00-226 of 05-Apr-2004 of the Director of the State Reserve - an agency subordinate to the Council of Ministers. With this letter, the appellant had been given an answer to his information request with receipt No. RD-00-1955 of 22-Jul-2003 filed by virtue of the APIA and conforming with the instructions within Ruling No. 111 of 09-Jan-2004 on Supreme Administrative Court case No. 7641 for 2003.

The appellant believes that the attacked letter projects a refusal to provide access to public information, and this refusal is illegal. In delivering the refusal, the Director of the State Reserve has violated the substantive law and the procedural rules. No reasoning for the decision has been given; the public authority has not referred to any legal grounds for his refusal to provide a copy of the document, requested with item 1 of the application; the Director of the State Reserve has not given any factual reasoning for refusing access to Acknowledgement of Receipt No. 1 of 24-Jan-2000, besides the formal citing of the *List Information of Categories, Subject to Classification as State Secret* - Appendix No. 1 to Art. 25 of the

Protection of Classified Information Act (PCIA, published in State Gazette issue 45 of 30-Apr-2002). In view of the above objections - further developed in the appeal - the appellant requests that this court reverses the information refusal and obliges the administrative body to disclose the requested information.

The legal counsel of the respondent has challenged the appeal.

The representative of the Supreme Administrative Prosecution Office found the appeal unjustified.

Having assessed the collected evidence and the claims of the parties, the Supreme Administrative Court, fifth division, finds the appeal procedurally admissible, since it was submitted within the legal time frame by a party having standing on the case. Viewed on the matter, the appeal is justified.

The appellant Kiril Dimitrov Karaivanov has filed an application for information No. RD-1955 of 22-Jul-2003 to the Director of the State Reserve, making a request for paper copies of the following documents:

1. Copy of a contract, registered under No. 211 of 03-Aug-1998 between the State Reserve and *Brilliant Ltd-Krusheto*, referred to in a letter, submitted as evidence by the appellant;
2. Copy of a document, showing that the supply and exchange of 838 tons of raw (unrefined) olive oil has been made by *Kambana 1889 JSC, Burgas* within the terms of Order No. III-100- 7, issued on 14-Jan-2000 by the Director of the State Reserve (copy of the latter contract was presented as evidence);
3. Copies of Preliminary reports No. 1 of 31-Jan-2000, No. 2 of 03-Feb-2000, No. 3 of 05-Feb-2000 and No. 1 of 29-Jun-2001, proving that the actual amount of withdrawn olive oil had been 805.5 tons, rather than 804.5 tons.

The Director of the State Reserve has informed Mr. Karaivanov that his agency does not keep a copy of contract No. 211 of 03-08-1998 because the requirement for keeping the contract had expired in April 2002. The respondent also claimed that the Acknowledgement of receipt No. 1 - registering the supply of raw (unrefined) oil by *Kambana 1889 JSC, Burgas* - contains classified information and had been classified as state secret

pursuant to the *List of State Secret Categories, Subject to Classification as State Secret* - Appendix No. 1 to Art. 25 of the PCIA. Because of this and by virtue of Art. 37, par. 1, item 1 of the PCIA, a copy of this document could not be disclosed.

Regarding the third request, the appellant had been notified that copies of the document would be disclosed after depositing the access fees to the bank account of the agency. The documents had later been disclosed and are enclosed as evidence.

Having considered the facts and reviewed the evidence, this court has found that the refusal of the State Reserve Director - projected in a letter No. RD 00-226 of 05-Apr- 2004 - to provide access to public information is unlawful.

The State Reserve unquestionably falls within the scope of Art. 3 Para. 1 of APIA, because it is a specialized body subordinate to the Council of Minister and is financed by the budget (see Art. 2 of its Organizational rules adopted with a Cabinet decree No. 13 of 21-Jan-2004, published in State Gazette issue 8 of 31-Jan-2004). All such institutions are required to provide access to public information, which they create or keep. Information, created or kept within public institutions, falls within two categories: official and administrative. Official public information is contained within acts of the state bodies and the bodies of local governance (see Art. 10 of APIA). The acts of the state bodies, containing official information by definition, are normative, individual or collective. Access to the former documents is provided by publishing them in the State Gazette, while all other documents are accessible by following the procedures of the APIA, unless another procedure has been explicitly stipulated. The court believes that information requested by Mr. Karaivanov does not bear the characteristics of official information, because it is not an act of the bodies of central or local governance, but is rather a contract and an acknowledgement of receipt, reflecting on the relations between the Agency and a commercial company, which is subject to civil law.

The second category of information, following from the definition in Art. 11 of APIA is *administrative*. This is information collected, created, and kept in relation to official information, and bearing to the activities

of the public institutions and their administration. With his application, pursuant to Art. 25 of APIA, Mr. Karaivanov has sought information related to the contract signed with *Briliant Ltd-Krusheto* with an unspecified purpose, whose existence was indicated within letter No. PZH-03-1250 of 06-Apr-1999, delivered by the State Reserve. The complainant also requested a document, proving the supply and substitution of 838 tons of raw (unrefined) oil within the terms stipulated in Order No. III-100-7 of 14-Jan-2000 issued by the Director of the Reserve. All this shows that Mr. Karaivanov has sought access to administrative information, related to the activity of the Agency and projected in a contract agreement and an Acknowledgement of Receipt No. 1 of 24-Jan-2000.

In refusing to disclose a copy of Contract agreement No. 211 of 03-Aug-1998, the Director of the agency has reasoned that the administrative body did not possess the document, because the internal rules for documentation processing of the State Reserve no longer required that the contract be kept. The legal counsel of the State Reserve stated in a court session that the contract agreement No. 211 of 03-Aug-1998 had been terminated on 22-Apr-1999, and it was missing from the agency archives. No documentation was available, proving that it had been destroyed or transferred to the National Archives.

The refusal to fulfill the first information request of the application of Mr. Karaivanov - supported by the the above reasoning - is unlawful.

According to the provision of Art. 9 of the National Archives Act (promulgated in State Gazette, issue 54 of 12-Jul-1974), no institution can destroy any documents without the consent of the National Archives. The designation of documents to be included in the national archival fund is done by expert commissions in coordination with the National Archives authorities (Art. 11). The categories of documents and the terms for keeping them are approved by the National Archives authorities. All institutions are responsible for creating temporary internal archives and for transferring the documents designated for permanent keeping to the National Archives. The rest of the documents are destroyed, except in cases, stipulated in other laws.

In view of this normative act, which establishes certain rules to be followed by the authorities (see Art. 10 of the National Archives Act), the

administrative body was expected to submit evidence showing that the requested document had either been destroyed after a decision of the expert commission, or had been transferred to the internal archive. In the latter case the administrative body should have indicated the position of the document. Otherwise, the authority is expected to find out who was responsible for the loss of the requested document, draw up a record certifying the loss and present it when requested. A formal statement that the document cannot be found, supported by no specific evidence, is in no way sufficient to ground a refusal for disclosure.

Mr. Karaivanov has requested - within item 2 of his application - to be provided with access to Acknowledgement of Receipt No. 1 of 24-01-2000, proving that the supply and exchange of raw (unrefined) olive oil had been made by *Kambana 1889 JSC, Burgas*. The respondent has stated that this document has been marked as state secret, since it contained classified information in the sense of item 10, Section II of the Appendix to Art. 25 of the PCIA, namely *Information about budget funds and property of the state, allocated and used funds for special purposes, relating to national security*. Based on these circumstances and by virtue of Art. 37, Para. 1, item 1 of the PCIA, the Director of the State Reserve has refused access to the information contained in the requested document. Mr. Karaivanov argued in his complaint that the respondent had unlawfully referred to the above categories. The claimant has supported his argument by submitting four receipts, which indicate that olive oil has been dispatched from *Briliant Ltd*, and prove that the requested information is not secret.

Considering the arguments of the parties and following the provision of Art. 41 Para. 3 of APIA, this court has obliged the Director of the State Reserve to submit - within a period of one week after a previous court hearing - a certified copy of the first page of Acknowledgement of Receipt No. 1 of 24-Jan-2000. The court wished to verify the statement of the respondent that the document had been marked with a security seal, but also to find out the grounds for the classification decision and the official who had taken it. The respondent did not follow the instructions of the court.

With the amendments of Art. 41 Para. 4 of APIA (State Gazette issue 45 of 2002), courts were given the authority to review classification decisions, which implies an obligation for the administrative bodies to sub-

mit proof about the classification date and the grounds the decision. The Director of the State Reserve did not follow the instructions of the court and did not state the classification grounds and whether the classification decision had been taken before or after the adoption of the PCIA. Because the requested receipt had been signed on 24-Jan-2000 - before the adoption of the new law - the classification decision had to refer to a specific category of state secret, contained in the *List of Facts and Matters, Subject to Classification as a State Secret of the Republic of Bulgaria* (promulgated in State Gazette issue 31 of 1990; repealed with § 43 of the Transitional and Conclusive Provisions of the PCIA). The complainant argues that the requested information does not fall into any of the listed categories, and has thus been incorrectly classified as state secret. From here it follows that the document - the bearer of the requested information - has been unlawfully marked with a security seal. The court lacks any evidence, which supports the argument of the respondent that the requested information has been classified as state secret. This court is in no position to review the classification decision, because it lacks any grounds for the classification of information, contained in receipt No. 1 of 24-Jan-2000 as a state secret. The simple assertion that information contained in the requested document is state secret does not identify it as such before this court. The response of the authority to the request refers only formally to the *List of Information Categories, Subject to Classification as State Secret* (Appendix No. 1 to Art. 25 of the Protection of Classified Information Act). No arguments have been provided, which would allow the court to see why the administrative body has considered the requested information to fall within the state secret exemption. This fact does not allow the court to exercise effective control over the lawfulness of the information refusal.

In view of the above arguments, the attacked decision of the Director of the Reserve Director (a body subordinate to the Council of Ministers) contained within a letter No. RD-00-226 of 05-Apr-2004 should be repealed, because it has been issued in considerable breach of the substantial law and the procedural rules - Art. 12, items 3 and 4 of SACA, in relation to Art. 38 of the APIA and Art. 15, Para. 2, item 3 of the APA. Following the provision of Art. 42, Para. 3 of the APA the files should be returned to the authority, who should reconsider the request of Kiril Dimitrov Karaivanov, adhering to the instructions of this court.

Lead by the above and abiding to Art. 28 of the SACA, and in relation to Art. 42, Para. 1, First principle of the same act, the Supreme Administrative Court, Fifth Division

HAS RULED:

REVERSES the refusal No. RD-00-226 of the 05-Apr-2004 issued by the State Reserve Director in response to an access to information application, filed by Kiril Dimitrov Karaivanov, residing in Sofia, 11A Yanko Sakuzov Blvd.

RETURNS the file to the authorities for a reconsideration of the first two requests made with the application for information No. RD-00-1955 of 22-Jul-2003.

THIS JUSGEMENT can be appealed before a five-member panel of the Supreme Administrative Court within 14 days of the notification of the parties.

True to the original,

PRESIDING JUDGE: (signed) Alexander Elenkov

PANEL MEMBRS: (signed) Vanya Ancheva, (signed) Yulia Kovacheva



CASE

Diyana Boncheva

vs.

*the President
of the National Audit
Office*



***Diyana Boncheva vs.
the President of the National Audit Office***

*1st Instance Court -Administrative Case No. 385/2003,
Sofia City Court, Administrative Division, Panel 3-b*

*2nd Instance Court -Administrative Case No. 10889/2003,
Supreme Administrative Court, 5th Division*

*In July 2002, Ms. Diyana Boncheva, editor-in-chief of the Yambol-based newspaper **Tundzha**, submitted a request for access to public information with the chairman of the National Audit Office (NAO). She requested access to the property declarations, stored in the public register of the National Audit Office, made by the appellate prosecutor of the city of Burgas in his capacity as a member of the Supreme Judicial Council. She also requested information about any verifications made of the declarations submitted by him, as well as any penalties imposed for failures to meet deadlines for the submission of declarations.*

*The chairman of the NAO did not respond to Ms. Boncheva's request within the period prescribed by the **Public Disclosure of Property Owned by High Government Officials Act (PDPOHGOA)**.*

Diyana Boncheva challenged the tacit refusal of the NAO chairman before the Sofia City Court (SCC).

The SCC's judgment of March 15, 2003 rejected the complaint. In interpreting the PDPOHGOA, the judges concluded that the chairman of NAO was only obliged to provide information whether or not the persons required to file declarations had done so, and was not obliged to disclose the content of these declarations. According to the court panel, data declared for entry into a public register were personal data and fell under the scope of the protections of the Personal Data Protection Act (PDPA).

The SCC decision was appealed before the Supreme Administrative Court (SAC), with the argument that under the PDPOHGOA, the public character of the information was to be achieved by the establishment of a public register. In that public register, the declarations by high-level state officials of their property,

incomes and expenses were recorded. Assuming that public access to the information from public registers is limited to finding out who had submitted their declaration and who had not would mean make the PDPOHGOA pointless, obviating its purpose: that of fostering greater transparency regarding the officials in high-level state positions.

*The SCC decision, as well as the tacit refusal of the NAO Chairman, were appealed before the Supreme Administrative Court (SAC). The SAC's judgment of April 20, 2004 rejected both the decision of the lower instance court and the tacit refusal by the NAO chairman and referred the case file back to the respondent for an information access decision based on merit, following the instructions of the court. In the motivations for its decision, the court pointed out that the legislator's intention expressed in the **Public Disclosure of Property Owned by High Government Officials Act**, which was explicit in the name of the law, was that the property declared by these officials should be public information. It was an anticorruption measure, which should not be overridden by the Personal Data Protection Act.*

To the Director
of the National Audit Office
Sofia

ACCESS TO PUBLIC INFORMATION REQUEST

by
Diana Georgieva Boncheva
Editor-in-chief of *Tundja* newspaper
City of Yambol

Dear Mr. Director,

On the basis of the Access to Public Information Act, I wish to be granted all available information regarding:

1. Property declarations for 2000-2002, kept in the public register of the National Audit Office, made by Yordan Ivanov, the appellate prosecutor of the city of Burgas.
2. Information about any verifications made of the declarations submitted by Yordan Ivanov.
3. Any penalties imposed on Yordan Ivanov for failures to meet deadlines for the submission of declarations pursuant to the **Public Declaration of Property Owned by High Government Officials Act**.

I should remind you that Mr. Yordan Ivanov is a public figure and disclosure of the requested information will not violate his rights of personal data protection.

I would like to receive the requested documents in printed format.

I hope that my request will be answered within the law-provided term of fourteen days.

04-Jul-2002

(signed):

**REPUBLIC OF BULGARIA
NATIONAL AUDIT OFFICE**

TO
MRS. DIANA BONCHEVA
EDITOR-IN_CHIEF
OF TUNDJA NEWSPAPER,
CITY OF YAMBOL

DEAR MRS. BONCHEVA,

I am writing to you in response to your letter with register No. PRZ-02-0003-01 of 04-Jul-2002. You have requested access to the property declarations made by Yordan Ivanov, the appellate prosecutor of the city of Burgas. We hereby inform you, that Mr. Ivanov has made his declarations in his capacity of member of the Supreme Judicial Council.

Please, specify your request in line with Art. 3 of the *Public Disclosure of Property Owned by High Government Officials Act*.

Information will be disclosed after you file a written request indicating the appropriate position of Mr. Ivanov and after the NAO publishes its official newsletter with the names of public officials who have failed to make their declarations (pursuant to Art. 6, Para. 4 of the law - between Oct-01 and Nov-01, 2002)

(G. Nikolov)
Director of NAO

To the Director
of the National Audit Office
Sofia

ACCESS TO PUBLIC INFORMATION REQUEST

by

Diana Georgieva Boncheva
Editor-in-chief of *Tundja* newspaper
City of Yambol

Dear Mr. Nikolov,

With an access to information request, registered with incoming No. PRZ-02-0003-01 of 04-Jul-2002 of the National Audit Office, I sought information about the property declarations for 2000-2002, made by Yordan Ivanov, the appellate prosecutor of the city of Burgas. In relation and in response to your letter No. PRZ-00-003-01 of 22-Jul-2002 and pursuant to the *Access to Public Information Act* and the *Public Disclosure of Property Owned by High Government Officials Act*, I request the disclosure of all available information, regarding:

1. Declarations (form II for 1999 and 2001) made by the appellate prosecutor Yordan Ivanov in his capacity of Supreme Judicial Council member and concerning:

- 1.1. Immoveable property;
- 1.2. Motor and aerial vehicles, and water vessels;
- 1.3. Any funds, debts, and liabilities equivalent to over 5,000 BGN (around 2,500 Euro) in local or foreign currencies;
- 1.4. Securities, company stakes and shares, including those acquired by privatization contracts besides the cases of mass privatization;
- 1.5. Incomes exceeding 500 BGN acquired during the previous financial year, besides those acquired as a member of the Supreme Judicial Council.
- 1.6. Expenses made by or in the benefit of Mr. Yordan Ivanov (with his consent), which have not been covered by him or by the Supreme Judicial Council, including for:
 - a/ education;

- b/ travel abroad:
- c/ other payments exceeding the equivalent of 500 Lev.

2. Information about any verifications made of the declarations submitted by Yordan Ivanov.
3. Any penalties imposed on Yordan Ivanov for failures to meet deadlines for submitting declarations pursuant to the *Public Disclosure of Property Owned by High Government Officials Act*.

I would like to receive the requested information in printed format.

Dear Mr. Nikolov,

The Access to Public Information Act establishes the right of every citizen to request and receive information from public institutions, one of which is the National Audit Office. By providing access to information you collect and keep, you provide an opportunity for the citizens to learn more about your activities.

In response to my initial request, you mention that information can only be provided between Oct-01 and Nov-01, a term regulated by Art. 6, Para. 4 of the *Public Disclosure of Property Owned by High Government Officials Act*. I would like to remind you that pursuant to Para. 1 and 2 of the same article, I have the right to receive the requested information before Oct-01; a right also established by the Protection of Personal Data Act. Article 35, Para. 2 of the PDPA gives the right to third parties to access personal data (in this case - economical information), when the information source is a public register or another document, containing public information, access to which is regulated by law. The Access to Public Information Act obliges the National Audit Office to disclose information of public interest, which has been collected or created in the course of its activities. The obligation to provide access to the requested information has also been established by the National Audit Office Act, the instructions for its implementation and in the *Public Disclosure of Property Owned by High Government Officials Act*.

According to the Access to Public Information Act, a response to an information request should be sent within 14 days of its registration. There is no reason why you can extend the response period, because you are not supposed to ask for the consent of Mr. Yordan Ivanov before you disclose his property declarations.

I received your previous response with a delay of five days without any explanation; Article 42, Para. 1 of the APIA establishes sanctions for officials responsible for such a delay.

I hope that this time you will strictly abide to the legal procedures.

06-Aug-2002
City of Yambol

(signed):
Diana Boncheva

THROUGH

THE DIRECTOR OF THE NATIONAL
AUDIT OFFICE

TO

THE SOFIA CITY COURT ADMINIS-
TRATIVE DIVISION

APPEAL

by Diana Georgieva Boncheva
Editor-in-chief of *Tundja* newspaper, City of Yambol,

AGAINST

Tacit refusal of the National Audit Office Director

PURSUANT TO

Art. 40, Para.1 of the Access to Public Information Act and Art. 33 of the
APA

Honorable Administrative Justices,

On 04-Jul-2002, in my capacity of editor-in-chief of the Yambol newspaper *Tundja*, I filed an access to information request to the National Audit Office (NAO) of the Republic of Bulgaria, registered under No. PRZ -02-0003-01. I sought all available information about the property declarations kept in the Public Register of the National Audit Office, and made by Yordan Ivanov, the appellate prosecutor of the city of Burgas. On 22-Jul-2002 I received an official notification of the NAO Director, asking me to specify my request, so that it conform with Art. 3 of the *Public Disclosure of Property Owned by High Government Officials Act*. Because the PDPOHGOA does not mention a term for specifying a request, I referred to Art. 29 Para. 2 of the Access to Public Information Act; so, I responded to the notification with a letter dated 06-Aug-2002. I specified that the request was made about the property declarations of Mr. Ivanov, kept in the NAO registers in his capacity of a member of the Supreme Judicial Council. However, I did not receive a reply to my letter within the term of one month, which is a requirement of Art. 6 Para. 2 of the *Public Disclosure of Property Owned by High Government Officials Act*.

The lack of a reply of the National Audit Office Director is a deemed refusal and is subject to appeal. Art. 6 Para. 1 of the PDPOHGOA establishes my right - as an editor-in-chief of Tundja newspaper - of access to the information contained in the public register of NAO. The register is **public** and the term „public access“ is used in the law. This is why - in the absence of a provision regulating information disclosure - laws regulating similar matters should be applied, pursuant to Art. 46 Para. 2 of the Statutes Acts. Without doubt, the Access to Public Information Act (APIA) contains the general regulation of access to public information. This law establishes an obligation for public authorities to respond to information requests with a reasoned decision: either to disclose or to withhold information. The same procedure should apply to access to information requests submitted to the National Audit Office. This has obviously been the legislators' will in formulating the purpose of the law; this is also clear from the fact that information requests are a means of exercising an individual right, the fulfillment of which is only made possible after the delivery of a decision for providing access to the requested information.

The right of access government held information is guaranteed by the possibility of judicial review pursuant to Art. 56 in relation to Art. 41 of the Bulgarian Constitution, Art. 6 item 4 and Art. 40 of the APIA. Failure of an authority to respond to an access to information request is considered a deemed refusal, violating the right of access to public information and is thus subject to judicial review (see Ruling on case No. 6393 of 2001 of the Supreme Administrative Court, five-member panel).

The refusal of the National Audit Office Director is a serious breach of the substantive and procedural legal norms:

1. Breach of the procedural law - Art. 15 of the Administrative Procedures Act (APA) and Art. 38 of the APIA

The law obliges the authorities to deliver a reasoned decision when publishing or refusing to publish the requested administrative act (Art.15 Para. 1 of the APA). In this case a decision is clearly lacking. The provision of Art. 38 of APIA also requires the delivery of a written decision, which - if a refusal - should contain legal and factual reasoning. The NAO Director has failed to comply with the legal requirements, which is a serious breach of the procedural norms.

2. Breach of the substantial law

The requested information is public in the sense of Art. 2 Para. 1 of the APIA, because it is related to the public life in the Republic of Bulgaria and - if disclosed - would allow me to form an opinion about the activity of the NAO Director. Besides, access to the requested information is undoubtedly free.

In contrast to the exemptions from the right to information access, stipulated in APIA, the *PDPOHGOA* makes no provision for such cases. This is so, because the purpose of the NAO register - as seen by its title - is to be open to the public. Consequently, the Director of NAO is bound by the principles of the law (and has no discretion) in fulfilling his obligation to provide access to the requested information.

3. Contradiction with the purpose of the law

Although the purpose of the *PDPOHGOA* is not clearly stated, it is obvious from its whole text that it aims at creating openness and transparency of specific information about higher level officials whose decisions affect the whole society. This is intended to serve as a mechanism for public control by informing the citizens when the property of the higher-level officials - i.e. the „public representatives“ - changes. For this reason, the refusal to disclose such information contradicts the purpose of the law.

In view of the above arguments, I request the honorable court to REPEAL the deemed refusal of the NAO Director - and by deciding the case on the matter - to OBLIGE the Director of the National Audit Office to provide me with access to the requested information.

Enclosures:

1. Two copies of the information request
2. Copy of the appeal for the respondent

City of Yambol
18-Sep-2002

Respectfully yours:
(signed)

TO
THE SOFIA CITY COURT

REQUEST

by

Diana Georgieva Boncheva
Editor-in-chief of *Tundja* newspaper,
City of Yambol

Honorable Chief Justice,

Within the law-provided term, I filed an appeal against a deemed refusal of the National Audit Office Director to provide me with access to information contained in their public register. According to information I have, the appeal has been held at the National Audit Office.

I hereby request that you order the NAO to submit the file to your court.

I enclose:

1. Copy of the appeal sent to NAO by registered mail
2. Return receipt

Respectfully yours:
(Diana Boncheva)

DECISION**SOFIA,
15-Jul-2003****IN THE NAME OF THE PEOPLE**

SOFIA CITY COURT, administrative division, panel III B, in an open session on twenty-fifth of June, two-thousand-three, composed of:

Presiding justice: Anna Dimitrova

Panel members: Donka Chakarova, Vladimira Yaneva

in the presence of the court stenographer Daniela Gencheva and the district public prosecutor Naidenov convened to hear administrative case No. 385 for 2003 reported by justice Chakarova and to issue a decision. The court took into consideration the following:

The hearing proceeded per the Administrative Procedure Act, Art. 33 et seq. and pursuant to the Administrative Procedure Act (APA).

Its purpose is to examine an appeal filed by Diana Georgieva Boncheva against a deemed refusal of the National Audit Office Director - failure to respond to an information request within the term, provided by law. The appellant submits arguments for unlawfulness of the tacit refusal: breach of the procedural law - Art. 15 of the APA and Art. 38 of the Access to Public Information Act, breach of the substantive legal norms, and contradiction with the purpose of the law. The appellant asks that her appeal be examined by this court and the refusal of the National Audit Office Director be reversed. The appellant also asks that this court obliges the authority to provide the information in the preferred form - printed material.

The respondent submits that the appeal is inadmissible and requests that the court proceeding be ceased. In case the appeal is examined on the matters, the respondent pleads that the ruling of the court be in compliance with the law.

The prosecutor pronounced the opinion that the appeal is groundless and should be dismissed.

Having familiarized itself with the issues raised by the appeal, the opinion of the prosecutor, and the evidence presented in the case, this court considers the following facts to have been established:

Pursuant to Art. 36 of APA and Art. 5 of the Supreme Administrative Court, the review of the individual administrative acts of the NAO Director is within the jurisprudence of the Sofia City Court.

With an APIA request No. PRZ-02-0003-01 of 04-Jul-2002 Diana Georgieva Boncheva, editor-in-chief of Tundja newspaper, has sought from the „director“ of the National Audit Office all available information about the property declarations kept in the NAO public register, made by Yordan Ivanov, the appellate prosecutor of the city of Burgas between 2000 and 2002. Mr. Boncheva also requested information about any verifications made of the declarations submitted by Yordan Ivanov, and any penalties imposed on Yordan Ivanov for failures to meet deadlines for the submission of declarations pursuant to the Public Disclosure of Property Owned by High Government Officials Act. Mrs. Boncheva has requested that a response would be delivered within the stipulated 14-days period and information is disclosed in printed format. The President of NAO responded with a letter No. PRZ-02-003-01 of 22-Jul-2002 informing the requester that Mr. Yordan Ivanov, the appellate prosecutor of the city of Burgas makes declarations in his capacity of a Supreme Judicial Council member; so the NAO president required that Mrs. Boncheva resubmit her request, formulating it in line with Art. 3 of the Public Disclosure of Property Owned by High Government Officials Act (PDPOHGOA). Information would be disclosed - the NAO president stated - only if the resubmitted request referred to the correct position of Mr. Ivanov and after the NAO publishes their newsletter containing the names of those higher-level officials who fail to make their declarations. No evidence is available, proving the exact date on which the appellant had been notified of the response. The court assumes, having inspected the two identical information requests registered with number PRZ-02-003-02 of 08-Aug-2002 and of 12-Aug-02, that Diana Boncheva has indeed received the letter from the NAO president, dated 22-Jul-2002. In response to the letter of the NAO, Mrs. Boncheva has submitted a clarification request, explaining that - pursuant to the APIA and the PDPOHGOA - she would like to access all available information, regarding the Declarations (form II for 1999 and 2001) made by the appellate prosecutor Yordan Ivanov in his capacity of Supreme Judicial Councilor

and concerning his immovable property; motor and aerial vehicles, and water vessels; any of his funds, debts, and liabilities equivalent to over 5,000 BGN in local or foreign currencies; securities, stakes in different companies, and shares, including those acquired by privatization contracts besides the cases of mass privatization; income exceeding 500 BGN acquired during the previous financial year, besides those acquired as a member of the Supreme Judicial Council; expenses made by or in the benefit of Mr. Yordan Ivanov (with his consent), which have not been covered by him or by the Supreme Judicial Council, including for education, travel abroad, and other payments exceeding the equivalent of 500 BGN. Mrs. Boncheva has repeated her request for information about any verifications made of the declarations submitted by Yordan Ivanov and any penalties imposed on him for failures to meet deadlines for submission of declarations pursuant to the PDPOHGOA. The request filed on 08-Aug-2002 has not been signed, while the one filed on 12-Aug-2002 has been signed by Diana Bancheva. This is why the court accepts the second request as a beginning of the law-provided term for filing an appeal against the tacit refusal of the NAO president.

The fact that Diana Boncheva is the editor-in-chief of Tundja newspaper is proven with a certification letter No. 67 of 27-May-2003 and copies of the front and back pages of the newspaper.

Having considered the above indisputable facts, the court has found the following with regard the lawfulness of the appeal:

According to Art. 41 Para.1, first sentence of the Bulgarian Constitution, everyone shall be entitled to seek, obtain and disseminate information. This provision reproduces Art. 19 item 2 of the International Pact of Civil and Political Rights (promulgated in State Gazette issue 43 of 1976) and Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (promulgated in State Gazette issue 80 of 1992; amended and published in issue 137 of 1998). The essence of this constitutional right lies in the restrictions imposed on the state to limit the free exchange of information in a democratic society. Freedom of information also guaranties everyone the opportunity to freely form (Art. 39 of the Constitution) and express opinions (Art. 40 of the Constitution). The right of freedom of information should include and is guaranteed by an obligation of public institutions to disclose information, but not all information collected and kept by the state. The right to seek and receive

information, guaranteed by Art. 41 of the Bulgarian Constitution only implies an obligation for public authorities to disclose information of public importance. The scope of this obligation is subject to further elaboration in laws. Indeed, the Bulgarian legislation contains a number of legal provisions, regulating both the obligation of public authorities to disclose information, and their right to impose limitations to certain information categories. These legal norms can be found in specific acts: the Access to Public Information Act (SG issue 55 of 2000, amended with issue 1 of 2002, issue 45 of 2002), Protection of Classified Information Act (SG issue 45 of 2002, amended with issue 5 of 2003, issue 31 of 2003), Personal Data Protection Act (SG issue 1 of 2002), Information about Unpaid Debts Act (SG issue 95 of 1997); or in separate provisions in certain acts, regulating other social relations: Art. 9 of the Environmental Protection Act (SG issue 86 of 1991, amended with issue 26 of 2001), Art. 6 of the Public Disclosure of Property Owned by High Government Officials Act (SG issue 38 of 2000, amended with issue 28 of 2002, issue 74 of 2002, issue 8 of 2003), Art. 12 and 12a of the Tax Code (SG issue 103 of 1999 with numerous amendments), Art. 12 Para. 1 item 3 of the Internal State Financial Control Act (SG issue 92 of 2000 with numerous amendments) etc.

The court holds the view that the APIA is the general law, which guarantees freedom of information, proclaimed in Art. 41 of the Bulgarian Constitution. The APIA reflects the will of the legislators and regulates questions like: who are the institutions obliged to disclose information, what is public information, and when **should it** be disclosed. Certain categories of information fall beyond the scope of APIA, either because they cannot be defined as public in the sense of Art. 2, Para. 1 of APIA, or because they are covered by the legitimate exemptions of Art. 2, Art. 3, Art. 7, and Art. 8 of APIA. This court holds that - in line with the principles contained in Art. 120 of the Bulgarian Constitution and the basic norms of the Administrative Procedure Act - every decision of an administrative body pursuant to Art. 3 of APIA is subject to judicial review in all cases when an appellant argues that an authority was obliged to disclose information, but failed to do so without providing any arguments. The questions whether the requested information was public, whether the requestor should have been provided access to it, whether the request had been correctly submitted, and whether the information should be protected by any of the exemptions, should be considered when this

complaint is reviewed on the merits; but not when it is examined for admissibility. In the APIA, a failure to reply within the 14-day-term is not explicitly considered a tacit refusal; but it is against the legal logic to conclude that tacit refusal are not subject to judicial control. This court holds that the general rule of Art. 14 Para. 1 of the APA should be applied and the deemed refusal to provide access to the requested information is subject to judicial review (see also Decision 893 of 2002 of the Supreme Administrative Court).

Having considered the above arguments, this court holds that the appeal submitted by Diana Boncheva against the refusal of the NAO president to deliver a decision on her information request is admissible. The initial application of 04-Jul-2002 lacks some of the characteristics of an information request as required by Art. 25 of APIA. This is why Mrs. Boncheva was asked to clarify it, while at the same time was provided with some information - that Yordan Ivanov has made property declarations in his capacity of a Supreme Judicial Council member. Pursuant to Art. 29 of APIA, Diana Boncheva clarified her request and the term for a delivery of a decision started running from 12-Aug-2002 (the day the signed request was registered).

Reviewed on the merits, the court holds that the appeal is unfounded.

In the interpretation of Art. 10 of the European Convention on Human Rights, the European Court has established that Art. 10 guarantees freedom of information only as far as authorities are not allowed to hinder the free flow information, which other subjects or persons are willing to publish; i.e. the Convention guarantees the negative aspect of freedom of information. The European Court holds that the Convention does not directly imply an obligation for the states to disclose information, be it classified or not. Proclaiming freedom of information does not create an obligation for public authorities to provide access to all government held information; instead, national legislators are authorized to judge which information should be public and to establish legal requirements for its disclosure. Consequently, when there is no explicit obligation for an authority to provide access to information, the general definition of Art. 2 Para. 1 of APIA should be applied in judging whether the authority is indeed obliged to disclose certain information. The National Audit Office Act (NAOA) establishes that the institution should follow the principles of transparency and openness, while its main activity is to perform

external audits of the budget and other public funds. The National Audit Office is a state agency, as defined in Art. 1 Para. 2 of the NAOA (SG issue 109 of 2001, amended with SG issue 45 of 2002), and - pursuant to Art. 15 of NAOA - is represented by its president. The PDPOHGOA has assigned a separate task to the NAO president, which had not been regulated with the NAOA. This is why this court holds, that PDPOHGOA is *lex specialis*, delegating tasks and functions of the NAO president, which are not related to his activities pursuant to Art. 1 Para. 2 of the NAOA. In all activities, delegated by the PDPOHGOA, the NAO president should adhere to the principles of the *lex specialis*, rather than to openness and transparency, which are proclaimed with the NAOA. The purpose of the PDPOHGOA - according to the motives of its sponsors - is to collect information to be used as an anti-corruption mechanism. The legislators have used the term „public register for declaring property, incomes and expenses,“ and although the law regulates the contents of the declarations and lists the public figures who are obliged to make them, it does not describe what information should be kept in the register. The legal concept of a register is contained in many normative acts, like the Civil Procedure Act, the Tax Code, the Pawnbrokers Act (1996), the Regulation for Register Keeping (1951). A register is a database of processed and summarized information kept at a state body, collected from declarations, requests and other documents submitted by different legal entities. Consequently, pursuant to Art. 5 of the PDPOHGOA, the NAO president is responsible for setting up a public register for information submitted by the persons listed in Art. 2 Para. 1 of the law. The law does not set up any requirements for the register content, so it should be defined by the NAO president pursuant to §3 of the transient and conclusive provisions of the PDPOHGOA. Regardless of the specific information held in the register, it should be organized around the principles of Art. 3 of the law and should contain excerpts from the declarations. Additionally, Art. 6 Para. 4 of the PDPOHGOA obliges the NAO president to analyze the collected information and to publish a newsletter, listing all higher-level officials who fail to make their declarations within the law-provided term. The law makes a distinction between the „data contained in the public register“ and the „declarations.“ The legislators have explicitly given a right to access the „data contained in the public register“ to a limited group of people and have highly restricted access to the „declarations“ (only to the officials obliged to make declarations listed in Art. 2, Para. 1 of the law). From here it follows that the lawmakers have distinguished

between three types of information, held by the NAO president: newsletters containing names of those who fail to make declarations, register data, and the „declarations.“ Accordingly, the NAO president provides information following three different access procedures: the newsletter is published in the media, the register data is provided only to entities and persons listed in Art. 6 of the law, and the declarations are accessible only to those who have made them. The provision of the PDPOHGOA does not contradict with the Personal Data Protection Act (PDPA; SG issue 1 of 2002). The newer law, which is also *lex specialis* to the PDPOHGOA, provides for a special procedure for access to personal data held by the data processors, the NAO president undoubtedly being one of them. Pursuant to Art. 2, Para. 2 of the PDPA, personal data are information for an individual, disclosing his physical, psychological, mental, marital, economic, cultural or public identity. It is obvious from the text of Art. 3 of the PDPOHGOA, that the declarations contain personal data, and pursuant to Art. 2, Para. 2 of the PDPA, the provisions of the act also apply in regards to personal data for the individuals related to their participation in civic associations, or in the bodies of management, control and supervision of the corporate bodies, as well as in fulfillment of their functions of state bodies. Therefore, when providing access to personal data of the officials listed in Art. 2 Para. 1 of the PDPOHGOA, the NAO president should comply with the provisions of PDPA including those in Art. 4 Para. 2 of the law, according to which personal data processed by state bodies is administrative information. From there it follows that the principles of the Protection of Classified Information Act should also be applied.

Having considered the applicable legal norms, the court holds that the President of the National Audit Office was not obliged to provide access to the information, sought by Diana Boncheva with an APIA request. Information requested with item 1 of the application is personal data of Yordan Ivanov and is excluded from the scope of the APIA, according to Art. 2 Para. 3 of the law. Information requested with items 2 and 3 of the application is not held by the NAO president, because his functions do not include control and sanctions of the officials listed in Art. 2, Para. 1 of the PDPOHGOA.

The President of the National Audit Office was not obliged to disclose the declarations made by Yordan Ivanov, as requested by Diana Boncheva with an application pursuant to the PDPOHGOA. Direct access to the

requested declaration can be provided only personally to Yordan Ivanov, but not to third parties. In case the NAO President had disclosed the declarations, he would have violated the PDPA by providing access to administrative information to a person, who was unable to submit evidence for the necessity of applying the „need to know“ principle.

After analyzing the provision of Art. 6 of PDPOHGOA, the court holds that there is a requirement for the NAO President to publish a newsletter containing the names of all officials who failed to make declarations. The NAO President should also disclose summarized information - not containing personal data - to bodies authorized by other laws, to institution heads - when declarations have been made by their employees - and to the media editors and managers, when their duties or specific activities require such access. Regarding personal data, the President of the National Audit Office should also comply with Art. 35 at seq. of the PDPA.

Having considered the above arguments, this court deems the appeal unfounded. The President of the National Audit Office has correctly and lawfully refused to disclose information requested by Diana Boncheva. The court is in position to bring forth arguments for the lawfulness of the attacked decision when those arguments are missing (see in this sense Decision of the Supreme Court Plenary Session No. 4 of 1974). The respondent has claimed no court or other costs.

Guided by the above arguments and on the basis of Art. 42 of APA, this court

HEREBY RULES:

that it REJECTS the complaint of Diana Georgieva Boncheva against a tacit refusal of the National Audit Office President to deliver a decision on access to public information request No. PRZ-02-0003-02.

This decision may be appealed before the Supreme Administrative Court, within a period of 14 days from its being issued to the affected parties.

PRESIDING JUDGE:

PANEL MEMBERS:

THROUGH
THE SOFIA CITY COURT,
ADMINISTRATIVE DIVISION

TO
THE SUPREME ADMINISTRATIVE
COURT OF THE REPUBLIC OF BUL-
GARIA

APPEAL

by
Alexander Emilov Kashumov, lawyer
legal council of the appellant on
administrative case No. 385 of 2003
of the Sofia City Court, administrative panel III-B

AGAINST

Decision from 15-Jul-2003 on admin. case No. 385 of 2003
of the Sofia City Court, admin. panel III-B

PURSUANT TO

Art. 218b, Para.1, letter „c“ of the Civil Procedure Code
in relation to Art. 11 of the Supreme Administrative Court Act

Honorable Supreme Justices,

I appeal within the law-provided term versus decision on admin. case 385 of 2003 by the Sofia City Court, which has been delivered in breach of the substantive law.

The appealed decision turned down the appeal of Diana Boncheva against a tacit refusal of the National Audit Office president to disclose information contained in the public register kept pursuant to the Public Disclosure of *Property Owned by High Government Officials Act* (PDPOHGOA). The Sofia City Court has incorrectly interpreted Art. 6 of the act, holding that the NAO president was only obliged to disclose information whether

the high government officials have made their declarations. The court held that the NAO president was not obliged to provide access to data kept in the register. The appellant believes that this is an incorrect application of the substantive law.

The above interpretation not only contradicts with the legal norms, but also with elementary logics. As seen from the grammar analysis of the name of the law, the term „public disclosure“ refers to and defines the noun „property.“ As seen from Art. 1 of the PDPOHGOA, publicity is ensured by the establishment of a public register, containing data about property, incomes and expenditures of the high government officials. Article 3 of the law defines which properties and incomes should be declared and entered into the register. Pursuant to Art. 6, Para. 1 of the PDPOHGOA, „the data contained in the register ... should be accessible by the media through their management bodies.“ Grammar analyses of the text clearly indicates the will of the lawmakers - by using the definite article in „**the** data, contained in the register“ it is clear that **all** data declared by the high government officials should be accessible. Also, the text of the law lacks any provision or even a hint that some of the collected data may not be of public character.

The Sofia City Court (SCC) held that information submitted to the public register is actually personal data in the sense of the Personal Data Protection Act (PDPA). This argument alone cannot lead to the conclusion that these data are exempt from public access. The PDPOHGOA contains a comprehensive list of certain information categories, which should be declared and be included in the public register. In this respect, the PDPOHGOA is a *lex specialis* to the PDPA and should be applied with regard to access to those data categories, contained in the register.

Moreover, it is not even necessary to apply the provision of Art. 46 of the Statute Act, in order to determine the precedence of **PDPOHGOA over PDPA**. The relation between the two acts has been settled by the lawmakers - according to Art. 35, Para. 1 item 2 of the PDPA, when the data source is a public register, no consent of the data subject is required and information has to be disclosed to third parties (*per argumentum a contrario* from item 1 of the same article). Undoubtedly, the register set up by the PDPOHGOA is public, as explicitly established by the law; thus the provision of Art. 35, Para. 1 item 2 of the PDPA is applicable. The relation of

lex specialis (PDPOHGOA) to the *lex generalis* (PDPA) only applies to the procedure and specifically to the term for answering information requests, because Art. 6, Para. 2 of the PDPOHGOA establishes a special term.

Among the arguments of the sponsors, who submitted the bill, was an argument in line with the public interest of the fight against corruption. However, this interest can be fulfilled largely by providing public access to the public register. On the basis of the accessible information citizens have an opportunity to form their opinion about the activities of those in power and may make an informed choice when parliamentary, presidential, or local elections approach. With regard to high government officials who are not directly elected by the people, public access contributes to the scrupulous exercise of their activities, as they would be aware of the public gaze and will have nothing to hide. Transparency not only contributes towards curbing corruption, but rather helps preventing it. This is the main purpose of the law, because the NAO president has no authority to review and verify the information submitted with the declarations, while the **investigation authorities (prosecution)** have the right to access much more reliable information sources, like the databases of the tax authorities, etc.

With regard to the interpretation of the SCC that the NAO president had an obligation to publish a newsletter with names of those officials who failed to make declarations, probably the justices had in mind the provision of Art. 6 Para. 4 of the PDPOHGOA. The analysis of this provision leads us to the conclusion that the contained requirement is different in relation to the requirement pursuant to Art. 6, Para. 2 of the law. Article 2 establishes the right to access information in response to requests, and Art. 4 provides for no requests. While the provision of Art. 2 refers to the *lex specialis* limited group of people who are granted the right of access, Art. 4 obliges the NAO president to disclose to a wider audience the names of those who did (and those who failed to) make their declarations. As seen from the web page of the National Audit Office, the obligation of its president has been fulfilled. The same web site announces the names of the media, which have requested information from the public register; information which was obviously different from that the already published in the newsletter of „unsubmitted“ declarations.

The assumption that access to information from the public register should only be limited to the knowledge about who made declarations, would contradict with the law and would be against its purpose (which is obvious from its very name). The main principle of this law is that the authority to take important decisions affecting the individuals and the society as a whole, goes hand in hand with greater responsibilities, projected in an obligation of a grater transparency of the „private deeds.“

In view of the above arguments, I request that the honorable justices reverse the decision of the Sofia City Court, Administrative Division. I request that the honorable court deliver a new decision instead, reversing the refusal of the NAO president and obliging him to provide access to the requested information.

Respectfully yours :
(legal counsel of the appellant)

TO THE SUPREME ADMINISTRATIVE
COURT, THREE-MEMBER PANEL
On admin. case No. 10889 of 2003

WRITTEN DEFENSE

By
Renny Gavrilova - legal counselor
of the National Audit Office President

On admin. case No. 10889 of 2003 of the SAC

Honorable Supreme Justices,

I request that you leave in force the correct and lawful decision of the Sofia City Court (SCC), delivered on 15-Jul-2003 on admin. case No. 385 of 2003. In delivering its decision, the SCC has correctly interpreted and applied the substantive law. The appeal brings forth arguments for unlawfulness of the first instance court decision. These arguments are groundless and legally incorrect.

The first instance court has correctly interpreted the applicable legal provisions of the *Public Disclosure of Property Owned by High Government Officials Act* (PDPOHGOA) and the Personal Data Protection Act (PDPA). The court has correctly identified the relationship between the *lex specialis* and the *lex generalis*. This is obvious from the correct analysis of Art. 6; the court has not established a requirement for the NAO President to disclose information in response to a request pursuant to the Access to Public Information Act. Indeed such information, collected pursuant to the PDPOHGOA, is personal data in the sense of the PDPA and is excluded from the scope of the Access to Public Information Act.

In view of the above arguments, I ask you to turn down the appeal and to leave in force the decision of the Sofia City Court, Admin. Panel III-B.

Enclosures: copy of this written defence for the appellant.

Respectfully yours

DECISION

No. 3508
Sofia, 20-Apr-2004

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at its session held on the twenty-second day of March two-thousand-four, composed of:

PRESIDING JUDGE: ALEXANDER ELENKOV
PANEL MEMBERS: MILKA PANCHEVA, VANYA ANCHEVA

in the presence of the court stenographer Ani Krastanova and with the participation of the public prosecutor Ognyan Atanassov heard the report of justice ALEXANDER ELENKOV on Administrative Case No. 10889 of 2003.

Proceeding in this case were pursuant to Art. 33 et seq. of the Supreme Administrative Court Act (SACA).

Alexander Kashumov - a lawyer from the Sofia Bar Association - representing Diana Boncheva, editor-in-chief of *Tundja newspaper* from the city of Yambol, has filed an appeal versus a decision of 15-Jul-2003 on admin. case No. 385/2003 delivered by the Sofia City Court, administrative Division, panel III-B.

The appeal is filed within the term provided by Art. 33, Para. 1 of the Supreme Administrative Court Act and is procedurally admissible. Based on the following arguments and reviewed on the merits, the appeal is justified:

With an information request No. PRZ-02-0003-01 of 04-Jul-2002 the appellant in her capacity of an editor-in-chief of *Tundja newspaper* lex specialishas sought „pursuant to the Access to Public Information Act“ to be granted access to „all available information regarding: property declarations for 2000-2002, stored in the public register of the National Audit Office, made by Yordan Ivanov, the appellate prosecutor of the city of Burgas; information about any verifications made of the declarations submitted by Yordan Ivanov;

any penalties imposed on Yordan Ivanov for failures to meet deadlines for the submission of declarations pursuant to the 'Public Declaration of Property Owned by High Government Officials Act'."

The above information request contains one material and two immaterial errors. The material one is that the appellant has requested information about Mr. Yordan Ivanov in his capacity of an appellate prosecutor of the city of Burgas, while appellate prosecutors are not obliged to declare their properties, incomes and expenditures *lex specialis* pursuant to Art. 2 of the *Public Disclosure of Property Owned by High Government Officials Act (PDPOHGOA)*. The immaterial errors are: a) information has been sought solely on the basis of the Access to Public Information Act (APIA), but not on the basis Art. 6 *lex specialis* of PDPOHGOA, and b) PDPOHGOA has been incorrectly referred to as „*Public Declaration of Property Owned by High Government Officials Act*."

With a letter No. PRZ-00-003-01 of 22-Jul-2002, the National Audit Office president has notified the appellant that the appellate prosecutor of Burgas Mr. Yordan Ivanov has submitted declarations to the public register in his capacity of a Supreme Judicial Council member. With the notification letter, the NAO president instructed the appellant to specify and resubmit the request in line with Art. 3 of the PDPOHGOA. With this article, the lawmakers have outlined the information categories, which should be entered into the register.

With an application No. PRZ-02-0003-02 of 12-Aug-2002, titled „Access to public information request“, the appellant followed the instructions of the NAO president and made the following request:

„... pursuant to... Public Disclosure of Property Owned by High Government Officials Act I ask the disclosure of all available information, regarding:

1. Declarations (form II for 1999 and 2001) made by the appellate prosecutor Yordan Ivanov in his capacity of Supreme Judicial Counsel member and concerning:...
2. Information about any verifications made of the declarations submitted by Yordan Ivanov.
3. Any penalties imposed on Yordan Ivanov for failures to meet deadlines for the submission of declarations pursuant to the *Public Disclosure of Property Owned by High Government Officials Act*."

The NAO president has failed to respond to the resubmitted request.

This failure was correctly identified as a tacit refusal by the Sofia City Court in the sense of Art. 14 Para. 1 of the Administrative Procedure Act.

The tacit refusal is a fiction, created by the Administrative Procedure Act (Art. 14), which is intended to provide protection of the public interest from an operative administration, rather than from an inoperative one. The Access to Public Information Act has not foreseen such a fiction. At first sight this might lead to the conclusion that the Bulgarian lawmakers did not find necessary to provide the opportunity of challenging the inactivity of the authorities. Indeed, the three-member panels of the Supreme Administrative Court (fifth and fourth Division respectfully), have come to this conclusion, expressed within Ruling No. 5482 od 10-Jul-2001 on admin. case No. 1763 of 2001 and Ruling No. 6858 of 17-Sep-2001 on admin. case No. 280 of 2001:

a) „The Access to Public Information does not stipulate that the failure to reply within the term of 14 days constitutes a deemed (tacit) refusal, which is subject to appeal. The APIA is a *lex specialis* with regard to the regulation of access to public information; for this reason, the application of the general norms of the Administrative Procedure Act is only acceptable when the matter has not been regulated by the *lex specialis*, and it refers to the general law. In the reviewed case, the *lex specialis* - the Access to Public Information Act - does not refer to the Administrative Procedure Act. Furthermore, the procedure for the delivery, content, and appeals against information refusals has been regulated in detail by Art. 38, 39, 40 and 41 of the APIA. None of these articles provides for an opportunity of a complaint against a tacit refusal.“ (Ruling № 6858).

b) „The special provisions of the APIA do not include a norm, similar to the provision of Art. 14 Para. 1 of the APA, which defines the failure to reply within the law-provided terms as a tacit refusal, subject to an appeal. Where a procedure has been regulated in special provisions, applicability of general provisions is derogated, if contradiction is found between the two normative sets, as in the instant case.“ (Ruling No.5482).

Both rulings, however, have been reversed by five-member panels of the Supreme Administrative Court - with Ruling No. 8645 of 16-Nov-2001 on admin. case No. 6393/2001 and Ruling No. 893 of 04-Feb-2002 on admin. case No. 35 of 2002, respectfully. Since then, the court practice

has been firmly established: the lawmakers have not explicitly defined the fiction of „tacit refusal“ in APIA, because they could not presume that the authorities would fail to deliver a reasoned decision - something legally and morally unacceptable considering the explicit requirement for a response. Nevertheless, practice shows that although unacceptable, such failure to act is a frequent phenomenon and citizens and legal entities should be provided with the effective opportunity of protection.

The idea that tacit refusals to APIA requests are void has been abolished, but the concept that they are inadmissible have been firmly established initially with Decision No. 1795 of 26-Feb-2002 on admin. case No. 7176 of 2001 by SAC, Fifth Division and Decision No. 2764 of 25-Mar-2002 on admin. case No. 1763 of 2001 of SAC, Fifth Division (detailed arguments why tacit refusals on APIA requests are legally unacceptable are set forth in Decision from 02-Aug-2002 on admin. case No. 512 of 2002 by the Sofia City Court, admin. Division III and in Decision No. 2666 of 21-Mar-2003 on admin. case No. 10261 of 2002, with which the Fifth Division of SAC left in force the Decision of the first-instance court). In all of the above cases the court have established that a failure to respond to APIA requests is not equivalent to an explicit refusal, meaning that the applicable provision is contained within Art. 42 Para. 3 of the APA, rather than within Art. 41, Para. 1 of the APIA.

Some three-member panels of the Supreme Administrative Court took a step further and pronounced the attacked tacit refusals void (Decision No. 11218 of 10-Dec-2002 on admin. case No. 6471 of 2002 by SAC Fifth Division; Decision. No. 12234 of 29-Dec-2002 on admin. case No. 7721 of 2002 by SAC, Fifth Division). The view they had adopted was not shared by the five-member panels of SAC, which reversed the decisions of the first-instance panels. With Decision No. 5618 of 06-Jun-2003 on admin. case No. 1553 of 2003 and Decision No. 5188 of 27-May-2003 on admin. case No. 791 of 2003 respectfully, the five-member panels held that tacit refusals could not be pronounced void solely on the basis of Art. 15 Para. 1 of the APA, which requires that administrative acts should be issued in written form. The supreme justices held that the tacit refusal was an informal act by presumption, meaning that the failure to reply in the form required by law was not a necessary condition for proclaiming the tacit refusals void.

The present three-member panel of the Supreme Administrative Court, Fifth Division, holds the same position in this case, as there is no reason to divert from the established court practice. We shall only note that when - in the course of the court proceedings - the authority or its legal counselor adduce detailed arguments why access to the requested information should not be provided, the court may (and in some cases should) apply the rule of Art. 41, Para. 1 of APIA, and should reverse the deemed (tacit) refusal and oblige the authority to provide access to the requested information.

As seen from the facts of the case, the president of the National Audit Office has personally appeared before the Sofia City Court in its hearing on 25-Jun-2003 and claimed that the appeal had been procedurally inadmissible, based on the following arguments:

- a) no refusal had been in place, because he had never delivered a decision to withhold information, but had rather notified the applicant that her request had to comply with the requirements of the law;
- b) APIA defines which information is public;
- c) the application contains requests for information, which he is not obliged to provide;
- d) it is unacceptable to disclose information before the names have been published following the procedures of the special law; while the request had been made before that.

In its ruling, the Sofia City Court has held that the arguments of the respondent are actually on the merits and would be discussed within the court judgement.

With its decision, the Sofia City Court has held, that the appellant had actually requested copies of the declarations made by the appellant prosecutor of Burgas, Yordan Ivanov in his capacity of a Supreme Judicial Council member. The first instance court also held that access to the declarations was unlawful and has therefore rejected the complaint.

The Sofia City Court has not considered the fact that the appellant had actually made three separate requests with her application. The first request has been formulated like: „1. Declarations (form II for 1999 and 2001) made by the appellate prosecutor Yordan Ivanov in his capacity of Supreme Judicial Council member and concerning (followed by listing

of the information categories under Art. 3, Para. 1 and 2 of the PDPOHGOA).“ This request unquestionably has its legal grounds within Art. 6, Para.1, of the PDPOHGOA. The lawmakers have established the right to access information contained in the public register to the bodies authorized by other laws, to the authorities, who employ officials listed in Art. 2, Para. 1 of the law, and to the managers and editors-in-chief of the media. There is an obligation for the NAO president, which corresponds to this right and is established by the provision of Art. 6, Para. 2 of the PDPOHGOA. The obliged authority has not delivered a decision, and has thus not stated his motives why he believed the appellant (and the newspaper, which she represented as an editor-in-chief) had no right to access the requested information. The arguments of the respondent for inadmissibility of the complaint are mutually exclusive (e.g. the argument that he had never withheld the requested information contradicts with the other arguments for inadmissibility) and are ungrounded. The Sofia City Court has yet again breached the law by bringing forth arguments supporting the lawfulness of the tacit refusal. The first instance court held that the appellant had requested access to the declarations made by Yordan Ivanov, member of the Supreme Judicial Council, rather than information contained in the public register. This conclusion was incorrect, because it contradicts with the text of the request, quoted twice above. This panel of the Supreme Administrative Court holds that the information request was completely clear and was not about declarations, but about information described in detail within the application. The interpretation of Art. 6 of the PDPOHGOA made by the first instance court is also incorrect. The Sofia City Court held that the NAO president was required to publish a newsletter with the names of the officials who failed to make declarations and to disclose only summarized information, which was not personal data. The provision of Art. 6, Para. 1 of the PDPOHGOA starts with: „Access to information from the public register is granted to...“ Article 6 is entitled „Public access to the declarations,“ and Art. 2 goes: „Requests for access to information from the public register are submitted in writing to the NAO president, *who is obliged to disclose information* within one month after receiving the request.“ The provision is straightforward and needs no interpretation. Furthermore, it is a *lex specialis* with regard to the Personal Data Protection Act, whose provisions have probably been interpreted by the Sofia City Court. The purpose of the Public Disclosure of Property Owned by Higher Government Officials Act, which was expressed by the lawmakers is ob-

vious from its very title - the property owned by higher level officials should always be public. This is an anti-corruption measure, which cannot be derogated with a reference to the Personal Data Protection Act (PDPA). Actually, the latter law also authorizes personal data controllers to disclose information to third parties without the consent of the data subjects, when information is contained in a public register (see Art. 35, Para. 1, item 2 of the PDPA). It is yet another issue that with the *Public Disclosure of Property Owned by Higher Government Officials Act*, the lawmakers did not provide guarantees against abusing the right of access to information. This is a problem, which needs to be solved with a new law.

The application submitted to the NAO president contains two further requests: for disclosure of information about any verifications made of the declarations submitted by Yordan Ivanov and any penalties imposed on Yordan Ivanov for failures to meet deadlines for the submission of declarations pursuant to the Public Disclosure of Property Owned by High Government Officials Act. According to the appellant, these requests are pursuant to the Access to Public Information Act. With his decision, the Sofia City Court has found the appeal unlawful, i.e. has held that the tacit refusal had been delivered in compliance with the law. The first instance court, however, has not adduced any arguments in support of its decision; and therefore its judgement is incorrect in the sense of Art. 218B, Para. 1, letter „c“ of the Civil Procedure Code.

In view of the above arguments, this panel of the Supreme Administrative Court holds that the decision of the Sofia City Court is unlawful because it has been delivered in serious breach of the subjective law and the procedural rules. Therefore, the judgement of the first instance court should be repealed and a new one should be delivered, reversing the tacit refusal of the NAO president and pronouncing it as inadmissible (legally intolerable). The arguments for procedural inadmissibility of the appeal, adduced by the NAO president before the Sofia City Court, cannot be adopted and analyzed as grounds to refuse access to information requested by the appellant. Therefore, the provision of Art. 41, Para. 1 of APIA is not applicable, so pursuant to Art. 42, Para. 3 of APA in relation to Art. 11 of the SACA the court file should be send back to the NAO president, who should deliver a decision on the merits, abiding to the interpretation made by this court of the *lex specialis* - the Public Disclo-

sure of Property Owned by High Government Officials Act - and the lex generalis - the Access to Public Information Act .

Led by the above arguments, the Supreme Administrative Court, Fifth Division,

HAS DECIDED:

Reverses the decision of the Sofia City Court, III-B panel delivered on 15-Jul-2003 on admin. case No 385 of 2003 and instead:

Repeals the tacit refusal of the National Audit Office president on information request No. PRZ-02-0003-01 of 04-Jul-2002 clarified with information request No. PRZ-02-0003-02 of 12-Aug-2002 filed by the editor-in-chief of Tundja newspaper Diana Georgieva Boncheva.

Sends the court file No.10889 of 2003 to the NAO president, who should deliver a decision on the matter, abiding to the interpretations of the law and its implementation, made by this court.

A copy of this judgement should be sent to the Sofia City Court to be included in its registry and for future reference.

This judgement is not subject to appeal.

True to the original,

PRESIDING JUDGE: (signed) Alexander Elenkov

PANEL MEMBERS: (signed) Milka Pancheva, (signed) Vanya Ancheva

CASE

Todor Yanakiev

vs.

*Director of the
„Prison Governance“
Department of
the Ministry of Justice*



**Todor Yanakiev vs.
Director of the „Prison Governance“ Department
of the Ministry of Justice**

*1st Instance Court - Administrative Case No. 3167/03,
Sofia City Court, Administrative Division, Panel 3-g*

*2nd Instance Court- Administrative Case No. 3378/04,
Supreme Administrative Court, 5th Division*

*second-time 1st Instance Court - Case No. 3997/2004,
Administrative, Sofia City Court Administrative Division, Panel 3-e*

In the beginning of 2002, the journalist Todor Yanakiev requested from the Director of the Prison Governance Department of the Ministry of Justice (PGDMJ) access to the personal prison record of the deceased dissident Ilia Minev. The journalist wished to examine the records in order to publish a monograph of Ilia Minev. Access was granted and the requestor had the opportunity to examine in-house the file of the dissident several times.

In 2003, Todor Yanakiev requested to receive copies of the records of the two personal files, but it turned out that this was impossible, because the initial request for access had been lost by the PGDMJ. The journalist had to file another request, which was turned down with a by the Director of PGDMJ. The refusal was not grounded in any law provisions, but it indicated that the Director was reluctant to disclose information, which could harm the interests of a third party.

Mr. Yanakiev challenged the refusal before the Sofia City Court (SCC). In his complaint, the journalist argued that the refusal he had received was not under the provisions of the Access to Public Information Act (APIA). He had been actually given access to the requested information, though not in the requested form-since he was refused to copy the documents. Under the APIA, however, the obliged bodies should grant access to information in the indicated by the requestor form. Furthermore, the authorities could refuse information according to an exhaustive list of legal grounds.

The SCC's judgment as of January 23, 2004 held that the demanded records were public information under the provisions of the APIA. The court, however, rejected the complaint of Mr. Yanakiev. The judges assumed that the requested prison files contained information that could harm third party's interests by uncontrollable publicity of facts related to one's personal life and official activities. According to the court panel, such an assumption was unacceptable in regards to the APIA provision that the right of access to information could not override the protection of other rights and reputation of third parties.

On December 2, 2004, the Supreme Administrative Court (SAC) rejected the decision of the lower instance court and referred the case file for reconsideration by another panel of the Sofia City Court. The SCC's argument regarding the protection of a third party's interests was regarded unconvincing. The higher instance court pointed out that in its reconsideration the first instance court should define the legal status of the prison file and should also inquire why the Director of the PGDMJ had not submitted the files to the National Archive as stipulated under the National Archive Act since the documents had already fallen under the scope of the law.

**Ministry of Justice
Prison Governance Department**

Registry No. 4400
Sofia

To
Mr. TODOR YANAKIEV

DEAR MR. YANAKIEV,

In response to your persistent application containing a request for an uncontrollable access and dissemination of the archival prison files of the dissident Ilia Stoyanov Minev, we notify you of the following:

Every journalist is required to follow in all his/ her actions the provisions of the Bulgarian Constitution, according to which the right to information access is not absolute and is subject to exceptions in some explicitly established cases:

- maintenance of the public order and crime prevention (Art. 39, Para. 2 and Art. 40, Para.2);
- protection of public health and morality (Art. 40, Para. 2 and Art. 41, Para. 1);
- protection of the reputation and right of other citizens (Art. 39, Para. 2, Art. 40, Para. 2, and Art. 41, Para. 1 and 2);
- protection of secrets (Art. 41, Para. 2) ,etc.

According to the rules of journalism ethics (adopted on the 10th Congress of the Union of Bulgarian Journalists), every journalist should: follow the established factual rules in the field; not violate the right of private information; refrain from using unfair means for collecting information; refrain from acting in a harmful way for his/ her informers; protect his/her information sources; not take advantage of the honesty or sufferings of others; his/ her articles should not disclose the identity of crime victims.

Considering the fact that prison files of Ilia Minev have already been provided to you for review and for taking notes, we believe that you have fulfilled your purpose of „writing a monograph.“ The disclosure of photocopies, however, will allow for their free duplication and public dissemination. This raises serious and justified concerns that the documents might be used for mercenary purposes, prosecution or retribution. In these cases, it is necessary to assess what is the „interest“ of the journalist of receiving these documents, and access to the requested information should be disclosed in a scope and manner, such that information concerning third parties should be protected, except when they have expressed their consent in writing before a lawyer/notary person.

Obviously, you cannot distinguish between „review“ of an official document and its free and uncontrollable usage, which would make useless the document handling rules and procedures at the PGD. The Prison Governance Department is not an agency which provides access to information of any character to the media. It is an institution, authorized by the law to govern the prisons in Bulgaria.

Fourteen years after the „collapse of the communist regime“ - whose victim you are as well - a gifted sports journalist and poet like you should not waste its talent and abuse the memory of a dignified person such as Ilia Minev, while at the same time inflicting psychological stress both with officials who have strictly followed the law, and with former prisoners and their descendants. The Prison Governance Department is legally and morally responsible before the Bulgarian civil society and in particular before the individuals in question and we cannot disclose their personal files.

We are aware that nothing and no one has been forgotten, but the wounds of our society should heal; but they will not heal if the rights of known or unknown, good or bad citizens and law-abiding officials are dishonored. If their rights are violated, they can seek remedy in court not only from the PGD, but also from you personally.

We are convinced that the talented, experienced and sensible literary man that you are, will make use of all the information already disclosed and will concentrate his efforts in creating a biography, rather than a „monograph“ (collection of archival documents). We sincerely hope that

you will use the opportunity and fill-up the white pages of the contemporary history of Bulgaria.

In view of all of the above stated, your request for copies of the prison files of the dissident Minev cannot be fulfilled.

Director of the PGD:
(Petar Vassilev)

THROUGH
THE DIRECTOR OF THE PRISON
GOVERNANCE DEPARTMENT
TO
THE SOFIA CITY COURT

APPEAL

by

Todor Alexandrov Yanakiev
city of Sofia

AGAINST

Refusal to disclose government held information by the Director of the Prison Governance Department with register No. 4400 of 17-Jun-2003

PURSUANT TO

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

Honorable justices,

With an application No. G - 46 of 31-Jan-2002 submitted to the Director of the Prison Governance Department (PGD), I requested access to the the prison dossiers records of the dissident Ilia Stoyanov Minev. The goal of my request was to use the received documents in my investigation and write a monograph for Ilia Minev.

As a result of my application, I received a permission to review the two record files of Ilia Minev and in the first half of 2002 ,I had the opportunity to personally acquaint myself with the original documents.

With an application filed on 23-May-2003 submitted to the PGD and registered under No. G-128 I requested printed copies of the two record files. With a letter No. 4400 of 17-Jun-2003, the Director of the PGD refused to provide me with the requested photocopies. The letter of the

PGD director constitutes a refusal to provide access to public information. This refusal is unlawful, in support of which I have the following arguments:

The requested information - the prison records of the dissident Ilia Minev - is public in the sense of the APIA. The PGD, which is an authority obliged under Art. 3 Para. 1 of the APIA has provided me with access to it in the form of a review, a fact proving that the requested information does not fall within the scope of the exemptions pursuant to the APIA. As a result to the access provided, I had the opportunity to review and get acquainted with the prison records of Ilia Minev.

Consequently, the decision of the PGD director constitutes a refusal to comply with the preferred form of access, because I had requested photocopies of the documents. Pursuant to Art. 27 Para. 1 of the APIA, the authorities are obliged to comply with the preferred form of access when providing public information. The hypotheses, in which the authorities may refuse to comply with the preferred form of access, are listed comprehensively in the provision of Art. 27 of APIA. None of these hypotheses are in place here, nor have they been and none of them are indicated in the refusal.

In view of the above stated, I REQUEST that you repeal refusal No. 4400 of 17-Jun-2003 by the PGD director and oblige him to provide me with access to the requested public information in the form of photocopies.

Enclosures:

1. Application to the PGD registered under No. G-128 of 23-May-2003.
2. Decision No. 4400 of 17-Jun-2003 delivered by the PGD director to withhold the requested public information.
3. Copy of the complaint for the respondent.

01-Jul-2003
Sofia

Respectfully:
(Todor Yanakiev)

DECISION

**Sofia,
23-Jan-2004**

IN THE NAME OF THE PEOPLE

Sofia City Court, administrative division, panel III-j, in open session on twenty-seventh of November, two-thousand-three, composed of:

PRESIDING JUDGE: ANELIA MARKOVA

PANEL MEMBERS: MILENA ZLATKOVA, PETAR STOICEV

in the presence of the court stenographer J. Takvor and the district attorney Jelev convened to hear administrative court No. 3167 for 2003 reported by justice Stoicev and to issue a decision took into consideration the following:

The hearing proceeded pursuant to the Administrative Procedure Act (APA) Art. 33-45 and in relation with Art. 40 of th APIA.

Its purpose is to examine an appeal filed by Todor Alexandrov Yanakiev against an information refusal contained within a letter No. 4400 of 17-Jun-03 of the Director of the Prison Governance Department, an institution subordinate to the Ministry of Justice.

The appellant submits that the refusal of the authority is unlawful. He holds that the requested information - prison files of the dissident Ilia Minev is public, because the Prison Governance Department (PGD) - an authority within the scope of Art. 3 Para. 1 of APIA - had already provided access to the information for review. Therefore, the appellant holds that the requested information does not fall within the scope of any exemptions from public access. Mr. Yanakiev submits that - after reviewing the prison files - he had requested access to them in a printed format from the PGD. The appellant claims that the refusal is unlawful because - pursuant to Art. 27, Para. 1 of APIA - the authority is required to comply with the form of access preferred by the requester. In view of the above arguments the appellant requests that this court reverse the refusal of the

authority and oblige him to provide access to the requested information in the form of printed documents (photocopies).

The respondent challenges the appeal.

The district attorney deems the appeal unfounded.

THE SOFIA CITY COURT, after considering the arguments of the parties and the evidence presented considers the following facts to be indisputable:

Todor Alexandrov Yanakiev has submitted a letter to the Director of the Prison Governance Directorate, registered with No. G-128 of 23-May-2003 requesting access to the prison files of Ilia Stoyanov Minev (Vakarelski) in the form of printed documents (photocopies). The appellant indicated that this was the only possible way for him to form a complete, thorough, accurate, and unprejudiced opinion about the information contained within the files, which he needed in order to complete his study of the life of Ilia Minev. The letter indicates that Mr. Yanakiev had previously received a permission to review the complete prison files (following his application No. G-46 of 31-Jan-2002), which has convinced him that information contained within them is of crucial importance for his research. Therefore, the requester needed photocopies of the complete prison files in order to complete his work on the monograph, as sources of information used for reference at any given moment. In his letter, Mr. Yanakiev specified the facts and circumstances to be included in the monograph of Ilia Minev and in particular those concerning his life in prison.

With a letter No. 4400 of 17-Jun-2003 sent by the director of the Prison Governance Directorate to Todor Alexandrov Yanakiev, the requestor has been notified that his application would not be honored. The authority brought forth arguments that a chance for review of the prison files of Minev had already been provided to Mr. Yanakiev; also, the PGD has given him an opportunity to take notes, which should have adequately met his need to "write a monograph". The disclosure of photocopies, however, would allow for their free duplication and public dissemination. This raised serious and justified concerns that the documents could

be used for mercenary purposes, prosecution or retribution. Access to the requested information should be disclosed in a scope and manner, such that information concerning third parties would be protected, except when the third parties have expressed their consent in writing in the presence of a lawyer/notary person.

Having considered the above indisputable facts, the court has found the following with regard to the lawfulness of the appeal:

No evidence has been submitted, showing when the letter No. 4400 of 17-Jun-2003 of the PGD director has been received by the appellant. Therefore, this court accepts that the appeal, subject to the current court proceedings, has been filed within the legally stipulated term and is procedurally admissible.

The information requested by the appellant is „public information“ pursuant to the Access to Public Information Act, as far as it relates to the social life in the Republic of Bulgaria, and gives the opportunity to the citizens to form their own opinion on the activities of the persons having obligations under this act. The request refers to administrative information, concerning the work of a public authority - the Prison Governance Directorate, subordinate to the Ministry of Justice. At the same time this is information, which reflects on a long period of the life of Ilia Minev, a public figure, repressed by the communist regime in Bulgaria before 1989, suggesting that the requested information concerns the public life in Bulgaria. In view of these arguments, this court holds that the request for access to the prison files of Ilia Minev should be granted pursuant to Art. 4, Para. 1; Art. 20, Para. 1 and Art. 24 - 27 of the APIA. The public authority has accordingly provided information access - an opportunity for review of the prison files.

At the same time, this court finds that the request of the appellant for photocopies of the prison files is not founded. The documents in question contain facts and evidence, whose free and uncontrollable dissemination among a wide range of people threatens to violate the rights of third parties - by publishing facts related to their private life or official functions. This is intolerable in view of the provision of Art. 5 of APIA, which stipulates that the right to information access cannot be exercised against the reputation and rights of others. The Bulgarian Constitution

also explicitly stipulates that the right of everyone to seek, receive and impart information cannot be exercised to the detriment of the rights and reputation of others. Therefore, the constitutional right of information access can be restricted in order to protect other constitutional interests, while necessary and sufficient recognition should be given to the protection of the competing interest (in this sense, see Ruling № 7 of 04-Jun-1996 of the Constitutional Court on case № 1 of 1996). In this case, the court should refer to Art. 32 of the Bulgarian Constitution, which establishes that everyone shall be entitled to protection against any illegal interference in his private or family affairs and against encroachments on his honour, dignity and reputation.

The court holds that the disclosure of photocopies of the requested documents would allow the requester to carry them out of the Prison Governance Department archives. In such a case the appellant could not effectively protect the documents from unscrupulous third parties (who could also gain access to them against his will). There is a danger that others may misuse the documents and disclose information related to the personal life or official functions of other prisoners or prison authorities. Indeed, Art. 27 of the APIA requires the public authorities to comply with the form of access preferred by requesters. At the same time, this requirement might be avoided when complying with the preferred form of access might create opportunities for unlawful processing of the information. Therefore, the public authority has rightfully and lawfully determined the only suitable form of access - review of the documents in a place where they can be duly preserved and protected against uncontrollable and unlawful publishing. Considering the fact that the appellant has been granted with the opportunity to take notes when reviewing the documents, this court holds that his legal interest has been realized to a degree not violating the rights and interests of other members of the society.

In view of the above arguments, this court finds that the attacked decision is lawful and should remain in force.

The respondent has not claimed any legal costs. Led by all of the above, the Sofia City Court

HAS RULED:

Turns down the appeal of Todor Alexandrov Yanakiev against a refusal of the Director of the Prison Governance Directorate - an authority subordinate to the Ministry of Justice - to provide access to public information, contained within letter № 4400 of 17-Jun-2003.

This decision may be appealed before the Supreme Administrative Court, within a period of 14 days from its being issued to the affected parties.

PRESIDING JUDGE:

PANEL MEMBERS:

THROUGH

the Sofia City Court
Administrative division, panel III-J

To

the Supreme Administrative Court

CASSATION APPEAL

By

Todor Alexandrov Yanakiev

Sofia

appellant on administrative case 3167 of 2003,
Sofia City Court, Administrative division, panel III-J

Against:

Decision of the Sofia City Court,
delivered on 23-Jan-2004 on admin. case 3167 of 2003

Honorable Supreme Justices,

The decision of the Sofia City Court delivered on 23-Jan-2004 on administrative case No. 3167 of 2003 is unlawful and ungrounded.

The following arguments support the abolishment of the attacked decision:

1. The decision of the Sofia City Court has been delivered **in breach** of Art. 27, Para.1 of the APIA. The first instance court has **incorrectly** reasoned that disclosure of photocopied prison files of the dissident Ilia Minev would potentially harm the interests of third parties, because facts related to their private life or official functions could be made public. The prison files of the dissident and political figure Ilia Minev are public information, something proven by the fact that they have been made available for review, as already established by the first-instance court decision. In this view, all the prerequisites for the application of Art. 31, Para.5 of the

APIA and Art. 35, Para. 1, item 2 of the PDPA are in place, with regard to information about third parties contained in the personal prison files of Ilia Minev.

The requested photocopies concern only the life and dissident activities of Ilia Minev - they are not related in any way to the private life or reputation of others. Neither the law, nor the society can presume a collective reprehension of certain groups of people - like, for example, the Prison Governance Directorate officials. The request of the photocopies does not aim at reprehending certain activities of certain groups of people - the Prison Governance Directorate officials - nor is it directed towards the infringement of their reputation and dignity. It is rather an attempt to make a comprehensive research of the life of Ilia Minev, a well-known dissident, opposing the communist regime before 1989. Everyone who misuses public information and violates the constitutional rights of others bears responsibility under the law. The argument that the requested information might possibly be misused is a **flimsy one**. It is obvious from the evidence submitted to the court that the PGD has previously provided me with the opportunity to review all documents within the prison files of Ilia Minev. I have used the opportunity to review the original documents and to take notes on numerous occasions. The decision to provide full access to the prison files is a **confirmation** that the prison files do not contain information about third parties, which - if made public - would harm their rights or their reputation. Had this actually been the case, the PGD would have followed the procedures of Art. 31, Para. 1-4 of the APIA. On the other hand, the liability in cases of insult and defamation is a guarantee for the protection of the dignity and reputation of others. The liability is established in Art. 146, 147 and 148 of the Penal Code and corresponds to the Constitutional provisions and to the two international treaties, which require the state to protect the dignity of its citizens. Furthermore, the argument of the respondent contradicts with Art. 39-41 of the Constitution and is not in line with Art. 10 of the European Convention on Human Rights. Articles 39-41 of the Constitution and Art. 10 of the Convention proclaim the right of everyone to freely express one's opinion and to seek, receive and impart information. The scope of this right includes the freedom of everyone to uphold one's opinions and to receive and distribute opinions, ideas, and other information by all means. This is one of the basic human rights, fundamental to democratic processes and one of the corner stones of a democratic

society. The Constitutional court of Bulgaria has underlined the significance of this right with Ruling No. 7 of 4-Jun-1996 on Constitutional court case No. 1 of 1996.

2. Ruling No. 7 of 4-Jun-1996 by the Constitutional court has been **incorrectly** interpreted and applied by the first-instance court. In this case, the provision of Art. 27, Para. 1, item 3 of the APIA cannot be applied. There is indeed a possibility to misuse information contained within the prison files of Ilia Minev when obtaining a photocopy - after making publicly available facts about third parties. But this possibility has not been lesser after reviewing the prison files and taking notes for an unlimited amount of time (and I had been given the opportunity to personally review and read all original documents). In this sense, the decision of the first-instance court to withhold access to the prison files of Ilia Minev is **badly grounded** and access should be provided for the purpose of writing a monograph of the dissident. Therefore, the Supreme Court has grounds for cassation of the SCC decision pursuant to Art. 12, item 5 of the SACA, because of a violation of the **purpose of the law**. Access should be provided in the form of photocopies, as **explicitly stipulated by Art. 26, Para. 1, item 3 of the APIA**.

With the attacked decision the Sofia City Court **has violated my right**, guaranteed by the Access to Public Information Act, which would allow me to research the dissident activities of Ilia Minev, a well-recognized public figure and a human rights activist during the totalitarian regime.

The right of everyone to receive information is a fundamental right, proclaimed with Art. 41, Para.1, sentence 1 of the Bulgarian Constitution. A number of international treaties signed by Bulgaria establish the protection of the right to government held information. Some of the fundamental international legal documents in this respect are: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and Resolution No 1096 of the Council of Europe.

3. The Sofia City Court has reviewed my appeal without **reviewing the prison files** of Ilia Minev; therefore, the conclusions and arguments of the court are based entirely on the arguments contained within the refusal of the Director of the Prison Governance Directorate, subordinate

to the Ministry of Justice. In this respect, I believe that, pursuant to Art. 38 of the SACA, the Supreme Court **should require** the Prison Governance Directorate to **submit the prison files for court inspection**.

Honorable Supreme Justices,

I hereby request that you **reverse** the attacked decision of the Sofia City Court delivered on administrative case No. 3167 of 2003 and instead deliver a new decision, **repealing the refusal** of the Prison Governance Directorate. I request that you **oblige** the authority **to disclose** photocopies of the requested prison files.

I hereby request that the Supreme Court awards me the court costs.

Sofia,
20-Feb-2004

Respectfully:
(Todor Yanakiev)

DECISION**Nº 10058**
Sofia, 02-Dec-2004**IN THE NAME OF THE PEOPLE**

The Supreme Administrative Court - Fifth Division, in a session held on the twenty-seventh of September, two-thousand-four in a panel composed of:

PRESIDING JUSTICE: ALEXANDER ELENKOV

PANEL MEMBERS: VANYA ANCHEVA, YULIA KOVACHEVA

in the presence of court stenographer Iliana Ivanova and with the participation of public prosecutor Maria Begumova, heard the report of Presiding Justice ALEXANDER ELENKOV on Admin. case No. 3378 for 2004.

Proceedings in this case are pursuant to Art. 33 et. seq. of the Supreme Administrative Court Act (SACA), following a cassation appeal filed by Todor Alexandrov Yanakiev against Decision No. 359 delivered on 23-Jan-2004 by the Sofia City Court, administrative division, panel III-J on administrative case No. 3167 from 2003.

The cassation appeal has been filed within the time limits prescribed by Art. 33 Para. 1 of the SACA and is procedurally admissible; reviewed on the merits, it is well grounded.

From the submitted evidence, the court clearly establishes that, while doing a research of the life of Ilia Stoyanov Minev, the appellant has filed an application with register No. G-46 of 31-Jan-2002 to the Director of the Prison Governance Directorate - an authority subordinate to the Ministry of Justice. The appellant has requested and was subsequently granted an opportunity to review the complete prison files of Ilia Minev. With an application No. G-128 submitted on 23-May-2003, the appellant has requested photocopies of all documents contained in the prison files, but the Director of the PGD turned down the request with a letter

No. 4400. The main argument of the refusal was that the disclosure of photocopies would „allow for their free duplication and public dissemination. This would raise serious and justified concerns that the documents could be used for mercenary purposes, prosecution or retribution.“ Therefore, the PGD director held that „it is necessary to assess what is the „interest“ of the journalist of receiving these documents, and access to the requested information should be disclosed in a scope and manner, such that information concerning third parties should be protected, except when they have expressed their consent in writing before a lawyer/notary person.“ The refusal also mentions that „The Prison Governance Department is not an agency, which provides access to information of any character to the media. It is an institution, authorized by the law to govern the prisons in Bulgaria.“

The appellant has challenged the refusal before the Sofia City Court, arguing that it was delivered in breach of the substantive law. The main argument of the appeal is that all information contained within the prison files of Ilia Minev is public in the sense of the Access to Public Information Act (APIA) - a fact proven by the opportunity, provided to him by the Prison Governance Directorate to review all documents and to freely take notes.

The legal counselor of the Prison Governance Directorate has submitted to the court written remarks, challenging the appeal on admissibility. Alternatively, should this court decide that the appeal is admissible, the respondent requests that it should be turned down as unfounded.

The first argument of the respondent, expressed in the written remarks, is that the prison files are not public information in the sense of Art. 2 of the APIA. The legal counselor of the Prison Governance Directorate holds that „...the only authorities, obliged to provide access to information pursuant to the APIA, are those whose activities are of public interest and regulated by public law. The Prison Governance Directorate is not required to disclose anyone's prison files, because they do not contain public information... (the dossiers) are neither normative acts... nor administrative information, collected and kept in relation to official information.“

The respondent also argues that the appellant has no legal interest in receiving photocopies of the requested documents, because he had al-

ready been given an opportunity to review and take notes on all documents related to the life of Ilia Minev in prison, which had been sufficient for the purposes of his research. The respondent also held that pursuant to APIA it was only possible to request information in the sense of *facts and knowledge about persons and events related to public life*, rather than access to documents. A related argument of the PGD was that "information contained within the prison files does not relate to public life in Bulgaria and cannot help the requester form an opinion about the work of the Prison Governance Directorate."

The respondent also adduces arguments for unlawfulness of the appeal on the merits. The PGD argues that the right to access government held information is not absolute, as Art. 5 of APIA enumerates the interests, which need to be protected by limiting access to public information: national security, public order, the rights and reputation of others, public health and morality. According to the European Court (probably the respondent had in mind the European Court of Human Rights and its interpretation of part II of the Convention for the Protection of Human Rights and Fundamental Freedoms), *public order is „a priority within a specific social group, in which disorder can affect the order within the whole society.“* The respondent held that not only the nation as a whole, but a smaller society like a group of prisoners could form such a society. Part of preserving the public order was the observance of human rights, according to the position, expressed in the written remarks. The rights of individuals and the respect for their dignity are fundamental constitutional principles and the right to information access could be restricted in all cases when it is necessary to protect the privacy, dignity or reputation of others.

The ruling of the Sofia City Court has turned down the appeal of the requestor. In order to reach this conclusion, the first-instance court has established the following:

a) The information requested by the appellant is „public information“ pursuant to the Access to Public Information Act, as far as it relates to the social life in the Republic of Bulgaria, and gives the opportunity to the citizens to form their own opinion on the activities of the persons having obligations under this act. The request refers to administrative information, concerning the work of a public authority - the Prison Governance

Directorate, subordinate to the Ministry of Justice. At the same time, this is information, which reflects on a long period of the life of Ilia Minev, a public figure, repressed by the communist regime in Bulgaria before 1989, suggesting that the requested information concerns the public life in Bulgaria;

b) The request for access to the prison files of Ilia Minev should be granted pursuant to Art. 4, Para. 1; Art. 20, Para. 1 and Art. 24 - 27 of the APIA. The public authority has accordingly provided information access, as an opportunity for review of the prison files;

c) the request of the appellant for photocopies of the prison files is not founded. The documents in question contain facts and evidence, whose free and uncontrollable dissemination among a wide range of people threatens to violate the rights of third parties - by publishing facts related to their private life or official functions. This is intolerable in view of the provision of Art. 5 of APIA, stipulating that the right to information access cannot be exercised against the reputation and rights of others;

d) Art. 27 of the APIA requires the public authorities to comply with the form of access preferred by requesters. At the same time, this requirement might be avoided when complying with the preferred form of access might create opportunities for unlawful processing of the information. The first-instance court held that the disclosure of photocopies of the requested documents would allow the requester to carry them out of the Prison Governance Department archives. In such a case, the appellant could not effectively protect the documents from unscrupulous third parties (who could also gain access to them against his will). There was a danger that others might misuse the documents and disclose information related to the personal life or official functions of other prisoners or prison authorities.

The Ruling of the Sofia City Court, supported by the above arguments, is incorrect - it contradicts with Art. 31, Para. 2 and Art. 4 of the APIA and has been delivered in substantial breach of the provision of Art. 41 Para. 3 of the Administrative Procedure Act.

In cases when the requested information concerns a third person, whose consent is a prerequisite for disclosure, the authority is obliged to ask for a written consent of the third party (see Art. 31, Para. 2 of the APIA).

The Director of the Prison Governance Directorate has not asked for the consent of the third party. The first-instance court had not considered the question, whether this failure to comply with the law was sufficient to reverse the attacked refusal of the PGD.

In the absence of consent by the third party or in case of explicit refusal by the third party to give its consent, the authority may disclose the requested public information in a scope and in a manner so as not to disclose the information concerning the third party (Art. 31, Para. 4 of the APIA). The provision of Art. 37 is in the same aspect: access to information can be restricted when it might affect the interest of third parties, who have not given their explicit written consent for disclosure (Art. 37, Para. 1, item 2 of the APIA), but in those cases access might be provided to the non-restricted parts of the requested information (Art. 37, Para. 2 of the APIA). With the above legal provisions the lawmakers have given the discretion to public authorities to decide whether partial access could be provided, or information related to third parties should be withheld. Such decisions, however, are not excluded from judicial control; just on the contrary, the discretion of the authority should be reviewed pursuant to Art. 41 Para. 3 of the Administrative Procedure Act in an attempt to answer the question whether it had been delivered in line with the purpose of the law. From the existing evidence it is unclear to this court how the requester can disturb the public order after receiving photocopies of the requested documents. Therefore, the Director of the Prison Governance Directorate was obliged to explain why he thought partial access to the requested information should not have been provided in the preferred form (photocopies of the original documents).

In a successive review of the case, the court should establish clearly the legal status of the prison files. Specifically, the court should request an explanation from the Director of the Prison Governance Directorate why the prison files had not been transferred to the National Archives following the procedures regulated by the National Archival Act. After thoroughly consulting with the Bulgarian legislation, this court does not find legal arguments why an authority can hold back documents of possible historical significance, which are owned by the state (while in principle state property should be used in a public interest). In view of everything

stated above, the argument that information can be withheld to protect the interest of third parties, is a weak one. The Sofia City Court should thoroughly discuss the character and the nature of the prison files and give an interpretation whether the society as a whole and its individual members have a right to access information contained within them; and also establish a clear procedure for access. The Director of the Prison Governance Directorate should express a firm position on the above questions and should adduce further unpublished evidence in order to contribute to a fair, open and thorough debate.

Pursuant to Art. 41, Para. 3 of the Administrative Procedure Act, when an administrative decision has been challenged, the court must check whether all requirements for the lawfulness of the decision are in place. In the present case, the Sofia City Court has not fully followed this legal requirement, resulting in the above questions being left undiscussed and unanswered. The attacked decision of the first instance court should be reversed by argument of Art. 218b, Para. 1, letter „c“ of the Civil Procedure Code. Pursuant to Art. 40, Para. 2, sentence 1 of SACA, the court file should be returned to a new panel of the same court for reconsideration.

Led by the above arguments and pursuant to Art. 40, Para. 2, sentence 1 of the SACA, the Supreme Administrative Court, fifth division

HAS DECIDED:

REVERSES decision No. 359 of 23-Jan-2004 delivered by the Sofia City Court, administrative division, panel III-J and returns the court file to a new panel of the same court for reconsideration.

This decision is not subject to further appeal.

PRESIDING JUSTICE:

PANEL MEMBERS:

CASE

*Association
„Center for NGOs in
the town of Razgrad“*

vs.

*The Municipality of
Razgrad*



***Association „Center for NGOs in the town of Razgrad“ vs.
The Municipality of Razgrad***

*1st Instance Court - Administrative Case No. 78/2004,
Regional Court of Razgrad*

*2nd Instance Court - Administrative Case No. 3169/2005,
Supreme Administrative Court, 5th Division*

In the end of 2004, the Association „Center for NGOs in the town of Razgrad“ submitted an information request to the mayor of the town, demanding access to all the regulations, related to public registers in the Municipality of Razgrad-what was their number, their names and procedures for exploitation.

The mayor did not respond to the FOI request at all but required the NGO to produce a document of its court registration. The association did not present such verification since they considered such a requirement unjustified. The NGO challenged the tacit refusal of the mayor before the Regional Court of Razgrad.

The Regional Court dismissed the complaint and denied justice, assuming that failing to comply with the mayor's requirements, the NGO did neither have the right to information, nor the right to complain.

The NGO appealed the denial of the regional court to hear the case before the Supreme Administrative Court (SAC).

*With a decision as of April 13, 2005 the Supreme Administrative Court disagreed with all the reasoning of the Regional Court. The supreme justices rejected the decision of the lower instance court and referred the case file back for reconsideration. The Supreme Administrative Court affirmed that the right to information was a fundamental civil right. In particular, it stated that everyone, even non-formal organizations, was entitled to that right and that no public institution was allowed to meet FOI request with silence. The Access to Public Information Act (APIA) lacked any requirement that an organization, seeking access to public information, needs to prove its legal status. Such a requirement could be senseless since under Article 41 of the Constitution of Bulgaria, „**Everyone** has the right to seek and obtain information.“ Furthermore, every organization is constituted of members by definition and each member as a natural person has the right to access public information.*



THROUGH
THE RAZGRAD REGIONAL COURT

TO
THE SUPREME ADMINISTRATIVE
COURT
OF THE REPUBLIC OF BULGARIA

APPEAL

by Georgi Milkov Dimitrov

Director of the „NGO Center in the city of Razgrad“
(represented by his legal counselor Alexander Kahumov)

AGAINST

Ruling on administrative case № 2 of 2005

PURSUANT TO

Art. 213 et seq. of the CPC in relation to Art. 45 of the APA

Honorable Supreme Justices,

A ruling of the Regional Court of Razgrad has ceased the proceedings on a court case, initiated by me with an appeal against a tacit refusal. The ruling of the first instance court violates my right to contest administrative acts, guaranteed by Art. 120 of the Bulgarian Constitution. Therefore, I request that you reverse the ruling of the first-instance court as unlawful.

1. The Regional Court of Razgrad (RCR) has ceased the proceedings on the case, adopting the view that the access to information request was incomplete, as it lacked some of the necessary attributes. The court held that the obliged authority - the mayor of Razgrad - had rightfully instructed the applicant to correct and re-submit the request. The first instance court also held that after the request had not been corrected, it had rightfully been left without consideration.

The conclusions of the Regional Court are wrong.

In the first place, it is obvious that the information request has been filed by and bears the signature of Georgi Milkov Dimitrov, i.e. myself. The conclusion that the request had been filed by the Center for non-government organizations in Razgrad is wrong, since the organization was not indicated as the requestor. Therefore, the question of „active legitimacy of the requestor“ as raised by the mayor of Razgrad in his letter No. 74-00-52.2 of 13-Dec-2004 is inapplicable.

Often in practice the requestors include in their access to information requests some of their social characteristics, besides their name (like „journalist,“ „member of the board,“ etc.). This is by no means a requisite of the access to information request under Art. 25 of the APIA, and furthermore Art. 4 Para. 1 of the APIA establishes the right to access government held information for everyone. Anyway, the practice of the Supreme Administrative Court has firmly established that this request has not been filed incorrectly. In Decision No. 793 of 30-Jan-2004 on admin. court case No. 8302/ 2003, the Supreme Administrative Court, Fifth Division held that „Obviously the appellant has requested information as a citizen, simply referring to her workplace, rather than as a representative of her employer or legal entity.“ The Supreme Administrative Court has interpreted the same question within Decision No. 4716 of 2004 on admin. case No. 8751/2003 and within Decision No. 4717 of 2004 on admin. case No. 8752/ 2003. The Supreme Court held that „Considering the specifics of the administrative proceedings, the court should summon the authority, which delivered the attacked decision, as well as the appellant and other interested persons and organizations, by argument of Art. 41, Para. 2 of the APA. Lyubov Gusseva has filed the request to the authority and has subsequently appealed its decision before the Regional court, therefore the court should have summoned her, whether personally or as a representative of the association.“ The interpretation was adopted precisely in answering the question who had been the filer of the information request, signed by Mrs. Gusseva as a „member of the board of the Animal Protection Association in Vidin.“ Equivalently, in the present case the information request has been filed by a physical person.

Even if the request had been filed by a legal entity, the ruling of the RCR would again be incorrect. Article 25, Para. 1 of the APIA thoroughly lists the requisites of an access to information requests. Pursuant to item 1 of

the same article, legal entities are required to provide their name and their seat. The information request submitted as evidence to the case and registered with No. 74-00-52.1 of 02-Dec-2004 proves that it had been filed on a form of the Center for non-government organizations in Razgrad. The bottom part of the form contains all court decisions of the Regional court for registration of the association, the tax number and the BULSTAT,¹ the social services registration number and the registration number within the Central Register for Legal Entities Working in Public Interest, kept by the Ministry of Justice. Data about the latter register are also available on the Internet on the following address:

<http://www.mjeli.government.bg/ngo/companyinfo.aspx?ID=3313>.

All the above proves that information provided about the associations exceeds the requirements of Art. 25, Para.1, item 1 of the APIA

The interpretation of the RCR regarding the implementation of the APA and the CPC are incorrect. The first-instance court has analysed the question whether a public authority may require additional facts proving the legitimacy of the legal entity requesting information. In this respect, Art. 25 of the APIA is a *lex specialis*, implicitly prohibiting the authority from requiring additional facts and circumstances from the requestor. One argument in support of this interpretation is the lack of a provision in the APIA, allowing the authorities to elaborate on the request filing process. The purpose of this is to stop the authorities from introducing different conditionalities, which could hamper the right to seek and receive information, guaranteed by Art. 41 of the Bulgarian Constitution. On the other hand, Art. 25 of the APIA is a *lex specialis*, to which the lawmakers have attached great importance. This can be seen from the motives of the freedom of information bill sponsors, when they introduced the APIA to Parliament in 2000:

„Harmonization of the Bulgarian laws with the litigation and practices of the European union depends on how we implement the principles of the Council of Europe recommendations, as this is the only institution of United Europe, of which Bulgaria is a full member.“ Furthermore, the sponsors explain that „The approach we have adopted in the bill corresponds to Recommendation R (81)19 of the of the Committee of Ministers of the Council of Europe for access to information held by the public authorities. According to the above Recommendation, „access to infor-

¹ Registration number within the National Statistical Institute.

mation shall not be refused on the ground that the requesting person has not a specific interest in the matter.⁴² The recently adopted Recommendation R (2002) 2 of the Committee of Ministers to member states on access to official documents elaborates this principle in the following way:³

V. Requests for access to official documents

- 1. An applicant for an official document should not be obliged to give reasons for having access to the official document.*
- 2. Formalities for requests should be kept to a minimum.*

This is why, it is against the purpose of the APIA for public authorities to require any data or prove about the requestors besides those stipulated within Art. 25 of the APIA. The provision of Art. 25 of the APIA is a *lex specialis* with respect to Art.15 of the Administrative Services for Citizens and Legal Entities Act (ASCLEA). The latter empowers the authorities to require information about those who request an administrative service, precisely because administrative services are provided after proving of specific interests - by argument of Art. 3, Para. 1, item. 3 of the ASCLEA. As already stated, public authorities cannot require the prove of an interest from access to information requestors; therefore the ruling of the RCR not only violates my right to information access, but also my right to access to justice, by introducing formalities, which contradict with the purpose of the APIA.

Furthermore, the RCR has incorrectly assumed that the information request has been left without consideration. First, because there is no evidence in support of this fact. Second, because the APIA does not allow for authorities not to consider information requests. And third, because the notification letter No. 74-00-52.2 of 13-Dec-2004 does not set a term for its implementation. Considering the above, it is impossible to conclude that the requestor had failed to fulfill its obligation for „active legitimation,“ even if such an obligation existed in the first place.

² Official translation available at: http://www.aip-bg.org/documents/rule81_bg.htm

³ Official translation available at: http://www.aip-bg.org/documents/rec2_bg.htm

And in the last place, obviously the request had been filed by someone. Even if the request does not contain the required data about the legal entity, if it contains all necessary information about the physical person, it must be considered, as filed by the latter. Any other interpretation would contradict the purpose of the APIA in light of the principles of the Council of Europe, and would lead to an unjustified restriction of the right of everyone to access information and of the obligation of public authorities to provide such access.

In view of the above arguments, the ruling of the RCR is incorrect. The requestor of public information is not a legal entity, but rather a physical person, i.e. myself. Anyway, the mayor of Razgrad has no authority to require any further evidence about the information requestors. Therefore, it follows that the authority has not yet delivered a decision on my access to information request, which constitutes a deemed refusal subject to judicial review.

2. The Regional Court of Razgrad has used another argument in order to cease the proceedings on the case: the first-instance court held that instead of requesting access to information, I had requested access to documents; and since the APIA did not provide for access to documents, the authority had not been obliged to provide me with access to information.

This interpretation of the first-instance court is incorrect for two reasons. It is obvious from the submitted Request No. 74-00-52.1 of 02-Dec-2004 that I have requested information contained in a „list of information categories, subject to classification as an administrative secret by the Municipality of Razgrad.“ Such a list should be adopted by all administrative units and published pursuant to Art. 26 Para. 3 of the Protection of Classified Information Act (PCIA). The bodies of local administration are administrative units and so is the mayor of Razgrad, according to Para. 1, item 3 of the additional provisions of PCIA. Therefore, pursuant to Art. 14 Para. 2, item 2 of the APIA, the mayor had to publish the list, thus also fulfilling his obligation under Art. 26 Para. 3 of the PCIA and Art. 21 of the Rules for the Implementation of the Act. Consequently, the information should not only have been disclosed in response to my information request, but it had to be published on the mayor's initiative in line with Art.14, Para. 2, item 3 of the APIA and in relation to Art. 26, Para. 3 of the PCIA.

Second, it is unclear why the RCR has considered the list to be a document. Just on the contrary - the list is a set of data ("information categories," as defined by the law itself, see Art. 26, Para. 3 of the PCIA). Therefore, it follows that the list should be disclosed pursuant to APIA.

On the other hand, the legal doctrine defines document as an „object, materializing a statement with written signs.“⁴ A document could also be an unsigned written statement.⁵ A legal definition of document is „every material bearer of information, created following the established legal procedures.“⁶ As seen from the above definitions, a document is considered a bearer of information or statement. Since any statement is also information about the person who made it, it can be concluded that a document is a bearer of information. Indeed, the information and the bearer differ only in the sense that certain information can be kept on a number of bearers in a different number of copies. Therefore, the requested list is information, and not a bearer, because it can be kept simultaneously on different bearers (like paper or electronic copies, which can differ in number).

According to Art. 2, Para. 2 of the APIA information is public (i.e. subject to disclosure) regardless of its bearer. As obvious from the listing contained within § 1 of the additional provisions of the APIA, the concept of „information bearer“ contains the concept of „documents“ and the two concepts largely overlap. The purpose of the law is obviously to provide the widest possible opportunities for access to public information, so access should be restricted based only on the information bearer. The provisions of the APIA in this respect are similar to those of Recommendation R (2002)2 of the Committee of Ministers to member states on access to official documents, which assumes that:

„official documents shall mean all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation“

⁴ See prof. J. Stalev, *Bulgarian Civil Procedure Law*, Sofia 2000, § 59, I, p. 277.

⁵ *Ibid*, p. 278; see also prof. P. Venedikov, *Written Evidence and Testimony in the Civil Process*, Sofia 2000, I, 15, p.15.

⁶ § 2, item 2 of the additional provisions of the Act on Access to Documents of the Former State Security Administration and the Former Intelligence Bureau of the General Staff (repealed).

In other words, the concept of a „document“ in the context of the right to access public information can only serve for defining wider opportunities for access, rather for restricting it.

The question of „access to documents versus access to information“ has been interpreted in the practice of the Bulgarian courts since 2002. However, this question has only been raised in cases when requestors seek access to specific documents - and whether by doing this they have defined what information they request access to (in line with Art. 25, Para. 1, item 3 of the APIA). Initially, the interpretation of the court was that requestors needed to describe the information in some other way, rather than point to specific documents, because in the latter case authorities would not know what *information* was actually sought. The above interpretation was made in Decision No. 4694 delivered on 16-May-2002 by the Five-member of SAC on admin. case No. 1543 of 2002 and in Decision No. 162 delivered on 12-Jan-2004 by the Five-member panel of the SAC on admin. case No. 8717 of 2003. The opposite interpretation was made in Decision No. 10539 delivered on 22-Nov-2002 by the Fifth Division of the SAC on admin. case No. 5246 of 2002: „the application contains specific and clear description of the requested information - inspection reports.“ Besides, if the authority fails to implement the requirement of Art. 29, Para. 1 of the APIA and does not notify the requestor, the request cannot be left without consideration. Decision No. 2113 delivered on 09-Mar-2004 by the Five-member panel of the SAC on admin. case No. 38 of 2004 is an important step for abandoning the initial court practice. In the latter decision, the court has reasoned that by requesting a paper copy of a contract the requestor actually wished to receive access to the public information contained within the contract clauses; moreover, the request had been for a specific contract, rather than for a „contract“ in general. The court practice reflected in the latter two decisions is in line with the purpose and spirit of the APIA, interpreted in the light of the „principles of the Council of Europe.“ This interpretation, as noted above, was made by the sponsors of the draft APIA, and has therefore been endorsed by the lawmakers. Because of the above arguments, it should be agreed that when a requestor refers to a document, he/she actually wishes to gain access to the information contained within. Moreover, with the lack of openness and publicity regarding the documents issued by some authorities, requestors have limited data about the requested information. This should not serve as an excuse for restrict-

ing access to public information; just on the contrary - special assistance should be provided to requestors in exactly those cases. In this respect, Recommendation R (2002) 2 establishes a requirement for the countries to guarantee the right to access official documents, and specifically to:

- i. manage their documents efficiently so that they are easily accessible;*
- ii. apply clear and established rules for the preservation and destruction of their documents;*
- iii. as far as possible, make available information on the matters or activities for which they are responsible, for example by drawing up lists or registers of the documents they hold.*

It is clear in this case that the authority has failed to fulfill his obligation and has not published the requested list.

In view of all of the above arguments, I request that you reverse the appealed ruling of the RCR, as it has been delivered in breach of the law. I request that you return the case to the first instance court for a consideration on the merits.

Enclosed: court fees receipt.

Respectfully yours:

(signed appellant)

Ruling on the proceedings**No. 3335****Sofia, 13-Apr-2005**

The Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, at its closed hearing held on the twentieth day of April, two-thousand five, composed of:

Presiding justice: ALEXANDER ELENKOV

Panel members: VANYA ANCHEVA, YULIA KOVACHEVA

in the presence of the public prosecutor heard the report of justice ALEXANDER ELENKOV on administrative court case No. 3169 for 2005.

Proceeding in this case were pursuant to Art. 213 et seq. of the Supreme Administrative Court Act (SACA).

Proceedings were initiated with an appeal filed by the Center for non-governmental organizations in Razgrad, represented by its chairperson Georgi Milkov Dimitrov. The appellant attacked Ruling on the proceedings No. 2 of 14-Feb-2005 delivered by the Regional Court of Razgrad on admin. case No. 78 for 2004.

It is obvious from the evidence on the case that the appellant has been informed of the Ruling on the proceedings on 24-Feb-2005. With Decision No. 102, the Council of Ministers has determined 04-Mar-2005 to be an official holiday. The days 03-Mar-2005 (national holiday, see Art. 154, Para. 1 of the Labor Code), 05-Mar-2005, and 06-Mar-2005 (Saturday and Sunday) are also holidays. The seventh day period for an appeal of the first-instance court ruling expired on 03-Mar-2005 - a national holiday. However, pursuant to Art. 33, Para. 4 of the Civil Procedure Code, in such cases the period should be extended to the next working day. As already mentioned, March 04, 05 and 06 were also holidays and the next working day in the sense of Art. 33, Para. 4 of the CPC was 07-Mar-2005. The appeal had been received by the Regional Court of Razgrad on precisely the same date and is therefore admissible.

Viewed on the merits, the appeal is well-founded.

The attacked Ruling of the Regional Court of Razgrad has not reviewed on the merits the appeal of the requestor and has cased the proceedings (the first instance-court has inaccurately stated „because the appeal lacks a subject, it will not be reviewed...“). The requestor had attacked the refusal of the Mayor of Razgrad to deliver a decision on an access to information request. The first-instance court has reasoned that there is no silent refusal in this case for two reasons:

a) the Mayor of Razgrad had instructed the requestor that he needed to prove his legal status (i.e. court registration of the association he represented), however the requestor had failed to do so. Pursuant to Art. 4 of the Access to Public Information Act (APIA), the right to access public information was guaranteed to Bulgarian and foreign citizens, persons without citizenship and legal entities. However - as the first instance court reasoned - an association of citizens is a legal entity only when it is registered by the court and it can exercise its right of public information only after proving its legal status;

b) the appellant had requested to review and read all available information about the public registers kept at the Municipality of Razgrad - number, name, and access procedures; however, a number of various registers were kept at the municipality and access to information contained within them was regulated by different laws. Therefore, the procedures of APIA could not be applied to access any of those registers and the failure of the mayor of Razgrad to deliver a decision within the term of Art. 28, Para. 1 of the APIA could not be considered a silent refusal. Considering the above arguments, the first instance court held that the appeal had no subject and was procedurally inadmissible.

The ruling of the first-instance court is wrong.

It is obvious from the evidence on the case that with an access to information request Georgi Milkov Dimitrov, in his capacity of a chairperson of the Center for non-governmental organizations in Razgrad, has sought access to „all available information regarding the public registers kept at the Municipality of Razgrad - number, name, and access procedures.“ The requestor has put an outgoing No. 83 of 06-Oct-2004, and the Municipality of Razgrad has registered it under No. 74-00-40-1 of the same date. With a letter from 15-Oct-2004 signed by the administrative secretary of the municipality, the requestor was asked to submit a „court registration of the association,“ which should be interpreted as a request for the association to prove its legal status.

This court holds that access to information is an immanent phenomenon of a civil society. This is why Art. 41 of the Bulgarian Constitution, devoted to the right of information begins with: „Everyone has the right.“ The above constitutional provision requires a broad interpretation of the APIA, meaning that even non-registered associations have the right to access public information, despite not explicitly listed in Art. 4 of the law. This is especially valid when the requested information is related to the activities of public authorities. The Access to Public Information Act (APIA) lacks any requirement that an organization, seeking access to public information, should prove its legal status. Such a requirement would be senseless since under Article 41 of the Constitution of Bulgaria, „Everyone has the right to seek and obtain information.“ Furthermore, every organization is constituted of members by definition and each of its members as a natural person has the right to access public information.

In this case, the request has been filed by Georgi Milkov Dimitrov, chairperson of the Center for non-governmental organizations in Razgrad. The Mayor of Razgrad and the Regional Court have considered it as a request filed by the association, represented by its chairperson. Considering the fact that the request was typed on a form of the association, this court does not agree with the argument of the appellant that the request has been filed by the Georgi Milkov Dimitrov as a physical person who provided his office address and phone number for correspondence, instead of and his home address. On the other hand, the form of the association contains all necessary information about it, so the request of the mayor for proving its legal status had been senseless - both from a factual point of view and as a requirement of the APIA.

What is essential in this case is that the appellant has requested access to official public information in the sense of Art. 10 of the APIA. According to the definition of the latter article, official information is contained within the acts of the state bodies and the bodies of local administration, issued by them **in the course of execution of their powers**. As mentioned above, the appellant has requested access to „all available information regarding the public registers kept at the Municipality of Razgrad - number, name, and access procedures.“ Obviously, the requestor was interested in the registers kept at the municipality and wanted to know what was the procedure for accessing each of them. As an example, pursuant to § 77, Art. 1 of the transient and conclusive provisions of the Municipal Property Amendment Act (promulgated in GS, issue 101 of

2004), the registers established by that law are public and all interested parties have the right to freely access them following a procedure, established by the mayor; the only opportunity for restricting that access is when information contained in the register is classified in the sense of the Protection of Classified Information Act. Pursuant to Art. 5, Para. 5 of the **Cadastre Act**, the mayors keep a register of all decisions for changes in the cadastre plans, a register of all construction permits, and a register of all ongoing constructions. While pursuant to Art. 63, Para. 1 of the same law, the mayors establish and update public registers of all green areas, ornamental trees and historical plants in their municipalities. Access to all information contained within this register is regulated by the APIA.

However, the registers under the Civic status registration act are not public and the Municipal Court of Razgrad has incorrectly quoted this law; it is also unclear why the court has referred to the Local Governance and Local Administration Act.

The analyses of the Bulgarian legislation can show what register should be kept at each municipality and access to which of them should be regulated by the mayor. Undoubtedly, mayors regulate access to the registers with an administrative act - a decision, order or a document with some other name. By definition, this act is official public information (see Art. 10 of the APIA). It is in clear public interest that mayors make these acts public - e.g. by publishing them in the media. If the Mayor of Razgrad has failed to do so, the request of the appellant could have been reasonable after all. This is a question, which needs to be answered by the Regional Court of Razgrad with a decision on the merits. Obviously in this case, the Mayor of Razgrad has silently refused to provide access to information to the appellant. There is yet another question, which needs to be answered by the Regional Court of Razgrad: whether it is admissible for an obliged authority - the Mayor of Razgrad - to fail to respond. State bodies and the bodies of local governance are elected and appointed to perform their legal functions, rather than silently ignore them. The first-instance court has the sovereign power to resolve this question. Therefore, the Supreme Court should reverse the initial ruling, by which the proceedings were ceased, and should return the case for consideration on the merits. The first-instance court should decide whether the case be appointed to the same panel; or in case the Regional Court of

Razgrad assumes that the first-instance panel had already expressed a position on the merits - it should appoint the case to a different panel.

Lead by the above arguments, the Supreme Administrative Court, Fifth division,

HAS RULED:

THAT IT REVERSES Ruling on the proceedings No. 2 of 14-Feb-2005 delivered by the Regional Court of Razgrad on admin. court case No. 78 of 2004 and returns the case to the same court for consideration of the case on the merits.

THIS RULING is not subject to appeal.

True to the original,



ABBREVIATIONS

APA	- Administrative Procedure Code
APIA	- Access to Public Information Act
CCD	- Constitutional Court decision
CMO	- Council of Ministers order
COA	- Contracts and Obligations Act
CoM	- Council of Ministers
CPC	- Civil procedure code
CC	- Constitutional court
ECHR	- European court of Human Rights
EPA	- Environmental Protection Act
FCA	- Fair Competition Act
GIS	- Government Information Service
JA	- Judiciary Act
MCR	- Municipal Court of Razgrad
ME	- Ministry of Education and Science
MF	- Ministry of Finance
MI	- Ministry of Interior
MJ	- Ministry of Justice
NA	- National Archives
NAO	- National Audit Office
NGO	- Non-governmental organization
NIS	- National Intelligence Services
PCIA	- Protection of Classified Information Act
PDPA	- Personal Data Protection Act

PDPOHGOA	- Public Disclosure of Property Owned by High Government Officials Act
PGD	- Prison Governance Directorate subordinate to the Ministry of Justice
PIFCA	- Public Internal Financial Control Act
PIFCA	- Public Internal Financial Control Agency
PPA	- Public Procurements Act
SAC	- Supreme Administrative Court of the Republic of Bulgaria
SACA	- Supreme Administrative Court Act
SCC	- Sofia City Court
SG	- State Gazette
SJC	- Supreme Judicial Council
TPC	- Tax Proecedure Code
TU	- Technical University
СП	- Сметната палата
ТД	- Териториална дирекция
ТР	- Тълкувателно решение
ТУ	- Технически университет



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