# ACCESS TO INFORMATION LITIGATION IN BULGARIA 2005 – 2008

## VOLUME 4

## SELECTED CASES

**AUTHORS:**
**ALEXANDER KASHUMOV**
**KIRIL TERZIYSKI**

**ACCESS TO INFORMATION PROGRAMME**

**Published by**
**ACCESS TO INFORMATION PROGRAMME**

**With the financial support of**
**OPEN SOCIETY INSTITUTE**

**ACCESS TO INFORMATION LITIGATION**
**IN BULGARIA 2005 – 2008**
Volume 4
Selected Cases

Text by:

© Alexander Kashumov, lawyer

© Kiril Terziyski, lawyer

Translation from Bulgarian;

© Angela Rodel,

© Diana Bancheva

Editors of the edition:

© Alexander Kashumov,

© Diana Bancheva



Sofia • 2009

ISBN 978-954-9953-44-2

**CONTENTS**

# ABBREVIATIONS

| | |
|---|---|
| **AIP** | Access to Information Programme |
| **APA** | Administrative Procedure Act |
| **APC** | Administrative Procedure Code |
| **APIA** | Access to Public Information Act |
| **BDC** | Burgas District Court |
| **CC** | Constitutional Court |
| **CCD** | Constitutional Court decision |
| **CMO** | Council of Ministers order |
| **COA** | Contracts and Obligations Act |
| **CoM** | Council of Ministers |
| **CPC** | Civil Procedure Code |
| **CRB** | Constitution of the Republic of Bulgaria |
| **DPIA** | Disabled People Integration Act |
| **ECHR** | European Court of Human Rights |
| **EIP** | Environmental Impact Assessment |
| **EPA** | Environmental Protection Act |
| **EPIC** | Electronic Privacy Information Center |
| **FCA** | Fair Competition Act |
| **FOI** | Freedom of Information |

| | |
|---|---|
| **GIS** | Government Information Services |
| **IAEA** | International Atomic Energy Agency |
| **ISPA** | Instrument for Structural Policies for Pre-Accession |
| **JA** | Judiciary Act |
| **KDC** | Kyustendil District Court |
| **LAVS** | Law on Administrative Violations and Sanctions |
| **MBA** | Municipal Budget Act |
| **MEER** | Ministry of Economics and Energy Resources |
| **MES** | Ministry of Education and Sciences |
| **MF** | Ministry of Finance |
| **MFA** | Ministry of Foreign Affairs |
| **MJ** | Ministry of Justice |
| **MOEW** | Ministry of Environment and Waters |
| **MoI** | Ministry of the Interior |
| **MP** | Member of Parliament |
| **MPA** | Municipal Property Act |
| **MRDPW** | Ministry of Regional Development and Public Works |
| **MSAAR** | Ministry of State Administration and Administrative Reform |
| **MTSSS** | Material-Technical Security and Social Services Directorate |
| **NA** | National Archives |
| **NAO** | National Audit Office |
| **NATO** | North Atlantic Treaty Organization |
| **NGO** | Non-governmental organization |

| | |
|---|---|
| **NIS** | National Intelligence Services |
| **NPP** | Nuclear Power Plant |
| **NRA** | Nuclear Regulatory Agency |
| **NSS** | National Security Services |
| **ORCMIA** | Organizational Regulations of the Council of Ministers and Its Administration |
| **PCIA** | Protection of Classified Information Act |
| **PDCA** | Protection and Development of Culture Act |
| **PDPA** | Personal Data Protection Act |
| **PDPOHGOA** | Disclosure of Property Owned by High Government Public 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 |
| **R (2002)2** | Recommendation (2002) 2 of the Council of Europe Committee of Ministers to the member states, with regard to access to official documents |
| **RDC** | Razgrad District Court |
| **RIPCIA** | Regulations for the Implementation of the Protection of Classified Information Act |
| **SAC** | Supreme Administrative Court of the Republic of Bulgaria |
| **SACA** | Supreme Administrative Court Act |
| **SCAC** | Sofia City Administrative Court |
| **SCC** | Sofia City Court |
| **SCIS** | State Commission for Information Security |

| | |
|---|---|
| **SG** | State Gazette |
| **SJC** | Supreme Judicial Council |
| **SSA** | Social Support Agency |
| **TPC** | Tax Procedure Code |
| **TU** | Technical University |
| **UCN** | Unique Citizen's Number |
| **UDP** | Urban Development Plan |

## INTRODUCTION

"People have a right to know what their elected representatives are doing and taxpayers deserve to know how their money is being spent. This verdict will boost transparency and bring Parliament closer to the people." This is a quote from a recent (16 May 2008) decision by the Supreme Court in the United Kingdom in response to a complaint from 14 MPs – including Tony Blair, David Cameron and Gordon Brown – who refused to provide full disclosure of additional expenses for which they had sought reimbursement as elected officials. The court rejected the following arguments brought by the MPs' lawyers:

- "a substantial unlawful intrusion" in the lives of parliamentarians and their families,
- "the legitimate expectations" of MPs that there would be no detailed breakdown of their expenses into the public domain,
- disclosure of the addresses of properties raises issues of "considerable concern" for the security of parliamentarians and their families.

The court's basic argument was the prevailing public interest in the disclosure of these documents.

What is the story of the basic principle of access to information legislation in Bulgaria – namely, the idea that citizens have the right to know? How is the concept of public interest in information created and stored by public institutions understood?

Grasping the basic principles of access to information legislation has turned out to be a much more complicated and difficult process than the mere passing of the law in 2000. If citizens, journalists and nongovernmental organizations (NGOs) had not actively sought information, the law would have remained nothing more than a lifeless text. Now, eight years after its publication in the State Gazette, we can say that information seekers who view the law as a powerful weapon in their fight to access information know and depend on its every word. This helps explain the active participation by people who have used the law to defend their right of access to

information in the AIP's 2007 campaign to defend the law's wording. Within a single week 1,071 people had voiced their support of the AIP's position – 463 journalists, 311 citizens, 252 NGOs and 45 local government representatives.

When we examine concrete examples in which people were refused information and decided to appeal the refusals, the law's texts come alive.

Dull and sometimes incomprehensible legal concepts become flesh and blood. It reveals the motives of those who defend their power and positions at all costs and think that information is their personal property. They fear that making information public will expose poor governmental decisions or will confirm suspicions of corruption. The battle is waged to the last and sometimes can drag on for years.

This book is about these stories and the lessons learned from them. Litigation practice is an exceptionally important indicator of how democratic culture is developing.

For this reason, we, the publishers of the fourth volume in the series *Access to Information Litigation in Bulgaria*, believe that the story of citizens' struggles with governmental institutions for access to information will be useful to all readers with an interest in what is happening in the country during these transitional times.

Whether those are the stories of journalists who have dedicated their professional careers to finding out the truth about the past and seeking access to the archives of the former State Security services, or whether it is the story of the Society for the Protection of Birds, which wants to understand what the state policy on renewable energy sources is, these are battles that don't always have a happy ending. The point is for there to be an ending and for the ending to be clear.

Do citizens have the right to know how they were governed, how they are governed, and how decisions are made about things that directly and indirectly affect them?

Sometimes those in power can hardly conceal their astonishment that someone would demand such information from them. Sometimes they don't even show up for sittings of court. Sometimes they do not obey court rulings.

The arbitrator in these battles is the court. Bulgarian law does not provide for a commission or an information ombudsman. And perhaps this was a good thing during the first years of the law's implementation. Indeed, if Bulgarian institutions don't respect court rulings, how could a commission without the power and authority equal to that of a court ever cope?

You'll read about many court decisions in this book – including serious and in-depth study of the disputes, as well as cases that are better examined using a formal approach. However, this court practice inspires optimism and shows that in Bulgaria, despite the general belief to the contrary, there are thinking, breathing, active people who want to live in a free and democratic society.

We dedicate this book to all of them.

Gergana Jouleva,
Executive Director
*Access to Information Programme*

## ACKNOWLEDGMENTS

The current book with commentary is the fourth volume of the series started in 2002. The second volume was printed in 2004, and the third – in 2005.

To a considerable extent, the commentary and the selection of the cases are based on the overall experience acquired by Access to Information Programme during the eleven years of its work. This would not have been possible without all the work accomplished in the monitoring of legislation and practices related to access to information, advocacy, legal help and litigation, trainings and raising public awareness campaigns. The in depth knowledge of foreign experience, the participation in a variety of forums and trainings abroad are of particular importance. Daily exchange of knowledge, experience and tactics within the global Freedom of Information Advocates Network are also invaluable source for creating that book (www.foiadvocates.net).

The selection of the court cases contained in the book, as well as the commentary on the litigation practices, would not have been possible without the valuable remarks of the founder and the director of AIP, Ms. Gergana Jouleva, without the dedicated work of our colleagues from the legal team, Darina Palova and Fany Davidova, without the assiduity of our colleagues Diana Bancheva, Katerina Kotseva, and Mariana Ivanova. The efficiency of our friends, who perseveringly have been seeking access to information, the professionalism of the judges – these were necessary conditions for the appearance of the book. Invaluable in this regard is the financial support of the Human Rights and Governance Grants Program of Open Society Institute, Budapest thanks to which the current book has become a fact. And last but not least, we thank to the CIELA Publishing House for the publication of the book.

Thank you all cordially!

*Alexander Kashumov*
*Kiril Terzyiski*
*2008*

# OVERVIEW OF FOI LITIGATION IN BULGARIA

The Access to Public Information Act (APIA) has already existed for more than eight years in Bulgaria. It was adopted nearly simultaneously with similar laws in Czech Republic, Slovakia, Moldova and Albania. The fate of laws concerning access to (and freedom of) information varies in different countries. In some, it creates and develops the practice of a commissioner/commission/ombudsman for the freedom of information, such as in Hungary, Australia, Ireland, the United Kingdom, Canada and certain states in the United States. In some places so-called administrative tribunals also play a role. In some countries judicial practice is of crucial significance for the improvement of access to information from public institutions – for example, the Netherlands and the United States. Bulgaria should undoubtedly be added to this latter category, too. Of course, certain countries are exceptionally lucky, such as Sweden, a pioneer in the field of access to government-held information (a law since 1766), where transparency and the disclosure of information are deeply rooted in the culture and practices of public administration. In a certain number of countries around the world, however, the citizens are not sufficiently familiar with the laws, while the establishment of implementation practices and supervision of the implementation process has been stuck in a preliminary stage for years. The good news for our society is that during the years of changes to legislation and constant structural changes in the administration, citizens have had at their disposal a relatively unchanged and viable law for access to public information.

In the previous three volumes dedicated to APIA court cases,[1] basic themes and questions that arose in the implementation of the law were identified and analyzed. The period from 1998–1999 was characterized by the

[1] The authors of the present analytical text and the editors of the volume, the lawyers Alexander Kashumov, head of AIP's legal team, and Kiril Terziyski, represented the complainants or provided legal aid in various forms in more than 120 APIA cases supported by AIP in the period from 2000 until the present time. They have acted as consultants in many cases and have participated in the realization of training seminars in Bulgaria and abroad.

submission of the first complaints against refusals to provide information by government institutions; they were generally dismissed by the courts without being examined on their merits. The adoption of the Access to Public Information Act in 2000 created not only a procedure for providing information from public institutions, but also a legal basis for appealing to the court in cases of refusal or other forms of infringement on the right to information. The first refusals appeared soon after the adoption of the law in 2000; hence, the first complaints were filed. In 2001 the Supreme Administrative Court (SAC) took up and decided the dramatic question concerning implementation of the law in cases of appeals of silent refusals. In the following year, 2002, the first case brought by a journalist was decided. In the judgment a broad interpretation of the concept of "public information" was adopted to include all information and knowledge about somebody or something, regardless of the type of physical carrier. A narrow interpretation of the restriction applicable to information with no significance in itself (preparatory documents) was also adopted.

In 2003 questions arose about access to contracts between public institutions and private firms, as well as information about their execution. In the following year, 2004, the court ruled that such information could not be totally refused and that the balance between public rights and third-party interests would have to be considered on a case-by-case basis. In the same year, for the first time a refusal based on an alleged state secret – a contract between the Minister of Finance and the British company Crown Agents – was overturned as not in accordance with the law. As a result of another AIP case challenging a refusal to disclose the secret *Regulations for the Organization of Work for the Protection of State Secrets in the People's Republic of Bulgaria* (1980), the government declassified 1,484 documents which were classified before the Protection of Classified Information Act (2002) came into effect. Again in the same year a refusal by the Supreme Judicial Council (SJC) to allow journalists into their meetings was overturned.

In 2005 SAC introduced the principle that it was not necessary to prove the seeker's status as a legal person, since the right of access to information is everyone's right. At the beginning of the following year, 2006, SAC practice was generalized with respect to the scope of the concept "public

information." The list of categories classified as state secrets was interpreted narrowly, and the position was taken that even in such cases a public institution is obliged to consider the possibility of *partial access*. The court also interpreted the scope of official secrets[2] narrowly when it overturned a refusal by the Minister of Regional Development and Public Works to disclose a contract for a concession with Trakia Highway Jsc.

Last year in 2007 the practice of narrow interpretations of restrictions related to *state secrets* was reconfirmed when the court required the National Intelligence Services (NIS) to disclose documents concerning the case of Georgi Markov. The practice of narrowly interpreting the scope of *trade secrets* was also expanded.

This short review gives the impression of a democracy based on active information seeking and fighting for the right of access to public information and for the continual development of practices in accordance with court rulings. In this respect a parallel can be drawn with other countries with well-developed judicial practice in this area, for example, the Netherlands and the United States. While the period up until 2005 can be characterized as an initial introduction to the material and the establishment of such practices, the past two or three years have been marked by their strengthening and development.

The present book traces development during the most recent period, covering the second half of 2005 up until the first half of 2008. Two large spheres of problems have been identified: one is related to the exercise of the right of access to public information, while the other extends to the implementation of restrictions on the right to information.

Of course, the second sphere of problems is the more extensive one – a comparative glance at similar works in the United States shows this.[3] The balance between the right of access to public information as a principle and restrictions on it as an exception to the principle is not merely a theoretical exercise; it involves real-life cases, as well as battles for more gov-

[2] In different legal systems and publications the category is also translated as "administrative secrets."

[3] Annual publications from the US Department of Justice, Freedom of Information Act Guide & Privacy Act Overview and from the EPIC, Litigation Under the Federal Open Government Laws 2006.

ernment accountability to citizens. At the same time, it is crucial that this balance be precise, so that it does not infringe unjustifiably on the rights of those affected. Progress has been made, but there is still a long way to go. Experience gathered in more than 120 court cases supported by AIP and constant monitoring of practices allows us to offer analyses and to outline certain tendencies.

Some of the questions that are still under discussion to at least a certain extent in practice are related to the concept "public information" and the formulation of written requests. As far as restrictions are concerned, here one can observe corresponding development in the implementation of the Protection of Classified Information Act (PCIA), which defines state and official secrets. Inspections are carried out to check whether the classification of information and the marking of documents obey the law and to verify that the proper procedure is being followed. At the same time, interpretive work related to other restrictions has also been undertaken. A narrow interpretation has been applied to the restriction allowing the refusal of preparatory documents – Art.13, Para.2, Item 1 of the APIA.[4] The topic of access to and restrictions on information created by contracts between public institutions and private persons, most notably commercial corporations, remains an open question very much under discussion.

This overview follows the structure of the law. Sections on various topics constitute short summaries, since our aim was to include more court decisions. When necessary, comparisons are made with regulations from relevant international and European documents. The book is intended to be useful to practicing lawyers, public administrators and teachers, as well as students, journalists and a wider sphere of people who take an interest in this topic.

[4] In Bulgaria this exemption does not cover documents under preparation as is the case in some other legislations, but rather working documents that were created in the course of the preparation of a final document.

# WHAT INFORMATION IS PUBLIC? WHO IS REQUIRED TO PROVIDE INFORMATION UNDER THE APIA?

In accordance with the provisions in Art. 2, Para. 1 of the APIA:

*"Public information for the purposes of this law is all information that is related to the public life of the Republic of Bulgaria and that will provide citizens with the opportunity to create their own opinion about the activities of subjects obliged under the law."*

Art. 10 of the APIA further specifies that public information is information contained in the offical documents generated by state bodies and local governmental institutions in the course of exercising their authority and executing their duties. According to Art. 11 of the APIA, information is public if it is collected, created and preserved in connection with official information, and also if it is related to the activities of governmental bodies and their administrations. Art. 17 and Art. 18 of the APIA further expand the scope of public information to include information preserved by entities specified in Art. 2, Para. 2 of the APIA (public law entities and persons financed by the consolidated state budget) and to certain categories of information concerning mass media. In the title of Section II of the APIA, this information is summarized under the term "other public information." Thus, the APIA defines public information as:

- Information in official documents of public authorities (Art. 10) – official public information;
- Information generated in connection with such documents, including that related to the activities of governmental bodies and their administration (Art. 11) – administrative public information;
- Information generated by entities specified in Art. 3, Para. 2 and 3 of the APIA.

Pursuant to Art. 2, Para. 3 of the APIA, information is public regardless of its physical carrier, which in accordance with § 1 of the Supplementary Provisions of the APIA can include texts, blue-prints, maps, photographs, images, disks, audio or video cassettes and other such carriers.

In this respect the definition of the concept "public information" in the Bulgarian APIA is similar to that in European documents. In Regulation (EO) No. 1049 from 2001 the following definition of the concept "document" was adopted:

*"Article 3 Definition*

*For the purposes of the present regulation:*

*a) "document" means any information that is preserved regardless of its informational carrier (on a paper carrier or in electronic form, audio recording, video or audiovisual recording) which concerns areas related to policies, activities and decisions that fall within the sphere of the competence of the corresponding institution;"* ( http://www.aip-bg.org/pdf/1049_2001.pdf )

In the same way, Recommendation R (2002) 2 by the Committee of Ministers to Member States of the Council of Europe adopts the following definition:

*"I. Definitions*

*For the purposes of the present recommendation:*

*.....*

*iii. 'official documents' means any information that is written in whatever form, processed or received and stored by state bodies and which is related to state or administrative functions, with the exception of documents in the process of preparation."* (http://www.aip-bg.org/documents/rec2_bg.htm ).

The SAC's practice concerning the scope of the concept "public information" is summarized in a judgment by a Five-Member Panel in 2006. The judgment recalls that as early as Judgment No. 4694 of 16 May 2002 on Administrative Case No. 1543/2002 by a Five-Member Panel, the SAC expressed the position that the concept "public information" should be understood as information or knowledge about someone or something, connected with the public life of the country, as well as the activities of subjects

obliged under Art. 3 of the APIA. The SAC's constant practice following that decision maintains that public information is:

*"**a)** any collection of data, structured by a certain criterion and with a certain aim and purpose (see, for example, Judgment No. 3875 of 28 April 2005 on Administrative Case No. 592/2005 and Judgment No. 7522 of 29 July 2005 on Administrative Case No. 3265/2005, both by the SAC Five-Member Panel, and many others.),*

***b)** similarly, any information about a given state or a given activity of those subjects obliged under Art. 3 of the APIA (explicitly stated in Judgment No. 962 of 27 January 2006 on Administrative Case No. 6515/2005 by the SAC-Fifth Division; also in Judgment No. 3101 of 23 March 2006 on Administrative Case No. 8452/2005 and Judgment No. 9097 of 21 September 2006 on Administrative Case No. 5319/2006, both by the SAC-Fifth Division; Judgment No. 9486 of 4 October 2006 on Administrative Case No. 3505/2006 by the SAC Five-Member Panel and others),*

***c)** but not about interpretations of statutory provisions (Judgment No. 2757 of 15 March 2006 on Administrative Case No. 8209/2005).*

*Again with Judgment No. 1165 of 1 February 2006 on Administrative Case No. 9728/2005 the SAC Five-Member Panel ruled that public information should apply only to existing documents; however, for now this judgment is isolated and one cannot speak of contradictory or incorrect legal practice that could serve as the basis for the issuance of an interpretive judgment on the question of what information is public in the sense of Art. 2, Para. 1 of the APIA."* [5]

The court examined the question of whether concrete information requested under the APIA was public in the sense of the law relatively infrequently between 2005 and 2007 in comparison with the previous years. In almost all cases in which this question was raised, the magistrates concluded that the information requested was public or they ruled that the information would allow the seeker to form an opinion about the activities of an obliged subject, or they found that the information possessed characteristics of *official public information* in the sense of Art. 10 of the APIA or of *administrative public information* in the sense of Art. 11 of the APIA.

[5] Judgment No. 9720 of 10 October 2006 on Administrative Case No. 5011/ 2006 by the SAC Five-Member Panel.

Such, for example, was the case of Krasimir Krumov (from the *Monitor* newspaper), who appealed a refusal by the regional governor of Shumen to grant him access to the following information: a list of public works projects in the territory (so-called small demonstrative projects) of the Shumen Region (including the name of the project and the community); list of those who submitted tenders for small demonstrative projects; and the amount of money requested from the regional administration for each project. The magistrates ruled that the information requested is unquestionably public according to the APIA.[6]

In another case the SAC found[7] that information about the number, purpose and duration of business trips conducted by the mayor of any municipality and the expenses related to such trips is public information and cannot be defined as "personal data" in the sense of Art. 2 of the Personal Data Protection Act (PDPA), since it does not affect the concrete physical person, but rather is related to the mayor of a municipality's fulfillment of his official duties. The content of the information requested about the activities of a body of the executive power, i.e. a municipality, shows it constitutes administrative public information pursuant to Art. 11 of the APIA.

In two other cases the court found that the information requested did not represent public information in the sense of the APIA. Thus, in its decision a panel from the Sofia City Court (SCC) ruled that information about the fulfillment of official duties by a person assigned leadership responsibilities within the Council of Ministers (CoM) related to the management of CoM vacation properties constitutes personal data. In this way the court panel upheld the argument of the director of the Government Information Service that this information is not public in the sense of the APIA, but rather constitutes personal data protected under the PDPA.[8]

In another judgment, a panel of the SAC found that "the request for access does not target information related to public life as far as its disclosure would allow citizens to form their own opinion on the chief prosecutor's actions de-

[6] Judgment No. 9110 of 19 October 2005 on Administrative Case No. 2113/2005 by SAC, Fifth Division.

[7] Judgment No. 9097 of 21 September 2006 on Administrative Case No. 5319/2006 by SAC, Fifth Division.

[8] Judgment of 23 July 2007 on Administrative Case No. 2900/2006 by the SCC, Administrative division, Three-Member Panel.

termined by his own discretion, even if it could be deemed that these actions were indirectly connected with the fulfillment of his duties." The history of this case is connected with the publication of an open letter in the media on 5 November 2002 by Edwin Sugarev, in which he accused the chief prosecutor of abuse of power, disputes with inferiors, pressure on the media and so forth. As a result, at the time (at the end of 2002) the SJC gathered evidence, investigated the case and adopted a judgment that ascertained violations committed by the chief prosecutor. In its judgment, the SJC recommended that the chief prosecutor resign from his post. As a result, at the beginning of 2003, 31 citizens submitted a petition demanding that Chief Prosecutor Nikola Filchev follow the SJC's recommendation and resign from his post. They also submitted a request, which is in fact the subject of this case, demanding information related to the recommendations made not only by the citizens, but also by the SJC, that the chief prosecutor resign from his post.

In judicial practice in recent years, the question has hardly been raised as to whether a given body is required to disclose information under the APIA, since there are not refusals claiming that the public body in question is not obliged by the law to provide information. Only in the case of the refusal by the director of the National Intelligence Services (NIS) to provide the journalist Hristo Hristov (of the newspaper *Dnevnik*) with access to materials from the archives of the First Chief Directorate of the former State Security services from the period of 1971-1979 related to the murder of Bulgarian writer Georgi Markov did the respondent claim that the NIS was not obliged to disclose information under the APIA. The director of the NIS claimed that the institution was not an obliged body in the sense of Art. 3 of the APIA, referring to the provisions in Para. 1, Item 1 of the Supplementary Provisions of the Protection of Classified Information Act (PCIA). The court, however, judged that the respondent's refusal was unfounded. Indeed, the NIS constitutes a "security service" in the sense of the PCIA; however, in the formation of this concept legislators did not exclude its capacity as a state body designated in Art. 3 of the APIA, which makes it an obliged subject in the sense of that law. Subsequently, the court of cassation also upheld that the NIS as a government body is an obliged subject under the APIA and that no other legislation frees it from its obligation to provide information to citizens.

# JURISDICTION IN CASES OF REFUSALS TO PROVIDE ACCESS TO INFORMATION

In 2006 the Administrative Procedure Code (promulgated in the State Gazette (SG), vol. 30 of 11 April 2006) was adopted. This act led to changes related to the jurisdiction over a complaint filed against refusals of access to information during 2006-2007. The Code established administrative courts with headquarters and judicial regions that coincided with the headquarters and judicial regions of all the district courts. The Code envisioned the administrative headquarters beginning to consider cases on 1 March 2007, while proceedings of administrative cases begun before that date in regional and district courts and the SAC would be completed in the same courts following the earlier procedure.

The provisions of the APIA related to legal appeals were adjusted to conform to the newly adopted Code as early as its promulgation on 11 April 2006, but only partly. In Art. 40, Para. 1 of the APIA the words "following the Act on Administrative Proceedings or the Supreme Administrative Court Act" were replaced by "following the Administrative Procedure Code," while in Art. 40, Para. 2 of the APIA the words "following the Act on Administrative Proceedings" were replaced by "following the Administrative Procedure Code." Some of the provisions, which provided for the appeal of refusals before regional courts, however, remained unchanged. That is, the legislation failed to stipulate that access to information cases fall under the jurisdiction of the newly created administrative courts. In any case, this did not lead to major problems in practice, since the administrative courts were not scheduled to begin their activities until 1 March 2007. In the most recent amendments to the APIA (promulgated in the SG, vol. 49 of 2007), the provision in Art. 40, Para. 1 of the APIA was changed with respect to the courts assigned to hear access to information cases; at the present time the law provides for the following:

*"Decisions on the provision of access to public information or on refusals to provide access to public information are to be appealed before*

***administrative courts*** *or the Supreme Administrative Court, depending on the body that has issued the act, following the Administrative Procedure Code."*

Following this change, appeals of refusals to provide access to information by state institutions and local governmental institutions are now under the jurisdiction of the newly created administrative courts, except, of course, those cases which fall under the jurisdiction of the SAC as the court of first instance. This is not so, however, in cases of refusals by the subjects obliged under the APIA, since Para. 2 of Art. 40 of the APIA was not changed and thus the text remains as follows:

*Decisions on the provision of access to public information or on refusals to provide access to public information by subjects designated in Art. 3, Para. 2 are to be appealed before the regional courts, following the Administrative Procedure Code.*

Thus, refusals by subjects designated in Art. 3, Para. 2 of the APIA – public law subjects other than state institutions and local government bodies (examples include the National Health Insurance Fund, the Central Election Committee, the Council on Electronic Media, and others); the activities of physical and legal persons that have been financed by state or municipal budgets; as well as means of mass information – all of these remain under the jurisdiction of regional courts in the first instance.

Although it remains unclear why legislators assigned different jurisdiction over access to information cases depending on the subject whose refusal is being appealed, the change designating administrative courts to hear cases appealing refusals of access by state bodies and local governmental bodies must be evaluated positively, since such courts have heretofore worked relatively quickly. For example, the NGO Center for Independent Living's appeal against a refusal from the Agency for Social Support was initiated in the Sofia City Administrative Court in March. The case was scheduled and heard in April and a court decision was pronounced on 16 May 2007. Such quick administration of justice, especially in access to information cases, is particularly important for the exercise of this constitutional right. Timely review of the lawfulness of such denials plays a significant role in preventing certain officials from refusing information in the hopes that lengthy, drawn-out legal battles will help uphold unscrupulous practices and the culture of secrecy.

# DECISIONS MADE ON MERIT IN APIA DISPUTES. IMPLEMENTATION OF COURT DECISIONS

The question of solving disputes on the merit of access to public information cases is directly tied to the effect of court decisions in these cases. This is so, given that the difference is obvious between cases in which:

a) the court overturns a refusal and returns the request to the institution for new consideration;

b) the court overturns a refusal and returns the request to the institution for new consideration with mandatory instructions on the interpretation and implementation of the law; or

c) rejects a refusal and requires the institution to provide access to the requested information.

The number of court decisions in which disputes were decided on the cases' merits increased during 2006–2007. One of the reasons for this is better familiarity with the APIA on the part of the administration, which led to an increase in explicit decisions for refusals grounded in the law's provisions. This made it possible for the court, for its part, to decide cases on merit. Otherwise, as in previous years in cases of silent refusals or cases in which information was refused without indicating concrete factual or legal grounds for a refusal, judges continue almost without exception to find that an administrative body's failure to indicate by what criteria and on what basis it decided that information was restricted does not allow the court to decide the case on its merits; thus, it returns the request to the appropriate body for new consideration.

In six of the 14 cases included as an appendix to the present volume, the court decided the cases on their merits, requiring the respective institution to provide access to the information requested.

One case which is especially important in this respect was the decision by the Sofia City Court (SCC)[9] to overturn the director of the National

[9] Judgment of 14 March 2006 on Administrative Case No. C 31/2005 by the SCC, Administrative Division, Panel III-G.

Intelligence Services refusal to provide Hristo Hristov (of *Dnevnik* newspaper) with access to materials from the archive of the First Chief Directorate of the former State Security services from 1971-1979 related to the murder of Bulgarian writer Georgi Markov, who was assassinated in London in 1978. In its decision the judicial panel notes that the materials demanded were prepared and classified as protected information before the adoption of the Protection of Classified Information Act (PCIA), in which case they are subject to the provisions of Para. 9, Item 1 of the Miscellaneous Provisions of the PCIA, according to which all documents prepared before the law came into effect and classified at the level of "top secret" are now considered to be classified at the level corresponding to "secret." Furthermore, the time limits are calculated according to Art. 34, Para. 1 and are calculated from the date of the data creation. Consequently, for all requested documents from the period of 1971-1979, a review had to be conducted as to whether the time limits for their protection under the PCIA have expired. For those marked in the past with the stamp "top secret of particular importance," the time limit is 30 years, while for those marked "top secret," the time limit is 15 years. Thus, in the operative part of the court ruling the director of NIS was ordered to provide access to the requested information after the obligatory procedure for the declassification of the documents following the PCIA had been conducted.

No less interesting is the SAC's decision in the case of the citizen Anton Gerdjikov related to an event in 2002. During the Second Meeting of Bulgarians in Ukraine held in the city of Zaporozhie, participants erected a memorial to Han Asparuh.[10] Local authorities, however, removed the memorial the very same evening and placed it in storage in the Historical Museum of the city of Zaporozhie. The citizen subsequently submitted a request asking the Bulgarian Foreign Minister to provide him with all the information the ministry possessed regarding the memorial's placement and removal. In part, the seeker requested that he be provided with documents, described in detail in five points in the request, all related to the position and actions undertaken by Bulgarian state institutions with regard to the case of the memorial's removal. In its decision on the merits, the SAC panel **overturned the minister's refusal and required him to provide access** to

[10] The founder of the Bulgarian state in 681 and its first ruler.

all the information requested. In their judgment, the judges noted that the minister must provide the complainant with access to the documents listed in the request, because only after familiarizing himself with their content would he be able to find an answer to the question that interests him – what is the Republic of Bulgaria's official standpoint on the events taking place in Ukraine to erect a monument to Han Asparuh in the city of Zaporozhie.

The implementation of a court decision is closely related to what the court orders. When a court orders an institution to provide access to requested information, it usually provides it; however, if the court returns the request for new consideration, it is usually refused again.

An example of this was the case of *Ekoglasnost v. the Nuclear Regulatory Agency* (NRA). The NRA refused to provide copies of the appendices to reports about the incident at the fifth block of the Kozloduy Nuclear Power Plant on 1 March 2006,[11] simply indicating that the information harmed third-party interests and that it lacked the third-party's consent for their release. The case was initiated by an appeal from the Ekoglasnost National Movement, which had received the reports under the APIA, but was refused access to their appendices. The reasoning for the refusal was that a third party – the nuclear power plant – had not given its consent to their disclosure. In its decision on the case a SAC three-member panel found that it was not clear why the NRA had decided that the commercial rights and interests of the Kozloduy NPP had been infringed upon. The judges found that the appendices, just like the reports, contain data about the investigation into the reasons for the incident, thus it cannot be assumed that they include some secret protected by law. This decision was subsequently upheld by a SAC five-member panel as well.[12] After the request was returned to the agency for new consideration, however, a new refusal followed, this time based on an *official secret*.

[11] The Bulgarian public learned about the incident, which was related to the failure of a control rods system, from publications in German newspapers.

[12] Judgment №. 1178 of 2 February 2007 on Administrative Case №. 6942/2006 by SAC, Fifth Division.

# FORMULATION OF REQUESTS FOR ACCESS TO INFORMATION

The question of how to formulate a request is tied to the interpretation of the provisions in Art. 25, Para. 1, Item 2 of the APIA, according to which a request for access must include a **description of the requested information,** and in Art. 29, Para. 1, which states that it if is not clear what information is being requested, or if it is described too generally, the seeker must be informed of this, at which point he has the right to clarify the subject matter of the requested information. It is obvious from these provisions that legislators aim to provide a simplified and quick procedure for citizens by reducing to a minimum the formalities connected with requests.[13] This understanding reflects the fact that the administrative body is always in a more favorable position vis-a-vis the citizen in terms of its knowledge of the information, since it is stored in the institution itself.

In this respect, the provisions of the APIA are harmonized with the standards imposed in Recommendation (2002)2, Principle V, Art. 1 of which reads:

***"Formalities** related to requests should be reduced **to a minimum."***

Thus, we should keep in mind that according to the approach imposed by the Recommendation, this principle should apply to oral requests as well. Furthermore, the acceptance of oral requests itself is also a way to facilitate the procedure for a citizen who would like to form an opinion about the activities of a state body.

The above-mentioned information shows that the APIA's norms with respect to the formulation of requests for access aim solely at the facilitation of the process of seeking and receiving access to information.

In 2003, however, judicial practice brought the problem of the formation of requests under discussion – this was reflected in AIP's book *Access to Information Litigation in Bulgaria: Volume 2*. At that time the problem of for-

[13] Nevertheless, Art. 24 of the APIA provides for the submission of a request in "oral form" as well.

mulating requests for access, which was discussed in several SAC decisions, was described in terms of **access to documents – access to information**. In the year in question the SAC made several rulings which found that under the APIA citizens have the right to access to information, but not to access to documents. Furthermore, if a citizen demanded access to a document (for example, by formulating his request in the following manner: please provide with a copy of contract or order X), the public authority was not even required to answer him.

The question was raised during the hearing of an appeal by Apostol Stoychev[14] against a silent refusal from the chairman of a state *chitalishte*, or community center. In its decision on that case the court panel reached the conclusion that the request for access to a document, rather than to information, provides a valid basis for refusal. The judges' reasoning was that in the case of a request for access to a document, no decision on the provision of access to public information is due.

The court had already presented similar arguments concerning the formulation of requests in its decision on a case brought by Nikolay Marekov[15] (a former member of the AIP team) against the minister of finance's refusal to provide access to a requested **copy** of the first three-month **report** by the British firm Crown Agents on the implementation of a contract between the ministry and the company.

In another case in 2003 in which the seeker requested access to a specific document, SAC ruled it an instance of the hypothetical case from Art. 29 of the APIA – in which the information requested is formulated too generally, hence the seeker should be informed of this so that he or she can further specify the desired information.

The SAC presented a similar judgment in the case brought by journalist Aleksey Lazarov in 2002[16] against a refusal by the Council of Ministers to provide a copy of the stenographer's report of the first cabi-

[14] *Apostol Stoychev v. the Hristo Botev State Community Center in the village of Banevo* (Administrative Case No. 210/2003 BDC, Administrative Case No.8825/2003 by SAC, Fifth Division)

[15] *Nikolay Marekov v. the Ministry of Finance* (Administrative Case No. 8962/2002 SAC, Fifth Division, Administrative Case No. 8717/2003 by SAC, Five-Member Panel)

[16] *Aleksey Lazarov v. the Council of Ministers* (Administrative Case No. 7189/2001 by SAC, Fifth Division, Administrative Case No.1543/2003 by SAC, Five-Member Panel)

net meeting.[17] In this case a SAC five-member panel ruled that in demanding a copy of the stenographer's report, the journalist did not fulfill the requirements in Art. 25, Para. 1, Item 2 of the APIA – which requires that the request contain a description of the information requested. In this case, the request was broadly formulated and only specified the preferred form of access – requirement of Art. 25, Para. 1, Item 3 of the APIA.

Similar arguments were made in the judgment in the case of the contract with Crown Agents, in which the SAC reached the conclusion that in Item 2 of Art. 25, Para. 1 of the APIA it is specified that the request must contain a **description of the requested information apart from the identification of the document**. However, the contents of the complainant's request obviously lack a description of the requested information. The Court supported its conclusion with the argument that a general demand to provide a **copy of the contract** cannot be accepted as a fulfillment of the requirements of Art. 25, Para. 1, Item 2 of the APIA, in so far as the contract was merely a material carrier upon which the public information being sought was recorded. The material carrier of itself cannot qualify as the public information according to the legal definition given in Art. 2 of the APIA.

Subsequently, the court's five-member panel found that the lower court's decision was in violation of the law in the section concerning the description of requested information and the applicability of Art. 29 of the APIA, when it ruled the following:

"It is obvious that in requesting a copy on a paper carrier, the seeker requested access to the public information contained in the contents of the document's clauses, and not just any collection of 110 sheets of paper. In this case the generic concept 'contract' has been specified so that not just any contract is demanded, but the one concluded between the Bulgarian government and the British consulting firm Crown Agents. From the behavior and the procedural declarations from both sides of the dispute it is obvious that **it is indisputably clear to both of them precisely what public information is being requested**."[18]

---

[17] The Cabinet (2001 – 2005) voted in the summer of 2001 after the election victory of the recently established king's party (the National Movement for Simeon II).

[18] Judgment No. 2113 of 9 March 2004 Administrative Case No. 38/2004 by SAC, Five-Member Panel, *Kiril Terziyski v. the Minister of Finance,* regarading access to the Crown Agents contract.

With this decision by the SAC five-member panel the question that had arisen in judicial practice was effectively decided; over the course of the next two years (2005–2006) it was only upheld. Thus, when the question arose again in two cases during 2005 based on complaints against rulings by the Razgrad District Court arguing that access to documents under the APIA was not obligatory, these decisions were overturned by the SAC. For example, in Decision No. 3548/2005 in Administrative Case No. 3170/2005 by the SAC, Fifth Division, the court held that:

*"The fact that access to documents and not to the information contained in the documents was requested is irrelevant to the APIA and is a matter of terminological clarification. It is obvious that if the seeker knew the contents of the information contained in the relevant documents, he would not need access to them. And since* ***administrative decisions (acts) by state bodies*** *and local government bodies* ***by definition contain public information****, the argument that the body is not obliged to provide access to the described documents is unfounded."*

Similarly, Decision No. 6774/2005 on Administrative Case No. 4183/2005 by the SAC, Fifth Division, found:

*"The court's argument that access to documents was not regulated under the APIA is incorrect. The error is made evident, for example, by the provision in Art. 10 of the APIA, which defines as public the information contained in the* ***acts (decisions) of state bodies*** *and local government bodies. In principle, acts… are documents."*

Unexpectedly and contrary to SAC precedent, in 2007 court judgments again appeared stating that under the APIA only access to information can be demanded, but not merely access to documents as a materialized carrier of information.

Thus, in 2006 the case of the Za Zemyata (For the Earth) environmental association against a refusal by the mayor of the Municipality of Sapareva Bania to provide access to the Draft for the Urban Development Plan (UDP) and to the Environmental Impact Assessment (EIA) Report on the UDP for *Panichishte Lakes-Kabul Peak Tourism and Ski Center* again led to the overturning of a refusal by the Kyustendil District Court (KDC).[19]

[19] Decision of 21 December 2006 on Administrative Case No. 201/2006 of the Kyustendil District Court (KDC).

Subsequently, however, a SAC panel, Third Division, in turn overrode the KDC's decision and made another ruling,[20] which dismissed the environmental association's complaint as unfounded. The court panel found that the mayor of the municipality's refusal to provide information on a material carrier was lawful, and that the complaint filed against him was unfounded. In the first place, access to the requested information had not been refused, as information had been provided under the special procedure set forth by the *Regulations for the Procedure for Conducting Environmental Impact Assessment of Plans and Programs,* as stipulated by Art. 4, Para. 1 of the APIA. The justices based their conclusion on the fact that the Municipality of Sapareva Bania had published an announcement as of May 12, 2006, saying that all interested physical and legal persons would have access to the Urban Development Plan and to the Environmental Assessment Report on the *Panichishte-the Lakes-Kabul Peak Tourism and Ski Center* and also to the Draft UDP; a final date for the acceptance of opinions was specified, as well as an e-mail address to which opinions could be sent.[21] Second, according to the magistrates, under the APIA access to information can be requested, but not merely access to documents as materialized carriers of information, as in the present case. The documents are material carriers of the information, but if the information itself is not sought in the form of a description of the information or knowledge about something, but merely as a demand for the provision of a document, then it is not obligatory to provide such information.

A SAC panel came to nearly identical conclusions in the case of Yuriy Valkovsky's appeal of the minister of culture's refusal to provide him with a copy of his order for the appointment of a working group to prepare a draft of a regulation under the Protection and Development of Culture Act (PDCA). In their judgment[22] the judges ruled:

---

[20] Judgment No. 10010/22.10.2007 on Administrative Case No. 2591/2007 by SAC, Third Division.

[21] The regulation stipulates the obligation of the contracting authority to organize public consultations with the community and interested parties that might be affected by any of the implementation phases of the plan or the program (Art. 19, Para.1), as well as the procedure for conducting such consultations (Art. 20, Para. 1).

[22] Judgment No. 439/14.01.2008 on Administrative Case No. 5161/2007 by the SAC, Third Division.

*"In the sense of Art. 2, Para. 1 of the APIA, public information is all information connected to the public life of the Republic of Bulgaria which offers citizens an opportunity to form their own opinion about the activity of subjects obliged under the law. The concept 'public information' must be understood as information or knowledge about something or someone related to the public life of the country. This public information can be contained in documents or on other material carriers, created, received or kept by those subject to the APIA. However, the way in which the request was formulated by the complainant for the provision of a copy of the order does not constitute a request for access to public information. Every request for access under the APIA must contain a description of the requested public information, pursuant to Art. 25, Para. 1, Item 2 of the APIA. Under the APIA access to information can be requested in the above-mentioned sense, but not merely access to documents as materialized carriers of information as in the present case of the seeker's first request. Documents are material carriers of information; however, if requests do not contain a description of information or knowledge about something or someone, but merely consist of a demand for the provision of a document, the provision of such information is not obligatory. Only if the seeker specifies the type of information requested by describing it in the sense given by legislators does the obligation for its provision arise. There is no existing law requiring the administrative body to provide information in response to a request formulated as in the concrete case under discussion. In refusing to provide a copy of the order, the minister of culture issued a refusal that was lawful in that respect, hence, the appeal against it is unfounded."*[23]

This interpretation by the court regarding the formulation of requests for access, however, is *contra legem*, as it adopts a narrow rather than broad interpretation. The result is a significant crippling of the right to access to information, since citizens are deprived of access to justice and protection against violations of the right of access in cases in which a copy of a document is requested. As has become clear, the fundamental problem stems from the fact that in cases in which access is requested to a contract, order,

[23] The decision was appealed with a cassation appeal before a SAC five-member panel.

stenographer's report or so on, every one of these concepts takes on a double meaning – both the information in and of itself and the form or carrier upon which this information is recorded. What remains unclear, however, is why in the face of an already well-developed practice on the question the court continues to consider the question of whether the requirement for a description of the requested information is met in cases when access is requested to a contract, stenographer's report or order, given that a refusal by a subject obligated under the APIA makes it obvious that it was absolutely clear to him precisely what information was being requested.

The explanation for the fact that in practice the question of the interpretation of APIA provisions regarding the formulation of requests for access is being raised again must be sought in the fact that in 2007 without prior preparation, access to information cases began to be heard by the SAC, Third Division, rather than the Fifth Division, which had previously been hearing them for years. Continuity was lost in this change, at least to some degree. Obviously, it will once again be necessary for synchronization to be reached with the already established positive legal practice through new decisions on court cases. The great danger is, however, that with the change of jurisdiction over access to information cases within the divisions of the SAC, the whole positive practice under the APIA created by the SAC, Fifth Division over the course of seven years will sink into oblivion.

# FORMULATION OF INDIVIDUAL REQUESTS

Very often, one request for access to information has several points; in other words, one request may contain several separate requests for information. This is completely natural and does not lead to any complications when the relevant obliged body decides to provide access to the information, despite the fact that the relevant body should consider each request separately. The situation is different, however, in cases in which the relevant body refuses access to the requested information. According to the provisions in Art. 38 of the APIA, which lists the necessary prerequisites for a decision to refuse access to information, a body must specify the legal and factual bases behind their refusal. In other words, the decision to refuse information must always be grounded. In practice, this means that in cases in which a single request contains several demands for access to information, in a refusal grounds must be provided for each of the individual demands. In this way it is possible for the seeker to be convinced of the justifiable grounds for a refusal; moreover, if he decides to appeal, it guarantees him the possibility for an adequate defense in the judicial proceedings. Conversely, the absence of grounds deprives the seeker the possibility to defend his position adequately and deprives the court of the possibility for evaluating the grounds for the refusal.

In previous years the Sofia City Court (SCC) advanced this position in the case of Pavlina Trifonova (from the newspaper *24 Hours*) against a refusal by the Governmental Information Services Directorate to provide access to information about ministers' business trips and about the Council of Ministers' vacation complexes. In that case the judges found that the request contained several separate requests for access to information, each of which must be considered individually by the administrative body.[24]

[24] Decisions of 23 August 2004 on Administrative Case No. 2860/2003 by the SCC, Administrative Division, Panel III-Z.

Subsequently, this judicial practice was upheld by the SAC as well, in the case of Krasimir Krumov (a journalist from the newspaper *Monitor*) concerning a refusal by the regional governor of Shumen to provide him access to information in the form of a report containing: a list of public works projects in the territory (so-called small demonstrative projects) of the Shumen Region (including the name of the project and the community); list of those who submitted proposals for small demonstrative projects; the sums requested from the regional administration for each project; and the contractor and subcontractor for each project. In its decision, a SAC Three-Member Panel noted:

"The regional governor's letter **lacks any grounds whatsoever [for the refusal of] each of the demands formulated in the request**. According to the provisions in Art. 38 of the Access to Public Information Act (APIA), a refusal to provide information must be issued with a decision that contains the factual and legal bases for the refusal, as well as the date and the means for appealing the refusal. Hence, the 'answer' received by the seeker represents the concretely formulated will of the administrative body, which, however, is not expressed in the manner specified in the law."[25]

Later, the judges reach the conclusion that the lack of grounds offered for each of the requests constitutes a fundamental violation of the rules of administrative procedure; thus, the request should be returned to the regional governor for proper processing following instructions concerning the obligatory interpretation and application of the law.

[25] Decision No. 9110 of 19 October 2005 on Administrative Case No. 2113/2005 by SAC, Fifth Division.

# RESTRICTIONS ON THE RIGHT OF ACCESS TO INFORMATION

*Overview of Bulgarian legislation*

Most laws for access to public information (or freedom of information) contain general provisions concerning restrictions on the right to information. At the very least these provisions list grounds for restrictions and general requirements that must be met for such restrictions. Detailed regulation of the restrictions is usually contained in separate laws.

Bulgarian lawmakers have taken a similar approach. Provisions related to exemptions to the right of access to information are scattered throughout various pieces of legislation. The norms concerning this subject include Art. 5, Art. 7, Art. 13, Para. 2 and Art. 37 of the APIA. As is apparent, these norms are found in the beginning, the middle and the end of the law; in other words, systematicity is lacking. Furthermore, these provisions on restrictions are incomplete and unclear. The restrictions are not exhaustively listed. An attempt at such an enumeration is made in Art. 37, Para. 1 of the APIA, where grounds for refusals to access to information are described. Such grounds include information classified as a state or official secret, information pursuant to Art. 13, Para. 2 and information harmful to a third party. The absence of trade secrets and the protection of personal data, however, puts in question the law's completeness and clarity. In fact, these two categories logically fall under the more general category of protection of the interests of a third party. In order to reach this conclusion in practice, however, it was necessary to create and accrue a body of practice.[26]

[26] In this respect it should be noted that court rulings are still found in which the judge does not deeply examine the protected interest of the relevant third party, but rather is satisfied with the claim that its consent was requested. Compare, for example, Decision No. 1299 of 6 February 2006 on Administrative Case No. 7222/ 2005 by SAC, Fifth Division.

The problem of the clarity of the norms concerning restrictions arises on another level as well. The approach according to which restrictions are defined by the type of interest they protect is generally accepted in international acts and in many national laws. For example, in national legislation the protection of national security is usually stipulated. In order to guarantee such protection, a relevant restriction on the right of access information related to the protection of that interest is introduced. At the same time, in Bulgarian law concepts such as "state and official secrets" still exist. However, they are not based on a protected interest, but rather on a protected subject – the government as a whole or simply the institution in question. Hence, a clear idea of what exactly is being protected is lacking. To arrive at such an understanding, the concepts must be interpreted and it must be established that, for example, the concept "state secret" in contemporary Bulgarian legislation actually covers four protected interests, namely national security, foreign affairs, defense and the constitutionally protected order (Art. 25 of the PCIA).[27]

At the same time, Art. 5 of the APIA separately lists protected interests which allow for the application of exemptions to the right of access to information. The norm literally reproduces Art. 41, Para. 1 of the Constitution.[28] In order to establish the connection between the exemptions – that is, between the terms for them in our tradition and the relevant protected interests of those listed in Art. 41, Para. 2 of the Constitution of the Republic of Bulgaria (CRP) – additional interpretation is necessary.

[27] In this respect Bulgarian legislation is not unique. Similarities can be observed in the legal system of a nation and a context similar to that of Bulgaria – Romania – as well as in the legislation of a nation in a different context, such as the United Kingdom, since in both the concept "official secret" is used.

[28] As was noted in a comparative legal survey by Toby Mendel, Art. 5 of the Bulgarian APIA defines the parameters of protected interests too broadly. This results from the literal reproduction of Art. 41, Para. 1 of the Constitution in Art. 5 of the APIA, despite the fact that the former relates not only to the right of access information (as part of the right to seek information), but also to the right to receive and distribute information. This also explains the larger amount of restrictions in the constitutional norms. See *Freedom of Information. A Comparative Legal Survey*, by Toby Mendel, UNESCO 2003, p 41.

The above-mentioned problems found in the wording of the APIA required serious and intensive interpretation by the courts. In recent years many of the questions were examined in detail and were clarified and defined in the court rolls. Support for cases that raised these questions was one of the Access to Information Programme's priorities. In this respect, cases developing in the courts turned out to be of exceptional importance to the implementation of the APIA, whereas attempts to reach legislative solutions to such problems were not typically successful.[29]

### *Definition of exemptions*

As was noted, the different restrictions on the right of access to information are set out in various laws. In this respect, Bulgarian legislation is no exception. The most detailed descriptions can be found in the provisions of the Protection of Classified Information Act (PCIA) of 2002, which regulates so-called **state and official** secrets. The definition of a so-called trade secret is contained within the Fair Competition Act (FCA), while the definition of personal data is found in the Personal Data Protection Act (PDPA) of 2002. The only restrictions on the right of access to information defined within the APIA itself are found in Art. 13, Para. 2 and are related to the process of **operational preparation** of a given act (an opinion, position, or recommendation) pursuant to Art. 13, Para. 2, Item 1, or the **process of negotiation** – Art. 13, Para. 2, Item 2.

The question of the precision of the various definitions of the different restrictions on the right of access to information has been raised in judicial practice. We can conclude that the more clearly the contents of a concept are defined, the easier it is to make detailed interpretations of them and to work towards a more precise definition of their boundaries within judicial

[29] The first unsuccessful attempt to improve the APIA's sections on restrictions was made by MP Iliya Petrov in 2000 immediately before the adoption of the law. Suggested amendments and additions in the same vein by Emil Koshlukov, Borislav Tsekov and a group of MPs in 2001were adopted only in a first reading (despite the fact that in the European Commission's annual report on Bulgaria's progress the incorrect claim was made that the law had been improved). The draft legislation introduced by three MPs in 2006, in addition to the fact that the proposed amendments suffered from an overall ignorance and lack of quality, also did not provide for an improvement of law in this respect.

practice. Thus, for example, in the case of *Zoya Dimitrova v. the Head of the President's Administration*,[30] the court found that the requested report by the security services regarding Bulgarian firms' participation in trade with Iraq in violation of the UN embargo could not be considered classified information on the grounds of Item 9 of Section III of the list appended to Art. 25 of the PCIA. The court found:

*"This law is not applicable to the concrete case, as it refers to 'reports… related to the operative work of the security services,' while in this case the subject of the request for access was not the operative work of those services, but only the result of it..."*[31]

In other words, it is clear that in cases in which a restriction is more clearly defined, its interpretation in practice is also characterized by a larger degree of precision. As a result, the right of access to public information is better guaranteed.

### *The relationship between the principle and exceptions*

Regarding all restrictions on the right to seek, receive and impart information and partial restrictions on the right of access to information, the Constitutional Court took the following approach:

*"this is not a question of a choice between two opposing principles, but rather of the application of an exception to a single principle (the right to seek and receive information); such an exception is subject to a narrow interpretation and only in order to guarantee the protection of a competing interest."*[32]

This understanding was also applied by the SAC in its practice, which viewed the right to information as a principle and the application of restrictions found in the PCIA and PDPA legislation as exceptions.[33]

---

[30] The president of the Republic of Bulgaria has delegated his function to respond to access to information requests to his chief secretary, who will be referred to hereinafter as the head of administration.

[31] Decision No. 5 of 3 January 2006 on Administrative Case No. 4596/2005 by SAC, Fifth Division.

[32] Constitutional Court Decision No. 7 of 4 June 1996 on Constitutional Case No. 1 of 1996, SG vol. 55/ 1996

[33] Decision No. 9595 of 19 November 2004 on Administrative Case No. 7897/04 by a SAC Five-member Panel, *V. Chobanov v. the Supreme Judicial Council.*

On the one hand, it is important for this principle to be clearly emphasized.[34] On the other hand, its subsequent application is interpreted in concrete hypotheses. One specific case in which legislators introduced this principle can be seen in the establishment of time limits for the protection of certain information. Another instance of the principle's application is in the legal requirement that an administrative body provide a factual basis and legal grounds in the case of a refusal to provide public information. In practice, these requirements are applied especially strictly in cases of refusals based on the protection of classified information.[35] The expression of the rule "exception from a principle" was also stipulated in Art. 41, Para. 3 and 4 of the APIA, which gives the court the authority to exercise control over the legality of marking documents as classified.

### *Time limits for the protection of information qualifying as an exception*

One of the manifestations of the "exception from a principle" rule is a stipulation of definite time limits for the protection of information. Before the adoption of the PCIA, the possibility of limitless protection of information by state institutions existed. The PCIA established three classification levels of information that qualified as state secrets, with the respective time limits for their protection being five, 15 and 30 years. They correspond to the level of harm or danger to the protected interests in the case of disclosure. The maximum time limit of 30 years for the protection of a state secret can only be extended to 60 years at the most via a decision by a commission created by the law (Art. 34, Para. 2 of the PCIA).[36]

[34] Ibidem.

[35] See Decision No. 5451 of 22 May 2006 on Administrative Case No. 6363/2005 by SAC, Fifth Division, upheld by Decision No. 10731/2006 on Administrative Case No. 7669/2006 by a SAC Five-Member Panel (*Silvia Yotova v. the Minister of Regional Development and Public Works* concerning the Trakia Highway Jsc. Contract), Decision No. 11682/2003 on Administrative Case No. 3080/2003 by SAC, Fifth Division, upheld by Decision No. 2113/2004 on Administrative Case No. 38/2004 by a SAC Five-Member Panel (*Kiril Terziyski v. the Minister of Finance* concerning the Crown Agents contract).

[36] The State Commission for Information Security.

The time limit for the protection of official secrets according to the PCIA is six months. Information pursuant to Art. 13, Para. 2 of the APIA can be protected for a maximum of two years from the time of its creation.[37]

The expiration of the time limits stipulated by the law for a given piece of information classified as a state secret forms the basis for the recognition of the right of access to it.[38] In the same way, the grounds for refusal are no longer valid in cases in which the time limit for the protection of certain information is also legally stipulated, for example, in the case of preparatory documents in the sense of Art. 13, Para.2, Item 1 of the APIA.[39]

### *General requirements for limitations on access to information*

The general requirements applicable to limitations on access to information are connected to the so-called three-part test. This means that a given restriction can only be imposed after verifying that it is:

- prescribed by the law;
- proportional to the goal of defending one or more protected inter ests;
- necessary in a democratic society.

The three-part test is found in a series of legal documents. It is imposed in Art. 10, Para. 2 of the European Convention on Human Rights concerning the right to freedom to receive and distribute information; in Art. 8, Para. 2 of the European Convention on Human Rights concerning the right to have

[37] In 2007 via amendments to the PCIA, the time limit for the production of official secrets was changed from two to six months. The time limit for the protection of information according to Art. 13, Para. 2 of the APIA was changed from 20 to two years in 2002.

[38] Decision of 14 March 2006 on Administrative Case No. C-31/ 2005 by the SCC, III-G panel, upheld by the Decision of 11 June 2007 on Administrative Case No. 3C-321/2006 by SAC, Fifth Division. (*Hristo Hristov v. the Director of the National Intelligence Services* concerning documents related to the writer Georgi Markov, who was killed in London).

[39] Decision No. 7483 of 11 July 2007 on Administrative Case No. 818/2007 by SAC, Fifth Division, upheld by Decision No. 11257/2007 on Administrative Case No. 9280/2007 by a SAC Five-Member Panel. (*Yordan Todorov v. the Minister of the Interior* regarding documents concerning the rental of housing properties owned by the Interior Ministry).

one's personal and family life respected;[40] in Recommendation (2002) 2 by the Committee of Ministers to the member-states of the Council of Europe concerning the right of access to official documents; in Regulation (EO) No. 1049 of 2001 of the European Parliament and the Council regarding public access to European Parliament, Council and Commission documents; and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, promulgated in the *State Gazette* vol. 9 of 2003, amended in the *State Gazette*, vol. 33 of 2004 (also known as the Aarhus Convention).

In Recommendation (2002) 2 concerning access to official documents, the condition that the restriction "be necessary in a democratic society" is further specified by the admission that access to a document can be refused only if the disclosure of the information contained therein:

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

### *General requirements for restrictions on access to information in Bulgarian legislation*

In the Bulgarian legislation the general requirements for restrictions on access to information reflected in the three-part test are not fully expressed or stipulated in the APIA, unlike in many other national laws. However, they are fully expressed in Art. 20 of the more recent Environmental Protection Act (EPA) from 2001 regarding environmental information.

The individual elements of the test can be extracted from various provisions of the APIA and from other laws related to it. For example, in Art. 7, Para. 1 of the APIA it is stipulated that the right to information can be restricted only by a law.

[40] This right also includes the right of access to information concerning one's own personal life – see *Judgment Gaskin v. the United Kingdom*.

### 1. Prescribed by law

As was already noted, various restrictions on access to public information are defined in different parts of the legislative corpus:

- Art. 25 of the PCIA defines a "state secret," while Appendix 1 to that norm gives the concrete categories of information that can be classified as state secrets;
- Art. 13, Para. 2, Item 1 of the APIA provides a definition of the restriction related to so-called preparatory documents without significance of its own;
- Art. 13, Para. 2, Item 2 of the APIA provides a definition of the restriction related to negotiations by or for a government institution;
- Para. 1, Item 7 of the Fair Competition Act (FCA) gives a definition of trade and industrial secrets;
- Art. 2, Para. 1 of the PDPA gives a definition of personal data;
- Art. 26, Para. 1 of the PCIA defines so-called official secrets by indicating concrete categories of information.

The requirements for precision in legislative provisions that regulate restrictions are high, in accordance with judicial practice. For example, legislative provisions which state that a protected secret is "information that has become known to someone during or due to the fulfillment of his duties" do not satisfy the requirement to be prescribed by law (nevertheless, a series of provisions still introduce the concept of "official secret" in that way). The various categories of information that fall within the restrictions should be described precisely in the legislaton; the "official secret" restriction is no exception to this rule. The SAC, Fifth Division, ruled in such a manner in the case of the *Civil Association Public Barometer of Sliven v. The Director of the Public Internal Financial Control Agency.*[41]

### 2. Protected interests

In Decision No. 7 of 4 June 1996 on Consitutional Case No. 1/1996, the Constitutional Court held:

[41] Decision No. 10539 of 22 November 2002 on Administrative Case No. 5246/2002.

*"The restriction of these rights is permissible with the goal of protecting other, also constitutionally protected rights and interests, and can occur only on grounds stipulated in the Constitution."*

However, the question of what exactly these protected interests are is not given a complete and systematic answer in the legislation. The provisions in Art. 5 of the APIA, reproduces Art. 41, Para. 1 of the Constitution, which generally relate to the right to seek, receive and impart information. At the same time, the protected interests listed there are also given in general terms. For example, the exception that can be formulated most generally as that related to the rights and interests of a third party, can in fact be further broken down into the protection of personal data and the legitimate interests of entrepreneurs.

Protected interests are most exhaustively given in Art. 20, Para. 1 of the EPA. They are also listed in Art. 37, Para. 1 of the APIA. Presented systematically, the right to free access to public information permits restrictions to protect the following interests (and rights):

- protected state or official secrets as defined in the PCIA;
- so-called protected trade secrets;
- data protected pursuant to the PDPA;
- protected data that constitutes intellectual property;
- protected internal consultations and discussions related to making a given decision (Art. 13, Para. 2, Item 1 of the APIA);
- protected negotiations in the name of a state institution (Art. 13, Para. 2, Item 1 of the APIA).

The interests protected under the definition of "state secret" are as follows:

- national security;
- defense;
- foreign-policy;
- protection of the constitutional order.

The permissible protection of these interests was defined in more detail in the list of specific categories in the appendix to Art. 25 of the PCIA.

At the same time, the defense of intellectual property is an inessential restriction. In copyright cases, the product does not constitute a secret; rather, the distribution of the product without the agreement of its creator is forbidden. In cases where such protection is necessary, it can be provided through the selection of the form of access to information by the responsible state institution – Art. 27, Para. 1, Item 3 of the APIA. It follows that access to such information is in principle permissible.

### 3. Proportionality to the goal of defending one or more protected interests

In Decision No. 7 of 4 June 1996 on Constitutional Case No. 1/1996, the Constitutional Court held:

"*... the restrictions (exceptions) to which these rights can be subjected should be applied in a limited fashion and only to guarantee the protection of a competing interest.*"

That is, the obligatory interpretation of Art. 41 of the Constitution introduces a second rule, namely that every restriction should be proportional to the goal of defending one or more protected interests.

As noted earlier, the relationship of the restrictions to a given protected interest is implicitly given in the APIA with the norm in Art. 5. In its decisions, the SAC also applied this relationship to concrete restrictions. For example, seeking the agreement of a third party entrepreneur must be done with the goal of protecting his interests. At the same time, the definition of these interests should not be an end in itself, but rather should follow objective criteria. In its decision the SAC held:

*"if we discuss the question of whether the request infringes on the rights or legal interests of a third party, the present panel holds that no such legal rights or interests of the commercial corporation as a third party were infringed upon. The request seeks data of a statistical nature and does not concern the corporation's commercial activities, nor does it constitute an official secret."*[42]

[42] Decision No. 4716 of 25 May 2004 on Administrative Case No. 8751/2003 by SAC, Fifth Division. Almost identical to Decision No. 4717 of 25 May 2004 on Administrative Case No. 8752/2003 by SAC, Fifth Division (the cases concerned refusals by the mayor of the Municipality of Vidin to disclose information concerning a contract signed

That is, not all information concerning an entrepreneur is subject to protection, but only that whose disclosure would infringe upon his rights and legal interests.

**• The narrow interpretation of restrictions**

The proportionality to the goal of protecting one or more interests is also reflected in the narrow interpretation of restrictions. For example, in its decision on the case *Zoya Dimitrova v. The Head of the President's Administration*, the court ruled that the goal of the PCIA is to protect data related to the operative work of the security services. The administration's attempt to also include in this category the results of such work is not proportional to the goal of the law. The court ruling also states that the cited category of information subject to classification as a state secret as defined by the PCIA is not applicable in this case.

**• Granting of partial access**

The granting of partial access is stipulated in Art. 7, Para. 2 of the APIA. A typical example is access to documents that also contain personal data. In such cases the words or passages that reveal personal data must be blacked out and copies of the documents without this data must be presented (if such a copy is indicated in the quest for access). For example, in the case of *D. Totev v. The Chief Tax Director* concerning a refusal to provide access to a letter by the latter addressed to a certain individual subject to taxation regarding questions of taxation, the court's instructions required that the individual's name and address be obliterated.[43] The same holds for the personal data of witnesses indicated in an act establishing administra-

between the Municipality of Vidin and the municipal waste management company and information concerning the contract's fulfillment).

[43] Decision No. 6017 of 2002 by a SAC Five-member Panel, on Administrative Case No. 10496 of 2002 published in Access to Information Legislation: Selected Cases 2002, published by the Access to Information Programme, Sofia, 2002, p. 263. Concerning the implementation of the court ruling see Letter from the Chief Tax Directorate No. 24-00-113 from 10 March 2003 concerning the implementation of certain provisions of the Codex on Tax Procedures.

tive violations.[44] There is also no reason to refuse partial access to contracts between public institutions and private firms.[45] To this end, the institution should not restrict access to all of the information in the contract.[46]

Partial access is also possible and obligatory in cases in which part of the requested information is classified as a state or official secret. According to the SAC, "even if we accept that through the disclosure of the results of the work of the security services there might arise some danger from the disclosure of the protected information, this risk can be avoided through the granting of partial access."[47]

**• Protection from harm or the risk of harm to protected interests**

Studying the harm of disclosing public information is part of the "exception from a principle" rule and of the narrow interpretation of the restrictions. Only in the face of harm or risk of harm does the actual necessity for protection via restriction of access exist. Despite the fact that the principle of harm is not explicitly formulated in the APIA, it is reflected in a series of other legal acts.

Some of these acts use the wording "disclosure of the information would have adverse effects" – see Art. 4, Para. 4 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and Art. 26, Para. 1 of the PCIA. In other acts the concept of "harm or risk of harm" is used – see Art. 25 of the PCIA.

---

[44] Decisions No. 9822 of 18 December 2001 on Administrative Case No. 5736/2001 by SAC, Fifth Division.

[45] Decision No. 4716 of 25 May 2004 on Administrative Case No. 8751/2003 by SAC, Fifth Division, Decision No. 4717/ 2004 on Administrative Case No. 8752/2003 by SAC, Fifth Division (the cases concerned refusals by the mayor of the Municipality of Vidin to disclose information concerning a contract signed between the Municipality of Vidin and the municipal company Chistota and information concerning the contract's fulfillment).

[46] Decision No. 8190 of 20 July 2006 on Administrative Case No. 3112/2006 by SAC, Fifth Division. The case concerned the municipal mayor's refusal to provide access to a contract for concession for trash collection and removal in the city of Razgrad.

[47] Decision No. 5 of 3 January 2006 on Administrative Case No. 4596/2005 by SAC, Fifth Division. The case was *Zoya Dimitrova v. the Chief Secretary of the President of the Republic*, which examined the refusal to provide the security services' report regarding participation by Bulgarian firms in trade with Iraq in violation of the UN embargo.

In certain cases the assessment of whether the disclosure of the given information will harm or could harm a protected interest is entirely left up to the administration. This is true in the case of the restriction concerning so-called preparatory documents (Art. 13, Para. 2, Item 1 of the APIA) and the restriction concerning current or upcoming negotiations (Art. 13, para. 2, Item 2 of the APIA).

In many cases the legislation stipulates that the assessment of whether the disclosure of certain information will harm or could harm protected interests must be made in advance. This is the case with so-called classified information – state or official secrets, as well as trade secrets – as defined in Para. 1, Item 7 of the PCIA. In the case of the latter, the restriction covers only information that a given entrepreneur has taken necessary measures to keep secret.

One element in the evaluation of eventual harm from the disclosure of certain information is the **temporary character** of the restriction – the time limits on the protection of information introduced by legislation (see above). The maximum duration of these time limits is fixed by law and can be extended only in the case of certain restrictions and only as an exception (see Art. 34, Para. 2 of the PCIA).

The test for the existence of the harm or risk of harm to protected interests defined in Art. 25 and Art. 26 must be carried out in a review stipulated by the law to take place every two years. There is no impediment to this review being conducted in the face of public interest in the disclosure of the information when a request has been submitted following the APIA. Such a reconsideration was conducted in 2004 by the Minister of Finance with respect to the contract with Crown Agents and in 2005 by the Minister of Regional Development and Public Works with respect to the contract with Trakia Highway Jsc. In the latter case the security marking "for official use [only]" was removed and the contract was provided.

### *Court practice on restrictions on the right of access to information*

One of the most important questions concerning the implementation of the APIA in recent years is the implementation of restrictions on the right

of access to information and the establishment of a precise balance between the right, on one hand, and protected rights and interests, on the other. This question is even more important, given that the interpretation of legal norms falls under the jurisdiction of the courts, which alone exercise control over the legality of refusals under the APIA. In recent years, questions have been raised regarding the clarification of the definition of various kinds of restrictions, such as state, official, and trade secrets, among others. Hence, the following question also arises – what is the scope of the information that falls within the restrictions and what are the mechanisms for its precise delineation? Thus, the necessity arises to clearly define the boundaries of the interests protected by law and information that falls within the restrictions on the right to information. These boundaries are made even more precise by the granting of partial access.

In precisely this way, court practice has narrowly interpreted the restrictions connected with state and official secrets, preparatory documents (Art.13, Para. 2, Item 1 of the APIA), and trade secrets in part. The courts also gave instructions on providing partial access to information. Of course, certain problems remain.

# CLASSIFIED INFORMATION. STATE SECRETS

Art. 7, Para. 1 of the APIA stipulates that access to public information cannot be restricted unless it is classified information. Similarly, Art. 37, Item 1 of the APIA states:

„Art. 37(1) Grounds for refusing to provide access to public information exist when:

*1. (Amendment – SG, vol.45 of 2002) the requested information is classified information constituting a state or official secret..."*

At the same time, Art. 5 of the APIA stipulates that the right of access to public information cannot be upheld at the expense of national security.

A comparison with the PCIA provides an answer to the question concerning the relationship between the concepts "state secret," "classified information" and "national security." Information subject to classification as a state secret is one of the types of classified information. National security is one of the interests protected by state secrets.

According to the PCIA, three types of information are subject to classification according to the law:

- state secret;
- official secret;
- foreign classified information.

### *The history of legislation concerning state secrets*

Prior to 1990, a list of facts, information and objects constituting state secrets was adopted by the Council of Ministers; in fact, the list itself constituted such a secret, as it was marked with a "classification" stamp.[48] In 1990,

[48] See the case *The Access to Information Programme v. the Council of Ministers* (2003), whose subject was precisely the refusal to provide access to the Regulations. See also *Alexander Kashumov*, National Security and the Right to Information in Bulgaria in: National Security and Open Government: Striking the Right Balance, Syracuse, New York, US 2003, p.121–146.

a list of facts, information and objects constituting state secrets was adopted in a parliamentary decision and promulgated in SG vol. 31 of 1990. With the Regulation on the Activities of the National Security Services Concerning the Protection of Strategic Objects and Actions and the Preservation of State Secrets of the Republic of Bulgaria, adopted via Council of Ministers Decree No. 324 of 1994, the procedure for the classification of documents and state secrets was adopted and promulgated in SG vol. 5 of 1995. The regulation introduced three levels of classification for information constituting a state secret: "secret," "top secret" and "top secret with particular importance" (Art. 20). Subsequently, the same procedure was stipulated in the Regulations for the Implementation of the Law for the Ministry of the Interior, promulgated in SG vol. 113 of 1998, without any significant changes. Perhaps the most essential change was the removal of the security units and corresponding officers from state bodies and organizations.

In 1996 in Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996, the Constitutional Court adopted an interpretation of Art. 39–41 of the Constitution, which, as far as the restriction being examined here is concerned, establishes that:

*"among the grounds listed in Art. 41, Para. 1, sentence 2, that relating to national security is in dire need of a legislative regulation, since it relates to information that in principle is subject to classification, hence it is possible for it to be defined in advance as a 'body of information' that includes concrete facts and circumstances."*

In 2002 in fulfillment of the established policy for joining NATO in accordance with the above-cited decision by the Constitutional Court, the Protection of Classified Information Act (PCIA) was adopted. The adoption of such laws was necessary for the acceptance of new member countries in NATO at the end of the 1990s and the beginning of the new century.

The PCIA for the first time completely specified the following: the definition of a state secre; the officials who have the right to classify information; the procedure; the levels of classification and time limits for the protection of information; the requirement to review information classified before the law was adopted; and the periodic review of information classified under the law.

*The definition of the concept "state secret"*

The definition of the concept "state secret" is contained in Art. 25 of PCIA, according to which:

*"Art. 25. A state secret is the information defined in the list in Appendix No. 1, unregulated access to which would create danger to or would harm the interests of the Republic of Bulgaria related to national security, defense, foreign policy or protection of the constitutionally established order."*

The definition consists of several elements. First, it contains the list of protected interests; second, it provides a list of concrete categories of information; and third, it gives criteria for the restriction of access – the protection from harm or risk of harm to those interests. That is, the elements of the concept are:

- definite protected interests;
- definite categories of information;
- protection from harm or risk of harm to those interests.

With respect to the definition, the SAC has established an interpretation that forbids a broader interpretation of the definition. Concerning one of the categories of information named in the appended list and related to the protection of the interest of national security, the court held:

*"The exemption category specified by the law is not applicable to the concrete case, as it refers to 'reports… related to the operative work of the security services,' while in this case the subject of the request for access was not the operative work of those services, but only the result of it..."*[49]

Unlike other laws, the Bulgarian PCIA does not contain restrictions, i.e. prohibitions on classification. Such restrictions can be found in other legislations, including that of neighboring Romania, which was adopted almost simultaneously with the Bulgarian law. Executive Order 12 958 by the president of the United States regarding the classification of information also contains such prohibitions. For example, information cannot be classified in order to hide violations of law, inefficiency, administrative errors,

[49] Decision No. 5/2006 on Administrative Case No. 4596/2005 by SAC, Fifth Division (*Zoya Dimitrova vs. the Head of the President's Administration*, concerning the intelligence services' report on the involvement of Bulgarian companies in illegal trade with Iraq).

to prevent embarrassment to a person or agency, and so forth. It remains an open question whether such a prohibition on classification could be introduced via the route of interpretation.

### *Interests protected by state secrets*

The restriction related to state secrets protects four interests:
- national security;
- defense;
- foreign policy;
- the constitutionally established order.

Appendix No. 1 to Art. 25 of the PCIA, which is part of the law, lists 64 categories of information whose protection permits classification as a state secret. They are divided into three groups:
- information concerning the country's defense (Section I);
- information concerning the country's foreign policy and internal security (Section II);
- information concerning the country's economic security (Section III).

It must be noted that it is not obvious in all cases from the names of the sections which protected interests belong to each of them. Indeed, the title of the first section unambiguously indicates interests connected with defense. In the second section two protected interests overlap – those connected with foreign policy and national security, as well as in part internal security.[50] The third section, if one judges from its title alone, is not directly connected to any of the protected interests. If we examine the seven categories of information within its scope individually, Items 1 and 4 mention negotiations related to financial contracts and the way that control signals and other similar systems related to national security function, respectively. Items 5 and 6 of this section indicate categories of information clearly re-

[50] It should be noted that in some national legal systems, for example, in the United States, classification is permissible only to protect national security; the latter is defined as being connected solely to defense and foreign policy. See the above-mentioned Executive Order 12 858.

lated to foreign policy, in so far as they protect data related to other countries. We can assume that interests related to the national economy – Item 2 of this section – and the country's economic interests – Item 3 of this section – are protected against the use of this information by other countries at Bulgaria's expense. The seventh category explicitly mentions security and the country's defense.

It should be noted that a concrete category of information related solely to the defense of the constitutionally established order cannot be found in the list in Appendix No. 1 of the PCIA. On the other hand, it appears that national security covers defense and foreign policy, but also extends to internal security and defense of the national economy (Section III, Items 2 and 3).

In practice, cases of refusals citing state secrets became more frequent after the adoption of the PCIA. While a study by AIP in 2001 did not record a single refusal based on a state secret,[51] in 2002 after the adoption of the PCIA, it identified 91 such refusals.[52] In one of the cases this was due to the failure to conduct the review of documents classified before the law came into force that is required in § 9 in the Miscellaneous Provisions of the PCIA (*AIP v. the Council of Ministers* [2003], *Hristo Hristov v. the Director of the National Intelligence Services*). In other cases the classification was based on the newly adopted PCIA (*Terziyski v. the Minister of Finance* concerning the Crown Agents contract, *Zoya Dimitrova v. the Head of the President's Administration*).

It is interesting to note which categories from the list in Appendix No. 1 to Art. 25 of APIA are indicated as the grounds for classification of information as a state secret. Access to the report by the National Intelligence Services and National Security Services to the president about the participation of Bulgarian companies in trade with Iraq in violation of the UN embargo was refused on the grounds (at the stage of the court proceedings) of Item 9 from Section II of the List-Appendix No. 1 of Art. 25 of the PCIA. The category includes reports concerning the operative work of the security services and is clearly related to the defense of national security.

[51] *Fulfillment of Obligations under the APIA by the Bodies of the Executive Power*, Sofia 2001, p.37 available at the following address: http://www.aip-bg.org/pdf/reportaip.pdf

[52] *The Year of Rational Ignorance*, Sofia 2002, p. 48, available at the following address: http://www.aip-bg.org/pdf/ignorance2.pdf

The contract between the Minister of Finance and the British firm Crown Agents, entitled "Measures to Assist the Reform of the Bulgarian Customs Administration," was classified (once again later, after the case had been brought for a second time and was again in the court of first instance) on the basis of Items 2 and 3 of Section III of the List-Appendix No. 1 of the PCIA. As mentioned above, these categories relate to the economic interests of the state, but the first case is a question of research work, while the second relates to technical, technological and organizational decisions. A receiving order from the State Reserves and Wartime Supplies Agency was refused on the basis of Item 10 of Section II of the List-Appendix. It turns out that the state reserves are traditionally considered "allocated and used budgetary funds and state property with special purposes related to national security".

### *Scope of the review in cases of refusals based on a "state secret"*

Regarding the relationship between the right of access to public information and exceptions to it connected with the protection of national security, the following position espoused by the Constitutional Court provides a general foundation:

*"this is not a question of a choice between two opposing principles, but rather of the application of an exception to one principle (the right to seek and receive information); this exception is subject to narrow interpretation."*

To conduct the necessary interpretation of the Constitution, lawmakers stipulated in Art. 41 of the APIA the court's authority to rule on marking of the information as classified (Para. 4, amended when the PCIA came into force – SG vol. 45 of 2002). It also stipulates the requirement that public institutions and other subjects obliged under the PCIA ground their refusals, even in the case of a state secret, by indicating not only the legal but also the factual grounds.

The PCIA does not introduce the presumption that the disclosure of information belonging to categories listed in Appendix No. 1 harms protected interests. The SAC thus found:

*"[the idea] that information should be considered classified under the force of law is based on an incorrect interpretation of Item 9 of Section II of Appendix No. 1 to Art. 25 of the PCIA and is not shared by the present court panel."*[53]

Consequently, under the PCIA, information can constitute a secret only if it was classified after an evaluation establishing that its free disclosure would lead to danger or harm to the protected interests (Art. 25 of the PCIA). In court practice requirements were later established not only for grounds for refusals based on state secrets, but also for the very classification of information as a state secret.

In its practice concerning the application of the APIA and in more concrete in cases of refusals to provide access to information based on state secrets, the SAC established definite requirements for the administration. Within the framework of legal action to appeal a refusal on the grounds of the existence of classified information, the respondent bears the burden of proof. The court's authority to exercise control over marking information with security stamps:

*"implicitly presumes the administrative body's obligation to provide data about when the security marking occurred and on what grounds."*[54] This requirement also includes the furnishing of proof showing "what security marking the information in question bears and when was created,"[55] as well as the establishment of the necessary "data concerning the type and character of the information, qualifying it as a state secret and the corresponding legal grounds for its definition as such."[56]

---

[53] Decision No. 5 of 2006 on Administrative Case No. 4268/2005 by SAC, Fifth Division, in the case of *Zoya Dimitrova v. the Head of the President's Administration* regarding access to a report by the security services. The ruling was decisive.

[54] Decision No. 2113 of 2004 on Administrative Case No. 38/2004 by SAC, Five-Member Panel, *Kiril Terziyski v. the Minister of Finance*, regarding access to the Crown Agents contract.

[55] Decision No. 3329 of 2004 on Administrative Case No. 4256/2003 by SAC, Fifth Division, upheld in that part by Decision No. 10075 of 2004 on Administrative Case No. 4662/2004 by SAC, Five-Member Panel.

[56] Decision No. 11682 of 2003 on Administrative Case No. 3080/2003 by SAC on Administrative Case No. 3080/2003, upheld by the above-cited Decision on Administrative

Second, to guarantee the effective protection of the constitutionally guaranteed right of access to information, lawmakers stipulated that a decision to refuse to provide public information must cite the legal and factual basis for the refusal – Art. 38 of the APIA. In this case, the lawmakers' explicit intention that the factual basis for the refusal be cited is obvious.[57] An administrative body's appeal to Art. 15, Para. 3 of the Administrative Procedure Code (APC), which allows for the indication of the legal basis alone in the issuing of an act, is impermissible. This is because:

*"the priority of specialized legal provisions above general ones rules out the possibility of applying Art. 15, Para. 3 of the APC in the concrete case."*[58] Again, the mere indication that the requested information belongs to a given category of information (section and point) on the list in Appendix No. 1 to Art. 25 PCIA are not sufficient grounds for refusal in the sense of Art. 38 of the APIA. Factual bases for the definition of the information as constituting a state secret must also exist and be presented, because otherwise:

"*it is not possible for the court to decide on the legality of the refusal*."[59]

The third guarantee of the effective protection of the right to information is Art. 41, Para. 3 of the APIA, which gives the court the authority to demand the necessary proof, including the document to which access was refused, in the exercise of its authority under Art. 41, Para. 4 of the APIA.[60]

Case No. 38/2004 by SAC, Five-Member Panel (*Kiril Terziyski v. the Minister of Finance*, regarding access to the Crown Agents contract).

[57] Decision No. 111 of 2004 on Administrative Case No. 7641/2003 by SAC, Fifth Division, entered into force.

[58] Decision No. 5 of 2006 on Administrative Case No. 4268/2005 by SAC, Fifth Division, in the case of *Zoya Dimitrova v. the Head of the President's Administration* regarding access to a report by the security services. The ruling was decisive.

[59] Decision No. 9154 of 2004 on Administrative Case No. 4408/2004 by SAC, Fifth Division, entered into force.

[60] This authority was exercised for example by SAC, Fifth Division, in Administrative Case No. 3080/2003, in Administrative Case No. 9898/2002 (Crown Agents contract), in Administrative Case No. 4120/2004, and by the SCC III-zh panel in Administrative Case No. 642/2002.

*The court's review under Art. 41, Para. 3 and 4 of the APIA. Control over the legality of classification markings*

According to Art. 41, Para. 3 and 4 of the APIA:

*(3) Upon appeal of a refusal to grant access to public information on the grounds of Art. 37, Para. 1, point 1, the court may, in a closed hearing, request the necessary evidence from the body.*

*(4) (Amendment – SG, vol. 45 of 2002) In cases under Para. 3 the court shall decide on the lawfulness of the refusal and on the marking of the information as classified.*

This control over the legality of classification is also stipulated in other laws. This is necessary so that the court may make the correct decision in an appeal against a refusal of information based on a restriction related to the protection of classified information. To this end:

*"it is necessary to clarify the question of the nature of the information in order to assess the legality of its classification."*[61]

That is, control over the lawfulness of classification implies the resolution of a preliminary question, i.e. the legality of the classification (security stamp markings)

Over the years, the court has repeatedly exercised its authority under Art. 41, Para. 3 and 4 of the APIA. The SAC, as well as the SCC, has followed this practice. The correctness of the final decision determines the obligation, even administratively, for the court to exercise its authority under Art. 41, Para. 3 of the APIA and to demand the necessary evidence.[62]

The practice of requesting evidence pursuant to Art. 41, Para. 3 of the APIA began in 2003. At that time SAC panels requested the relevant information from an administrative body for the purpose of reviewing them in an in camera session and ruling on both the legality of the security stamp marking, as well as the legality of the appealed refusal to provide access.

What is the subject of such a review under Art. 41, Para. 3 and 4 of the APIA? In the first two cases in which this procedural action was taken, the disputed document which was marked as classified was requested and

[61] Decision No. 5 of 2006 on Administrative Case No. 4268/2005 by SAC, Fifth Division.

[62] Ibidem.

subsequently reviewed in an "in camera". In one of the cases – *AIP v. the Council of Ministers* – this was the Regulations for the Organization of Work to Protect a State Secret in the People's Republic of Bulgaria from 1980,[63] while the other – *Kiril Terziyski v. the Minister of Finance* – concerned the contract with the British firm Crown Agents.[64] In both cases, however, the court conducted a review of the information in an *in camera* session and established the existence of the corresponding security stamps. In these cases, no rulings on the legality of the security stamp markings were made. The reason for this was that the established stamps were affixed according to legal provisions pre-dating the PCIA, which does not require the stamps to include requisite information such as the date, legal basis for classification and the name of the official who had done the classifying. In light of the absence of any subsequent indication on the part of the institutions as to when and for what reason the security markings were made, in both cases the SAC panels ruled that without receiving the grounds from the relevant bodies as to what criteria and bases were used to determine that the information constitutes a state secret, the court cannot evaluate the lawfulness of such markings nor exercise effective control over the legality of such markings and refusals to grant access. It remains an open question in light of the circumstances to what extent it was correct for the court to return the request to the body for new consideration, rather than requiring it to present in the legal proceedings the complete grounds and evidence supporting its claim that the information in question was classified.

[63] *AIP v. 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 filed an appeal in court against a refusal by the Governmental Information Service Directorate to provide access under the APIA to the previously classified Regulations for the Preservation of State Secrets in the NRB, adopted by the Council of Ministers in 1980. The court case can be seen as one of the stimuli for the Council of Ministers to review classification in accordance with § 9 of the Miscellaneous Provisions of the PCIA and for the declassification of 1,484 documents during the summer of 2004. The Regulations in question were among the declassified documents.

[64] *Kiril Terziyski v. the Minister of Finance* (Administrative Case No. 3080/2003, SAC, Fifth Division; Administrative Case No. 38/2004 SAC, Five-Member Panel).

In 2004 in court practice concerning Art. 41 of the APIA, the question was raised about the court's authority to review the content of such information in its rulings on the lawfulness of security stamp markings. After a repeated refusal by the Minister of Finance to provide information in the form of a copy of the contract with Crown Agents, the SAC Three-Member Panel again requested and established the contents of the security stamp on the contract.[65] In a court ruling the content of the security stamp was established, but from evidence presented by the responding side it became clear that a commission, following § 9 of the Miscellaneous Provisions of the PCIA, had reviewed the classification of the contract, which was completed before the PCIA entered into force, after which a new security stamp was affixed in accordance with the new PCIA. The finding was that a security stamp of "secret" had been affixed to the contract, but was then crossed out with a straight line. A new stamp of "confidential" had been affixed, which included the signature of the responsible person, as well as an indication of the grounds for the classification – § 9 of the Miscellaneous Provisions of the PCIA – and a date. Two members of the judicial panel accepted the legality of the classification and the refusal as lawful. The viewpoint of the head of the panel, who signed a dissenting opinion, is interesting:

*"on the factual side it was imperative to clarify the content of the concept 'organizational-technical protection'... (in the sense of Item 3 of Section III of the list in question here – Appendix No. 1 to the PCIA). On the legal side it was imperative to check whether the original stamp of 'secret' was applied in accordance with the rules..."*

Thus, this position categorically includes a review of the content of the information with the purpose of deciding the legality of its classification with respect to the security stamp marking. For this reason, the dissenting opinion also states that the contract does not contain any information corresponding to the description in Appendix No. 1 to Art. 25 of the PCIA. Hence follows the final conclusion:

*"since the contract of 29 November 2001 is none of those things, a legal basis for declaring it classified information is lacking."* [66]

[65] *Kiril Terziyski v. the Minister of Finance 2* (Administrative Case No. 4120/2004, SAC, Fifth Division; Administrative Case No. 592/2005, SAC, Five-Member Panel).

[66] Decision No. 9472 of 16 November 2004 by SAC, Fifth Division.

The position set out in the dissenting opinion was accepted by the SAC Five-Member Panel, which found that the lower court had not ruled on the legality of the security marking under either the current or the amended legal act. For this reason, its conclusion that the procedural contract contained classified information was unfounded, since:

*"the court should have ruled on whether the contents of the contract constituted information about the organizational-technical and programmatic defense of automated systems or networks of bodies belonging to the national government or to local governmental bodies and their administrations. [They should have ruled] on whether it constituted research work of particularly essential significance to the interests of the national economy, ordered by state organs, or whether it was information regarding technical, technological and organizational decisions, whose disclosure would threaten to harm economic interests important to the country. [They should have ruled] on the legality of the security marking 'secret' and 'confidential' with respect to the provisions in §9 of the Miscellaneous Provisions of the PCIA."*[67]

In court practice it is also accepted that in proceedings concerning Art. 41, Para. 3 and 4 of the APIA, the opposing sides have the right to know the court's findings before the pleadings. In cases in which this has not been fulfilled:

*"There exists a fundamental violation of the rules of court procedure, since after the conclusion of the oral arguments the court proceeds towards the pronouncement of a decision according to Art. 186 of the Civil Procedure Code (CPC) and cannot carry out other procedural activities, including the collection of evidence, regardless of the fact that there is a special provision concerning this in the Access to Public Information Act. The appellant's right to defense is violated, since that party is not able to know the facts and circumstances established by the court in a closed session before the closing of the oral arguments in the case. "*[68]

Similarly, even the return of the documents demanded by the court to the administrative body (as in the case of the Council of Ministers) after findings have been made and the hearing of the case in an open session constitute a violation of law. This is because:

[67] Decision No. 3875 of 28 April 2005 by SAC, Five-Member Panel.

[68] Ibidem.

*"the court's action in carrying out the collection of evidence in a closed session without the participation of the litigants is a fundamental violation of the rules of court procedure and is grounds for repealing a court decision in returning the case for new hearing to a new panel from the court. The court has confused its competence to demand evidence, which is permissible in a closed session, with that of its collection, which is not permissible in a closed session."*[69]

Following this established court practice, in recent years the evidence collected by following the proceedings under Art. 41, Para. 3 and 4 has been appended to the case-file. In this respect, the courts' interpretation is also in accord with the Obligatory Instructions for the Classification of Court and Remanded Cases, which was adopted by the State Commission for Information Security (SCIS) with Protocol No. 209-I of 23 November 2004 (available at the address: http://www.dksi.bg/NR/rdonlyres/E95F849E-12EB-404F-AA84-8B2CB0F4CA6D/0/ZUsadfinal.doc).

In more recent practice, the tendency has arisen for the court to demand the grounds for classification of information under the PCIA. This practice is similar to court practice in more advanced countries such as the United States. In a ruling as of 31 March 2008, a SAC panel instructed the administrative body:

"*to present in corresponding order the appendices to the reports about the incident of 1 March 2006 at the fifth block of Nuclear Power Plant Kozloduy described in the complaint, as well as a document listing the grounds according to which this information was classified."*[70]

### *The time limits for protecting a state secret. Partial access*

With the adoption of the PCIA in 2002, time limits for the protection of information classified as state and official secrets were introduced into the legislation for the first time. A comparison of the PCIA with documents

[69] Decision No. 6977/ 2004 on Administrative Case No. 11243 of 2003 by SAC, Five-Member Panel.

[70] Protocol on Administrative Case No. 8948/2007 by SAC, Third Division (denial to grant the appendices to the report drafted on the occasion of the March 1, 2006 accident in the nuclear power plant Kozloduy).

compiled by NATO in 2002 shows that the Bulgarian law reproduces the four security levels according to which information should be classified and documents should be marked. According to Art. 28 of the PCIA the security levels are:

- top secret;
- secret;
- confidential;
- for official use.

The first three categories relate to state secrets, while the last concerns official secrets. The security level corresponds to the potential danger or harm which could result from the disclosure of the information (Art. 28, Para. 2 of the PCIA). Accordingly, the time limits stipulated in Art. 34, Para. 2 of the PCIA for the protection of classified information for the respective security levels are:

- top secret – 30 years;
- secret – 15 years;
- confidential – 5 years;
- for official use – six months after an amendment to the PCIA in 2007.

Pursuant to Art. 34, Para. 2 of the PCIA the time limits can be extended with permission from the SCIS when national interests require it, but not for longer than the original limits. When the time limit expires, the level of classification is removed – Art. 50, Para. 2, Item 1 of the Regulations for the Implementation of the PCIA (RIPCIA) – while the security stamp on the document should be crossed out with a horizontal line. Pursuant to Art. 36, Para. 2 of the RIPCIA, in such cases the date, legal basis for the removal, position, first name, last name, and signature of the official carrying out the removal should be noted.

Even if information has been classified, citizens still have the right to receive the requested information when the time limit for its protection has expired. At that point, its classification level should be removed, according to the SAC.[71]

[71] Decision by SAC, Fifth Division on 11 June 2007 on Administrative Case No. ZS-321/2006, in the case of *Hristo Hristo v. the Director of NIS*.

Pursuant to Art. 37, Para. 2 of the APIA, even in cases in which information is classified as a state or official secret, access can be provided to only that part of the information whose access is not restricted. In connection with a request for access to a report by the security services, the SAC ruled:

*"even if we were to accept that the release of the result would risk the disclosure of information protected under Item 9 [of Section II of the List-Appendix to Art. 25 of the PCIA], this risk could be avoided through the provision of partial access according to Art. 37, Para. 2 of the APIA."*

In other words, the court clearly binds the provision of partial access as a guarantee of the right of access to public information with a precise assessment of the possible harm made by the classifying body. The harm is subject to evaluation pursuant to Art. 28, Para. 2 of the PCIA, which stipulates that the path used to reach such classification should be objectively traced. In this regard, the SAC delivered a ruling for the corresponding document requiring the responding party:

"*to present in corresponding order the appendices to the reports about the incident of 1 March 2006 at the fifth block of Nuclear Power Plant Kozloduy described in the complaint, as well as a document listing the grounds according to which this information was classified."*[72]

[72] Protocol on Administrative Case No. 8948/2007 by SAC, Third Division.

# OFFICIAL SECRETS

As was already noted above, Art. 7, Para. 1 of the APIA stipulates that access to public information cannot be restricted unless it is classified information. According to the provisions in Art. 37, Item 1 of the APIA:

"Art. 37. (1) Grounds for the refusal to provide access to public information exist when*:*

*1. (Amended – SG, vol.45 of 2002) the requested information is classified information constituting a state or official secret..."*

The remaining protected interests listed in Art. 5 of the APIA include the public order and the rights of others.

A comparison with the PCIA answers the question of the approximate scope of the concept "official secret;" however, it does not make clear the scope of the protected interests. Unlike the case of state secrets, the PCIA does not provide a list of categories of information that constitute official secrets.

Information subject to classification as an official secret is one of the types of classified information, along with state secrets and foreign classified information. Thus, the PCIA stipulates procedures to be implemented for its protection.

### *Definition of the concept "official secret"*

The definition of the concept "official secret" is contained in Art. 26, Para. 1 of the PCIA, which states:

*"Art. 26 (1) An official secret is information created or kept by state bodies or by local government bodies, which is not a state secret, but unathorized access to which might adversely affect the interests of the state or might harm another legally protected interest."*

The definition contains several elements. First, protected interests are given in a negative way. That is, it clarifies that such interests are those that fall outside the scope of national security, foreign policy, defense and the constitutionally protected order. Second, it also notes that these interests

could be connected with the state or another subject (another legally protected interest). Third, the criterion for the restriction of access to information is an "adverse effect" on the relevant interests. The categories of information subject to classification as official secrets are not listed in the PCIA; however, the demand has been made that they be formulated in a law. In the SCIS's Obligatory Instructions, adopted in a decision on Protocol No. 17-I of 17 February 2006, the following was clarified with respect to official secrets:

*"a specialized law is a law or laws that regulate the sphere of activities of an organizational unit."*

That is, in its most general form, the elements of the concept "official secret" are:

- protected interests and corresponding categories of information defined in a concrete law or laws;
- protection from adverse effects on the protected interests.

In the first years of the implementation of the PCIA administrative structures raised the question of what it means that information subject to classification as an official secret is defined by law. In response, the SCIS's Obligatory Instructions explicitly state that it is a question of concrete categories of information defined by a law. At the same time, according to the SCIS:

*"the categories of information constituting an official secret in a specialized law must be understood as generalized categories whose scope includes concrete knowledge about the activity of an organizational unit."* (Ibidem, 1.1.5)

Concerning the question of what categories of official secrets mean, the SAC advanced a narrow interpretation of the restriction when it ruled that legal norms formulated simply as a prohibition on the disclosure of information that has become known to administrative bodies and servants through and in the course of the fulfillment of their administrative duties, are in principle:

*"not relevant to the prohibition in Art. 37, Para. 1, Item 1 of the APIA on the disclosure of public information when it constitutes an official secret."*[73]

[73] Decision No. 10539 of 2002 in Administrative Case No. 5246 of 2002 by SAC, Fifth Division.

The SCIS also adopted a narrow interpretation with respect to the concept "categories of official secrets." In the above-cited Obligatory Instructions, it is explicitly stated that types of secrets such as industrial and trade secrets, correspondence secrets, secrets about data related to the creation of an electronic signature and other such secrets do not fall in the scope of an official secret (Ibidem, 1.1.7).

One important distinction for the precise application of the restriction related to the protection of an official secret is the distinction emphasized in the Obligatory Instructions between official secrets and so-called administrative information – a type of public information, which, according to Art. 13, Para. 1 of the APIA, is collected, received or created in connection with official duties (Ibidem, 1.1.9). Of course, access to administrative public information is presumed to be free, while access to information classified as an official secret is restricted.

Concerning the rather unclear expression "adverse effect" used in Art. 26, Para. 1 of the PCIA as an element of the definition of an "official secret," the SCIC instructions interpret it as identical to a threat or risk of harm or harm (Ibidem, 3.2.4).

### *Interests protected by official secrets*

Unlike the case of state secrets, interests subject to protection via official secrets are not clearly indicated or listed in any law. This leads to difficulty in the formulation of so-called precise lists of categories subject to classification as an official secret within the scope of activity of the relevant organizational units. This is one possible explanation for the low percentage of publication of such lists, despite their existence and despite the existence of a clear norm stating that they should be public (Art. 21, Para. 4 of the RIPCIA).[74]

However, it is clear which interests do not fall in the scope of the concept "official secret." Some are explicitly defined by the legislation. They include interests related to the protection of:

• national security;

[74] Compare AIP's surveys of the websites of public institutions in its annual reports on the state of access to information in Bulgaria, 2006–2008

- defense;
- foreign policy;
- the constitutionally established order;
- consultations in the preparation of official documents (Art. 13, Para. 2, Item 1 of the APIA)
- impending or current negotiations (Art. 13, Para. 2, Item 2 of the APIA).

Second, a protected interest exists that in itself could not possibly fall into the scope of "official secret;" it is the intimate sphere protected from publicity, or more precisely, protected personal data. A perusal of the PDPA indicates that this type of data is in principle protected from disclosure without grounds, as long as the subject (i.e. the individual) to whom the data is related exists. Information classified as an official secret is subject to protection for a time limit of only six months; for this reason, it cannot be claimed that the protection of personal data falls into its scope.

A third group of protected interests are also excluded from the scope of the concept "official secret" through the above-cited SCIS's Obligatory Instructions. They include interests falling into the following spheres:

- industrial and trade secrets;
- correspondence secrets;
- secrets concerning data related to electronic signatures.

### *The scope and requirements for the application of a restriction related to the protection of an official secret*

It has been noted that according to SAC practice, not every norm that mentions the phrase "official secret" can serve as the grounds for such a refusal. When a norm is formulated very generally as a prohibition on the disclosure of circumstances arising during and in the course of the fulfillment of administrative duties, it does not constitute a law that regulates a category or categories of official secrets.[75]

Even if an administrative body has adopted a list of the categories of information that constitute an official secret for a given administrative unit,

[75] Decision No. 10539 of 2002 in Administrative Case No. 5246 of 2002 by SAC, Fifth Division.

it nevertheless is subject to evaluation of its conformity with the categories stipulated in a law. For example, information about the number, goal, duration, and amount of business-trip related expenses incurred by the deputy mayor of a municipality cannot be considered an official secret. In this regard, a SAC three-member panel adopted the following position:

*"given that there is no legal requirement for the classification of information of the type requested by the seeker and given that its disclosure would not harm legally protected interests, its inclusion in the list of categories of information subject to classification as official secret does not constitute a hindrance for its disclosure."*[76]

SAC practice on this question can be regarded as invariable, since in a case similar to the one noted above, the argument was rejected that a contract for the Trakia Highway concession could be legally considered an official secret:

*"In considering the requested public information as protected due to the fact that it constitutes an official secret, the administrative body did not cite a law which defines the information as such, nor did it indicate an approved list containing categories of information subject to classification as an official secret within the system of the Ministry of Regional Development and Public Works."*[77]

At the same time, regarding the application of Art. 41, Para. 3 and 4 of the APIA – control over the lawfulness of the security stamp marking of a refused document – it should be noted that court practice is in accordance with the above-mentioned practice concerning state secrets.[78]

---

[76] Decision No. 1694/ 2007 on Administrative Case No. 7364/2006 by SAC, Fifth Division.

[77] Decision No. 5451/ 2006 on Administrative Case No. 6363/2005 by SAC, Fifth Division, upheld by a Five-Member Panel. The case was based on an appeal by a journalist from the newspaper *Novinar*, Silvia Yotova, against a refusal by the Ministry of Regional Development and Public Works to provide access to a contract with Trakia Highway Jsc.

[78] The classified document was requested for a review on the lawfulness of the security stamp marking by the SCC III-zh panel in Administrative Case No. 642/ 2002. The case was based on an appeal by the Bulgarian Helsinki Committee against a refusal by the Supreme Cassation Prosecutor's Office to provide access to a report concerning the misuse of intelligence intercepts. The grounds for the refusal were a classification of the report as an "official secret."

# PREPARATORY DOCUMENTS UNDER ART. 13, PARA. 2, ITEM 1 OF THE APIA

One of the most problematic restrictions on the right of access to information relates to so-called "**preparatory documents**" – Art. 13, Para. 2, Item 1 of the APIA. According to the formulation of the norm, access to administrative public information can be refused if:

***"relates to the preparatory work of an act of the bodies, and has no significance in itself (opinions and recommendations prepared by or for the body, reports and consultations);"***

According to other national legislations, the goal of such a restriction is to protect in certain cases the independence of the consultative process before administrative decision until the completion of the relevant procedure. According to the APIA, this restriction cannot last more than two years after the creation of the information. Wide use[79] of this restriction by the administration as grounds for refusals of information has led to legal debates and subsequently to a more precise delineation of the limits of its applicability in a series of court decisions.

For example, a SAC three-member panel held that protocols from public discussions held within the framework of an Environmental Impact Assessment (EIA) of plans and activities could not be refused on the grounds of Art. 13, Para. 2, Item 1 of the APIA. "Public discussions carried out according to the EPA are an independent stage in the process of making a decision about an EIA by a competent body; thus, the protocol from such a discussion does not have the characteristics of preparatory documents prepared by an auxiliary body with the goal of producing final official documents," the court argued.[80] Interpreting the term "information without significance in itself" used in Art. 13, the judges applied the rule of narrow interpreta-

[79] According to the annual reports by the minister of state administration and administrative reform, this restriction is frequently applied.

[80] Decision No. 4239/2006 on Administrative Case No. 10628/2005 by SAC, Fifth Division.

tion of exceptions to the right to information that was established by the Constitutional Court in Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996.

The potential for the broad application of Art. 13, Para. 2, Item 1 of the APIA, which contradicts the purpose of the law, was also limited in another decision by SAC, this time by a five-member panel. Circulated position papers and other documents by the Foreign Ministry related to the removal of the recently erected memorial to Han Asparuh in the city of Zaporozhie, Ukraine, could not be refused on the grounds of "preparatory documents." According to the court panel, "the information contained in them was not concretely related to preparation for the publication of a final official document by the administrative body, from which (document) the seeker could obtain the information that interested him."[81] In other words, according to the accepted interpretation, positions and consultations that are not related to the adoption of a specific official document have independent significance, since it is only from them that a citizen can form an opinion about the activities of the administration, which is the goal of the APIA.

In the past, there were cases in which audit reports by the Public Internal Financial Control Agency were refused on the grounds of an official secret. The information had long been disclosed under the APIA by the agency itself, but this year the mayor of the Municipality of Tutrakan refused to provide it. However, according to the judges, there must be free access to a copy of the final audit report and it cannot be refused under the pretext of protecting so-called preparatory documents (Art. 13, Para. 2, Item 1 of the APIA).[82]

In two decisions during 2007, the subject of interpretation was a restriction in Art. 13, Para. 2 of the APIA, connected with so-called preparatory documents. A SAC three-member panel repealed the refusal by the minister of the interior to provide a journalist from the newspaper *168 Hours* with access to information connected to the rental and sale of residential property belonging to the Ministry's of Interior departmental fund. The judges

[81] Decision No. 2308/2006 on Administrative Case No. 10940/2005 by SAC, Five-Member Panel.

[82] Decision No. 9898 of 12 October 2006 on Administrative Case No. 4401/2006 by SAC, Fifth Division.

ruled that the requested documents prepared by the housing committee did in fact have a preparatory character, since they were compiled within the framework of a procedure for the rental of residential properties from the Ministry's of Interior departmental fund. However, the minister incorrectly cited the restrictive provision in Art. 13, Para. 2 of the APIA as grounds for refusing access to those documents, since this hypothesis is applicable only within the two-year time limit defined by law, which begins at the moment of the creation of administrative information of a preparatory character – Art. 13, Para. 3 of the APIA. In the case in question, by the date of the submission of the complaint this time limit had run out, thus making the basis for refusal invalid.[83] This decision was subsequently upheld by a SAC five-member panel.[84]

In its decision on a case challenging a refusal by the Ministry of Economics and Energy, the SCC held that the information related to the procedure of preparing and adopting the National Long-Term Program for Encouraging the Use of Renewable Energy Sources could not be refused on the basis of Art. 13, Para. 2 of the APIA, since grounds for refusal under the APIA are not applicable in the evaluation of requests for access to information related to the environment.[85]

[83] Decision No. 7483 of 11 July 2007 on Administrative Case No. 818/2007 by SAC, Fifth Division.

[84] Decision No. 11257 of 15 November 2007 on Administrative Case No. 9280/2007 by SAC, Five-Member Panel – Collegium I .

[85] Decision of 13 April 2007 on Administrative Case No. 4871/2006 by SCC, Administrative Division, panel III-zh.

# SEEKING THIRD-PARTY CONSENT UNDER ART. 31 OF THE APIA

The majority of court decisions made in 2007 concerned cases challenging state institutions' refusals to provide access to information based on the infringement of a third party's rights. Most frequently, these grounds were based on "trade secrets" or "personal data," but not infrequently refusal was grounded by a simple statement of the fact that the requested information infringed upon the interest of a third party and that his consent to its disclosure had not been obtained (Art. 31 of the APIA).

For example, in the case against a refusal by the Nuclear Regulatory Agency (NRA) to provide access to the appendices to the report on the incident at NPP Kozloduy on 1 March 2006, which was grounded by the argument that such information harmed the interests of the nuclear power plant, a SAC three-member panel held that the provisions in Art. 31, Para. 1 of the APIA are applicable when the requested information relates to a third party. However, the conclusion that a third party has been harmed does not necessarily follow from the mere fact that the information was created by the third party. According to the judges, it is not clear why the NRA director thought that the request infringed upon the rights or legal interests of the nuclear power plant, just as it is not clear precisely what information was considered harmful to the third party and why. In their arguments, the judges also noted that in the case the suggestion was logical that the reports, as well as the appendices, included data concerning the investigation and analysis of the incident at the nuclear power plant. It cannot be presumed, however, that this information reveals specific data about the NPP or that the requested appendices to the report contain, for example, information that could qualify as a trade secret, or administrative and/or state secret, i.e. classified information. If it indeed constitutes classified information, its refusal should be based on other grounds under the APIA, and not Art. 31, Para. 1 of the APIA, which in and of itself is not grounds for a refusal.[86] Finally, but no less significantly, according to the court:

[86] Decision No. 1178 of 02 February 2007 on Administrative Case No. 6942/2006 by SAC, Fifth Division.

*"besides that, in the case of not receiving consent from a third party or in the case of an explicit refusal to give consent, the relevant body can provide the requested public information to such a degree and in such a manner so as to not reveal information concerning the third party – Art. 31, Para. 4 of the APIA."*[87]

In its decision on a case challenging the refusal by the Government Information Service (GIS) to provide Rosen Bosev, a journalist from the newspaper *Capital*, with access to information connected to the conditions under which a contract was signed between former State Administration Minister Dimitar Kalchev and the company Microsoft concerning the rental of software licenses for the needs of the state administration, as well as access to copies of the contracts themselves, a SCC panel held that the protection of a trade secret and the prevention of unfair competition could provide grounds for a refusal to provide access to administrative public information under the hypothesis in Art. 37, Para. 1, Item 2 of the APIA. But such a refusal would be valid only after following the procedure in Art. 31 of the APIA and in the face of an explicit refusal or the absence of consent by the affected third party. The failure to request the explicit consent of the affected third party, in this case Microsoft, causes the refusal to be illegal due to its fundamental violation of the rules of administrative procedure in issuing the refusal. Even the explicit non-consent or the absence of the consent of the third-party does not require the administrative body to automatically refuse access to public information – using its own judgment, it could provide the requested information to such an extent and in such a way so as not to harm the third party. The court panel's judgment ended with the conclusion that the operative independence granted to the administrative body reflects the purpose of the law – to guarantee access to information which is related to the public life of the country and which provides citizens with the opportunity to form their own opinion about the activity of obliged subjects. This was violated in the present case.[88]

[87] Ibidem.

[88] Decision No. of 02 November 2007 on Administrative Case No. 03528/2006 by the SCC, Administrative Division, III-b panel.

SAC judges offered a similar judgment, when in another case they held that Art. 31 of the APIA does not stipulate that access to public information must be refused merely due to an assumption that the consent of an affected third party will not be given; furthermore, it obliges the administrative body to request such consent.[89] Without the implementation of such a procedure, it is not possible for the body to judge whether to grant access to the requested information and to what extent.

[89] Decision No. 7483 of 11 July 2007 on Administrative Case No. 818/2007 by SAC, Fifth Division, upheld by the five-member panel.

# PERSONAL DATA

Differing decisions can be found in the court practice related to cases concerning the protection of personal data. In one case it was held that in a conflict between the right to information and the right to protection of personal data the latter categorically prevails, regardless whether the individuals in question are public figures, pursuant to Art. 2, Para. 3 of the APIA.[90] Another decision was balanced in the opposite direction – the number, purpose, and duration of business trips made by a deputy mayor and the expenses related to them could not be defined as "personal data" in the sense of Art. 2 of the PDPA.[91] Declarations by experts on an Environmental Impact Assessment do not contain only personal data and can be requested under the APIA, another SAC decision found.[92]

In another decision a SCC panel found that information about the fulfillment of administrative duties by an individual holding a higher post in the Council of Ministers related to the management of the Council of Ministers' vacation complexes constitutes personal data.[93]

The Sofia City Administrative Court (SCAC) also offered interesting arguments in a case challenging a refusal by the Social Support Agency (SSA) to provide the Center for Independent Living with information about individuals who are authorized to establish violations and to impose penalties according to the Integration of People with Disabilities Act. According to the agency, the full names and job titles of these individuals are in principle personal data. The SCAC panel repealed the refusal and returned the case to the SSA for new processing after completing the procedure of seeking third-party consent. In their arguments the judges found that the information did not con-

---

[90] Decision No. 6438/2006 on Administrative Case No. 2527/2006 by SAC, Fifth Division.

[91] Decision No. 3101/2006 on Administrative Case No. 8452/2005 by SAC, Fifth Division.

[92] Decision No. 2910/2006 on Administrative Case No. 10371/2005 by SAC, Fifth Division.

[93] Decision of 23 July 2007 on Administrative Case No. 2900/ 2006 by SCC, panel III-d, appealed by a cassation appeal to the SAC.

stitute personal data belonging to the relevant obliged persons, yet at the same time they held that their consent should be sought for its disclosure.[94]

One of the most important decisions concerning a refusal to provide information on the grounds of the protection of personal data was a SAC decision that declared unlawful a refusal to provide information about the educational level and qualifications of deputy ministers, the chief secretary of the Ministry of Education and Science (MES) and members of the minister's cabinet. All of their names are contained in the public register according to Public Disclosure of Property Owned by High Government Officials Act (PDPOHGOA) and are publicly accessible. According to the court, other data such as education and levels of qualification, although they are not contained in the public register, are necessary for forming one's own opinion about whether the leading political and executive team in the field of education and sciences in Bulgaria has the necessary educational and professional qualifications for high quality and effective actualization of the state power allotted to it in this sphere of public life.[95] The decision corresponds to the spirit of the law and public interest, but it should be mentioned that it appears in an unwelcoming legal environment. The frequent changes to the PDPA bear witness to the lack of clarity in the search for European standards without the necessary prior research; in this way, we end up with amendments to the law's provisions that create difficulties, confusion and contradictions in the implementation of the law. For example, in our opinion it was unjustifiable to amend Art. 35 of the PDPA, which in Para. 2 stipulated that personal data was subject to disclosure without consent when the sources of that data are public registers or documents containing public information. Furthermore, this amendment was stubbornly imposed in 2006, after the body introducing it – the Council of Ministers – had in the previous year given up on its implementation after a heated debate in which AIP experts also participated. In the new PDPA wording the balance between the right of access to public information and the protection of personal data must be sought and applied in accordance with the hypotheses in Art. 4 of the law.

[94] Decision No. 1 of 16 May 2007 on Administrative Case No. 62/2007 by SCAC, 23rd panel.

[95] Decision No. 9486 of 4 October 2006 on Administrative Case No. 3505/2006 by SAC, Five-Member Panel.

# TRADE SECRETS

The provisions in Art. 37, Para. 1 of the APIA lists the grounds for the restriction of the right of access to information, which include the following:

"Art.37. (1) Grounds for refusal to provide access to public information exist when*:*

…

*2. The access is of a nature to affect a third party's interests and the third party did not give its explicit written consent for the disclosure of the requested public information;"*

In court practice it is accepted that the restriction can only be introduced with the purpose of defending the specific rights and interests of a third party. In this sense the consent of the third party should be demanded by the administrative body only when it has been established that provision of the information will harm its rights or legal interests.

At the same time, with respect to public information related to the activities of public law bodies, persons financed by the consolidated budgets and in general persons obliged under Art.3, Para. 2 of the APIA, in the provisions of Art.17, Para.2 it is explicitly stated that:

*"information constituting a trade secret or whose disclosure or dissemination is of a nature to result in unfair competition among business entities shall not be disclosed."*

If we examine the protected interests indicated in Art.5 of the APIA, the protection of a trade secret without a doubt falls within the scope of "protection of the rights of others."

The concept "trade secret" is found in only one place in the APIA – Art.17, Para. 2. However, it is also used in other laws, for example the Fair Competition Act and the Law on Commerce. In this respect the Bulgarian legislation does not differ from the system of access to information and the regulation of trade secrets in other democratic countries.

*Definition of the concept "trade secret"*

As in the cases of the other restrictions, the definition of the concept "trade secret" is given in the corresponding specialized law. Similar to other legislations, this law is the Fair Competition Act (FCA). According to § 1, Item 7 of the Miscellaneous Provisions of the FCA,

*"'Industrial or trade secrets' are facts, information, decisions and data related to managerial activities, whose secrecy is in the interest of the rights holders, who have taken the necessary measures [to protect such interests]."*

In its decisions, the SAC has interpreted the concept "trade secret." The Court has held that in practice it is used with different content, ranging from facts or knowledge about offers and contracts, which were explicitly classified as secrets by the parties who created the offer, to facts and knowledge about the industrial or technological cycle, which could cause harm if it became known to a third party.[96] According to the court, information about the medicinal products, consumable goods and types of healing foods paid for by the National Health Insurance Fund does not constitute a trade secret.

Information that is declared public also does not constitute a trade secret. Since lawmakers explicitly stipulated that data about concessions, including the basic clauses in concession contracts, can be provided under the APIA, the lack of consent from a third party based on the principle of protecting trade or economic interests cannot restrict access to all of the requested public information.[97]

According to the court, a contract between a municipality and a municipal company cannot be considered a trade secret,[98] as long as it does not infringe on the rights or legal interests of the corporation.

[96] Decision No. 115/ 05 on Administrative Case No. 5380/ 04 by SAC, Fifth Division.

[97] Decision No. 8190/2006 on Administrative Case No. 3112/2006 by SAC, Fifth Division. The subject of the case was a refusal by the mayor of the municipality to provide a copy of the contract and all the annexes to do the contract for trash collection and trash removal in the city.

[98] Decision No. 4716/2004 on Administrative Case No. 8751/ 2003 by SAC, Fifth Division. (The case concerns refusals by the mayor of the Municipality of Vidin to provide information concerning the contract concluded between the Municipality of Vidin and the municipal company Chistota.)

*"If this contract contained data concerning a trade secret belonging to the corporation, even then the information could be provided regardless of the third-party consent by applying the provisions in Art. 31, Para. 4 of the APIA – information can be provided to such an extent and in such a manner that does not disclose information related to the third-party."*

In other words, the understanding has been established that although a contract may contain data related to a corporation's trade secret, the entire contract itself does not constitute a trade secret.

The law includes a requirement that a company define in advance which data it considers a trade secret (§ 1, Item7 of the FCA). At the same time, however, its desires do not bind a public institution faced with requests for access to information, since in the above-mentioned cases, for example, the information could not be considered a trade secret.

*"The limiting hypothesis in Art.31, Para.2 of the APIA can find application only in accordance with the clauses concerning the confidentiality of the contract and only then if it does not affect information that has been declared public by the force of the law."*[99]

Not everyone has the legal right to declare certain information a trade secret. This follows from the fact that its definition is contained in the FCA, hence the subject of this type of information can be only a company. This is due to the definition of the concept of "unfair competition". According to the SAC:

*"unfair competition is possible only between enterprises that pursue business activities (§ 1, Item 1 of the FCA)."*[100]

For this reason, an association whose official registration certificate states that the body does not intend to pursue business activities cannot be placed in a more or less profitable position through the disclosure of information.

[99] Decision No. 8190/2006 on Administrative Case No. 3112/ 2006 by SAC.

[100] Decision No. 2203/2003 on Administrative Case No. 9504/2002 by SAC, Fifth Division.

### *Conditions that must be met for a legally grounded "trade secret"*

Considering the broad definition of the concept "trade secret" in the FCA in combination with the principle of narrow interpretation of the restrictions on the right of access to information established by the Constitutional Court, it is necessary to establish certain requirements in the process of implementing the law.

In the FCA itself, obtaining others' trade secrets is identified as one of the forms of unfair competition. According to Art. 30 of the FCA unfair competition is:

*"any act or failure to act in carrying out economic activity that contradicts good-faith business practices and that harms or could harm the interests of competitors in their mutual interrelations."*

In this respect there are two relevant circumstances that define an act or failure to act as unfair competition:

a) its contradiction of good-faith business practices; and

b) that it harms or could put one in a position to harm the interests of competitors in their mutual interrelations or in their relations with consumers.[101]

Subsequently, in order to establish whether unfair competition exists or whether there are any other manifested forms of unfair competition, which are concretely listed in the FCA (and which include obtaining, using or distributing a trade secret), an assessment must be conducted that answers all of the following questions:

a) whether the act or failure to act contradicts good-faith business practices and whether it harms or could harm the interests of competitors in their interrelations or in their relations with consumers; if this question receives an affirmative answer, then the following question must also be answered;

b) whether this falls within the scope of Art. 35 of the FCA, which forbids obtaining, using or distributing a trade secret in contradiction to good-faith business practices.[102]

[101] Decision No. 246/2004 on Administrative Case No. 3921/2003 by SAC, Fifth Division, upheld by SAC, Five-Member Panel.

[102] *Mutatis mutandis* to the cited decision.

*"in the face of the absence of one of the elements of unfair competition as understood in this legal text … , one cannot speak of such [unfair competition] in any form..."*[103]

Currently, in cases in which an administrative body has refused information under the APIA on the grounds of a trade secret, there is no data indicating whether the question was examined by the court precisely in the manner described above. At the same time, however, in court practice requirements have been established to evaluate the existence of a trade secret.

For example, the claim of infringement on the rights and legal interests of a third-party and the subsequent seeking of consent from the third-party should not be made at will. Rather, the absence of factual grounds presented in a refusal or in a response from a third party that would give the administrative body the basis for applying the legal norm constitutes a violation of the provisions in Art. 38 of the APIA and in Art. 15, Para. 2, Item 3 of the APA. The failure to present the concrete reasons behind the restriction of free access to a commercial contract with a municipality is a violation of the law. This is so according to the court, since:

*"The requirement to present grounds represents one of the guarantees that an administrative act conforms to the law, since such grounds lead to an awareness of the considerations taken into account by the administrative body, while at the same time instituting the exercise of control over the legality [of its decisions]."*[104]

The requirement to present concrete arguments in such cases was further specified in another court decision. In Decision No. 115 of 1 May 2005 in Administrative Case No. 5380/2004 by SAC, Fifth Division, it was held that:

"When a subject obliged under Art. 3, Para. 2, Item 1 of the APIA refers to Art. 17, Para. 2 of the APIA and refuses to provide information requested from him under Para. 1 on the grounds that its provision and distribution would lead to unfair competition between companies, he must obligatorily indicate which characteristics of the requested information are threatened by such a danger. The mere reference to Art. 17, Para. 2 of the APIA is not sufficient, since the refusal is not grounded. And an ungrounded refusal under the APIA is always illegal and subject to repeal."

---

[103] Decision No. 4488/2004 on Administrative Case No. 1711/2004 by SAC, Five-Member Panel.

[104] Decision No. 4717/2004 on Administrative Case No. 8752/2003 by SAC, Fifth Division.

# REPEATED REQUESTS FOR INFORMATION

Art. 37, Para. 1, Item 3 of the APIA provides one ground for refusal to provide access to information that as of yet has rarely been encountered in practice. According to the cited provisions, grounds for the refusal to provide access to public information exist when the public information requested has been provided to the seeker in the previous six months. This restriction has its basis in Recommendation (2002)2 of the Council of Europe Committee of Ministers to the member states, with regard to access to official documents. According to Principle VI, Para. 6 of the Recommendation, a request for access to an official document can be rejected if it is *manifestly unreasonable*. According to the Explanatory Memorandum to the Recommendation, this means that it recommends that member states should deal with all requests for access on the merits unless they are manifestly unreasonable (e.g. where requests are excessively vague, or require a disproportionate amount of searching or cover too broad an area or too great a volume of documents). Where a request is plainly abusive (**one of many regular requests designed to hinder a department's normal work, or uncalled-for repetition of an identical request by the same applicant)**, it may be refused.

In 2007 a Bulgarian court for the first time delivered an interpretation of this specific restriction in a case concerning access to information supported by AIP. This occurred in the examination of the court appeal by the mayor of Nesebar against the decision by the Burgas District Court (BDC), which obligated him to provide Genka Shikerova, a reporter from bTV, with access to his orders, especially those granting real estate and construction rights to the exceptionally needy. In its decision, the SAC panel, Fifth Division,[105] rejected the mayor's court appeal and upheld the decision of the prior-instance court and rejected the argument by the appellant (the Municipality of Nesebar) that the journalist had repeatedly requested the

[105] Decision No. 6788 of 28 June 2007 on Administrative Case No. 1098/2007 by SAC, Fifth Division.

same information. Since it had not disclosed the information upon the first request, the institution cannot raise the objection that the same information was requested from it within six months:

"The objection that there are grounds for a refusal according to *Art. 37, Para. 1, Item 3 of the APIA is unfounded. Indeed, practically the same information was already requested by the seeker in the previous six months, but this request was not answered. Because of this and because of the arguments presented above, it follows that the prerequisites for the cited legal text are not met, thus reasons for a refusal are lacking (****the basis for such a refusal according to the norm cited exists only in cases when access to the information has already been granted to the seeker****).*"

# INSTEAD OF A CONCLUSION

Of course, the many APIA cases examined here and the decisions on them do not exhaust court practice from recent years (2005 – 2008). Indeed, that was not the point of this overview. However, they are indicative not only of the kind of cases that arise in practice, but also of the kinds of decisions made on such cases and the tendencies that have arisen. To see it in a context, we have presented European standards in the area of access to public information (official documents) wherever we have considered it necessary. A comparison of such standards with decisions reached by Bulgarian courts is indicative of where our practice stands in relation to that of the more developed democratic countries. The result of this survey is encouraging – we can observe development and progress.

But there are also grounds for skepticism. There is still variation in practice concerning the question of what information is public, for example, and whether citizens in their description of the requested information should refrain from indicating a particular document. Likewise, if we compare the criteria for the application of the restriction related to trade secrets as derived from Bulgarian court practice with the criteria established by American courts, for example, we will see a significant difference. In order to reach the level of developed democratic societies, it is necessary to interpret the right of access to public information more widely, and to interpret restrictions on this right more narrowly than is presently done.

However, it is important to note that over the years the principle of transparency in government and access to information held by public institutions has been strengthened thanks to the role and functioning of the courts, which places things on a higher level. A democratic society exists precisely in the dynamics of public debate, of which judicial arguments are a crucial part. This appears to be the case in history – if we wish to live according to principles, we must be ready to stand up for them and to argue.

# *APPENDIX*

## *SELECTED COURT CASES*

# CASE

***Anton Gerdjikov vs. the Ministry of Foreign Affairs***

## *Anton Gerdjikov vs. the Ministry of Foreign Affairs*

*First Instance Court–Administrative Case No. 7088/2004, SAC, Fifth Division*
*Second Instance Court–Administrative Case No. 10940/2005, SAC, Five Member Panel*

**Request:**

In 2002, during the Second Meeting of Bulgarians who live in the Ukraine, held in the town of Zaporojie, the participants mounted a statue of Khan Asparuh, the founder of the Bulgarian state in the 7th century. The local authorities, however, dismantled the statue during the night and brought it to the historical museum of the town of Zaporojie for storage.

A year and a half after the event, in June 2004, the citizen Anton Gerdjikov–a participant in the Second Meeting of Bulgarians who live in the Ukraine–submitted a written request for access to information to the Ministry of Foreign Affairs (MFA). In his request, Gerdjikov stated that the mounting of the statue was desired by all Bulgarians who knew about its dismantling and demanded that the MFA provide all available information about the mounting and the removing of the statue. In particular, the requestor demanded documents, pointed out in five detailed points of the request–all related to the position and the measures taken by the Bulgarian state bodies in terms of the event.

**Refusal:**

The Minister of Foreign Affairs did not respond to the request within the legally prescribed 14 days period.

**Complaint:**

The silent refusal of the Minister was challenged before the Supreme Administrative Court (SAC).

**Developments in the Court of First Instance:**

In the course of the proceedings, the representative of the MFA presented a file with correspondence–letters and documents–concerning the issue.

The hearing of the case was postponed at the first session in order for the complainant to get acquainted with the presented documents. It turned out that these documents contained part of the requested information, though some questions, raised in the request, still remained unanswered.

At the second session, the MFA submitted a written defence which presented two alternative statements. According to the first one, there was no silent refusal since the information about the mounting and removal of the statue was not related to the public life of the Republic of Bulgaria and did not concern events from the public life of the Republic of Bulgaria. Consequently, the information was not public pursuant to Art. 2, Para. 1 of the APIA. According to the second statement, the requested information was official information pursuant to Art. 11 of the APIA and contained documents with no significance of their own, thus access to these was exempted under Art. 13 of the APIA.

**Court Decision:**

Decision No. 7836 as of August 29, 2005 of the SAC, Fifth Division repealed the silent refusal of the Minister and sent the request back to the body, obliging it to provide all of the information that Anton Gerdjikov had requested. In their judgment, the justices pointed out that the Minister should provide access to the documents listed in the request since the complainant would only find an answer to the question that concerned him after getting acquainted with their content–the official position of the Republic of Bulgaria with regard to a demand of the Bulgarians residing in the Ukraine to mount a statue of Khan Asparuh in the town of Zaporojie. According to the justices, the access to these documents should not be restricted on the grounds of Art. 13 of the APIA since there was no final act of the Minister, whose preparation may have required the collection of the particular documents, whose content may have given an answer to the questions of the requestor.

**Court Appeal:**

The MFA appealed the court decision with the argument that the Access to Public Information Act (APIA) did not stipulate that administrative in-

formation was information that may only be generated in the process of a final act preparation, thus the exemption under Art. 13 of the APIA may not be applied.

**Developments in the Court of Second Instance:**

The case was heard at a single court session and and scheduled for judgment.

**Court Decision:**

The Supreme Administrative Court found the appeal inadmissible in its decision No. 2308 as of the beginning of 2006 and upheld the decision of the lower instance court. In their judgment, the justices elaborated on the argument that access to the requested documents may not be restricted under Art. 13 of the APIA since the information they contained was not directly related to the preparation of a final act and their content may not give an answer to the questions of the requestor.

# DECISION

## No. 7836
## Sofia, 29 August 2005

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the thirtieth of May in the year two-thousand and five, in a panel composed of:

**PRESIDING JUDGE:** ALEXANDER ELENKOV
**PANEL MEMBERS:** VANYA ANCHEVA, IVAN RADENKOV

in the presence of court stenographer Iliana Ivanova and with the participation of prosecutor Maria Begamova, heard the report by Presiding Judge ALEXANDER ELENKOV on Administrative Case No. 7088 of 2004**.**

These proceedings were held pursuant to section two of the third chapter of the Supreme Administrative Court Act (SACA), concerning Art. 40, Para. 1 of the Access to Public Information Act (APIA).

The case was initiated by an appeal from Anton Dimitrov Gerdjikov of Sofia against a silent refusal by the minister of foreign affairs to provide him with access to public information demanded in a request Reg. No. 4PR-1097 of 21 July 2004.

The complaint does not bear a date indicating when it was submitted to the Ministry of the Foreign Affairs and in the case no objection was made that it was overdue; thus, considering the date of its preparation (16 July 2004) placed by the appellant upon it, it must be held that it was submitted within the timeframe stipulated by Art. 13, Para. 2 of the SACA. Examined on its merits, the appeal is grounded.

From the data in the case it is clear that an informal organization of Bulgarians in Ukraine called the Meeting of Bulgarians in Ukraine, with

President Nikolay Gaber, a former MP in the Parliament of Ukraine, organized and held the Second Meeting of Bulgarians in Ukraine during the period of 16-18 August 2002. The meeting opened on 16 August 2002 in the village of Mala Pershchepina, in the Novosandzharski Region in the Poltava District, in a place where many Bulgarians (both those living in Ukraine and those living in Bulgaria) are convinced that the grave of Han Kubrat is located and where a monument has been erected. On the third day, the participants in the meeting went as an organized group to the city of Zaporozhie to the place where it is thought (also unofficially) that the grave of Han Asparuh is located and where they also erected a monument. Alexandra Dobrev, second secretary to the Bulgarian Embassy in Ukraine, was present there and subsequently prepared a report for the Bulgarian ambassador. This report reads that "... due to the lack of agreement on the side of the organizers and the lack of permission from the local administration for the placement of such a memorial ... the Deputy Director of the Ukrainian Bureau for Nationalities, Migration and Religions suggested that the memorial to Asparuh, which consisted of a black marble plaque on a pedestal, be moved to the city historical museum until the resolution of the situation and the obtaining of permission to install the monument, but his suggestion did not satisfy the meeting organizers, who, represented by Mr. Nikolay Gaber, made the decision to erect a monument on the previously noted site in front of the regional state telecommunications company." The local authorities, however, removed the monument the very same night and placed it for storage in the city of Zaporozhie's Ethnographic-Historical Museum "until the historical fact is clarified and the necessary documentation is formulated" (quotation from the letter No. 08-38/1546 of 20 August 2002, in which the Deputy Director of the Zaporozhie District State Administration informed the Bulgarian ambassador to Ukraine about the actions of the former MP Nikolay Gaber, which were in his opinion unlawful).

In a letter Reg. No. 94-A-5 of 16 September 2002 the appellant Anton Dimitrov Gerdjikov expressed to the minister of foreign affairs critical observations regarding what he considered the apparent passivity on the part of high-ranking state bodies toward the Second Meeting of Bulgarians in Ukraine and the noted interest by the same bodies in the celebrations of the 140th anniversary of the settlement of Bulgarians (during the time of

Ottoman rule) in Tavria, Ukraine. This difference in relations, according to the appellant, could have the dangerous consequence of dividing the 300,000 Bulgarians living in Ukraine. The letter ends with the suggestion "that it be proclaimed in a suitable yet categorical manner that all previous patriotic, cultural and other displays by Bulgarians in Ukraine are considered useful and timely and that in the future incorrect or unfounded attitudes toward such displays will not be allowed."

In a letter also from September 2002 (without a registration number), the head of the minister of foreign affairs' political cabinet informed the appellant in response to his letter that the only officially registered association of Bulgarians in Ukraine was the Association of Bulgarian Societies and Organizations in Ukraine and that the Meeting of Bulgarians in Ukraine was not officially registered. The author of the letter made the suggestion that the removal of the monument to Han Asparuh in the city of Zaporozhie was a complex result of the illegitimacy of the Meeting of Bulgarians in Ukraine organization, poor coordination between the relevant local bodies and the "fact that in academic circles the claim is not uniformly and indisputably accepted that the graves of Han Kubrat and Han Asparuh are precisely in those places." The letter also expresses the position that "the preservation of the unity of the Bulgarian movement in Ukraine demands that priority be given to the maintenance of relationships with the official representative of the Bulgarian community, which is the Association of Bulgarian Societies and Organizations in Ukraine."

More than a year and a half after that, in a procedural request for access to public information Reg. No. 4PR-1097 of 21 June 2004, the appellant, noting that "the restoration (of the monument to Han Asparuh) is desired by all Bulgarians who know about its removal and who follow the activities of state bodies with a legal basis and interest," requested that he be "provided with all the information held by the Ministry of Foreign Affairs related to the indicated installation and removal of the monument to Han Asparuh in the city of Zaporozhie in Ukraine." In particular, the appellant asked that he be provided with documents which he described in detail under five points in the request. The minister of foreign affairs did not express a position on this request. His authorized legal representative during the course of the judicial proceedings presented a folder containing certified copies of letters and other

documents related to question under discussion. The written defense offered two alternative positions. According to the first of them, the complaint was procedurally invalid due to the absence of a silent refusal. In the case, the silent refusal was lacking because "the information related to the installation and removal of the monument to Han Asparuh in the city of Zaporozhie, Ukraine, is not directly related to the public life of the Republic of Bulgaria (in the sense of Art. 2, Para. 1 of the APIA) and does not concern events in the public life of the Republic of Bulgaria – conditions introduced by lawgivers for the existence of public information in the sense of Art. 2, Para. 1 of the APIA." For that reason, the minister of foreign affairs was not obliged to provide the information described in the request for access. The alternative position concerns the unfoundedness of the appeal and is based on the conclusion that the information that the appellant requested access to is administrative information in the sense of Art. 11 of the APIA, consisting entirely of documents that do not have independent significance and that were created in the course the Ministry of Foreign Affairs' activities; as of the date 21 June 2004, when the request for access was submitted, the time limit pursuant to Art. 13, Para. 3 of the APIA had not yet expired.

In a petition of 30 May 2005 the appellant clarified that the fundamental issue in the current suit was the "failure in the case to provide documents concerning measures taken by the MFA to solve a situation which is extremely unpleasant for Bulgaria" and, on the other hand, "official visits to Ukraine by the president, prime minister and speaker of parliament of the Republic of Bulgaria... without solving the problem of the reestablishment" (of the monument). In addition he further states that the lack of decision on the question of reestablishing the monument could be the result either of a general decision by high-ranking state bodies to not take measures with the Ukrainian authorities, or of a refusal of the same bodies to honor the steps taken; but regardless of the reason, information about the situation remains secret. The existence of such a secret, according to the appellant, is impermissible, as it leads to incorrect conclusions which are a prerequisite for the creation of negative public attitudes among the Bulgarians in Ukraine as well as those in Bulgaria, and which create the conditions for the adoption of unsuitable solutions and even harmful actions.

The current panel of the Supreme Administrative Court, Fifth Division, fully shares the viewpoint expressed by the appellant.

According to Art. 5, Para. 2, Items 1, 10, 11, 12 and 13 of the Organizational Regulations for the Ministry of Foreign Affairs, the minister of foreign affairs guarantees the maintenance and development of cooperation with other countries in the sphere of culture; defends the rights and interests of the Bulgarian state and of Bulgarian citizens abroad; undertakes diplomatic action for the preservation of Bulgarian cultural-historical heritage and monuments abroad; assists in the activities of Bulgarian institutions abroad in the fields of science, education, culture and information; and defends the rights and freedoms of individuals belonging to Bulgarian national communities and minorities.

The information to which the appellant requested access obviously indicates his desire to form his own opinion about the activity of the minister of foreign affairs through the prism of a single concrete case. The minister's legal representative correctly defined the information as administrative information in the sense of Art. 11 of the APIA, since it was gathered, created and stored in the course of the minister of foreign affairs' activities pursuant to Art. 5, Para. 2, Items 1, 10, 11, 12 and 13 of the Organizational Regulations for the Ministry of Foreign Affairs. According to Art. 13, Para. 1 of the APIA, access to administrative public information is free. Thus, the minister of foreign affairs should have provided the appellant with access to documents listed in the request, since only after familiarizing himself at their content could he find an answer to the question that is of interest to him – what is the official position of the Republic of Bulgaria regarding the desire of some Bulgarians in Ukraine to erect a monument to Han Asparuh in front of the building of the regional state telecommunications company in the city of Zaporozhie. Access to these documents cannot be refused on the grounds of Art. 13, Para. 2, Item 1 of the APIA, due to the absence of an official document by the minister, for whose preparation information was gathered and from whose content the appellant could find an answer to the question of interest to him. Therefore, the rule in Art. 13, Para. 3 of the APIA is not applicable in this case. On the grounds of the aforementioned considerations, the Supreme Administrative Court, Fifth Division, finds that in this case there exists an

unlawful silent refusal, which must be repealed, and on the basis of Art. 41, Para. 1 of the APIA the minister of foreign affairs must be obliged to provide the appellant with access to the documents listed in the request.

Given the aforementioned considerations, the Supreme Administrative Court, Fifth Division,

**HEREBY RULES:**

**TO REPEAL** the silent refusal by the minister of foreign affairs to provide Anton Dimitrov Gerdjikov of Sofia with access to public information demanded in request Reg. No. 4PR-1097 of 21 June 2004.

**TO RETURN** the file to the Minister of foreign affairs and on the basis of Art. 41, Para. 1 of the Access to Public Information Act to oblige him to provide Anton Dimitrov Gerdjikov of Sofia with access to the administrative public information demanded by him in the request with Reg. No. 4PR-1097 of 21 June 2004.

**THE DECISION** can be appealed by cassation appeal to the five-member panel of the Supreme Administrative Court within 14 days of its pronouncement.

**True to the original**,

**PRESIDING JUDGE:** (signature) Alexander Elenkov
**PANEL MEMBERS:** (signature) Vanya Ancheva, (signature) Ivan Radenkov

# DECISION

## No. 2308
## Sofia, 06 MARCH 2006

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Five-Member Panel – Collegium II,** in a court sitting on the twenty-sixth of January in year two-thousand and six, in a panel composed of:

**PRESIDING JUDGE:** ANDREY IKONOMOV
**PANEL MEMBERS:** ZHANETA PETROVA, DIANA DOBREVA, TANYA VACHEVA, VIOLETA GLAVINOVA

in the presence of court stenographer Grigorinka Lyubenova and with the participation of prosecutor Ivan Lulchev, heard the report by Judge TANYA VACHEVA on Administrative Case No. 10940 of 2005**.**

These proceedings were held pursuant to Art. 33 *et seq*. of the Supreme Administrative Court Act (SACA).

The case was initiated by an appeal from the minister of foreign affairs, through his legal representative, against Decision No. 7836 of 29 August 2005 on Administrative Case No. 7088 of 2004 by the Supreme Administrative Court, which repealed his silent refusal to provide Anton Dimitrov Gerdjikov of Sofia with access to public information demanded in request No. 4 PR-1097 of 21 June 2004, in which return the file to the administrative body to provide the access requested by the individual. The complaints concern the incorrectness of the decision, which contradicts the substantive law, and which is unfounded due to fundamental violations of the rules of court procedures – the grounds for repeal are pursuant to Art. 218b, Para. 1,b letter "v" of the Civil Procedure Code. First, the complainant claims that the decision was made on an unlawful appeal (the silent

refusal was not a valid object of court control), and that the decision is in principle incorrect, since access to the administrative public information being sought in the case is restricted on the basis of Art. 13, Para. 2, Item 1 of the Access to Public Information Act. In this sense, he wants a repeal of the appealed decision any pronouncement on the merits of the dispute that rejects the complaint by Anton Dimitrov Gerdjikov is unfounded.

The respondent Anton Dimitrov Gerdjikov contests the cassation appeal. The representative of the Supreme Administrative Prosecutor's Office gave a motivated conclusion for the unfoundedness of the appeal. The Supreme Administrative Court, Five-Member Panel, after reviewing the correctness of the appealed decision and considering the arguments from both parties, finds the cassation appeal unjustified on merit. There is no dispute over the facts in the proceedings. The administrative body was approached by Anton Dimitrov Gerdjikov with the request with Reg. No. 4 PR-1097 of 21 June 2004, containing his request to be provided the information held by the Ministry of Foreign Affairs (MFA) regarding the activities related to the installation and removal of a monument to Han Asparuh in the city of Zaporozhie, Ukraine, which in five points described the documents possessed by the MFA related to the information being sought. The request was related to previous active correspondence between the parties to the case, for which written evidence was provided which was discussed in detail by the ruling panel. Activity related to the installation and removal of a monument to Han Asparuh in Ukraine is connected to a public event by Bulgarians in Ukraine, organized as the "Meeting of Bulgarians in Ukraine." The removal of the monument and its placement in storage in the city of Zaporozhie's Historical-Ethnographic Museum by the local authorities was dictated by the absence of an established historical fact and "properly formulated documents." A written response from the head of the minister of foreign affairs' political cabinet in 2002 casts doubt on the legitimacy of the Association of Bulgarians in Ukraine, while giving priority to the Association of Bulgarian Societies and Organizations in Ukraine. This exchange of viewpoints preceded the submission of a request for access to public information; the latter was dictated by Anton Gerdjikov's desire as a citizen of the Republic of Bulgaria to un-

derstand the MFA's activity related to the initiative by patriotic Bulgarians in Ukraine, as well as to the publicizing of their cultural and other displays. The minister of foreign affairs did not provide a written answer to the submitted request. In the course of the court proceedings, the minister, through his legal representative, maintain the position that the request was inadmissible, since the information requested was not directly related to the public life of the Republic of Bulgaria, but instead concerned relations with another country. Alternatively, he also maintained that the information was administrative information in the sense of Art. 11 of the APIA and consisted of documents that do not have independent significance and which were created in the course of the ministry's activities. In repealing the silent refusal by the minister of foreign affairs, the three-member panel of SAC held that the information requested by the seeker indicated his desire to form his own opinion about the activities of the minister of foreign affairs regarding the development of cooperation with other countries in this year of culture; the defense of the rights and interests of Bulgarian citizens and the Bulgarian state abroad; but the undertaking of diplomatic actions for the preservation of the Bulgarian cultural-historical heritage and monuments abroad; the defense of the rights and freedoms of individuals belonging to Bulgarian national communities and minorities, based on a single concrete case. In this respect it is held that access to administrative public information is free. Thus, the judgment passed is correct. According to Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996 by the Constitutional Court, every citizen's right under Art. 41, Para. 1 of the Constitution to seek and receive information "is guaranteed by the obligation of state bodies to provide it." The Constitutional Court explicitly emphasized that from the content of the right under Art. 41, Para. 1 of every citizen to seek and receive information follows the obligation to guaranteed access to information; the content of that obligation subject definition via the legislative route. The public relations related to the right of access to public information are established in the Access to Public Information Act (promulgated in the *State Gazette*, vol. 55 of 2000). Public information in the sense of this law is all information connected with the public life of the Republic of Bulgaria and which offers citizens the possibility of forming their own opinion about the activities of subjects obliged under the law – Art. 2, Para. 1 of the APIA.

The subjects in Art. 3, Para. 1 of the APIA are pledged provide information that is created in the sphere of their competency and which is available. Public information that fits the first criterion is categorized into two groups: official and administrative public information. Official public information is information contained in official documents of the state bodies and local government bodies in the fulfillment of their authorized duties. The legal acts of state bodies, which by definition are held to contain official information, are normative, general and individual acts. For the first type, access to them is guaranteed by their promulgation in the *State Gazette*. For the remaining acts, access is realized under the APIA, unless it is explicitly stipulated that it should be granted in a different way. The second category of information according to the definition in Art. 11 of the APIA is administrative, which is information that is collected, created and stored in connection with official information, as well as in the course of the activities of the bodies and their administrations. According to the contents of the request under Art. 25 of the APIA and given the legally distinctive characteristics, the information described in a request by Anton Gerdjikov possesses the characteristics of administrative public information. As was rightly pointed out in the appeal decision, the information requested is administrative as it was collected, created and stored in connection with the activities of the minister of foreign affairs, as referred to in Art. 5, Para. 2 of the Organizational Regulations of the Ministry of Foreign Affairs. Access to the documents described in the request is not limited in the sense of Art. 13, Para. 2, Item 1 of the APIA, since the public information contained in them is not directly related with the preparation of the publication of the final act by the administrative body, from which the seeker could receive the information of interest to him. Given the aforementioned considerations, the present panel finds the cassation appeal a justified due to the complaints raised there and. The decision by the three-member panel was made in accordance with the substantive law, while no fundamental violations of the rules of court procedure were made in its pronouncement; the pronouncement is well-founded and thus must remain in force. Led by the above-mentioned considerations and on the grounds of Art. 40, Para. 1 of the SACA, the Supreme Administrative Court, Five-Member Panel

**HEREBY RULES:**

TO UPHOLD Decision No. 7836 of 29 August 2005, pronounced in Administrative Case No. 7088 of 2004 by the Supreme Administrative Court.

The decision is final and not subject to appeal.
True to the original,

**PRESIDING JUDGE:** (signature) Andrey Ikonomov
**PANEL MEMBERS:** (signature) Zhaneta Petrova, (signature) Diana Dobreva, (signature) Tanya Vacheva, (signature) Violeta Glavinova

# CASE

***The Newspaper 168 Hours vs. the Ministry of Education and Sciences***

## *The Newspaper 168 Hours v. the Ministry of Education and Sciences*

*First Instance Court – Administrative Case No. 3621/2005, SAC, Fifth Division*
*Second Instance Court – Administrative Case No. 3505/2006, SAC Five-Member Panel – Collegium II*

**Request:**

In February 2005 Nikolay Penchev, editor in chief of the newspaper *168 Hours*, submitted a request for access to information to the minister of education and sciences. In practice, the seeker wanted the administrative body provide in written form the names, education and qualification levels of each of the members of a ministerial team led by the minister, of all the heads of departments, all governmental experts, as well as of all people hired by civil contracts.

**Refusal:**

A response to the request was not received within the 14 day time limit established by law.

**Complaint:**

The silent refusal was appealed before the Supreme Administrative Court (SAC). The appeal pointed out a decision by the SAC which contained a summary of court practice on the question of silent refusal, in which it was held that "lawmakers did not explicitly create a fiction called *silent refusals* in the Access to Public Information Act (APIA) because they did not presume that, given the imposed obligation for the production of a grounded decision, subjects obliged under this law would display unlawful and immoral inaction." In the same decision of silent refusal under the APIA is defined as "a legally intolerable phenomenon."

**Development in the Court of First Instance:**

The case was examined in a court sitting and scheduled for judgment.

**Court Decision:**

In Decision No. 11422 of 19 December 2005 the SAC panel, Fifth Division, rejected the appeal as unfounded. The judges' reasoning was that the requested information was not "public" in the sense of the APIA. The court found that the information requested in that way did not concern the data about the public life of the country, nor data about the activities of a subject or the individuals obliged under the law; rather, it concerns the personal data of individuals characterized by the posts held by them. Because of this, according to the court panel, the silent refusal by the administrative body was lawful.

**Court appeal:**

The decision was appealed before a SAC five-member panel. In the court appeal it was noted, that it was absurd to hold that information about who is the deputy minister, who is the state expert and so on in the Ministry of Education and Sciences could be personal data. On the contrary, such information is necessarily public, especially in light of the transparency of the entire activity of the public institution. State policy cannot be prepared and implemented by anonymous individuals. It was also pointed out that the educational and qualification levels of the ministry's leading team, which prepares the minister's most important acts and which advises him in the decision-making process, reflects on their quality to a significant extent; this is grounds for the public interest in the information requested. In the cassation appeal arguments were also developed that professional activities of people, especially of state employees, and even more so of those from a leading team of a body of the executive power, not fall in the sphere of the personal intimate life of that individual. On the contrary, the professional experience and abilities of individuals filling leading positions in the administration is the object of appropriate transparency and accountability to the society, whose condition and life they affect.

**Development in the Court of Second Instance:**

The case was examined in a court sitting and scheduled for a judgment.

**Court Decision:**

In Decision No. 9486 of 4 October 2006 the SAC five-member panel overturned a decision of the previous court instance, reversed the minister's silent refusal and required him to provide the newspaper *168 Hours* with the names, education and qualification levels of the deputy ministers and head secretary of the Ministry of Education and Sciences, as well as the names, education and qualification levels of members of its political cabinet. According to the judges, the decision in the court of first instance was incorrect in the section that rejected the appeal against the refusal to be provided information about the names, education and qualification levels of deputy ministers, the head secretary and members of the political cabinet of the Minister of Education and Sciences, since they all belong to the public register under the Public Disclosure of Property Owned by High Government Officials Act (PDPOHGOA); their names are publicly accessible via this register. The judicial panel noted that the remaining data – education and qualification level – are not included in the public register, but are necessary for the formation of an independent opinion on the question of whether the leading political executive team in the sphere of education and sciences in Bulgaria has the necessary scientific and professional qualifications for high-quality and effective fulfillment of its state duties in the sphere of public life.

## *DECISION*

## No. 11422
## Sofia, 19 December 2005

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the first of November in the year two-thousand and five, in a panel composed of:

**PRESIDING JUDGE:** MILKA PANCHEVA
**PANEL MEMBERS:** DIANA DOBREVA, TANYA RADKOVA

in the presence of court stenographer Iliana Ivanova and with the participation of prosecutor Meri Naydenova, heard the report by Presiding Judge MILKA PANCHEVA on Administrative Case No. 3621 of 2005**.**

These proceedings were held pursuant to Art. 12 of the Supreme Administrative Court Act (SACA), concerning Art. 2 of the Access to Public Information Act (APIA).

The case was initiated by a complaint from Nikolay Todorov Penchev, editor-in-chief of the newspaper *168 Hours* against a silent refusal from the minister of education to a request for access to public information Reg. No. 132-37/16 February 2005. He claims that he did not receive an answer within the legally stipulated timeframe, which constitutes a silent refusal on the part of the minister to present the requested information. He believes that the MES is an obliged subject in the sense of Art.3, Para.2, Item 2 of the APIA, while the requested information was created and preserved by the ministry. He requests that the appealed refusal be reversed and that the minister of education and sciences be required to provide access to the information demanded in accordance with the request.

At the court proceedings, the appellant, summoned in accordance to the legal procedure, did not appear and did not present himself.

The respondent – the minister of education and sciences – was represented by legal council Georgieva, who contested the appeal and requested that it be rejected, since she believes that the data requested by the appellant constitute personal data.

A representative of the Supreme Administrative Prosecutor's Office considers the appeal unjustified, since the appe lant did not prove the necessity of the requested information.

The Supreme Administrative Court evaluated the written evidence collected in the case and found the complaint to be procedurally permissible, but unfounded in its merits for the following reasons:

The right of every individual to seek, receive and distribute information is constitutionally guaranteed by the provisions in Art. 41, Para. 1 of the Constitution of the Republic of Bulgaria.

The public relations related to the right of access to public information are set forth in the APIA; Art. 2 provides a legal definition of the concept "public information" in the sense of that law. It is "all information connected with the public life of the Republic of Bulgaria and which offers citizens the opportunity to form their own opinion about the activities of subjects obliged under the law." The concept "information" is defined in the *Dictionary the Bulgarian Language* (published by Science and Art 2001; fourth edited edition) as: 1. A given or received message or knowledge about someone or something; 2. A service that gives such knowledge; 3. Knowledge about the objects or processes in the world, perceived, accumulated and passed on by humans through special means, etc. It follows that the concept "public information" should be understood as knowledge about someone or something connected with the public life of the country, especially the activities of subjects obliged under the law, which create or preserve such knowledge.

In the concrete case, from the content of the request by the editor-in-chief of the newspaper *168 Hours,* N. Penchev, to the minister of education and sciences it is obvious that the information being sought does not possess the characteristics of "public information" in the sense of the APIA. In fact, the appellant demanded that the administrative body provide in written

form the names, education and qualification levels of all members of a team led by the ministry, the heads of all departments, all state experts, as well as people hired with civil contracts.

The court finds that the information requested in this way does not concern data about the public life of the country, nor data about the activities of subjects obliged under law or the individuals described in the requests, but rather concerns personal information related to the personal data of the individuals characterized by the positions they hold. For this reason, the provisions in Art.31, Para.1 and Para.2 of the APIA cannot be applied, but rather, when the requested information concerns a third-party whose consent it is necessary to obtain for the information's disclosure, the relevant body is required to ask for explicit written consent from the third party within seven days of registering the request, according to Art. 24 of the law. If the consent of the third party is not obtained or if it is explicitly refused, the administrative body can present the requested information to such an extent and in such a manner, such that it does not reveal information concerning the third party – Art. 31, Para. 4 of the APIA.

All hypotheses contained in the provisions of Art.31 of the APIA refer to "public information" concerning a third-party. The personal data of individuals from a leading team in the ministry of education and sciences cannot constitute public information.

In this sense, the silent refusal by the administrative body was lawful and the appeal, which is unfounded, must be rejected.

Guided by the aforementioned considerations and based on Art. 28 of the SACA, in connection with Art. 42 of the APA, the Supreme Administrative Court, Fifth Division

**HEREBY RULES:**

TO REJECT the appeal by Nikolay Todorov Penchev, editor-in-chief of the newspaper *168 Hours* against a silent refusal from the minister of education and sciences in response to a request for access to public information Reg. No. 132-37/16 February 2005.

The decision can be appealed before a five-member panel of the Supreme Administrative Court within 14 days from the time the parties have been informed of its pronouncement.

**True to the original,**
**PRESIDING JUDGE:** (signature) Milka Pancheva
**PANEL MEMBERS:** (signature) Diana Dobreva,
(signature) Tanya Radkova

# DECISION

## No. 9486
## Sofia, 04 October 2006

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Five-Member Panel, Collegium II,** in a court sitting on the twenty-eighth of September in the year two-thousand and six, in a panel composed of:

**PRESIDING JUDGE:** SVETLA PETKOVA
**PANEL MEMBERS:** IVAN TRENDAFILOV, ALEXANDER ELENKOV, NATALIA MARCHEVA, RUMYANA PAPAZOVA

in the presence of court stenographer Milka Angelova and with the participation of prosecutor Anna Bankova, heard the report by Judge ALEXANDER ELENKOV on Administrative Case No. 3505 of 2006**.**

These proceedings were held pursuant to Art. 13 of the Supreme Administrative Court Act (SACA).

The case was initiated by a cassation appeal from Nikolay Todorov Penchev of Sofia, editor-in-chief of the newspaper *168 Hours* against Decision No. 11422 of 19 December 2005 on Administrative Case No. 3621/2005 by the Supreme Administrative Court, Fifth Division.

The cassation appeal was filed within the time limit stipulated in Art. 33, Para. 1 of the SACA and is admissible, and examined on its merits is in part grounded.

From the facts of the case is clear is that with the letter outgoing Reg. No. 19 of 14 February 2005, received by the Ministry of Education and Sciences on 16 February 2005 and registered with incoming Reg. No. 132–57 of 16 February 2005, the cassation appellant requested that the minister of education and sciences provide him in written form the names, education and qualification levels of all high-ranking members of the ministry's lead-

ing team, as well as that for department heads, all state experts, as well as people employed with civil contracts.

Within the time limit stipulated by Art. 28, Para. 1 of the Access to Public Information Act (APIA), the minister of education and sciences did not make a decision to present or to refuse access to the requested information. For this reason, the cassation appellant assumes that there was a silent refusal to provide him the requested information and he contested that refusal under Art. 40 *et seq*. of the APIA. Based on a complaint filed by him, Administrative Case No. 3621/2005 was initiated in the Supreme Administrative Court, Fifth Division. In the case, one court sitting was held in which the minister of education and sciences was represented by an authorized attorney. The minister's legal representative expressed the opinion that the appeal was unfounded, based on the argument that the data requested by the cassation appellant are personal data in the sense of the Personal Data Protection Act. In the decision now under appeal, the Three-Member Panel of the Supreme Administrative Court held that the information requested in the letter (which possesses the character of a request in the sense of Art. 24 and Art. 25 of the APIA) does not concern data about the public life of the country, nor data about the activities of subjects obliged under law or the individuals described in the requests, but rather concerns personal information related to the personal data of the individuals characterized by the positions they hold. This information is not public, thus it does not fall within the scope of the provisions of Art. 31 of the APIA and thus the question is moot as to whether the minister requested the consent of the individuals identified in the request letter or whether the possibility existed to present the cassation appellant with the requested information to such a degree and in such a way so as to not disclose information related to third parties.

Decision is incorrect in the section that rejects the appeal against the refusal to provide information about the names, education and qualification levels of the deputy ministers, head secretaries and members of the minister of education and sciences' political cabinet. All of them belong to the public register according to the Disclosure of Property Owned by High Government Public Officials Act (Art. 2, Para. 1, Items 3, 28 and 30), due to which their names are publicly accessible through this register. The remaining data – education and qualification level – are not included in the

public register, but are necessary for citizens to form their own opinion as to whether the leading political and executive team in the sphere of education and sciences in Bulgaria has the necessary scientific and professional qualifications for high-quality and effective fulfillment of their official duties in that sphere of public life. By the way, with respect to these positions, the solution to the question under discussion should be the same or similar to that of the minister of education and sciences himself, whose picture, a short but information-rich biography, and even his property declaration are publicly accessible on the electronic webpage of the Council of Ministers. The remaining part of the decision by the three-member panel is correct. State employees, employees under labor contracts and individuals with civil contracts are experts and implementers who assist the minister of education and sciences as a body of the executive power in the implementation of his authority. They do not fall into the category of "public figures," even when they are acknowledged by the law for high-ranking government officials (for example, heads of directorates – see Art. 5, Para. 2 of the Public Officials Act), and have the right to anonymity in the public sphere. Based on these arguments, the Supreme Administrative Court, Five-Member Panel finds that the appealed decision of the three-member panel must be overturned in the part that rejects the complaint of the cassation appellant against the refusal to provide information about the names and education and qualification levels of the deputy ministers, head secretary and members of the minister of education and sciences' political cabinet; in its place another ruling is established, in which the minister's silent refusal is reversed and the case should be returned to him with instructions to provide information about the names and education and qualification levels of the deputy ministers, the head secretary and members of his political cabinet. In the part concerning information about the remaining state employees and individuals working on labor contracts or on civil contracts, the decision is correct and should be upheld.

Guided by the aforementioned considerations and based on Art. 41, Para. 1 of the APIA, the Supreme Administrative Court, Five-Member Panel,

**HEREBY RULES:**

TO REVERSE Decision No. 11422 of 19 December 2005 on Administrative Case No. 3621/2005 by the Supreme Administrative Court, Fifth Division, IN THE PART that rejects the appeal by Nikolay Todorov Penchev of Sofia, editor-in-chief of the newspaper *168 Hours*, against the silent refusal by the minister of education and sciences to provide him with the names and education and qualification levels of the deputy ministers, head secretary and members of his political cabinet; in its place is enacted a decision:

TO REVERSE the silent refusal by the minister of education and sciences to provide Nikolay Todorov Penchev of Sofia, editor-in-chief of the newspaper *168 Hours*, with the names and education and qualification levels of the deputy ministers, the head secretary of the Ministry of Education and Sciences, as well as the names and education and qualification levels of the members of the minister's political cabinet.

ON THE GROUNDS of Art. 41, Para. 1 of the Access to Public Information Act the minister of education and sciences is obliged to present Nikolay Todorov Penchev of Sofia, editor-in-chief of the newspaper *168 Hours*, with the names and education and qualification levels of the deputy ministers, the head secretary of the Ministry of Education and Sciences, as well as the names and education and qualification levels of the members of his political cabinet.

TO UPHOLD Decision No. 11422 of 19 December 2005 on Administrative Case No. 3621/2005 by the Supreme Administrative Court, Fifth Division, in its remaining parts.

THE DECISION is not subject to appeal.

**True to the original,**

**PRESIDING JUDGE:** (signature) Svetla Petkova
**PANEL MEMBERS:** (signature) Ivan Trendafilov, (signature) Alexander Elenkov, (signature) Natalia Marcheva, (signature) Rumyana Papazova

# CASE

***Bulgarian Society for the Protection of Birds vs. the Ministry of Economics and Energy***

## *Bulgarian Society for the Protection of Birds vs. the Ministry of Economics and Energy*

*First Instance Court – Administrative Case No. 6044/2006 in SAC, Fifth Division*
*First Instance Court – Administrative Case No. 4871/2006 in SCC, Panel III-J*

**Request:**

On February 1, 2006, Ivailo Ivanov, regional coordinator of the Bulgarian Society for the Protection of Birds in the town of Varna, submitted a request to the Minister of Economics and Energy in which he asked for all information available in the ministry regarding the procedure of preparation and approval of the National Long-term Program for Encouraging Use of Renewable Energy Sources 2004 – 2015, including the draft of the Program itself.

**Refusal:**

With an order as of March 2006, the head of the ministry's administration refused to provide the information on the ground that the information regarding the procedure of drafting and approval of the Program related to the preparatory work on the act and had no significance of its own (Art. 13, Para. 2, Item 1 of the APIA). It was also pointed out that at the present moment the draft of the Program was not finalized and was not adopted by the Council of Ministers (CoM).

**Complaint:**

The refusal was challenged before the SAC. The complaint stated that the administrative body used solely the provision of Art. 13, Para 2, Item 1 of the APIA without, however, specifying exactly which documents were considered to be related to the operational preparation of the act, nor explaining the circumstances according to which the whole requested information fell under the exemption of Art. 13, Para. 2, Item 1 of the APIA.

**Developments in the Court of First Instance (SAC):**

At an open session held on October 24, 2006, a panel of the SAC, Fifth Division, found out that the court body was not competent to hear the case, since the challenged order had been issued by the head of ministry's administration, and not by the minister. Subsequently, the case was sent to the Sofia City Court (SCC).

**Developments in the Court of First Instance (SCC):**

The case was heard at an open court session in March 2007 and scheduled for judgment. The complainant provided written notes which stated that for the application of Art. 13, Para. 2, Item 1 of the APIA, it should be ascertained that the issue was about opinions, recommendations, statements or consultations with regard to the preparation of the given act which did not have significance of its own. It was also set forth that the provision of Art. 13, Para. 2, Item 1 of the APIA was not applicable to the case according to another reason. The requested information, and especially the draft Program, was "information relating to the environment" as stipulated by Art. 19, Item 2 of the Environmental Protection Act (EPA) – as it undoubtedly feel under the category of " programmes impacting or capable of impacting the environmental media". It had not been specified in the request for access to information, but identification of the applicable legal norms was not the responsibility of the requestor, rather the obligation of the administrative body. Since the requested information corresponded to the description under Art. 19 of the EPA, the appropriate norm for the exemption to the right of information was that of Art. 20 of the EPA. It appeared as a special norm. Article 20 of the EPA did not set forth a provision analogous to the one stipulated by Art. 13, Para. 2, Item 1 of the APIA. Such an absence conformed to the essence of the environmental information which should be subject to a broad public discussion.

**Court Decision:**

With a decision as of April 13, 2007, the SCC repealed the order of the head of the ministry's administration as unlawful. In their judgment, the magistrates signified that the head of the ministry's administration had unlawfully used the provision set by Art. 13, Para. 2, Item 1 of the APIA as

a ground for refusal, as the exemptions set forth by the APIA were not applicable to information regarding environment. Grounds for restrictions to the access to environmental information were stipulated by the Environmental Protection Act (EPA). The court panel also held that the requested information did not fall under any of the hypotheses set forth by Art. 20, Para. 1 of the EPA and the right of access to information should not be limited. On the other hand, public discussion was an independent stage in the process of adoption of common administrative acts (the National Program being such an act). It was a form of participation for interested persons. However, putting the national program to a discussion, meant provision of information about the drafting process, as well as information regarding its content, to interested persons and organizations.

# DECISION

## *Sofia 13.04.2007*

## IN THE NAME OF THE PEOPLE

The Sofia City Court, Administrative Division, Panel III-zh, in a public court sitting on the twenty-sixth of March in the year two-thousand and seven, in a panel composed of:

**PRESIDING JUDGE:** ANELIA MARKOVA
**PANEL MEMBERS:** MARIA GEORGIEVA, TATYANA BACHVAROVA

in the presence of court stenographer Donka Shuleva and prosecutor Hristozova, examined Administrative Case No. 4871 of 2006**,** reported on by Judge Markova; in order to pass a judgment, the following was taken into account:

The proceedings were pursuant to Art. 40 of the APIA.

**The complainant** Ivaylo Petrov Ivanov claims that the refusal by the head secretary of the Ministry of Economics and Energy Resources (MEER), expressed in Order No. PD-16-145/02 March 2006 in response to a request submitted by Ivanov on 3 February 2006, Reg. No. 92-00-160, in which he requested access to existing information related to the procedure for preparing and approving the "National Long-Term Program for Encouraging the Use of Renewable Energy Sources 2004 – 2015" assigned by MEER, including the draft of the program itself, was unlawful. He believes the act was issued by a body not competent to do so. Despite the fact that the information was available to it, the administrative body did not present it. Grounds as to why the body believes that the information fell within the scope of the restriction in Art. 13, Para. 2, Item 1 of the APIA were also lacking. In terms of merit, the appellant's authorized representative presented arguments that the cited provisions in Art. 13, Para. 2, Item 1 of the APIA or not applicable in the concrete

case, since it concerned access to "information about the environment." Here a specialized law was applicable – the EPA, which in Art. 20 does not contain the restriction found in Art. 13, Para. 2, Item 1 of the APIA. Furthermore, "the Program" in its character constitutes a general administrative act and thus participation in the discussion of it is an obligatory element of the procedure.

For this reason, the complainant asked the court to reverse the appealed refusal by the head secretary of the Ministry of Economics and Energy.

**The respondent,** the head secretary of the Ministry of Economics and Energy, claims that the information requested constitutes preparation for an administrative act; thus, its refusal was lawful.

Neither side is claiming expenses.

The representative of the Sofia Chief Prosecutor's Office finds that the complaint is unfounded.

**The court,** after evaluating both parties' arguments and the written evidence presented, holds the following as established in terms of the factual and legal aspects of the dispute:

With the request Reg. No. 92-00-160/03 February 2006, Ivaylo Petrov Ivanov asked to be granted access to existing information related to the procedure for preparing and approving the "National Long-Term Program for Encouraging the Use of Renewable Energy Sources 2004 – 2015" assigned by MEER, including the draft of the program itself.

As is obvious from the subsequent Order No. PD-16-145/02 March 2006, the head secretary of the Ministry of Economics and Energy refused to present the information being sought. In his grounds for the refusal, he indicated that the information related to the procedure for preparing and approving the Program, thus it was connected with the operative preparation of the act and did not have independent significance, using the provisions in Art. 13, Para. 2, Item 1 of the APIA as the basis for his argument. Furthermore, at the moment the refusal was issued, the plan had not yet been prepared in a final form and had not yet been adopted by the Council of Ministers pursuant to the requirements in Art. 4, Para. 2, Item 9 of the Energy Act.

In letter No. 92-00-160/02 March 2006 the head secretary sent his decision-order in response to the request. As is obvious from the receipt confirmation, the letter was received by the Bulgarian Society for the Protection of Birds on 14 March 2006. Considering the clarification made in the request from 20 June 2006 before the Supreme Administrative Court of the Republic of Bulgaria that the complaint had been submitted by Ivaylo Ivanov as a physical person, it follows that we cannot hold that he was informed by a refusal presented in this way.

Unsatisfied by the position expressed in Order No. PD-16-145/02 March 2006 by the head secretary of the Ministry of Economics and Energy, Ivanov submitted a complaint on 27 March 2006 by mail. The present court proceedings were initiated precisely in fulfillment of the instructions by the Supreme Administrative Court of the Republic of Bulgaria in the definition expressed in a protocol from 24 October 2006 on Administrative Case No. 6044/06 by the Supreme Administrative Court of the Republic of Bulgaria, Fifth Division.

Since during the case the respondent did not provide evidence regarding the date on which Ivanov was informed of Order No. PD-16-145/02 March 2006 by the head secretary of the Ministry of Economics and Energy, the court accepts that the appeal was submitted within the time limits stipulated by Art. 37, Para. 1 of the APC.

In the case is not disputed that Ivanov is the regional coordinator of the Bulgarian Society for the Protection of Birds and in his capacity as such he submitted the request for access to information. Since he cannot represent the society before the Supreme Administrative Court of the Republic of Bulgaria as it had become clear from the Certificate for Legal Status submitted by that society, as was established in the clarification, it follows that the information was sought by an individual citizen. Thus, that individual citizen is the addressee of the refusal, since the request was submitted by him.

For the appellant, there exists a legal interest in the sense of Art. 56 in connection with Art. 120, Para. 2 of the Constitution of the Republic of Bulgaria for the appeal of this "refusal." The administrative act is subject to court control of its legality, since there is not a legal norm regulating its exclusion from appeal. Whether the information sought by the appellant is public information in the sense of the APIA is the fundamental question, not whether an appeal submitted in this way is permissible.

On the basis of the above-mentioned considerations, the present instance finds that the appeal under consideration is permissible.

According to the provisions in Art. 41, Para. 3 of the APA, amended, but also applicable in connection with § 4, Para. 1 of the Miscellaneous Provisions of the Administrative Procedure Code, the Court evaluated the legality of the administrative act by checking whether it has been issued by a competent body and in the proper form, whether it respects the legal-procedural and legal-material provisions for its issuance and whether it is in accordance with the goal of the law.

In view of Order No. PD-16-710/18.11.2005, which was presented to the court of present instance, the head secretary of the Ministry of Economics and Energy was authorized to issue the order.

Public relationships related to the right of access to public information are set out in the APIA.

According to Art. 3, Para.1 of the APIA, that law is applied to access to public information that is created and preserved by state bodies or local government bodies. The respondent is inarguably a state body in the sense of Art. 3, Para. 1 of the APIA.

According to Decision No. 7 of 1996 on Constitutional Case No. 1 from 1996 by the Constitutional Court, the right of every citizen under Art. 41, Para. 1 of the Constitution to seek and receive information "is guaranteed by the obligations on state bodies to present it." The Constitutional Court explicitly emphasized that from the content of the right under Art. 41, Para. 1 of every citizen to seek and receive information also follows the obligation to secure access to information and that the content of this obligation is subject to definition via the route of legislation.

A legal definition of the concept "public information" is given in the provision in Art. 2, Para. 1 of the APIA. This is information preserved by subjects under Art. 3 of the APIA from which every citizen could form his own opinion about the work and activities of a certain subject. The system concerning access to public information is set out in Chapter Three of the APIA. According to Art. 24 of that chapter, access to public information should be provided on the basis of a written or oral request. In this case, the appellant made a written request. The elements that such a request must contain are listed in the provisions in Art. 25, Para. 1 of the APIA. It is obvi-

ous from the request that it indicates that the seeker wants access to information related to the procedure for preparing and approving the "National Long-Term Program for Encouraging the Use of Renewable Energy Sources 2004 – 2015" assigned by MEER, including the plan of the program itself. The form in which the seeker would like the requested information presented – on a paper carrier and/or in electronic form – is also noted.

Thus, the necessary concretization of the request has been fulfilled.

Public information that fits the first criterion of the APIA is categorized into two groups: official and administrative public information. Official public information is information contained in official documents of the state bodies and local government bodies in the fulfillment of their authorized duties. The legal acts of state bodies, which by definition are held to contain official information, are normative, general and individual acts. For the first type, access to them is guaranteed by their promulgation in the *State Gazette*. For the remaining acts, access is realized under the APIA, unless it is explicitly stipulated that it should be granted in a different way. The second category of information according to the definition in Art. 11 of the APIA is administrative, which is information that is collected, created and stored in connection with official information, as well as in the course of the activities of the bodies and their administrations. Access to administrative public information is free and can be restricted only when information is connected with the operative preparation of acts by state bodies and does not have independent significance, pursuant to the provisions in Art. 13, Para. 2, Item 1 of the APIA.

Indeed, preparatory documents for the issuance of an internal-administrative act do not have independent significance, because the information contained in them is concretely tied with the preparations to issue a final act by the administrative body, from which the seeker could receive the information of interest to him, as was found in Decision No. 10168 of 07 December 2004 by the Supreme Administrative Court of the Republic of Bulgaria, Fifth Division, on Administrative Case No. 9502/03 and Decision No. 2308 of 06 March 2006 on Administrative Case No. 10940/2005, by a five-member panel of the Supreme Administrative Court of the Republic of Bulgaria.

In this case, the dispute is precisely whether the requested information has independent significance.

The system and conditions for providing access to information about the environment is regulated by the Environmental Protection Act, which is a specialized law with respect to the Access to Information Act. Art. 20 of the EPA indicates the concrete grounds for the refusal of access to requested information about the environment and excludes the application of the provisions in Art. 37 of the APIA, which sets out the hypotheses for refusals under that law. As is obvious from the administrative act in question, its issuer did not discuss whether the elements of some of the factual contents of Art. 20 of the EPA that allow for the refusal of access to information about the environment were fulfilled in the issuance of the act.

In light of the aforementioned considerations, the court of the present instance holds that the respondent unlawfully cited the provisions in Art. 13, Para. 2, Item 1 of the APIA. The grounds for refusal based on the APIA are not applicable in the evaluation of requests for access to public information related to the environment. In Art. 19 of the EPA a definition of "information about the environment" is given, which includes in its scope both information about components and factors that influence and define the state of the environment, as well as a wide range of activities and circumstances connected with human health and safety, people's living conditions, and so forth, insofar as they are or could be affected by the state of aspects of the environment. The right to information, examined in the context of citizens' basic right to a favorable and healthy environment, which is proclaimed in Art. 55 of the Constitution of the Republic of Bulgaria, can be restricted only in cases pursuant to Art. 20, Para. 1, Item 1 – Item 6 of the EPA. In the appealed refusal, the administrative body did not cite any of the factual elements of the applicable legal norm, but rather assumed that it had fulfilled the prerequisites pursuant to Art. 13, Para. 2, Item 1 and Item 2 of the APIA. In order to be devoid of independent significance, the requested information must constitute in and of itself an opinion, recommendation or viewpoint prepared by or for the body and intended as preparation for the adoption of a corresponding final act. [The information in question] concerns information that is public in character, considering the goal of its creation and the method of its distribution, precisely following the provisions in Art. 4,

Para. 2, Item 9 of the Energy Act – the minister of economics and energy resources develops and introduces to the Council of Ministers for adoption the nationally indicated goals for encouraging the use of electric energy generated by renewable energy sources. The conclusion follows precisely from that provision in the Energy Act that the "program" itself is the final act, and not a preparation for the final act.

For this reason the program does not possess the characteristics of a preparatory document, prepared by an assisting body with a view to issuing a final act.

This information does not fall within any of the restrictive hypotheses in Art. 20, Para. 1 of the EPA, thus the right of access to it cannot be restricted. Access to public information concerning the activities of the administration guarantees the possibility for citizens to form an adequate idea of and a critical viewpoint on the bodies that govern them; for this reason, the grounds for refusal are limited to the framework of restrictions on the right of access regulated in the applicable law. Citizens and organizations' right of access to information related to decisions that affect the environment cannot be restricted except for in the cases referred to in Art. 20 of the EPA. The provisions in Art. 26, Para. 1 of the EPA exclude other legal sources as grounds for refusal of information requested by a seeker, since it refers to the procedure stipulated in Chapter Three of the APIA for the provision of access to public information, but not to the material-legal requirements for refusal regulated in the general law.

On the other hand, public discussion is an independent stage in the procedure of adopting general administrative acts, as well as way for interested parties to participate in their production. In order for "the program" to be subject to public discussion, interested parties and organizations must have information about the preparation procedure, as well as about its content.

For this reason, the appealed act is unlawful and thus must be repealed.

Since the appellant does not claim expenses, the court does not award him such.

GUIDED BY THE ABOVE-MENTIONED REASONING,
THE SOFIA CITY COURT

**HEREBY RULES:**

**TO REPEAL** Order No. PD-16-145/02 March 2006, issued by the head secretary of the Ministry of Economics and Energy, in which Ivaylo Petrov Ivanov was refused information requested by him on 03 February 2006 in a request Reg. No. 92-00-160, in which he sought access to existing information related to the procedure for preparing and approving the "National Long-Term Program for Encouraging the Use of Renewable Energy Sources 2004 – 2015" assigned by MEER, including the plan of the program itself, as it was UNLAWFUL.

**THE DECISION** is subject to **CASSATION** before the **SUPREME ADMINISTRATIVE COURT** of the Republic of Bulgaria within 14 days of the time the parties are informed of its publication.

**PRESIDING JUDGE:**
**PANEL MEMBERS:**

# CASE

***The Environmental Association For the Earth vs. the Ministry of Environment and Waters***

# The Environmental Association *For the Earth* vs. the Ministry of Environment and Waters

*First Instance Court – Administrative Case No. 3138/2004, Sofia City Court, Administrative Division, Panel III-B*
*Second Instance Court – Administrative Case No. 10628/2005, Supreme Administrative Court, Fifth Division*

**Request:**

In July 2004, the Environmental Association *For the Earth* submitted a written request for access to information to the Ministry of Environment and Waters (MOEW). The organization demanded access to three categories of information regarding a project financed through the ISPA programme of the EU, through the European Investment Bank, and through the European Bank for Reconstruction and Development. The requested categories of information were as follows:

- copies of all Environmental Impact Assessment decisions issued by the MOEW;
- copes of all records of public discussions, including lists of the participants;
- copies of the opinion statements presented by the participants at the public discussions.

**Refusal:**

A written decision issued by the head of the MOEW administration granted partial access to the requested information. Copies of all Environmental Impact Assessment decisions issued by the MOEW were provided. Access to copies of all records of public discussions was refused on the grounds of Art. 13, Para. 2 of the APIA (preparatory documents with no significance of their own). Copies of the opinion statements presented by the participants at the public discussions were also refused on the grounds of Art. 27, Para. 1, Item 2 of the APIA (information that affected a third party's interests; thus their consent was required for the provision of the information).

**Complaint:**

The part of the MOEW's decision that had denied access to the requested information was challenged. The arguments given were that the requested information had been explicitly defined as publicly accessible under the provision of Art. 102 of the Environmental Protection Act (EPA). The argument went on to say that Art. 13, Para. 2 of the APIA was not applicable in cases in which access to environmental information, defined under Art. 19 of the EPA, was being requested. The APIA provision was not applicable since it was Art. 20 of the EPA that provided for restrictions on the right of access to environmental information. Article 20 of the EPA did not allow for referral to Art. 13, Para. 2 of the APIA. Furthermore, the letter of complaint went on to state that the opinion statements of the participants in the public discussions were public and thus did not constitute information that may harm a third party's interests under the provisions of the APIA.

**Developments in the Court of First Instance:**

The case was heard in a single session and scheduled for judgment.

**Court Decision:**

With a decision as of July 18, 2005, the Sofia City Court repealed that part of the Head of the MOEW Administration's decision that refused information and referred the file back to the Ministry, obligating it to provide access to the requested information. In their judgment, the justices accepted the complainant's arguments about the inapplicability of the provision of Art. 13, Para. 2 of the APIA to this particular case. With regard to the refusal to grant access to copies of opinion statements presented at public discussions, the justices remarked that the consent of these individuals was not required since the statements they had made, which were submitted in written form as well, did not constitute information that might harm their rights or legitimate interests.

**Court Appeal:**

The MOEW appealed the court decision with the argument that not only the records from the public discussions, but also the opinion statements presented during those discussions constituted information related

to the operational preparation of the EIA decisions and consequently had no significance of their own. That was why access to the information was restricted under the provisions in Art. 13, Para. 2 of the APIA.

**Developments in the Court of Second Instance:**
The case was heard at a single court session and scheduled for judgment.

**Court Decision:**
With decision No. 4239 of April 20, 2006, a panel of the Supreme Administrative Court upheld the decision of the SCC. In their judgment, the justices pointed out that the SCC had correctly assumed that the refusal had been unlawful since the requested information was not related to preparatory work on the documents (i.e. the EIA decisions), pursuant to Art. 13, Para. 2, Item 1 of the APIA. In order to have no significance of its own, the requested information should contain opinions, recommendations, and statements prepared by or for the body, which are meant to be used for the preparation of a final decision. Public discussions, held under the provision of the Environmental Protection Act (EPA), were an independent phase in the procedure for the adoption of EIA decisions by the competent body. That was why the records from these discussions did not possess the characteristics of preparatory documents prepared by a subordinate body and as part of the procedure for the adoption of the final act. It was also emphasized that the records from the public discussions included statements and positions that had been publicly expressed by the participants. Considering that the requested information was public with regard to the purpose of its creation and the manner of its dissemination, the grounds stated by the obliged body that its disclosure would harm the interests of third parties who had not given their consent were unjustified and had no basis in the legal regulations.

The court panel also remarked that the provisions in Art. 102 of the EPA defined the principle of publicity of information about EIA procedures, including public discussions. The right of access to the information related to decisions on environmental issues should not be restricted beyond the cases provided by Art. 20 of the EPA.

# DECISION

## No. 4239
## Sofia, 20 April 2006

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the thirteenth of March in the year two-thousand and six, in a panel composed of:

**PRESIDING JUDGE:** VANYA ANCHEVA
**PANEL MEMBERS:** YULIA KOVACHEVA, VIOLETA GLAVINOVA

in the presence of court stenographer Iliana Ivanova, and with the participation of prosecutor Elena Encheva, heard the report by Judge YULIA KOVACHEVA on Administrative Case No. 10628 of 2005**.**

These proceedings were held pursuant to Art. 33 *et seq*. of the Supreme Administrative Court Act (SACA).

The case was initiated by a cassation appeal by the minister of the environment and waters against the decision of 18 July 2005 by the Sofia City Court on Administrative Case No. 3138/2004. The appeal presents arguments about the incorrectness of the judgment and asks for its repeal.

The respondent, the Ecological Association For the Earth, through their legal representative, expressed the viewpoint that the cassation appeal was unfounded and requested that the appealed decision be left in force.

The prosecutor from the Supreme Administrative Prosecutor's Office gave a motivated argument for the unfoundedness of the cassation appeal.

The Supreme Administrative Court, Fifth Division panel, found that the cassation appeal was procedurally permissible since it was submitted within the timeframe given in Art. 33, Para. 1 of the SACA by the proper party. Examined on its merits, it is unfounded for the following reasons:

In the decision now under appeal, the Sofia City Court overturned Decision No. 53/22 July 2004 by the head secretary of the Ministry of the Environment and Waters in the part that refused to provide access to public information according to the request Reg. No. 1249/09 July 2004 by the Ecological Association For the Earth and returned the file, requiring him to provide access to the requested information. In the case under examination, the complainant in the court of first instance (now the respondent in the cassation appeal) asked to be provided with the following: 1) a copy of the protocols from public discussions; and 2) viewpoints represented by participants in public discussions about various projects during the period of 1999-2004, described in appendix No. 1 to the request. The administrative body refused the request on the grounds of Art. 37, Para. 1, Item 1 and Item 2 of the APIA, in the case of Item 1 claiming that the documents were preparatory acts for decisions on Environmental Impact Assessments (EIA) and did not have independent significance, thus, according to Art. 13, Para. 2, Item 1 of the APIA access to them is restricted. Concerning materials under Item 2, [the refusal claimed that] the information contained in them concerned the interests of third parties and that it was necessary to obtain their written consent; in any case, they also did not have independent significance. Given these factual circumstances, the court pointed out that the system and conditions for providing access to information about the environment is regulated by the Environmental Protection Act (EPA), which is a specialized law with respect to the more general Access to Public Information Act. Art. 20 of the EPA lists the concrete grounds for a refusal to access this requested information about the environment and excludes the application of the provisions in Art. 37 of the APIA, which sets out the hypotheses for refusals under the latter law. The obliged subject did not discuss whether the elements of some of the factual components of Art. 20 of the EPA were fulfilled, which would have provided the grounds for a possible refusal to access to information about the environment. Instead, the refusal unlawfully referred to the provisions in Art. 13, Para. 2, Item 1 of the APIA, ignoring the specialized text in Art. 102 of the EPA, which reads that the MOEW must maintain a register of data about the fulfillment of EIA procedure, including about public discussions and decisions issued on EIA, and until the creation of such a register through a specialized order by the minister of the environment and

waters, it provides a system for the preservation and presentation of such information.

Unsatisfied with the decision, the cassation appellant claims that the court's decision about the inapplicability of the grounds for the refusal based on the APIA is not applicable in the evaluation of request for access to public information related to the environment, citing provisions in Art. 26, Para. 1 of the EPA, which refer back to the procedure in the APIA. The arguments are once again made that in contrast to the findings of the court, the information is related to the operative preparation of acts and does not have independent significance; in addition, it contains the opinions and positions of third parties with respect to the realization of projects for the protection of the environment, i.e. there are grounds for restricting access to the requested information under Art. 13, Para. 2, Items 1 and 2 of the APIA, according to which the obliged subject has lawfully refused access to the information under the hypotheses in Art. 37, Para. 1, Item 1 and 2 of the APIA.

The decision is correct.

Art. 19 of the EPA offers a definition of "information about the environment," which includes in its scope both information about components and factors that influence and define the state of the environment, as well as a wide sphere of activities and circumstances connected with human health and safety, people's living conditions and so forth, insofar as they are or could be affected by the state of aspects of the environment. The right to information, examined in the context of citizens' basic right to a favorable and healthy environment, which is proclaimed in Art. 55 of the Constitution of the Republic of Bulgaria, can be restricted only in cases pursuant to Art. 20, Para. 1, Item 1 – Item 6 of the EPA. In the appealed refusal, the administrative body did not cite any of the factual elements of the applicable legal norm, but rather assumed that it had fulfilled the prerequisites pursuant to Art. 13, Para. 2, Item 1 and Item 2 of the APIA. As the ruling court correctly held, the refusal was unlawful, since the request was not related to the operative preparation of acts – decisions on EIA, in the sense of Art. 13, Para. 2, Item 1 of the APIA. In order to be devoid of independent significance, the requested information must constitute in and of itself an opinion, recommendation or viewpoint prepared by or for the body and intended as preparation for the adoption of a corresponding final act. Public discussion held

within the framework of the EPA is an independent stage in the procedure for making a decision on an EIA by the competent body; for this reason, the composite protocol for such a discussion does not have the characteristics of a preparatory document prepared by an assisting body with a view to the issuance of a final act. The protocols from public discussions reflect the publicly expressed viewpoints and positions of the participants. Given that the information in question is public in character, considering the purpose of its creation and the method of distribution, the obliged subject's argument that providing it to the seeker would harm the interests of third parties who had not given their consent is unfounded and does not find support in the legislation. Once certain information has become publicly known and does not fall within any of the restrictive hypotheses in Art. 20, Para. 1 of the EPA, the right of access to it cannot be restricted due to the need to protect competing interests – the right to protect personal information in the sense of Art. 6, Item 5 of the APIA. Access to public information about the activities of the administration guarantees citizens the possibility of forming an adequate idea and a critical viewpoint about the bodies that govern them; for this reason, the grounds for refusal are limited to the framework of restrictions on the right of access regulated in the applicable law. Given that the provisions in Art. 102 of the EPA define the principle of the public nature of information related to EIA procedure, including public discussions, citizens and organizations' right of access to information related to decisions that affect the environment cannot be restricted except for in the cases referred to in Art. 20 of the EPA. The provisions in Art. 26, Para. 1 of the EPA exclude other legal sources as grounds for refusal of information requested by a seeker, since it refers to the procedure stipulated in Chapter Three of the APIA for the provision of access to public information, but not to the material-legal requirements for refusal regulated in the general law.

Given the aforementioned arguments, the decision under appeal is correct and must be left in force.

Guided by the considerations above and on the basis of Art. 40, Para. 1 of the SACA, the Supreme Administrative Court, Fifth Division panel,

**HEREBY RULES:**

**TO UPHOLD** the decision of 18 July 2005 by the Sofia City Court on Administrative Case No. 3138/2004.

The decision is not subject to appeal.

**True to the original,**
**PRESIDING JUDGE:** (signature) Vanya Ancheva
**PANEL MEMBERS:** (signature) Yulia Kovacheva, (signature) Violeta Glavinova

# CASE

***Zoya Dimitrova (Monitor Newspaper) vs. the President of the Republic of Bulgaria***

# Zoya Dimitrova (*Monitor* Newspaper) vs. the President of the Republic of Bulgaria

*First Instance Court – Administrative Case No 1380/2004 Sofia City Court*
*Second Instance Court– Administrative Case No 4596/2005 SAC, Fifth Division*

**Request:**

In February 2004, Zoya Dimitrova, a journalist from *Monitor* newspaper, submitted a request for public information to the President of the Republic of Bulgaria, Mr. Georgi Parvanov. She demanded access to the report prepared by the National Security Services (NSS) and the National Intelligence Services (NIS). The report contained data about Bulgarian citizens and companies that had been involved in oil trade with Iraqi companies or state bodies during the regime of Saddam Hussein. In her request, Ms. Dimitrova pointed out that she would prefer to be given partial access to the public information if the report contained parts of information classified under the appropriate legal procedure.

**Refusal:**

The information request was dismissed by the Head of the President's Administration. The refusal referred to the Access to Public Information Act simply by stating that the information had been classified.

**Complaint:**

The refusal was appealed before the Sofia City Court. The complaint stated that the wording of the refusal did not create the presumption that the requested information had been lawfully classified as a secret of any type. The mere statement that the requested information constituted classified information, with no reference to the particular provisions of the Protection of Classified Information Act (PCIA) and no specification of the state secret information category, stipulated by Appendix 1 to Art. 25 of the PCIA, or any other particular list of categories that may have defined the information as an official secret, determined the refusal as ungrounded.

**Developments in the Court of First Instance:**
The case was heard in a single session and scheduled for judgment.

**Court Decision:**
On February 28, 2005, the Sofia City Court reversed as illegal the refusal of the Head of the President's Administration and returned the file to the institution for reconsideration. In their judgment, the justices pointed out that the letter of the Head of the President's Administration lacked any proof why the requested information was secret, nor did it refer to any legal grounds for its classification. The refusal did not even specify whether the requested information was classified as state or official secret under the Protection of Classified Information Act (PCIA). The preparation of the report by the National Intelligence Services in cooperation with the National Security Service did not automatically classify the information confidential, nor did it remove the obligation of the public authority (the Head of the President's Administration) to provide criteria and reasons for classifying the requested information.

**Court Appeal:**
The Head of the President's Administration appealed the judgement of the Sofia City Court (SCC) before the Supreme Administrative Court. In the appeal, the high official argued that the decisions of the Head of the President's Administration were not subject to appeal and that the refusal had been grounded.

**Developments in the Court of Second Instance:**
The case was heard in a single session and the court adjourned.

**Court Decision:**
The Supreme Administrative Court repealed the decision of the Sofia City Court with a decision No. 5 as of January 2006 and turned the case back to the lower instance court for reconsideration, The supreme justices assumed that the with its decision, the SCC had not thoroughly investigated the lawfulness of the refusal that was being appealed. The SCC had not applied its entitled privilege under Art 41, Para. 3 and 4 of the APIA to oversee

the classification with a security stamp. Several other important issues were settled by the decision of the supreme court:

- access to information refusals of the Head of President's Administration are liable to appeal.;
- the simple statement that the requested information is *state or other legally protected secret,* does not exclude the refusal from appeal liability;
- the first instance court should request and inspect the report of the special services in order to judge on the lawfulness of the decision to classify it as a state secret;
- the fact that the information relates to the work of the security services does not automatically classify it as secret. What was requested was not *an operational report on the work of the services*, but a report presenting the results from the operational work;
- even if there is a possibility of harm from disclosure, it could be eliminated by granting partial access to the requested information.

# DECISION

## *Sofia, 28 February 2005*

## IN THE NAME OF THE PEOPLE

THE SOFIA CITY COURT, Administrative Collegium, Division III-Z, in a public court sitting on the twenty-seventh of January in the year two-thousand and five, in a panel composed of:

**PRESIDING JUDGE:** EMILIA MITKOVA
**PANEL MEMBERS:** LOZAN PANOV, BILYANA MAGDELINOVA

in the presence of court stenographer Nikolina Ilieva and prosecutor Dimitrov, examined Administrative Case No. 1380 of the SCC docket for 2004**,** reported on by Judge Panov; in order to pass a judgment, the following was taken into account:

***The proceedings were pursuant to Art. 40, Para. 1 of the APIA, in conjunction with Para. 33- 45 of the APA.***

The case was initiated by a complaint from Zoya Dimitrova Ivanova against a refusal by the chief secretary of the president (outgoing No. 31-00-9 of 09 March 2004), which, on the grounds of Art. 37, Para. 1, Item 1 of the APIA, refused access to information contained in the report prepared on the orders of the president by the National Security Services (NSS), together with the National Intelligence Services (NIS), regarding the participation of Bulgarian individuals and corporations in the oil trade with Iraqi companies or state bodies or representatives during the regime of Saddam Hussein. Arguments were made that the issuance of the administrative act violated the substantive law and the appeal requests the repeal of the refusal, requiring that the administrative body provide access to the requested public information. Expenses have been claimed.

The respondent to the appeal – the chief secretary of the president, through his legal representative – contests the appeal, claiming that it is im-

permissible. He expresses the standpoint that the administrative act issued is lawful and correct.

The representative of the SOFIA CITY PROSECUTOR'S OFFICE holds the opinion that the appeal is unfounded.

*THE SOFIA CITY COURT, evaluating the arguments of the parties and the evidence collected in the case, which was discussed individually and in combination, has established the following factual aspects of the case:*

The appellant Zoya Dimitrova Ivanova submitted a request Reg. No. 31-00-9/26 February 2004 to the President of the Republic of Bulgaria, asking to be provided a copy on a paper carrier of the report prepared on the orders of the president by the National Security Services (NSS), together with the National Intelligence Services (NIS), regarding the participation of Bulgarian individuals and corporations in the oil trade with Iraqi companies or state bodies or representatives during the regime of Saddam Hussein. The request explicitly indicates that if the report contains sections that constitute classified information that was classified in the proper manner, the seeker would like to be provided partial access to the public information.

In a letter with outgoing No. 31-00-9, the chief secretary of the president refused to provide access to the requested information. The letter indicates that the requested information belongs to a category of classified information. Regarding an evaluation of the request for partial access, the administrative body declared that such an evaluation cannot be performed by the Administration of the President, due to the nature of the information being sought: "a report prepared by the NSS, together with the NIS."

The parties do not dispute that there exists a report prepared on the orders of the president, regarding the participation of Bulgarian individuals and corporations in the oil trade with Iraqi companies or state bodies or representatives during the regime of Saddam Hussein. They also do not dispute the fact that the report was prepared by the NSS, together with the NIS.

In Order No. 360/10 October 2002 it is established that the President of the Republic has decreed that requests for access to public information will be examined and decided upon by the chief secretary of the president.

*Given this clarified factual context, the court reached the following legal conclusions:*

*Regarding the permissibility of the appeal:*

The legal representative of the respondent raised the objection that the appeal is inadmissible, since it concerns an act by the president, whose legality is not subject to court control under the system of administrative procedure. In this case, however, the disputed letter was issued by the chief secretary of the president and possesses the characteristics of a decision to refuse to provide access to public information. It was issued on the basis of Order No. 360/10 October 2002 by the president, which is in turn based on Art. 28, Para. 2 of the APIA. In the indicated legislation lawgivers granted the right to state bodies/obliged subjects to designate other officials within their administration who can: a) make decisions to grant or refuse access to requested public information and; b) to inform the seeker about their decision in written form. The expression "his own decision" in this norm unambiguously shows that the official appointed by the relevant body makes decisions about requests for access in his own name, and not in the name of the body that authorized him (*in the sense, see Definition No. 2026 of 08 March 2004 on Administrative Case No.10452/03, SAC, Fifth Division, and others*). Thus, this case does not concern proclamations by the President of the Republic, whose acts indeed are not subject to court control of their legality under administrative procedure; instead, it concerns an act by the chief secretary of the president, which on general grounds can be contested by interested citizens or legal persons when their interests have been infringed upon.

On the other hand, the chief secretary of the president is not the head of a department directly subordinate to the Council of Ministers in the sense of Art. 36, Para. 2 of the APA or of Art. 5, Item 1 of the SACA; he is also not in the sphere of persons and organs listed in the remaining points of Art. 5 of the SACA. For this reason, the dispute over the legality of the decision he issued to refuse to provide the appellant with access to the public information requested falls generically within the jurisdiction of the Sofia City Court as the Court of first instance, taking into consideration the provisions in Art. 40, Para. 1 of the APIA.

Regarding the objection of the appellant's lack of a legal interest to file an appeal, it must be noted that the refusal infringes upon the appellant's right of access to public information proclaimed in Art. 41, Para.1 of the Constitution, and in so far as her right is infringed upon by the disputed refusal, Zoya Dimitrova Ivanova has the legal right to appeal before a court.

Considering the reasoning above, the court finds that the appeal is procedurally permissible – it was submitted within the legally established time limits against an act that is subject to court control and by the addressee of that act, who has a legal right to appeal.

*Examined on its merits, the appeal is justified.*

In Recommendation (2002) 2 of the Council of Europe Committee of Ministers to the member states, with regard to access to official documents recommendation, it is stipulated that "wide access to official documents offers citizens the opportunity to form an adequate idea and a critical viewpoint on the state of the society in which they live and the bodies that govern them, while at the same time encouraging the public's informed participation on questions of general interest – increasing the effectiveness and efficacy of the administration and assisting in the maintenance of its respectability."

According to Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996 by the Constitutional Court, the right of every citizen under Art. 41, Para. 1 of the Constitution to seek and receive information "is guaranteed by state bodies' obligations to provide it." The Constitutional Court explicitly emphasized that from the content of the right under Art. 41, Para. 1 of every citizen to seek and receive information also follows the obligation to secure access to information and that the content of this obligation is subject to definition via the route of legislation.

Public relationships related to the right of access to public information are set out in the APIA (promulgated in SG, vol. 55 of 2000). The system concerning access to public information is set out in Chapter Three of the APIA. It is obvious from the content of Zoya Dimitrova Ivanova's request that it fulfills the requirements of Art. 24 and Art. 25 of the APIA, since it was made in written form and contains all legally necessary elements. It provides a concrete description of the requested information: the report prepared on the orders of the president by the National Security Services (NSS), together with the National Intelligence Services (NIS); the subject of the request is connected with the public life of the country, which constitutes objective public interest. Furthermore, the request by the appellant explicitly states that if the document contains sections constituting classified information classified in the relevant manner, then she asks to be provided with partial access to public information.

The disputed refusal, objectified in the letter No. 31-00-9 by the chief secretary of the president, does not fulfill the requirements for the necessary content stipulated in the provisions of Art. 15 of the APA, Para. 2 of the APA, and Art. 38 of the APIA. As was already noted, the letter in principle possesses the characteristics of a decision to refuse access to public information. Thus, as an individual administrative act, the letter must fulfill the requirements of Art. 15, Para. 2 of the APA and contain certain elements. The absence of any one of them leads to its unlawfulness, if in fact there is a fundamental violation of administrative procedure. In addition to the applicable Art. 15 of the APA, Art. 38 of the APIA also exists as a specialized law. According to the latter, in a decision to refuse to provide access to public information, the legal and factual basis for refusal based on that law must be specified, as well as the date the decision was made and the system for its appeal. The disputed administrative act states that the information is "classified;" for this reason, citing the provisions in Art. 37, Para. 1, Item 1 of the APIA, the body refused access to it. The court finds it necessary to point out that according to the norm in Art. 37, Para. 1, Item 1 of the APIA, there are grounds to refuse to provide access to public information if the requested information is classified information constituting a state or official secret. The decision lacks data about the type and nature of the information that qualifies it as classified information and hence the legal basis for its definition as such. It is not even concretely stated whether the classified information constitutes a state or an official secret in the sense of Art. 25 and Art. 26 in the Protection of Classified Information Act (PCIA).

The fact that Art. 37, Para. 1, Item 1 of the APIA was mentioned does not make the refusal grounded. Furthermore, the information's confidentiality does not follow from the statement that "the report was prepared by the NSS, together with the NIS," nor does it nullify the body's obligation to give grounds for the issued administrative act – i.e. by what criteria and on what grounds was it decided that the requested public information constitutes classified information. The court finds it necessary to note that information about the organization, skills and means for fulfilling certain tasks carried out in the course of the operative-investigative and operative-research activities of the security and public-order services, as well as data about individuals assisting them in these activities, is indeed included in the List of

Categories of Information Subject to Classification As a State Secret – Appendix No. 1 to Art. 25 of the PCIA. At the same time, however, the disputed act fails to indicate the cited legislation, nor does it even define that information as a "state secret." This noted absence hinders the court's control over the legality of the disputed refusal in the application of Art. 41 of the APIA. In general, the grounds given in an administrative act should be limited solely to the factual and legal bases for its issuance; their presence within the act offers the addressee the possibility to understand the body's will and to defend his rights and interests before the court if he feels that they have been violated. The grounds possess a fundamental significance for the court as well, allowing it to make the correct decision on a dispute. In this case, such grounds are lacking in the procedural letter in practice, which does not allow the court to evaluate its correctness and to exercise effective control over the legality of the decision under appeal. Through interpretation of the provisions in the APIA and the PCIA (a law that is not even mentioned in the refusal), the court should not have to seek and find the arguments that led to the disputed refusal of access to public information that would "supplement" the content of the act. This is the responsibility of the administrative body, which is an obliged subject under Art. 3 of the APIA.

Based on this reasoning, the disputed refusal must be repealed, since it was issued with a fundamental violation of the rules of administrative procedure – Art. 38 of the APIA. On the basis of Art. 42, Para. 3 of the APA, the file should be returned to the administrative body for new processing of the request by Zoya Dimitrova Ivanova, in accordance with the court's instructions, including those regarding the possibility for the provision of partial access.

Based on the outcome of the case and on Art. 5 of the APA,in conjunction with. Art. 64 of the CPC, the respondent owes the appellant expenses incurred by her during the course of the proceedings in the sum of 10 leva – the state tax paid.

*Guided by the above-mentioned considerations, the current panel of the SOFIA CITY COURT*

**HEREBY RULES:**

**TO REPEAL** as unlawful the refusal (outgoing No. 31-00-9 of 09 March 2004) by the chief secretary of the president, in which, on the basis of Art. 37, Para. 1, Item 1 of the APIA, access was refused to information contained in the report prepared on the orders of the president by the National Security Service (NSS), together with the National Intelligence Service (NIS), regarding the participation of Bulgarian individuals and corporations in the oil trade with Iraqi companies or state bodies or representatives during the regime of Saddam Hussein.

**TO RETURN** the administrative file to the chief secretary of the president of the Republic of Bulgaria for new processing of the request Reg. No. 31-00-9/26 February 2004 under the APIA by Zoya Dimitrova Ivanova.

**TO ORDER** the Presidency of the Republic of Bulgaria to pay Zoya Dimitrova Ivanova, UCN 5601214076, address: Sofia, 116 Tsarigradsko Shose, expenses in the sum of 10 (ten) leva.

The decision can be appealed before the SUPREME ADMINISTRATIVE COURT of the Republic of Bulgaria with a cassation appeal, within 14 days of the time the parties are informed of its publication.

Presiding Judge: Panel Members

# DECISION

## No. 5
## Sofia, 03 January 2006

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the fourteenth of November in the year two-thousand and five, in a panel composed of:

**PRESIDING JUDGE:** VANYA ANCHEVA
**PANEL MEMBERS:** YULIA KOVACHEVA, IVAN RADENKOV

in the presence of court stenographer Iliana Ivanova, and with the participation of prosecutor Nikolay Nikolov, heard the report by Presiding Judge VANYA ANCHEVA on Administrative Case No. 4268 of 2005**.**

These proceedings were held pursuant to Art. 33 et seq. of the Supreme Administrative Court Act (SACA). The case was initiated by a cassation appeal by Krasimir Stoyanov, chief secretary of the president of the Republic of Bulgaria, against a decision of 28 February 2005 on Administrative Case No. 1380/2004 by the Sofia City Court (SCC).

The decision under appeal repealed as unlawful an refusal with outgoing No. 31-00-9 of 09 March 2004 by the chief secretary of the president, in which, on the basis of Art. 37, Para. 1, Item 1 of the APIA, Zoya Dimitrova Ivanova, a journalist from *Monitor* newspaper, was refused access to a report prepared jointly by the National Intelligence Services (NIS) and the National Security Services (NSS) on the orders of the president and concerning "the participation of Bulgarian individuals and corporations in the oil trade with Iraqi companies or state bodies or representatives during the regime of Saddam Hussein."

The cassation appeal claims that the decision by the SCC under appeal is invalid – under the cassation grounds in Art. 218b, Para. 1, letter "b" of

the Civil Procedure Code (CPC), in connection with Art. 11 of the SACA. Arguments are introduced regarding the judgment's incorrectness due to violations of the substantive law and fundamental violations of the rules of court procedure – which are grounds for repeal under Art. 218b, Para. 1, letter "c," the first and second propositions.

The claimed inadmissibility of the SCC decision under appeal is based on the contention that refusal No. 31-00-9 of 09 March 2004 was not subject to appeal, since it was made by the chief secretary under authority explicitly delegated to him by the president, whose acts, according to Art. 3, Item 1 of the Administrative Procedure Act (APA) are not subject to appeal. He claims that the legal right for demanding access to the requested information was lacking, as was the right to appeal the refusal to provide access to it. In this way the conclusion is supported that the decision of the court of first instance, which involves an appeal against that refusal, is inadmissible. As a third basis for its inadmissibility, it is emphasized that the court of first instance in its decision ruled on an request that was never presented, in not limiting the boundaries of the appeal's subject matter to requiring the president to present a refusal to the requested information, but rather returning the file to the chief secretary for new processing.

Eventually in his arguments about the admissibility of the disputed court ruling, the cassation appellant complains that the SCC decision was incorrect to do a fundamental violation of the rules of court procedure in the form of the absence of grounds for rejecting arguments made by him. He finds that violations of the substantive law were committed, reflected in the citation of a nonexistent normative act, which is not in accordance with the provisions of Art. 15, Para. 3 of the APA, which does not distinguish information according to its material carrier, as well as the court's conclusion that the refusal under appeal was not grounded to do the failure to cite the legal text that served as the basis for the classification of the requested information.

In a court sitting on 14 November 2005, the cassation appellant was represented by legal counselor Leskovska, who defended the cassation appeal and requested that the decision under appeal be repealed as inadmissible and overturned is incorrect. She submitted written notes that reproduced the arguments set out in the cassation appeal.

The respondent to the appeal, through her authorized legal representative, contests the cassation appeal and requests that the SCC decision under appeal be left in force. She disputes the arguments set out in the cassation appeal, emphasizing that acts by the chief secretary of the president are subject to appeal on general grounds. She claims that under Art. 41, Para. 3 of the APA the court is not restricted to rule only on the subject matter of the complaint, but is required to conduct a judicial review of the legality of an act under appeal. She agrees with the conclusion reached by the court of first instance that the appealed refusal was not grounded in accordance with the requirements in Art. 38 of the APIA. Written notes were submitted which develop and support this viewpoint.

The representative of the Supreme Administrative Prosecutor's Office finds the appeal justified. He considers the decision under appeal inadmissible due to the lack of a justified legal interest, stemming from the nature of the requested information as classified under the force of the law.

The Supreme Administrative Court (SAC), Fifth Division, has established that the cassation appeal was submitted in the timeframe under Art. 33, Para. 1 of the SACA, against a court ruling that is subject to cassation appeal by the proper party, who has a legal right to appeal; thus, it is procedurally admissible.

Examined on its merits, the appeal is justified.

Given the factual context established by the SCC, which is not disputed by the parties, the present court of cassation finds the decision under appeal incorrect because of a fundamental violation of the rules of court procedure. The argument introduced in the cassation appeal is justified that the court did not offer grounds as to why could not accept the arguments and the legal conclusions of the respondent in the court of first instance. From the facts of the case is clear that the parties made contradicting claims regarding the character of information to which access was being requested. In violation of the principle of the judicial basis of the administrative process, which require the court to conduct a full check of the legality of the administrative act under appeal, the SCC did not exercise its authority under Art. 41, Para. 3 and 4 of the APIA to check the security stamp marking on the requested information. This check would have provided an answer to the basic disputed question between the parties and what if confirmed or refuted the legality of

the appealed refusal. Indeed, in the wording of the law of this hypothesis is seen only as a legal possibility for the court (which is clear from the phrase "can…"), but in cases where the question is not clarified by the factual aspects, the use of this authority should be included in the scope of the check under Art. 41, Para. 3 of the APA and becomes a requirement for the court. The fact that the SCC did not research this basic question constitutes a violation of the rules of court procedure, which influenced the contents of the final court ruling. For this reason it is a fundamental violation which provides grounds for the repeal of the decision.

Irregardless of this result, for the sake of the clarity of the explanation, the text below will briefly comment on the remaining arguments by the cassation appellant, with which the present judicial panel does not agree.

First, it must be noted that the appeal against the refusal by the chief secretary to provide access to request a public information is justified. In his capacity as a public law subject, the president of the republic is an applied subject under the APIA on the basis of Art. 3, Para. 2, Item 1 of the law, irregardless of the fact that he is not a body of the executive power. This being the case, if the refusal had been issued by the president himself, it would not be subject to appeal, since the procedure for appeal should follow the APA or the SACA) (Arg.: Art. 40 of the APIA); however, Art. 3 of the APA explicitly excludes the appeal of acts by the president, while the exhaustive list in Art. 5 of the SACA does not include such acts. In the present case, however, the appealed refusal was issued by the chief secretary of the president, whom such authority is been delegated, as subject to appeal an independent legal basis. Unlike an authorization in which "the authorized party acts in the name and on the account of the represented party… in the case of the delegation, the activity is made in the name of the body to which the authority was delegated" (SAC Interpretative Decision No. 4) and the appealed act must be evaluated according to the legal status of the body that issued it, and not according to the status of the body that delegated such authority. In a concrete case, the chief Secretary acted in his own name and exercised his own competency, since the conditions for the admissibility of the appeal against refusal No. 31-00-9 of 09 March 2004 should be evaluated with respect to the chief secretary, and not with respect to the president. In practice this means that the interdiction in Art. 3, Item 1 of the APA is

not applicable in this case, since it concerns "acts by the President of the Republic," and not acts within the competency of the president that were issued by another body in its own name.

Second, the claim by the cassation appellant is unjustified that the court ruled out a request that was not in its purview. As was discussed above, in the process of administrative case the court must conduct a complete judicial review of the act under appeal; it is not restricted to the arguments introduced in the appeal they can exercise its rights under Art. 42 of the APA, without needing the corresponding request from the appellant and can rule on grounds not indicated by the account. Thus, the court is subordinate only to law and acts in accordance with its internal conviction, irregardless of the appellant's requests and the arguments that support them.

The court cannot agree with the claim made in the appeal regarding the lack of legal right to seek the requested information, since that information constitutes "a state secret or another secret protected by the law." In this respect, the citation of Item 9 of Section II of Appendix No. 1 to Art. 25 of the Protection of Classified Information Act (PCIA) is unjustified. That legal text is not relevant to the current case, because it refers to "reports… concerning the operative work of the security services," while this case the subject of the request for access was not the operative work of those services, but only the results of it. Even if we held that the risk of revealing information protected by Item 9 might arise from the distribution of the result, this risk could be avoided by the provision of partial access according to Art. 37, Para. 2 of the APIA. Furthermore, here once again the question arises of the legality of defining the information as classified, which, in violation of the principle of the judicial basis of the administrative process, was not investigated by the court of first instance.

The cassation appellant's arguments regarding violations of the substantive law must also be rejected.

The citation of a nonexistent law on the part of the SCC is due to an obvious factual mistake. It does not negate the formed will the court, whose content to unambiguously be understood from the context of the grounds expressed.

There are two fundamental precisions in the claim by the cassation appellant that "the lawgiver did not provide an opportunity to evaluate wheth-

er or not the information object to fight in a report by the security services and classified in the stipulated manner constitutes confidential information such as a state secret. This is so under the force of the law." First, there is no data suggesting that the information was classified in the stipulated manner, and the fact of its classification and the legality of that procedure are based solely on the claims made by the body refusing access. As noted above, this viewpoint that the information should be considered classified under the force of law is based on an incorrect interpretation of Item 9 of SectionII of the Appendix No. 1 to Art. 25 of the APIA and is not shared by the current judicial panel. Second, if the proper classification information has not been proved, the lawmakers explicitly give the court to positively to evaluate legality – Art. 41, Para. 3 and 4 of the APIA.

The distinction between information and its material carrier does not affect the exactness of the request for access and its suitability to be satisfied by the subject obliged under the APIA, since from the text that is unambiguously clear exactly what public information is being requested. This sense is reflected in the constant practice of the SAC (see, for example, Decision No. 2113 of 09 March 2004 on Administrative Case No. 38/2004, five-member panel).

The court of first instance's conclusion that in cases under Art. 37, Para. 1, Item 1 of the APIA the refusal for access to information must be grounded in an indication of the legal as well as factual grounds does not constitute a violation of the substantive law. The cassation appellant was unjustified in assuming that the provisions in Art. 15, Para. 3 of the APA or applicable in this case. There exists an explicit provision in a specialized law (Art. 38 of the APIA), which stipulates indication of the factual basis as well in the case of a refusal. In so far as one of the hypotheses for a refusal is precisely the classified status of the information, which is stipulated in the preceding legal text (Art. 37, Para. 1, Item 1 of the APIA), the explicit will of the lawgiver is for the factual basis to be indicated in such a case as well. The priority of specialized legislation over general legislation excludes the possibility to apply Art. 15, Para. 3 of the APA in this case.

Given the existing factual context and with respect to the arguments set out, the president judicial panel finds that in order to make the correct decision on the legal dispute raised in this case, it is necessary to clarify

the question of the nature of the requested information in the legality of its classification. The Court of first instance did not fulfill its procedural requirements to investigate and collect facts in this regard, which constitutes a fundamental violation of the rules of court procedure. For this reason the appeal decision must be repealed and returned for examination by another panel of the SCC, which will conduct the necessary investigation in the case.

In light of the above-mentioned considerations and on the basis of Art. 40, Para. 2, first proposition of the SACA, the Supreme Administrative Court, Fifth Division

**HEREBY RULES:**

**TO REPEAL** the decision of 28 February 2005 on Administrative Case No. 1380/2004 by the Sofia City Court, Division III-z.

**TO RETURN** the case to the Sofia City Court for new examination by another panel according to the instructions given in the present decision. The decision is not subject to appeal.

**True to the original,**

**PRESIDING JUDGE:** (signature) Vanya Ancheva
**PANEL MEMBERS:** (signature)Yulia Kovacheva,
(signature) Ivan Radenkov

# CASE

**Yordan Todorov**
**(*168 Hours* newspaper)**
**vs. the Minister of the Interior**

# Yordan Todorov (*168 Hours* newspaper) vs. the Minister of the Interior

*First Instance Court – Administrative Case No. 818/2007,*
*Supreme Administrative Court (SAC), Fifth Division*
*Second Instance Court– Administrative Case No. 9280/2007,*
*in SAC, Five Member Panel – First Panel*

**Request:**

In October 2006, Yordan Todorov, a reporter from "168 chasa" newspaper, filed a request to the minister of the interior to get access to information regarding a lodging released for rent and then for sale by the housing department of Material-Technical Security and Social Services Directorate (MTSSS) of the Ministry of Interior. The information requested was thoroughly described as follows:

Decision of the housing committee of MTSSS to define the priority in distributing the housing between six registered officers, whose applications were viewed by the commission;

Draft decision of the housing commission of MTSSS to allocate two lodgings;

The order issued by the minister of the interior as approval to draft decision for the allocation of the two lodgings;

The order issued by the minister to accommodate an officer on a rent basis in one of the lodgings;

The order issued by the minister approving sale of that particular housing.

**Refusal:**

By a decision as of November 2006, the minister of the interior had refused to provide access to the requested information. As a ground for the refusal Art. 13, Para. 2 of the Access to Public Information Act (APIA) was referred. According to the provision, access to administrative public information that was of preparatory character and had no significance of its own may be refused. It was also referring to the provision of Art. 37, Para 1, item 2 of the APIA, according to which information which concerned

the interests of a third party, and whose consent for disclosure had not been obtained, was not subject to provision. Additionally, the minister in his decision stated that the requested information was not connected with the public life, but is of a private character, thus access to it shall not be granted.

**Complaint:**

The refusal was challenged before the Supreme Administrative Court (SAC). The complaint pointed that application of the exemption provided by Art. 13, Para. 2 of the APIA was possible only with regard to the information requested under items 1 and 2. At the moment when the refusal was issued, however, the two year's term of protection had been expired since under the provision of Art. 13, Para. 3 of the APIA the exemption set by the Para.2 of the same provision shall not be applied after two years from the creation of the information. It was also pointed out that it was improper to apply Art. 37, Para.1, item 2 of the APIA, as in his request the journalist stated that he would like to get partial access to information, specifically the data regarding the personal information on the officers in need of the housing, as well as the data on the officer who got the housing released for rent initially and further on for sale, shall be extracted. It was emphasized that the requested information was certainly related to the public life in the Republic of Bulgaria, under the stipulation of Art. 2 of the APIA, since it was related to the disposition of real estate which was state property.

**Development in the Court of First Instance:**

The case was heard at one open session and scheduled for judgment.

**Decision of the Court of First Instance:**

By a decision No. 7483 as of 11 July 2007, a three member panel of the SAC, Fifth Division repealed the refusal of the minister and turned the information request back to the administrative body for reconsideration. In their judgment, the magistrates pointed out that in terms of the subject of the request in items 1 and 2, the information fell within the hypothesis of the provision set forth by Art. 13, Para. 1 of the AIPA – the requested documents had a preparatory character, as the documents are compiled within the implementation of the procedure on releasing a lodging from the hous-

ing fund of the Ministry of Interior for rent. As for the data included in the orders requested under items 3, 4 and 5 of the request, they possessed the characteristics of official information generated as a result of the activities of the administrative body with regard to the exercise of legally prescribed functions to manage and dispose with the real estates of the same body. However, the obliged body had incorrectly referred to the exemption set by Art. 13, Para.2 of the APIA to refuse access to the acts of the MTSSS. The hypothesis of that provision was applicable within the legally prescribed period of two years from the moment of the creation of the preparatory official information – Art. 13, Para. 3 of the APIA. In the particular case, that period had expired before the date of on which the challenged refusal was issued, and consequently the ground for the refusal had dopped out. As to the other requested information, the judges stated that the provision of Art. 31, Para. 2 of the APIA clearly stated that in case when the requested public information concerned a third party, the appropriate body shall request its written consent within 7 days after the request was registered. The requested information undoubtedly contained personal data, those of the officers targeted by the orders. Consequently, without notifying them, the body would not be able to decide whether and in what volume to provide the requested information. However, the file of the case contained no evidence that the responsible body had notified the interested persons about the submitted request, nor had it sought for their written consent to provide the requested information. Thus the refusal grounded on the lack of consent of the third party was unlawful, it should be repealed and the request should be sent back to the administrative body to fulfill its obligation set forth by Art. 31, Para. 2 of the APIA.

**Court Appeal:**

The decision of the SAC, Fifth Division was appealed by the minister of the interior before a five member panel of the same court with the argument that the finding of the court that the procedure of issuing the refusal had been breached was incorrect.

**Developments in the Court of Second Instance:**

The case was heard within one session and scheduled for judgment.

**Decision of the Court of Second Instance:**

By a decision No. 11257, as of 15 November 2007, a five member panel of the SAC, First Division, upheld the decision of the preceding instance. In their judgment, the magistrates completely approved of the arguments of the three member panel of the SAC, and also added that Art. 31 of the APIA did not set the ground for refusal of access to public information based on speculations that the third party would not consent of disclosure, but entrusted an obligation for the body to seek for such consent.

# DECISION

## No. 7483
## Sofia, 11 June 2007

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the seventeenth of April in the year two-thousand and seven, in a panel composed of:

**PRESIDING JUDGE:** MILKA PANCHEVA
**PANEL MEMBERS:** DIANA DOBREVA, YULIA KOVACHEVA

in the presence of court stenographer Anelia Stankova, heard the report by Judge YULIA KOVACHEVA on Administrative Case No. 818 of 2007**.**

These proceedings were held pursuant to Art. 145 *et seq*. of the Administrative Procedure Code.

The case was initiated by a complaint by Yordan Nikolov Todorov against a refusal by the minister of the interior to grant him access to the requested information, objectified in letter Reg. No. 5576/06 of 20 November 2006. The complaint presents arguments for the unlawfulness of the act under dispute and requests it be repealed and that the case be sent back to the body with instructions to provide the requested information to the seeker.

The minister of the interior, through his legal representative, expressed the viewpoint that the appeal was unfounded and requested that it be rejected.

The Supreme Administrative Court, Fifth Division panel, finds that the appeal is procedurally admissible, as it was submitted in the time limit stipulated by law and by the proper party. In order to rule on its merits, the court accepted the following as established:

The appellant Yordan Nikolov Todorov submitted a request for access to public information Reg. No. 5576/05 October 2006 to the minister of the

interior, in which he asked to be provided with the following documents: 1) A decision from the housing committee of the Directorate for Material-Technical Security and Social Services (MTSSS ) defining the level of housing need for the six indexed employees whose requests for housing were examined by the committee on 29 October 2004; 2) the draft plan prepared by the MTSSS housing committee for the distribution of two of the residences; 3) the order by the minister of the interior confirming the draft plan for the distribution of the two residences; 4) the order by the minister for the rental of the described residence by an employee; 5) the order by the minister for completing the sale of the same property.

In the letter under appeal, the minister of the interior refused to provide the requested information. According to the grounds set out in the act, the documents indicated in the request did not have an independent character, since they were part of a procedure for the issuance of an individual administrative act with which a given departmental residential property is offered for sale or rent; the information affects the interests of third parties who have not given their explicit written consent; and the requested information is not related to public life, but rather to private civil-legal relationships, for which reason free access to it is not required.

According to the definition in Art. 2, Para. 1 of the APIA, public information in the sense of that law is all information connected to the public life of the Republic of Bulgaria and which gives citizens that opportunity to form their own opinion about the activities of subjects obligated under the law. Art. 10 and Art. 11 of the APIA contain the legal definition of the kinds of public information: official and administrative. Access to administrative public information is in principle free with the exception of the cases explicitly listed in the law. The provisions in Art. 13, Para. 2 of the APIA stipulate the possibility for restricting access to such information: when it relates to the operative preparation of acts by administrative bodies and does not have independent significance, or when it contains opinions and positions related to current or upcoming negotiations led by the body or in its name, as well as all information connected with them. Another restriction on access to public information is contained in Art. 31, Para. 4 of the APIA – when the requested information affects a third party.

The conditions and procedure for the management, rental and stewardship of real estate that is private state property included in the departmental housing fund of the Ministry of Interior (MoI) is regulated by the Regulation for the Management, Rental and Stewardship of Real Estate Constituting Private State Property Included in the Departmental Housing Fund of the Ministry of Interior. According to the subject of the request under Items 1 and 2, the information falls within the scope of the hypothesis in Art. 13, Para. 1 of the APIA – the requested documents have a preparatory character, since they were created within the framework of a procedure for the rental of residential real estate from the departmental fund of the IM, while the data reflected in the orders described in Items 3, 4 and 5 of the request show the characteristic signs of being official information created in the course of the administrative body's activities while exercising its normative functions related to the management and stewardship of real estate owned by the ministry. In this respect, the body's arguments in the disputed refusal, i.e. that the requested information does not possess the characteristics of public information, do not find support in the normative legislation. The obliged subject also incorrectly cited the restrictions in Art. 13, Para. 2 of the APIA in order to refuse access to acts by the MTSSS. The hypothesis is applicable within a two-year timeframe defined by law from the moment administrative information of a preparatory nature is created – Art. 13, Para. 3 of the APIA. In the case under examination, by the date of the issuance of the disputed act, this deadline had already passed and thus basis for the refusal had become invalid.

The administrative body correctly held that the public information being sought affected the interests of a third party, thus its provision must be tied to their consent. Decisions by the housing committee and the orders by the minister of the interior are directly related to the personalities and qualities of the employees who participated in a procedure for rental and sale of the residential real estate. Art. 31, Para. 2 of the APIA categorically states that in cases in which the public information requested relates to a third party, the relevant body is required to ask for their explicit written consent within seven days of registering the request under Art. 24. The requested information inarguably contains personal data about the addressees of the acts, thus without notifying them the administrative body cannot evaluate

whether to provide the requested information, and if so, to what degree. The administrative file appended to the case, however, lacks data as to whether the obliged subject informed the affected parties about the request for access that had been received in order to ask for their consent to provide the seeker with the requested information. In these circumstances, the issued refusal, grounded in the lack of consent from third parties, is unlawful and must be repealed, by returning the file to the administrative body to fulfill its obligations under Art. 31, Para. 2 of the APIA. Depending on the third parties' opinions, the administrative body must either provide access to the information pursuant to Art. 31, Para. 3 of the APIA or respond to the request following the hypothesis in Para. 4 of the legislation. In this context, the appellant's arguments concerning the unlawfulness of the appealed refusal due to the failure to provide partial access to the requested information is at the present moment premature and in that sense unfounded.

Given the aforementioned, the appealed refusal must be repealed as unlawful and the administrative file returned to the body for a decision on the appellant's request for access to public information after completing the procedure in Art. 31, Para. 2 of the APIA.

Guided by the above considerations, the Supreme Administrative Court, Fifth Division panel,

**HEREBY RULES:**

**TO REPEAL** the refusal by the minister of the interior, objectified in the letter Reg. No. 5576/06 of 20 November 2006, to provide access to information requested by Yordan Nikolov Todorov in a request for access to public information Reg. No. 5576/05 October 2006.

**TO RETURN** the administrative file to the administrative body for processing according to the instructions given in the arguments in the present decision.

The decision can be appealed within 14 days of the time the parties are informed via a cassation appeal before a five-member panel of the Supreme Administrative Court.

**True to the original,**
**PRESIDING JUDGE:** (signature) Milka Pancheva
**PANEL MEMBERS:** (signature) Diana Dobreva, (signature) Yulia Kovacheva

# DECISION

## No. 11257
## Sofia, 15 November 2007

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Five-Member Panel – Collegium I,** in a court sitting on the eighth of November in the year two-thousand and seven, in a panel composed of:

**PRESIDING JUDGE:** FANI NAYDENOVA
**PANEL MEMBERS:** ZDRAVKA SHUMENSKA, MARUSYA DIMITROVA, MILENA ZLATKOVA, ATANASKA DISHEVA

in the presence of court stenographer Grigorinka Lyubenova and with the participation of prosecutor Anna Bankova, heard the report by Judge MARUSYA DIMITROVA on Administrative Case No. 9280 of 2007**.**

These proceedings were held pursuant to Art. 208 *et seq*. of the Administrative Procedure Code.

The cassation appellant, the minister of the interior, requests the repeal of Decision No.7483/11 July 2007 in Administrative Case No.818/2007 by the Supreme Administrative Court, three-member panel, which repealed as incorrect the cassation appellant's refusal to provide access to public information under request Reg. No.zh-5576/5 October 2006 on the schedule of the Coordination and Analysis of Information Directorate at the MoI. He claims that a violation of the substantive law provides grounds a cassation appeal. In order to provide the requested information, the consent of third parties had to be given, which it was not. He requests that the cassation appellant's refusal be left in force.

The respondent to the cassation appeal, Yordan Todorov, was regularly summoned, but he did not send a representative. He did not submit an objection within the time period given by the court.

The prosecutor from the Supreme Administrative Prosecutor's Office finds the cassation appeal unfounded.

The Supreme Administrative Court, five-member panel, after evaluating the validity of the cassation appeal and the grounds for repeal under Art. 218 of the Administrative Procedure Code set out within it, holds the following as established:

The cassation appeal is admissible, as it was submitted within the time period, however, examined on its merits, it is unfounded.

In the decision under appeal, the SAC three-member panel repealed a refusal Reg. No. 5576/20 November 2006 by the minister of the interior to provide access to information to Yordan Todorov following a request for access to public information Reg. No.5576/5 October 2006. The court returned the administrative file for new processing with instructions to fulfill the procedure pursuant to Art.31 Para.2 of the APIA. In its arguments, the SAC three-member panel held that Todorov requested that he be provided with a decision of 29 October 2004 from the housing committee of the Directorate for Material-Technical Security and Social Services (MTSSS ), the plan prepared by the MTSSS housing committee for the distribution of two of the residences, the order by the cassation appellant confirming the plan for the distribution of the two residences, the order by the cassation appellant for the rental of the residence, and the order by the cassation appellant for completing the sale of the same property. The administrative act claims that the requested documents have a preparatory character, since they were part of a procedure for the issuance of an individual administrative act with which a given departmental residential property is offered for sale or rent; the information affects the interests of third parties who have not given their explicit written consent; and the requested information is not related to public life, but rather to private civil-legal relationships, for which reason free access to it is not required. The court found that the first two documents had a preparatory character, but says the two-year time limit under Art.13 Para.3 of the APIA had already run out, thus there were no grounds for refusing access to the information under Art.13 Para.2 of the APIA. It also ruled that the rental and sale of the residential properties was regulated by the Regulation for the Management, Rental and Stewardship of Real Estate Constituting Private State Property Included in the Departmental Housing

Fund of the Ministry of Interior, and that information about activities related to the implementation of the regulation fall within the scope of public information defined in Art.13 of the APIA as administrative public information. The court also held that the administrative body had correctly judged that for the provision of the requested information, the consent of affected third parties under Art.31 Para.1 of the APIA was needed; however, the administrative body did not fulfill the procedure under Art.31 Para.2 of the APIA, which requires the body to request the written consent of the parties whom requested information concerns.

The court has accepted the factual context in accordance with the evidence in the case. From the correctly established facts, the SAC three-member panel drew lawful legal conclusions. Art.31 of the APIA does not stipulate that access to information can be refused under the assumption that the consent of affected third parties will not be given; rather, it imposes the requirement on the administrative body to request such consent.

Being correct, the decision must remain in force. Given the above-mentioned considerations and on the basis of Art.221 Para.2 of the APC, the Supreme Administrative Court, five-member panel

**HEREBY RULES:**

**TO UPHOLD** Decision No.7483/11 July 2007 in Administrative Case No. No.818/2007 by the Supreme Administrative Court, Fifth Division, three-member panel.

The decision is not subject to appeal.

**PRESIDING JUDGE:** (signature) Fani Naydenova
**PANEL MEMBERS:** (signature) Zdravka Shumenska, (signature) Marusya Dimitrova, (signature) Milena Zlatkova, (signature) Atanaska Disheva

# CASE

***Krasimir Krumov (Monitor Newspaper) vs. the Regional Governor of the Town of Shumen***

## Krasimir Krumov (*Monitor Newspaper)* vs. the Regional Governor of the Town of Shumen

*First Instance Court – Administrative Case No. 2113/2005, SAC, Fifth Division*

**Request:**

In January 2005, the journalist from *Monitor Newspaper,* Krasimir Krumov, submitted a written request under the procedure stipulated by the APIA to the Regional Governor of the town of Shumen. The journalist demanded access to information about the projects for regional development (the so-called *demonstration projects)*. More precisely, the journalist requested a list of the projects that had been approved and information about the contractors and the sub-contractors and the amount of money allocated for the implementation of these projects.

**Refusal:**

A written response was sent to the requestor, informing him that an Internet site that would contain information about all regional development projects for the region of Shumen was under construction. Furthermore, the letter signified that after the online publication of the information, the journalist would be informed personally.

**Complaint:**

The refusal was challenged with the argument that the publication of the requested information on the Internet did not relieve the regional governor of his obligation to provide the information when requested. Furthermore, the information was not published afterwards, making the governor's statement into a mere promise.

**Developments in the Court of First Instance:**

The case was heard in a single session and the court adjourned.

**Court Decision:**

An October 2005 Decision of the Supreme Administrative Court reversed the refusal and returned the request back to the regional governor for reconsideration in compliance with the instructions given by the court. In their judgment, the justices emphasized that the requested information was undoubtedly public under the stipulations of the APIA and that no grounds for the refusal were given in the letter sent by the administrative body. Furthermore, the justices pointed out that the *response* received by the requestor constituted a will for refusal, which, however, was not expressed in the way prescribed by the law, i.e. the refusal had been announced in the form of a recommendation with the intention of better service provision in the future.

The court decision was not appealed and has come into effect.

*Subsequently, the regional governor provided access to all of the requested information to the journalist.*

# DECISION

## No. 9110
## Sofia, 19 October 2005

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the fifth of October in the year two-thousand and five, in a panel composed of:

**PRESIDING JUDGE:** MARINA MIHAYLOVA
**PANEL MEMBERS:** ZHANETA PETROVA, TANYA VACHEVA

in the presence of court stenographer Madlen Dukova and with the participation of prosecutor Anna Bankova, heard the report by Judge TANYA VACHEVA on Administrative Case No. 2113 of 2005**.**

These proceedings were held pursuant to Art. 12 of the Supreme Administrative Court Act (SACA), concerning Art. 2 of the Access to Public Information Act (APIA).

The case was initiated by a complaint from Krasimir Aleksandrov Krumov of Shumen against a refusal by the regional governor of the Shumen Region, objectified in letter No. 94 K-00-1/19 January 2005, in which he was refused access to public information, concretized in a request from 5 January 2005. The complaint claims that the administrative body unlawfully issued the refusal under appeal, since the statement in the letter that the requested information could be sought in a soon-to-be prepared informational site by the regional administration was not a materially sound basis for a refusal under the Access to Public Information Act (APIA). In this sense he requests a repeal of the issued refusal and a return of the administrative file with instructions for the interpretation and application of the law.

The respondent did not express a viewpoint on the complaint.

The representative of the Supreme Administrative Prosecutor's Office gave a grounded argument that the appeal was grounded.

The Supreme Administrative Court, after examining individually and as a whole the evidence gathered in the case and considering the argument stated, finds the complaint grounded.

The procedure involving the administrative body began with a request from Krasimir Krumov No. 94 K-00-1/5 January 2005, in which the seeker requested from the regional governor of the Shumen Region information (on a paper or electronic carrier) consisting of: a list of the small demonstrative objects in the Shumen Region (the name of the project and the place); a list of those who submitted proposals for small demonstrative objects; the funding requested from the regional administration for each project; and the contractor and subcontractor for each project. In the course of the court proceedings, the regional governor of the Shumen Region submitted requests from legal persons, which stated that they did not wish the circumstances surrounding their participation in the demonstrative objects projects in the region's territory to be publicized. In the appealed letter No. 94 K-00-1/19 January 2005, the administrative body informed the seeker that he would have the opportunity to gather the requested information at a later moment, once the informational site of the Regional Administration was launched. That is, there exists a formulated will to refuse to provide the requested public information.

The provisions in Art. 2 of the APIA contain the legal definition of the concept "public information" – all information related to the public life of the Republic of Bulgaria that gives citizens the opportunity to form their own opinion about the activities of subjects obliged under the law. State bodies pursuant to Art. 3 can provide public and administrative information only with certain restrictions defined by law and stipulated in a specialized procedure. It is indisputable that the information requested by the appellant, which was described in detail in the request, is public information in the sense of the law. The grounds for a refusal on the part of an administrative body are explicitly listed in Art. 37 of the APIA.

The regional governor's letter lacks any grounds whatsoever to any one of the demands formulated in the request. According to the provisions

in Art. 38 of the APIA, a refusal to provide such information must be issued with the decision that contains the factual and legal grounds for the refusal, the date and the system for appeal. The "answer" received by the seeker constitutes the concretely formulated will of the administrative body, which, however, is not expressed in the manner stipulated by the law. For this reason, the appeal by Krasimir Krumov is grounded. The issued refusal is unlawful and must be repealed due to its failure to preserve the form established by the law, as well as due to fundamental violations of the rules of administrative procedure and contradictions with the material legislation – based on Art. 12, Item 2, 3, 4 of the SACA. The administrative file should be returned to the regional director of the Shumen Region for processing under the proper system in accordance with the instructions regarding the obligatory interpretation and application of the law. From the written evidence contained in the file, the conclusion can be made about the application of the provisions in Art. 17 and Art. 37, Para. 1, Item 2 of the APIA. The appealed refusal was issued in the form of a recommendation with the intention of creating better administrative-legal service in the future. The concrete grounds in response to the demands set out by the seeker must be precisely expressed by the competent body. In issuing his decision, the regional governor must provide grounds, even in cases in which he allows partial access to public information.

Given the aforementioned considerations, the court must repeal the refusal by the regional governor of the Shumen Region to provide access to public information following a request by Krasimir Krumov and the file should be returned for processing according to the court's instructions.

Guided by the reasoning above, the Supreme Administrative Court

**HEREBY RULES:**

TO REPEAL the refusal by the regional governor of the Shumen Region, objectified in letter No. 94 K-00-1/19 January 2005, to provide access to public information, following a request No. 94K-00-1/5 January 2005 by Krasimir Aleksandrov Krumov of Shumen and TO RETURN the

file to the body for processing in accordance with the given instructions for interpreting and applying the law.

The decision can be appealed within 14 days of the time when the parties are informed via the submission of a cassation appeal to a five-member panel of the Supreme Administrative Court.

**True to the original,**
**PRESIDING JUDGE:** (signature) Marina Mihaylova
**PANEL MEMBERS:** (signature) Zhaneta Petrova,
(signature) Tanya Vacheva

# CASE

***National Movement Ecoglasnost vs. the Nuclear Regulatory Agency***

## *National Movement Ecoglasnost vs. the Nuclear Regulatory Agency*

*First Instance Court – Administrative Case No. 6942/2006, SAC, Fifth Division*
*Second Instance Court – Administrative Case No. 30538/2007, SAC, Five-memberl Panel– First Panel*

**Request:**

In May 2006, the deputy chairman of the Naitonal Movement *Ecoglasnost*, Peter Penchev, submitted a request to the Nuclear Regulatory Agency (NRA) asking for information regarding the first and the second reports prepared by the Nuclear Power Plant "Kozloduy," as well as all the annexes, regarding the March 1, 2006 incident on the fifth block of nuclear plant, and the third report with the annexes if it had been compiled. Besides that, he also requested copies of the first and second notification (third only if applicable) sent to the International Atomic Energy Agency (IAEA), together with all the annexes.

**Refusal:**

Several days after the submission of the request, NM *Ecoglasnost* was informed that on the ground of Art. 31, Para. 1 of the APIA and due to the circumstances that the requested information dealt with a third party, namely, the Nuclear Power Plant "Kozloduy," whose written consent should be obtained for the disclosure, the term for responding to the request was extended with 14 days. Simultaneously, a request was sent to the NPP "Kozloduy" to provide its consent for granting access to the requested reports. On May 17, 2006, the executive director of the nuclear plant responded that access should be granted to the reports compiled in regard to the accident, though he dissented disclosure of the annexes. On May 31, 2006, the chairman of the NRA sent the requestor a letter stating the refusal of the NPP "Kozloduy" and providing partial access to the requested reports (without the annexes), as well as to the notifications sent to IAEA.

**Complaint:**

The refusal was challenged before the Supreme Administrative Court (SAC). The complaint stated that for requesting the consent of the third party, a potential harm to its rights or legal interests stemming from the disclosure of certain data should be ascertained. No evidence for such assessment undertaken by the administrative body was found in the grounds stated in the challenged refusal. It did not become clear why the request for access had been considered as harmful for the rights or the legal interests of the third party, and which were the specific data that would have harmed those rights and legal interests. In the current case, the requested information did not relate to the third party, but it was created by the third party. The information did not relate to the third party but to the investigation and the analysis of the nuclear plant incident, as it was obvious. Consequently, the application of the provision of Art. 31 of the APIA to the case was wrong from the beginning. Furthermore, the provision of Art. 20, Para. 4 of the Environmental Protection Act (EPA), according to which the public interest served by the disclosure of the information should be taken into consideration. There was no evidence, however, that the provision had been applied in the current case. Public interest in the case was undoubtful, as it regarded an accident in a nuclear power plant, which was classified as level two after the International Nuclear Event Scale. That conditioned the need for informing the society.

**Developments in the Court of First Instance:**

The first hearing of the case in November 2006 was, however, postponed as the court panel considered that the NPP "Kozloduy" should be constituted as an interested party. Subsequently, on January 23, 2007, the case was heard at an open court session and scheduled for judgment.

**Court Decision:**

With a decision No. 1178 as of February 2, 2007, a panel of the SAC, Fifth Division, repealed the partial refusal issued by the NRA and returned the request back for reconsideration. Magistrates found that it was not clear why the NRA decided that the rights and interests of the NPP "Kozloduy" would have been affected and asked for its consent.

It was logical to assume that the reports, as well as the annexes, contained information related to the investigation and thus it was impossible to presume that the documents contained a secret protected by law.

**Court Appeal:**

The decision was appealed by the chairman of the NRA before a five-member panel of the SAC. The appeal stated that the assessment whether the information would harm the interests of the third party was made by the third party itself and thus the NRA was not supposed to justify the refusal by qualifying the requested information.

**Developments in the Court of Second Instance:**

The case was heard during one open court session in June 2007 and scheduled for judgment. The nuclear power plant presented parts from the contract with a Russian companying for design, development and putting into exploitation of a control rods system, a considerable part of which stopped functioning on March 1, 2006. According to the contract, everything related to its implementation, was confidential.

**Court Decision:**

With a decision No. 6858 as of July 2, 2007, a five-member panel of the SAC upheld the decision of the preceding instance. The justices rejected the arguments set forth by the NRA and the NPP and confirmed that the dissent of the third party was not by itself a ground for refusal to provide information which was of public character.

# DECISION

## No. 1178
## Sofia, 2 February 2007

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the twenty-third of January in the year two-thousand and seven, in a panel composed of:

**PRESIDING JUDGE:** DIANA DOBREVA
**PANEL MEMBERS:** YULIA KOVACHEVA, MARIETA MILEVA

in the presence of court stenographer Anelia Stankova and with the participation of prosecutor Nestor Nestorov, heard the report by Presiding Judge DIANA DOBREVA on Administrative Case No. 6942 of 2006**.**

These proceedings were held pursuant to Art. 12 of the Supreme Administrative Court Act (SACA) in connection with Art. 40, Para. 1 of the Access to Public Information Act (APIA).

The case was initiated by a complaint from the Ekoglasnost National Movement of Sofia against the partial refusal by the Nuclear Regulatory Agency (NRA), objectified in letter No. 92-00-98/31 May 2006, to provide access to public information. The complaint claims that it was unlawful to refuse to provide the seeker the requested appendices to the presented reports on the event of 1 March 2006 at the Reactor No. 5 of the Kozloduy Nuclear Power Plant.

The respondent contests the appeal and requests that it not be honored.

The interested party Kozloduy NPP did not express an opinion.

The representative of the Supreme Administrative Prosecutor's Office provided arguments that the appeal is justified.

The Supreme Administrative Court, fifth-division panel, after discussing the evidence gathered in the case, finds the appeal procedurally permissible, and justified in its merits.

It is obvious from the request, submitted on 08 May 2006, that on the grounds of the APIA the appellant requested that the NRA provide public information, including the first and second reports on Kozloduy NPP, together with all appendices, related to the incident on 01 March 2006 in Reactor No. 5, as well as a third report with appendices, if such had been prepared. In addition, copies were demanded of the first and second (and third if such exists) notifications to the International Atomic Energy Agency (IAEA), together with all appendices.

Several days after the submission of the request, Ekoglasnost was informed that on the basis of Art. 31, Para. 1 of the APIA and due to the fact that some of the requested information affected a third party – the Kozloduy NPP – and since that party's express written consent was necessary, the timeframe for the procedure would be extended by 14 days. At the same time, an inquiry was sent to the Kozloduy NPP asking whether it gave its consent for the seeker to be provided access to the reports. On 17 May 2006, the executive director of the nuclear power plant responded that he did not object to the seeker being provided with the reports prepared in connection with the incident, but that he did not give his consent to access to the appendices to them. On 31 May 2006 the chairman of the NRA sent a procedural letter [informing the seeker] of the lack of consent from the Kozloduy NPP and that he would be provided partial access only to the described documents (without appendices), as well as to the notifications to the IAEA, and that the documents would be provided on paper carriers.

Given this evidence, the court finds the NRA's partial refusal unlawful. It is indisputable that the requested information is public in nature. Due to the absence of any grounds whatsoever, it is unclear why the subject obliged under the APIA believes that the request harms the rights or legal interests of a third party, just as it is unclear precisely which information is considered harmful by the third party and why. According to the contents of Art. 31, Para. 1 of the APIA, that law is applicable when the requested information relates to a third party; however, this conclusion does not automatically follow from the fact that it was created by the third-party. In this case the

suggestion is logical that the reports as well as the appendices include data about the investigation and analysis of the incident at the nuclear power plant. It cannot be presumed, however, that the information reveals specific data about the plants or that the requested appendices to the reports contain information, for example, that could qualify as a trade secret, administrative and/or other secret, i.e. as classified information. If the information is indeed classified, its protection should be based on other grounds in the APIA, and not on Art. 31, Para. 1 of that law, which in and of itself is not grounds for refusal. Furthermore, in the case of a failure to obtain the consent of the third party or given an explicit refusal to give consent, the relevant administrative body can provide the requested information to such an extent and in such a manner that it does not disclose information related to the third party – Art. 31, Para. 4 of the APIA.

Due to the above-mentioned considerations, the partial refusal by the NRA, objectified in the letter under appeal, must be repealed, and the case must be returned to the same body for new processing of the part of the request by Ekoglasnost that was not satisfied. In this second examination, the NRA must evaluate the validity of the arguments presented for the first time before the court that the requested information concerns the environment and hence whether the subsidiary Environmental Protection Act is applicable.

For these reasons and on the basis of Art. 28 of the SACA in connection with Art. 42, Para. 3 of the APA, the Supreme Administrative Court, fifth division,

**HEREBY RULES:**

**TO REPEAL t**he partial refusal by the Nuclear Regulatory Agency (NRA), objectified in letter No. 92-00-98/31 May 2006, to provide access to public information to the seeker, the Ekoglasnost National Movement of Sofia.

**TO RETURN** the administrative file to the Nuclear Regulatory Agency for new processing in accordance with the instructions given by the court.

**THE DECISION** can be appealed with a cassation appeal to a five-member panel of the Supreme Administrative Court within 14 days of its pronouncement.

**True to the original,**
**PRESIDING JUDGE:** (signature) Diana Dobreva
**PANEL MEMBERS:** (signature) Yulia Kovacheva, (signature) Marieta Mileva

# DECISION

## No. 6858
## Sofia, 02 July 2007

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Five-Member Panel – Collegium I,** in a court sitting on the fourteenth of June in year two-thousand and six, in a panel composed of:

**PRESIDING JUDGE:** PANAYOT GEKOV
**PANEL MEMBERS:** BISERKA KOTSEVA, YORDAN KONSTANTINOV, RUMYANA MONOVA, DONKA CHAKAROVA

in the presence of court stenographer Maria Popinska and with the participation of prosecutor Maria Kamenska, heard the report by Judge DONKA CHAKAROVA on Administrative Case No. 3053 of 2007**.**

These proceedings were held pursuant to Art. 208 *et seq*. of the Administrative Procedure Code (APC) in connection with Art. 40, Para. 1 of the Access to Public Information Act (APIA).

The case was initiated by a cassation appeal from the Nuclear Regulatory Agency (NRA) against Decision No. 1178/2 February 2007 on Administrative Case No. 6942/06 on the docket of the Supreme Administrative Court, Fifth Division, which repealed the NRA's partial refusal, objectified in letter No. 92-00-98/31 May 2006, to provide access to public information to the seeker, the Ekoglasnost National Movement, and which returned the case to the NRA for new processing in accordance with instructions given by the court. Arguments are presented for the incorrectness of the decision due to a violation of the substantive law and lack of grounds. The cassation appellant requests a reversal of the court decision and the issuance of a new decision on the merit of the dispute that would

reject the Ekoglasnost National Movement's appeal. The cassation appeal contains detailed arguments in support of its position. It does not claim the payment of compensation for legal consultation.

The respondent, the Ekoglasnost National Movement, contests the cassation appeal. A written defense argues in detail for its position. No expenses are claimed.

An interested party, the Kozloduy Nuclear Power Plant (NPP), takes the view that the cassation appeal is justified.

The prosecutor from the Supreme Administrative Prosecutor's Office expressed the opinion that the cassation appeal is unjustified.

The Supreme Administrative Court, Five-Member Panel of the First Collegium, finds that the cassation appeal was submitted by the proper party and within the time limit, thus it is procedurally admissible; examined on its merits, it lacks grounds due to the following reasons:

The appealed Decision No. 1178/2 February 2007 on Administrative Case No. 6942/06 on the docket of the Supreme Administrative Court, Fifth Division, repeals the NRA's partial refusal, objectified in letter No. 92-00-98/31 May 2006, to provide access to public information to the seeker, the Ekoglasnost National Movement, and returns the case to the NRA for new processing in accordance with instructions given by the court. The court offered justification for its decision to repeal the refusal to provide the appendices to the reports on Kozloduy NPP related to the incident on 1 March 2006 in Reactor No. 5, based on factual circumstances established by the court that a proper request had been submitted on 8 May 2006 by Ekoglasnost to the NRA asking to be provided with public information, including the first and second reports on Kozloduy NPP, together with all appendices, related to the incident on 01 March 2006 in Reactor No. 5, as well as a third report with appendices, if such had been prepared. In addition, copies were demanded of the first and second (and third if such exists) notifications to the International Atomic Energy Agency (IAEA), together with all appendices. However, not all of the requested information was provided. According to the SAC three-member panel, the cassation appellant cited the provisions in Art. 31, Para. 1 of the APIA and the fact that part of the requested public information affects a third-party – the Kozloduy Nuclear Power Plant – that had not given written consent; in doing so, the cassation appellant violated the substantive law. The

legal norm in Art. 31, Para. 1 of the APIA cited by the NRA does not constitute grounds for a refusal to provide information that is public in character. The issued decision is correct, lawful and grounded.

The court of cassation finds that it was correct to repeal the NRA's partial refusal, since the arguments introduced in the cassation appeal – concerning the existence of other circumstances according to which access to the appendices to the presented documents should not be provided – cannot be considered as grounds for the unlawfulness of the court decision. Following Art. 220 of the APC the court of cassation evaluates the application of the substantive law on the basis of the facts established by the court of first instance in the decision under appeal.

The claim that the information that was not provided constitutes an administrative or trade secret was not a subject established or demonstrated in the court proceedings before the three-member panel; for this reason, it should not be analyzed in the current phase of the process. In fact, the only grounds for reinstating the repealed partial refusal is a lack of written consent from the Kozloduy Nuclear Power Plant; the legal grounds for such a refusal are found in Art. 37, Para. 2 of the APIA, which, however, was not referred to in letter 92-00-98/31 May 2006 by the NRA. The three-member panel correctly ruled that the letter does not contain grounds concerning the existence of harm to third-party interests, which would make such consent necessary. The court cannot presume that access would reveal specific information that harms the interests of third parties and that such information constitutes an administrative or trade secret. It is precisely due to these legal arguments that the disputed partial refusal was repealed and the case returned to the NRA for new processing after discussion of all relevant facts.

Given the aforementioned considerations, the court of cassation finds the appealed decision correct and lawful, hence it should be left in force.

In the course of the case, the respondent has not generated expenses and has not claimed any; thus, no compensation shall be awarded.

Following the abovementioned considerations and based on Art. 221, Para. 2, first proposition of the APC, the Supreme Administrative Court, five-member panel,

**HEREBY RULES:**

**TO UPHOLD** Decision No. 1178/2 February 2007 on Administrative Case No. 6942/06 on the docket of the Supreme Administrative Court, Fifth Division.

**THE DECISION** is not subject to appeal.

**True to the original,**
**PRESIDING JUDGE:** (signature) Panayot Gekov
**PANEL MEMBERS:** (signature) Biserka Kotseva, (signature) Yordan Konstantinov, (signature) Rumyana Monova, (signature) Donka Chakarova

# CASE

***Rosen Bosev from Capital Weekly vs. the Director of the Government Information Service***

## *Rosen Bosev from Capital Weekly vs. the Director of the Government Information Service*

*First Instance Court – Administrative Case. № 03528/2006*
*Sofia City Court, Panel III-B*

**Request:**

On 5 of April 2006, Rosen Bosev, a journalist from Capital weekly, filed a request to get information from the Ministry of State Administration and Administrative Reform (MSAAR) on the contract concluded between the Ministry, by the former minister Dimitar Kalchev, and Microsoft Co for the procurement of software licenses necessary for the state administration. The journalist was seeking information on the conditions of the above-mentioned contract and he wanted to get a copy of the contract.

In ten days, the head of administration at the MSAAR sent a response to Mr. Bosev, informing the latter that the contract under request was concluded by the ex-minister of state administration Mr. Kalchev, who was acting on behalf of the Council of Ministers, thus MSAAR was not a party to the given contract and did not have it. For this reason MSAAR forwarded the request to the Council of Ministers.

On 28 of April 2006, the Director of the Government Information Service (GIS), Ms. Tanya Geneva, sent a letter to the journalist, saying that he would receive the requested information, but its preparation needed some time, and for that reason and in accordance with Art. 30, Para. 1 of the Access to Public Information Act (APIA) the term for providing the information would be increased to ten days.

**Refusal:**

In ten days, on 8 May 2006, Mr. Rosen Bosev did not receive the requested information, but a letter with a refusal, that was signed by Ms. Tanya Geneva. The refusal letter indicated *...the conditions under which the contract for the procurement of software packages to be used by the state administration was signed with Microsoft is a matter of commercial secret. Thus the disclosure of the provisions of the contract will lead to unfair competition between the traders, as the conditions of the contract envisage the*

*requirements of the state administration, including the clauses on providing free of charge training to the employees of the state administration system as well as other specific conditions*.

**Complaint:**

The refusal was challenged before the Sofia City Court (SCC). The complaint pointed out that according to the Fair Competition Act (FCA), the definition of the commercial secret was as follows: the facts, connected with implementing business activities, disclosure of which contradicts to the best business practices and causes or may cause harm to the relations between the competing parties or between them and the customers. The unfair competition was used as a ground for the refusal to provide information. However, it was unclear how the disclosure of the requested information might have affected the private firm.

**Development in the Court of First Instance:**

On 19 of March 2007, the case was reviewed by the SCC, that however noted that the competence of the Director of the GIS to issue the refusal was unclear. (To clarify, the APIA prescribes that the refusal to grant information should be issued by the head of the corresponding institution. If issued by another person, they shall be specifically authorized to do that. In the particular case, the Director of the GIS was authorized with an order by a former Prime Minister, namely Ivan Kostov, to decide on requests for information. The court, however, is not obliged to know that, while the GIS shall present the order as evidence in every court case against its refusal to grant information.) For that reason, the case was to be reviewed in June and the GIS was instructed to provide the court with the relevant data. Among other reasons to delay the case was the absence of the GIS representative.

On 25 of June 2007, the case was again heard by the SCC. The court panel found that not only the GIS did not send their representative, but also the previous prescriptions of the court were not carried out. That was the reason to another adjournment of the case till October 2007. The panel of judges refused to impose a fine on the GIS for non fulfillment of court prescriptions, but ruled that the GIS shall provide all necessary documents within an appointed term.

During the court session on 3 of October 2007, the representative of the GIS was present and provided the court with requested evidence, namely a copy of the order of the Prime Minister, that empowered the Director of the GIS to decide on requests for information. The case was heard and scheduled for judgment.

**Court Decision:**

With a decision as of 2 November 2007, the SCC repealed the refusal of the Director of the GIS declaring it unlawful, and returned the information request for reconsideration. The court ruled that the administrative act should be cancelled as it breaks the existing law and contradicts the letter of the law. The provision of Art. 17, Para. 2 of the APIA, that was regarded to by the administrative body, which exempted access to public information that comprises commercial secret and might cause unfair competition, is part of Chapter 2, Section III of the APIA . Its content and location within the purview of the law implies that it was connected with access to the so-called "other" type of public information – on the activity of obliged bodies under Art. 3, Para. 2 of the APIA. The information, requested by the applicant, cannot be viewed as falling within the scope of that provision. The requested information is connected with the conditions of the contract concluded between the obliged under Art. 3, Para. 1 of the APIA public body, and third parties, public-law entities, thus constituting administrative public information as stipulated by article 11 of the APIA.

Besides, according to the judges, the protection of the commercial secret and prevention of the unfair competition would be a sufficient reason to ground the refusal on granting administrative public information under the provision of Art. 37, Para. 1, 2 of the APIA. That might serve as a legal ground only if the procedure set forth by Art. 31 was applied and no consent for disclosure of the requested information was obtained from the third party. Thus, not requesting the consent of the third party concerned, the Microsoft Company in this case, grounded the illegality of the refusal due to violations of the administrative procedural rules for issuing the refusal. Nevertheless, explicit dissent or lack of consent of the third party cannot bind the administrative body to automatically withhold public information. On the contrary, the administrative body in charge shall provide the

information in the scope and mode that would not cause harm to the third party concerned. As concluded by the panel of judges, the functional independence provided to the administrative body to apply the law and which embodied the purpose of the law itself – to ensure access to information connected with public life in the country which provides citizens with the opportunity to form their own opinion regarding the activity of responsible bodies – was violated in this case.

The decision was not appealed and became effective.

# DECISION

## *Sofia, 2 November 2007*

## IN THE NAME OF THE PEOPLE

**The SOFIA CITY COURT,** Administrative Division, Panel III-B, in a public court sitting on the third of October in the year two-thousand and seven, in a panel composed of:

**PRESIDING JUDGE:** ZDRAVKA IVANOVA
**PANEL MEMBERS:** MARIA YANACHKOVA, PETYA ZAHARIEVA

in the presence of court stenographer Tatyana Shumanova and prosecutor Boryana Betsova, after hearing the report by Judge Zaharieva on Administrative Case No. 03528 of 2006**,** took the following into account:

The case was initiated by a complaint from Rosen Rosenov Bosev against the refusal letter No. 03.07-18/08 May 2006 by the director of the Government Information Service Directorate to provide the information demanded in the request Incoming No. 29-P-13/07 April 2006 concerning the conditions under which the contracts were signed for Microsopft software licenses for the needs of the state administration, as well as the contract itself. It was refused with the argument that the information constituted a trade secret and that its disclosure could lead to unfair competition between competitors, pursuant to Art. 17, Para. 2 of the APIA. The appellant considers the refusal ungrounded and requests that it be repealed.

The proceedings are pursuant to Art. 33 *et seq*. of the APA (amended), in connection with § 4, Para. 2 of the Miscellaneous Provisions of the APC, and in connection with Art. 40, Para. 1 of the APIA.

The respondent contests the appeal as unjustified.

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

**THE COURT**, on the basis of the arguments by both parties and the evidence collected in the case, considers the following facts established:

In a request for access to public information Incoming No. 29-P-13/07 April 2006, the appellant Rosen Rosenov Bosev asked the Ministry of State Administration and Administrative Reform for information (on a paper or technical carrier) concerning the conditions under which the contracts were signed for Microsopft software licenses for the needs of the state administration, as well as the contract itself. With letter No. 29-P-13/14 April 2006, the appellant was informed that his request had been sent to the competent body – the Council of Ministers, pursuant to Art. 32, Para. 1 of the APIA. With letter No. 03.07-18/28 April 2005, the appellant was informed of the extension of the time limit for the provision of the information by 10 days, given the extra time needed for its preparation, based on Art. 30, Para. 1 of the APIA.

Letter No. 03.07-18/08 May 2006 from the director of the Government Information Service Directorate refused access to the requested information, arguing that the conditions of the contract from 12 March 2002 and the annexes to it from 30 October 2002, 11 August 2003, 3 September 2002, 8 September 2004 and 12 March 2005, concerning the conditions under which the contracts were signed for Microsoft software licenses for the needs of the state administration, as well as the contract itself, "constitute a trade secret and its provision could lead to unfair competition between competitors, insofar as the conditions of the contract correspond to the specific needs of the government administration and contain clauses about the free training of employees from a state administrative system and other special conditions," based on Art. 17, Para. 2 of the APIA.

As is clear from the appended confirmation receipt, the appeal to the Court against the above-mentioned letter was submitted on 22 May 2006.

As is clear from Order No. B-36/29 December 2000, the prime minister and the minister of state administration authorized the director of the Government Information Service Directorate to make decisions about providing or refusing access to public information under the APIA, based on Art. 28, Para. 2 of the APIA and Art. 3, Para. 2 of the Organizational Regulations of the Council of Ministers and Its Administration (ORCMIA).

**THE COURT**, on the basis of this established factual context, drew the following legal conclusions:

The appeal is from an individual whose request for access to public information was rejected by the appealed refusal (Art. 35, Para. 1 of the APA, repealed), and was submitted within the 14 day time limit for appealing the act (Art. 37, Para. 1 of the APA, repealed.); thus, it is procedurally admissible.

Examined on its merits, the appeal is justified. That the appealed act was issued by a competent body is not under dispute in the case. The Council of Ministers is an obliged subject in the sense of Art. 3, Para. 1 of the APIA, which can delegate its authority under that law to an individual subordinate to it, pursuant to Art. 28, Para. 2 of the APIA. Precisely such delegation, irregardless of the fact that the term used was "authorize" (Interpretative Decision No. 4/2004 SAC), was completed in the above-cited Order No. B-36/29 December 2000 by the prime minister, representing the Council of Ministers (Art. 23, Para. 2 of the Public Administration Act), to the benefit of the director of the Government Information Service Directorate, which is a specialized administrative body within the Council of Ministers, according to Art. 99, Para. 1, Item 6 of the ORCMIA (SG, vol.103/1999, repealed) and Art. 100, Para. 2, Item 4 of the ORCMIA now in force (SG, vol. 84/2005).

It is also indisputable that the appealed act, namely the Letter-Refusal No. 03.07-18/08 May 2006, was issued in the written form established in Art. 38 of the APIA and also contained all the essential requirements. The legal and factual bases for the refusal are indicated – the existence of clauses in the requested documents concerning the training of employees in the state administration and other specific needs of the state administration, which constitute a trade secret and whose disclosure could lead to unfair competition from competitors of Microsoft, the other party to the contract. All these qualify for the restriction on public information under Art. 17, Para.2 of the APIA.

The administrative act under appeal was issued in violation of the substantive law and does not correspond to the purpose of the law. The provision in Art. 17, Para. 2 of the APIA, which the administrative body cited and which excludes access to public information when trade secrets or the possibility of unfair competition exists, is found in Chapter Two, Section II of the

APIA, and as is clear from its systematic placement and from the wording itself of the provision, it relates only to access to so-called "other" public information – that which is connected to the activities of obliged subjects under Art. 3, Para. 2 of the APIA. The information requested by the appellant, however, does not fall within the scope of the cited provision. It relates to the conditions under which the contract was signed between a state body obliged under Art. 3, Para.1 of the APIA and a third-party, private-law subject; for this reason, it constitutes administrative public information in the sense of Art. 11 of the APIA. In this regard, see Decision No. 6930/15 July 2005, Administrative Case No. 128b/2005, SAC five-member panel; and Decision No. 118/09 January 2004, Administrative Case No. 5496/2003, SAC Fifth Division. Access to administrative public information is regulated by Art.13 of the preceding Section I of the APIA and is in principle free, with the restrictions given in Para. 2; the information requested by the appellant does not fall within their scope. The preservation of a trade secret and the avoidance of unfair competition could form the basis of a refusal to access to administrative public information as well – in the hypothesis in Art. 37, Para. 1, Item 2 of the APIA – but only after following the procedure in Art. 31 of the APIA and in the face of an explicit refusal or lack of consent from the affected third party. The failure to request the explicit consent of the affected third party, which was in this case Microsoft (it had to be requested in view of the fact that this court does not find Microsoft obliged to disclose information under Art. 3, Para. 2, Item 2 of the APIA), is unlawful due to a fundamental violation of the rules of administrative procedure. Even the explicit refusal or lack of consent from the third party does not force the administrative body to automatically refuse access to public information – using its own judgment, it can present the requested information to such an extent and in such a way that it does not harm the third party. The operative independence granted to the administrative body expresses the purpose of the law – to guarantee access to information that is connected to the public life of the country and which provides citizens with the possibility to form their own opinion about the activities of obliged subjects; in the present case, it was violated.

The above-stated insufficiencies in the administrative act under appeal, Letter-Refusal No. 03.07-18/08 May 2006 from the director of the

Government Information Service Directorate, which refused to provide access to public information, constitute grounds for unlawfulness; hence, it should be repealed, and the file concerning the request for access to public information Incoming No. 29-P-13/07 April 2006 by Rosen Rosenov Bosev should be returned to the director of the Government Information Service Directorate for processing on the basis of Art. 41, Para. 1 of the APIA.

**THE COURT**, on the basis of the above-mentioned considerations

**HEREBY RULES:**

**TO REPEAL** the Letter-Refusal No. 03.07-18/08 May 2006 by the director of the Government Information Service Directorate for providing access to public information in response to a complaint by Rosen Rosenov Bosev, of Sofia, 20 Ivan Vazov, fl. 3.

**TO RETURN** to the director of the Government Information Service Directorate the administrative file, created by the request for access to public information Incoming No. 29-P-13/07 April 2006 by Rosen Rosenov Bosev, for processing.

The decision is subject to appeal via a cassation appeal to the Supreme Administrative Court within 14 days of the time when the parties are informed of it.

**PRESIDING JUDGE**

**PANEL MEMBERS**

# CASE

***Centre for Independent Living vs. the Social Support Agency***

## *Centre for Independent Living vs. the Social Support Agency*

*First Instance Court – Administrative Case No. 62/2007, Administrative Court – Sofia city, Panel-23*
*Second Instance Court – Administrative Case No 6700/2007, SAC, Third Division*

**Request:**

In January 2007, Kapka Panayotova, executive director of the association *Centre for Independent Living – Sofia* submitted a request to the Social Support Agency (SSA) asking for information described in two points as follows:

1. Names and positions of the officials appointed by the director of the SSA responsible for issuing protocols of violations on the basis of Art. 55, Para. 1 of the Disabled People Integration Act (DPIA), and

2. The number of issued protocols finding administrative violations of the DPIA for the period 2005 and 2006, as well as the total amount of sanctions imposed during the same period.

**Refusal:**

With a decision as of February 14, 2007, the executive director of the SSA refused to provide the requested information. The stated ground for refusal of the information under point 1 was that the names and the positions of the officials appointed on the basis of Art. 55, Para. 1 of the DPIA, constituted personal data according to the definition stipulated by Art. 2, Para. 3 of the Personal Data Protection Act (PDPA). Pursuant to the same provision of the special act, the Access to Public Information Act was not applicable for access to personal data. In terms of the information requested under point 2, access was denied with the argument that the particular information was processed by the Agency for People with Disabilities as stipulated by Art. 55 of the DPIA.

**Complaint:**

The refusal was challenged before the Sofia City Administrative Court (SCAC). It was argued in the complaint that the information requested under point 1 could not be personal data, as the purpose of the PDPA was protection of personal life, while information about the activities of an official was just the opposite to personal life, as those activities were related to public life due to the exercise of public power by an institution which serves the society and the citizens. With regard to point 2 of the request, it was emphasized that no hypothesis for issuing a refusal followed from the statement of the fact that the requested information had been processed by the Agency for People with Disabilities. No redirection of the request as provided by Art. 32 of the APIA was made. Also no data existed that the SSA did not dispose of the requested information. Even the contrary, the provision of Art. 55, Para. 5 of the DPIA, quoted in the challenged refusal, established an obligation for the bodies under Art. 55, Para. 1 to provide annually (until December 31) the relevant data to the Agency for People with Disabilities. Since the SSA was a body under the particular provision, it should have the requested information.

**Developments in the Court of First Instance:**

The case was heard in an open court session and scheduled for judgment.

**Court Decision:**

With a decision No. 1 as of May 16, 2007, a panel of the SCAC repealed the refusal and returned the request back to the SSA for reconsideration of point 1 of the request after seeking the consent of the third party, and obligated the SSA to provide access to the information requested under point 2. In their judgment, the justices assumed that the information under point 1 did not constitute personal data with regard to the respective officials, but at the same time, the court presumed that consent for disclosure of those that should be obtained. As for the information requested under point 2, the justices pointed out that the circumstance that SSA was obliged to provide reports for investigations and imposed sanctions to the Agency for People with Disabilities annually, did not remove the obligation for provision of the

same information under the procedure stipulated by the APIA and may not be used as a ground for the refusal.

**Court Appeal:**

The SCAC decision was appealed by the Social Support Agency before the Supreme Administrative Court beads on the argument that the court had wrongly applied the substantive law since the requested information constituted personal data, but even if it had constituted public information, the latter would have affected the interests of third parties who had not given consent for its disclosure.

**Developments in the Court of Second Instance:**

The court was heard in a single court session and scheduled for judgment.

**Court Decision:**

With decision No. 240 as of January 9, 2008, a panel of the SAC, Third Division, rejected the court appeal and upheld the decision of the previous court instance. In their judgment, the justices stated that the first instance court had lawfully assumed that the information related to the positions and names of persons (which were appointed by an act of the executive director of the SSA on the ground of Art. 55, Para. 1, Item 6 of the DPIA), should be considered official public information as described by Art. 10 of the APIA – information contained in the official acts of the state bodies in the course of exercise of their powers. The legal conclusion drawn by the administrative court that the requested information was related to physical persons but in their capacity of officials who exercised power by finding out violations of the DPIA in the social support area following the procedure stipulated by the Law on Administrative Violations and Sanctions was lawful and grounded.

## *DECISION*

## *16 May 2007, Sofia*

## *IN THE NAME OF THE PEOPLE*

**SOFIA CITY ADMINISTATIVE COURT, Second Division, 23rd Panel**, on the eighteenth of April, in the year two-thousand and seven, at a public hearing in a panel composed of:

**PRESIDING JUDGE:** ANTOANETA ARGIROVA

in the presence of court stenographer Ani Marinova and with the participation of prosecutor Dimitar Mladenov, heard the report by Judge Argirova on Administrative Case No. 62 of 2007. In order to make a ruling, the following were taken into account:

These proceedings were held on the legal grounds of Art.40, Para.1 of the APIA and according to Art.145 *et seq*. of the APC.

With a decision with outgoing No. 63-32/12 February 2007 the executive director of the Social Support Agency (SSA) refused to provide access to information demanded in a request for access to public information No. 63-32/31 January 07 from the Center for Independent Living Association, submitted by Kapka Ivanova Panayotova, in her capacity as chairperson of the association steering committee.

This decision, submitted in the timeframe pursuant to Art. 149, Para. 1 of the APC and according to Art.152 of the APC, was appealed by the Center for Independent Living Association. The appeal presents arguments about the material unlawfulness of the act being challenged and a failure to preserve the required form. The concrete factual claims made in support of the violations indicated include the fact that the appointment of individuals to compile acts about violations of the DPIA is a requirement established by

the law and that must be fulfilled by the specification of oficially responsible individuals. The fulfillment of this requirement provides an opportunity to form an opinion about the activities of an obliged subject. The information demanded in Item 1 of the request does not constitute protected personal information, since the purpose of the PDPA is the protection of one's personal life (established in Art. 8 of the European Convention on Human Rights, Convention No. 108 of the Council of Europe and Directive 95/46/EC), while the activity of an officially responsible individual is the opposite of private life and is related to the exercise of public authority, one's profession, and service to society and citizens. The appeal further claims that the refusal to provide information requested in Item 2 was ungrounded and unfounded. The fact that the requested information had been summarized by the Agency for People with Disabilities cannot form the basis of the issued refusal. To the contrary, the norm in Art. 55, Para. 5 of the DPIA obligates bodies under Art. 55, Para.1 of the DPIA to submit relevant information to the Agency for People with Disabilities annually by 31 December and since the SSA is among the bodies obliged under Art. 55, Para.1 of the DPIA, it follows that it should be in possession of the information requested. The failure to preserve required form of the act under appeal is based on the failure to indicate to whom and what timeframe the refusal could be appealed. Having presented these claims and arguments, the appeal requests that the court rules to reverse the refusal under appeal and to require the respondent to provide the requested information.

In a court sitting before the Sofia City Administrative Court, the appellant was represented by a legal representative, who argued for the appeal given the grounds indicated within it and requested that it be honored and that expenses accrued in the case be awarded.

The respondent to the appeal, who was summoned, did not send a representative to the court proceedings and did not express an opinion on the appeal.

The representative of the Sofia City Prosecutor's Office express an opinion regarding the partial groundedness of the appeal and suggested that the disclosure of the names of the responsible individuals would disclose data related to their personal lives, due to which the appeal should not be honored.

**The Sofia City Administrative Court, after discussing the grounds relevant to the appeal, the arguments made by the parties to the proceedings, and after weighing the evidence in the case according to Art. 188 of the CPC, concerning Art. 144 of the APC and administratively, on the basis of Art. 168, Para. 1 of the APC, and having entirely review the legality of the act under appeal, made the following factual and legal findings:**

The appellant is an association created on the basis of Art. 18 of the Legal Persons with Nonprofit Purposes Act for the actualization of socially useful activities to assist people with disabilities of a working age in the territory of the city of Sofia in their attempts to be integrated into society.

In a request for access to public information No. 63-32/31 January, the appellant requested that the executive director of the Agency for Social Assistance provide the full names and job titles for responsible officials indicated on the basis of Art. 55, Para. 1 of the DPIA, as well as the number of acts issued establishing violations of the DPIA, the value of the issued acts and the fines levied during the period of 2005-2006.

In the act appeal before the court the respondent refused access to the requested information arguing that the full names and job titles of the individuals indicated on the basis of Art. 55, Para.1 of the DPIA are inprinciple personal data, and according to Art. 2, Para. 3 of the APIA, this law does not apply to access to personal data, while the information requested in Item 2 of the request had been summarized that Agency for People with Disabilities according to Art. 55 of the DPIA.

Giving the established facts in the case, the court finds the appeal grounded.

The civic relationships related to the right of access to public information are set out in the APIA, while Art. 2 gives a legal definition of the concept "public information" in the sense of that law – "all information connected with the public life of the Republic of Bulgaria and that gives citizens the opportunity to form their own opinion about the activities of subjects obliged under the law." According to the definition in Art. 9 the APIA, public information is information created and stored by bodies and their administrations. The law differentiates between two types of public information – official and administrative. Official information is that infor-

mation contained in the official documents of state and municipal bodies, issued in the course of exercising their legally established authority – Art. 10 of the APIA. Administrative information is that information that is gathered, created or stored in connection with official information and due to the activities of bodies and their administrations – Art. 11 of the APIA.

The Social Support Agency (SSA), according to Art. 5 of the Social Suport Act is the executive agency of the Ministry of labor and social policy designated to implement state policy in the sphere of social assistance and thus in that sense is a state body – and obliged subject under Art. 3, Para. 1 of the APIA.

In order to correctly characterize the information requested in Item 1 of the request, we must answer the disputed question in the case of whether the full names and job titles of the individuals indicated by the executive director of the SSA under Art. 55 of the DPIA constitute personal data according to Art. 2, Para. 3 of the APIA. The legal definition of "personal data" in a sense of the APIA is contained in §1, Item 2 of the Additional Provisions of the APIA – "personal data" is all information related to a physical person who is identified or who could be identified directly or indirectly by an identification number or by one or more specific signs related to his physical, ideological, genetic, mental, psychological, economic or social identity. According to Art. 55, Para. 1, Item 6 of the DPIA, the acts establishing violations of that law in the sphere of social assistance should be issued by officially responsible persons, designated by the executive director of the SSA. In that respect, the current court panel shares the opinion that since on the one hand information related to the responsibilities and full names of individuals has been indicated in an official document by the executive director of the SSA, issued in fulfillment of his legal authority under Art. 55, Para. 1, Item 6 of the DPIA, and since on the other hand that information offers an opportunity to form one's own opinion about his activities in his capacity as a subject obliged under the APIA субект, this information is official public information in the sense of Art. 10 of the APIA, and does not constitute personal data in the sense of Art. 2, Para. 3 of the APIA – connected with a physical person in his capacity as a private-law subject. To the contrary, the information requested relates to a physical person in his capacity as an officially responsible person exercising total legal authority

in the implementation of the system provided in the Law on Administrative Violations and Sanctions (LAVS) for violations of the DPIA in the sphere of social assistance – Art. 55, Para. 3, related to Art. 55, Para. 1, Item 6 the DPIA. (According to Art. 42, Item 1 of the LAVS, the full name and job title of the compiler is a necessary prerequisite for an act establishing violation.) The arguments set out above determine the material on lawfulness of the act under dispute, which refused access to official public information requested in Item 1 of the request.

At the same time, public information demanded in Item 1 of the request infringes on the interests of third parties in the sense of Art. 37, Para. 1, Item 2 of the APIA – the officially responsible individuals indicated as such pursuant to Art. 55, Para. 1, Item 6 the DPIA, who are not obligated subjects under Art. 3 of the APIA. Given the conclusion above and without express written consent being requested from the officially responsible individuals for the disclosure of the information, the processing of Item 1 of the request is vitiated, and in this section of the act under dispute should be overturned in the file returns the administrative body for new processing after fulfilling the procedure designated in Art. 31, Para. 2 of the APIA.

The grounds for the now-disputed explicit refusal to provide information demanded in Item 2 of the request regarding the number of acts issued for established violations of the DPIA, the value of the acts issued at the fines levied during a period of 2005-2006 with that such information had been summarized by the Agency for People with Disabilities, according to Art. 55 of the DPIA. The court finds that the grounds cited are not applicable to the issued refusal and in that sense the act under dispute is ungrounded in that part. The information demanded in Item 2 of the request is administrative public information in the sense of Art. 11 of the APIA, due to the fact that it was created in the course of activities by the government body and its administration (*per argumentum ab* Art. 55, Para. 5 of the DPIA) and access to it is free, with the exception of certain cases stipulated by law (Art. 13, Para. 2 of the APIA). The concrete cases not fall within the exceptions stipulated by law. The fact that the respondent is required under Art. 55, Para. 5 of the DPIA provide annual reports to the Agency for People with Disabilities regarding checkups conducted and fines levied this not free him in any way from his obligation to provide the same information under the

conditions of the APIA and cannot constitute grounds for refusal. In light of the arguments presented, the disputed decision to refuse access to information under Item 2 of the request, being ungrounded, constitutes a violation of the substantive law and a fundamental violation of procedural rules; thus, it should be overturned in the respondent required within 14 days of the time when this decision comes into effect to provide access to the public information demanded in Item 2 of the request.

In light of the outcome of the dispute and on the basis of Art. 143, Para. 1 of the APC, the expenses for the court proceedings amounting to 10 leva – the government fee paid (in the contract for legal defense and assistance presented, no renumeration to the attorneys for representing the appellant during court proceedings was specified) – should be awarded for the budget of the body that issued the refusal: the SSA.

In light of the considerations above and on the basis of Art. 41, Para. 1 and Para. 2 of the APIA, Art. 172, Para. 2, third proposition, Art. 173, Para. 2, second proposition and Art. 174 of the APC, the Administrative Court-Sofia City, Division II, 23rd panel

**HEREBY RULES:**

**TO OVERTURN** in accordance with the complaint from the Center for Independent Living Association, with its headquarters and registered address in Sofia, represented by Steering Committee President Kapka Ivanova Panayotova, Decision with outgoing No.63-32/12 February 2007 by the Executive Director of the Agency for Social Assistance, which refused access to information demanded in a request for public information No. 63-32/31 January 07 in the SSA's docket.

**TO RETURN** the file to the administrator director of the Agency for Social Assistance for fulfillment of the procedure in Art.31, Para. 2 of the APIA and for new processing of Item 1 of the request for public information No. 63-32/31 January 07 in the SSA's docket.

**TO REQUIRE** the executive director of the Agency for Social Assistance to provide access under the APIA to the Center for Independent Living Association, with its headquarters and registered address in Sofia,

represented by Steering Committee President Kapka Ivanova Panayotova, to the public information demanded in Item 2 от of the request for public information No. 63-32/31 January 07 in the SSA's docket within 14 days of this decision coming into force.

**TO REQUIRE** the Agency for Social Assistance, Sofia 1051, 2 Triaditsa St, on the basis of Art. 143, Para. 1 of the APC, to pay the Center for Independent Living Association, with its headquarters and registered address in Sofia, represented by Steering Committee President Kapka Ivanova Panayotova, the sum of 10 leva to cover government fees paid.

**The decision shall be communicated to the parties by sending copies of it according to Art. 137 of the APC.**

**The decision can be appealed and/or protested before the Supreme Administrative Court of the Republic of Bulgaria within 14 days of the parties being informed of it.**

**ADMINISTRATIVE JUDGE:**

# DECISION

## No. 240
## Sofia, 9 January 2008

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Third Division,** in a court sitting on the nineteenth of December in the year two-thousand and seven, in a panel composed of:

**PRESIDING JUDGE:** PENKA IVANOVA
**PANEL MEMBERS:** VESELINA KALOVA, KREMENA HARALANOVA

in the presence of court stenographer Mariana Kalcheva and with the participation of prosecutor Ognyan Atanasov, heard the report by Presiding Judge PENKA IVANOVA on Administrative Case No. 6700 of 2007**.**

The court proceedings were held pursuant to Art. 210, Para. 1 in connection with Art. 208 of the APC and were initiated by a cassation appeal submitted by the Agency for Social Assistance of Sofia against Decision No. 1 of 16 May 2007 on Administrative Case No. 62/2007 on the docket of the Sofia City Administrative Court.

The cassation appeal argues that the decision is incorrect given the considerations outlined regarding violations of the applicable law and is unfounded – indicating as the grounds for revocation Art. 209, Item 3 of the APC.

The Supreme Administrative Court, Third Division, in its current configuration, after evaluating the validity and grounds of the cassation appeal, finds that it was submitted within the timeframe indicated in Art. 211, Para. 1 of the APC by the proper party; examined on its merits it is unfounded.

In the appealed decision, in a case concerning Art. 40, Para. 1 of the Access to Public Information Act (APIA) in connection with Art. 145,

Para. 1 of the APC, initiated by a complaint from the Center for Independent Living Association, the court exercised control over the legality of Decision Outgoing No. 63-32/12 February 2007 by the executive director of the Social Support Agency (SSA) of the Ministry of Labor and Social Policy. The disputed administrative decision refused access to information in connection with a request for access to public information submitted on 31 January 2007.

Evaluating the lawfulness of the administrative refusal in light of the object of the requested access to public information, as well as the grounds indicated by the administrative body and the applicable law (APIA), the court found that the complaint was justified and reversed the administrative refusal.

The decision issued is correct, since the court based its decision on the established and accepted circumstances in the case and on the applicable law.

From the evidence in the case it was established that the case for providing access to public information began on the basis of a written request Incoming No. 63-32/31 January 2007, submitted by the association, which requested that it be "provided with existing information about the job positions and individuals designated by the Agency on the basis of Art. 55, Para. 1 of the Disabled People Integration Act (DPIA), as well as information for 2005 and 2006 on the number of acts issued that established administrative violations of the DPIA and the value of the issued acts and fines levied."

The object of the request for access to the indicated information was defined by the administrative body as information fundamentally tied to access to personal data (the full names and job positions of individuals) and on the basis of Art. 2, Para. 4 (formerly Para. 3) of the APIA it was decided that this law did not apply to access to personal data.

The court of first instance discussed the validity of the complaint on the grounds of the nature of the three demands made in the request, and expressed founded arguments that explained its legal conclusions about the unlawfulness of the administrative refusal. In accordance with the law, the court found that information related to the job positions and names of individuals (data that was indicated in an act by the executive director of the SSA on the basis of Art. 55, Para. 1, Item 6 of the DPIA) should be consid-

ered official public information according to the definition in Art. 10 of the APIA – information contained in the acts of state bodies in the course of exercising their authority.

The Administrative Court's legal conclusion that the requested information concerns physical persons but in their capacity as officially responsible individuals exercising their authority established under the LAVS regarding violations of the DPIA in the sphere of social assistance is lawful and well-founded.

Following the law, the court also ruled that the information demanded in Item 2 of the request is administrative public information according to the definition in Art. 11 of the APIA – information gathered, created or stored in the course of activity by state bodies and their administrations, thus access to this information is free according to the provisions in Art. 13, Para. 1, with the exception of certain cases stipulated by the law (Art. 13, Para. 2 of the APIA).

Given these considerations, the cassation appeal is unfounded and should not be honored.

Guided by the considerations above, the Supreme Administrative Court – Third Division,

**HEREBY RULES:**

**TO UPHOLD** Decision No. 1 of 16 May 2007 on Administrative Case No. 62/2007 on the docket of the Sofia City Administrative Court. The decision is not subject to appeal.

**True to the original**,

**PRESIDING JUDGE**: (signature) Penka Ivanova
**PANEL MEMBERS**: (signature) Veselina Kalova, (signature) Kremena HARALANOVA

# CASE

***The Non-Governmental Organizations Center Razgrad vs. the Municipality of Razgrad (Waste Management Concession)***

## *The Non-Governmental Organizations Center Razgrad vs. the Municipality of Razgrad (Waste Management Concession)*

*First Instance Court – Administrative Case No. 104/2005*
*Razgrad District Court*
*Second Instance Court – Administrative Case No. 3112/2006,*
*Supreme Administrative Court, Fifth Division*

**Request:**

With a written request as of June 7, 2005, the chairman of the Non-Governmental Organizations Center in the Town of Razgrad demanded that the mayor of the Municipality of Razgrad provide access to the following information:

– copies of all annexes to the waste management concession contract in the town of Razgrad and all settlements within the territory of the Municipality of Razgrad, which had been signed between the Municipality of Razgrad and Shele Bulgaria Ltd; and

– information about the money paid monthly in the process of contract fulfillment until the present moment.

**Refusal:**

In a written decision, the mayor of the municipality refused to provide access to the requested information. The mayor assumed that the requested information affected the interests of a third party (the subcontractor) who had not given an explicit written consent for the disclosure of the requested information as provided by Art. 31, Para. 1 of the APIA.

**Complaint:**

The refusal was challenged before the Razgrad District Court (RDC).

**Developments in the Court of First Instance:**

The case was heard in an open court session and scheduled for judgment.

**Court Decision:**

With decision No. 191 of January 10, 2006, a panel of the Razgrad District Court dismissed the complaint concluding that the contractor was not an obliged body under Art. 3, Para. 2 of the APIA, thus the public body had lawfully applied the procedure provided by Art. 31, Para. 1 of the APIA. After the explicit statement of the third party that the requested information was a company secret and that it affected its economic interests, the obliged body had to comply with that dissent to information disclosure.

**Court Appeal:**

The decision of RDC was appealed before the SAC. The appeal stated that the RDC had to take into consideration the fact that in the particular case there were circumstances that did not require the third party's consent and in which certain information was public according to a special legal provision. In such cases, the special law derogated the common one (Art. 31 of the APIA). In the current case, the municipal budget was public and its allocation was controlled by the local community according to the Municipal Budget Act (MBA). Pursuant to Art. 30, Para. 4 of the MBA, the annual report on the implementation and conclusion of the municipal budget was not only accessible to everyone, but was also subject to public discussion. Since the submitted request demanded information about money paid from the budget of the Municipality of Razgrad, the information requested was public and thus should be provided without the consent of the third party.

**Developments in the Court of Second Instance:**

The case was heard in an open court session and scheduled for judgment.

**Court Decision:**

With decision No. 8190 of July 20, 2006, a panel of the SAC repealed the decision of the RDC and returned the case back for reconsideration in compliance with the instructions given by the court decision. In their judgment, the court panel emphasized that in judging the nature of the information requested, the first instance court had wrongly assumed that it constituted a commercial secret, when in fact it had not applied the relevant legal

provisions, which categorized the information as public. Thus, under the Municipal Property Act (MPA) and the Concessions Act, the data about concession contracts and their main characteristics were public, which was why exemptions for commercial secrets and third party's interests could not be applied to that type of information. It was also emphasized that in the current case priority must be given to the principle of transparency and publicity of activities financed with money from the municipality budget, the former being collected as a garbage tax from citizens. The court panel concluded that the mayor of the municipality had unlawfully taken the requirement for the protection of the company's interests as the leading principle. He had thus disrespected a legal rule about public accessibility of data related to the waste management in cases in which expenses were covered with municipal budget money collected from taxes on citizens within the territory of the municipality. In considering the request for access to public information about a waste management concession, the mayor should have provided access to the requested data, since they were legally defined as publicly accessible.

# DECISION

## No. 8190
## Sofia, 20 July 2006

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the twelfth of June in the year two-thousand and six, in a panel composed of:

**PRESIDING JUDGE:** VANYA ANCHEVA
**PANEL MEMBERS:** YULIA KOVACHEVA,
VIOLETA GLAVINOVA

in the presence of court stenographer Iliana Ivanova and with the participation of prosecutor Viktor Malinov, heard the report by Judge YULIA KOVACHEVA on Administrative Case No. 3112 of 2006**.**

These proceedings were held pursuant to Art. 33 *et seq*. of the Supreme Administrative Court Act (SACA).

The case was initiated by a cassation appeal from the Non-Governmental Organizations Center in Razgrad by Director Georgi Milkov Dimitrov against Decision No. 191 of 10 January 2006 on Administrative Case No. 104/2005 by the Razgrad District Court. It set out arguments for the incorrectness of the judicial act and requested its revocation.

The respondent – the mayor of the Municipality of Razgrad and the interested party to the case Shele Bulgaria LLC – did not express an opinion on the cassation appeal.

The prosecutor from the Supreme Administrative Prosecutor's Office gave a motivated argument that the cassation appeal is unfounded.

The Supreme Administrative Court, Fifth Division panel, found that the cassation appeal is procedurally admissible, since it was submitted within the timeframe indicated in Art. 33, Para. 1 of the SACA and by the

proper party. In order to rule on its merits, the court accepted the following as established:

In the decision under appeal the Razgrad District Court rejected complaints by Georgi Milkov Dimitrov against the refusal by the mayor of the Municipality of Razgrad to provide information demanded in a request submitted by the appellant, Ingoing No. 74-00-25.1/07 June 2005. The Court established the facts that with request No.74-00-25.1/07 June 2005, the director of the Non-Governmental Organizations Center in Razgrad requested that he be provided with: a) a copy and all annexes to the concession contract for trash collection and trash removal in the city of Razgrad and all communities in the Municipality of Razgrad signed between the Municipality of Razgrad and Shele Bulgaria LLC; and b) information about the amounts paid up until that moment to the concessionaire each month for fulfillment of the contract. The mayor of the municipality, arguing that access harmed the interests of a third party that had not given express written consent for the provision of the requested information pursuant to Art. 31, Para. 1 of the APIA, in the letter under appeal refused to provide access to the seeker. On the basis of these factual circumstances, the court concluded that the concessionaire is not an obliged subject in the sense of Art. 3, Item 2 of the APIA, thus the administrative body lawfully applied the procedure in Art. 31, Para. 1 of the APIA. Since the third party explicitly stated that the information requested is a company secret and infringes on the economic interests of the corporation, the obliged subject was required to comply with the refusal to grant the seeker access to information. The administrative body correctly interpreted the lack of consent on the part of an interested party as a basis for refusal under the hypothesis in Art. 37, Para. 1, Item 2 of the APIA and lawfully refused to provide the seeker access. Such were the grounds behind the result under dispute.

The decision is incorrect because it violates the substantive law. In deciding the question of the nature of the information being sought, the court held that it constituted a trade secret whose disclosure would harm the interests of a third party without complying with the applicable statutory norms governing public access to data concerning objects and activities for which a concession contract has been signed and for its basic parameters. At the time that the refusal under appeal was issued, the provisions

of Art. 75a (new – SG, vol. 101 of 2004, repealed, vol. 36 of 2006) of the Municipal Property Act were in force, which required the mayor of the municipality to organize the creation and maintenance of a municipal concessions register which would contain data about all concessions granted on the municipality's territory. The contents of that register are regulated in Regulation No. 5 of 10 September 2005 for the ratification of models for official documents concerning municipal property and registers stipulated by the Municipal Property Act and for the definition of a system for their compilation, use and storage. The mayor of the municipality is obligated to create and maintain a municipal concessions register. The Concessions Act in force at the time of the refusal (repealed, SG, vol. 36 of 2 May 2006, in force from 1 July 2006) sets out the maintenance of a National Concessions Register by the Council of Ministers, which contains data about all concessions. Access to the register and any information in its archive is public and should be implemented according to the APIA, pursuant to Art. 59, Para. 1 of the Regulations for Implementing the Concessions Act. The question of the Operative Concessions Act – Art. 96 *et seq*. is solved in an analogical manner.

Thus, with respect to the information sought by the seeker, which has been declared public, the restrictive hypothesis in Art. 17, Para. 2 of the APIA in connection with Art. 31, Para. 1 of the APIA cannot be applied. Since lawmakers explicitly regulated that data about concessions including basic clauses of concession contracts can be provided under the APIA, the third party's lack of consent based on the protection of trade and economic interests cannot entirely eliminate access to the requested public information. In the case at hand, priority is given to the preservation of the principle of transparency and openness regarding activities financed with funds from the municipal budget, which for their part take the form of a tax for household waste on the population. The restrictive hypothesis in Art. 31, Para. 2 of the APIA can be applied only to clauses concerning the confidentiality of the contract and then only if it does not concern information that has been declared public under the law. For these reasons, the court's conclusions regarding the lawfulness of the disputed refusal by the obliged subject to provide the seeker with the requested public information based on the lack of consent from the third party are incorrect. The mayor of the municipality

in his capacity as a public body under Art. 3, Para. 1 of the APIA unlawfully gave precedence to the requirement to protect the interests of a corporation and neglected the legally stipulated rule of the general accessibility of data related to the organization of services for trash collection and trash removal whose costs are covered by funds from the municipal budget stemming from a local tax collected from taxpayers in the municipality's territory. For this reason, in considering the request for access to public information related to the concession for trash collection and trash removal, the administrative body should have provided the requested data, since the law regulates that such information is publicly accessible. If the documents contain information that goes beyond that designated by lawmakers as public information, the administrative body has the option of providing partial access pursuant to Art. 31, Para. 4 of the APIA. In the administrative act under appeal, no differentiation of the nature of the information in that respect was made; for this reason, in contrast to the findings of the previous court, access to the requested information was unlawfully refused in full.

In light of the considerations above, the decision under appeal, which rejected the complaint from the association against the refusal by the obliged subject, should be overturned, as should the administrative act under dispute. The administrative file should be returned to the administrative body for the question to be decided on merit in accordance with the instructions in the present decision.

Guided by the arguments above, the Supreme Administrative Court, Fifth Division panel,

**HEREBY RULES:**

**TO OVERTURN** Decision No. 191of 10 January 2006 on Administrative Case No. 104/2005 by the Razgrad District Court and instead to PRONOUNCE

**TO OVERTURN** the refusal by the mayor of the Municipality of Razgrad, objectified in letter No. 74-00-25.5/29 June 2005 to provide the Non-Governmental Organizations Center in Razgrad with access to public information according to the request Incoming No. 74-00-25.1/07 June 2005.

**TO RETURN** the administrative file to the mayor of the Municipality of Razgrad for new processing of request Incoming No. 74-00-25.1/07 June 2005 from the Non-Governmental Organizations Center in Razgrad.

The decision is not subject to appeal.

**True to the original,**
**PRESIDING JUDGE**: (signature) Vanya Ancheva
**PANEL MEMBERS**: (signature) Yulia Kovacheva, (signature) Violeta Glavinova

# CASE

***The Non-Governmental Organizations Center Razgrad vs. the Municipality of Razgrad (Mayor's Per Diems)***

# The Non-Governmental Organizations Center Razgrad vs. the Municipality of Razgrad (Mayor's Per Diems)

*First Instance Court – Administrative Case No. 1/2006,*
*Razgrad District Court*
*Second Instance Court – Administrative Case No. 5319/2006,*
*Supreme Administrative Court, Fifth Division*

**Request:**

With a written request for access to information, the chairman of the Non-Governmental Organizations Center in the Town of Razgrad demanded that the mayor of the Municipality of Razgrad provide access to the following information:

– number, purpose and duration of the official trips, the amount of per diem expenses made in the country and abroad by Mr. Venelin Uzunov, current mayor of the Municipality of Razgrad since 1991.

**Refusal:**

No response was received within the legally prescribed 14-day period.

**Complaint:**

The silent refusal of the mayor of the Municipality of Razgrad was challenged before the Razgrad District Court (RDC).

**Developments in the Court of First Instance:**

The case was heard in an open court session and scheduled for judgment.

**Court Decision:**

With a decision No. 19 as of March 10, 2006, a panel of the RDC repealed the complaint of the NGO by assuming that the plaintiff demanded access to information which was not public under the provision of Art. 2, Para. 1, Item 1 of the APIA and constituted personal data. The court panel also concluded that a major part of the requested data was not held con-

sidering the expiration of the legally prescribed period for their storage as provided by the Accounting Act.

**Court Appeal:**

The decision of RDC was appealed before the Supreme Administrative Court (SAC). The appeal pointed out that the request was for information about the number, purpose and duration, as well as the expenses made with regard to the of the official trips of the mayor of the Municipality of Razgrad. Those data may not be defined as "personal data" with regard to the provision of Art. 2 of the Personal Data Protection Act (PDPA) since they did not concern a specific physical person but relate to the exercise of official duties by a mayor of a municipality. The content of the requested information, related entirely to the activities of an executive body, fell under the qualification of administrative public information as stipulated by Art. 11 of the APIA. The plaintiff also argued that the legislation (State Archives Act) introduced clear rules for document management and that the process of holding, archiving and destruction of documents was not left at the free will and the discretion of the officials working in the institutions. That was why the mere statement not backed with specific evidence that the documents which contained the requested information were not held in the municipality was not sufficient ground for refusing access to public information.

**Developments in the Court of Second Instance:**

The case was heard in an open court session and scheduled for judgment.

**Court Decision:**

With a decision No. 9097 as of September 21, 2006, a panel of the SAC repealed the RDC decision, as well as the mayor's refusal and turns the request back for reconsideration instructing him to satisfy the request for public information in line with the existing documentation within the municipality. In their judgment, the justices pointed out that the regional court had wrongly and in violation of the substantive law assumed that the plaintiff requested access to information which was not public under the provision of Art. 2, Para. 1 of the APIA. The requested data were not personal as provided by Art. 2 of the PDPA since they were not related to the specific

physical person Venelin Uzunov who would have been identified as such if data had been disclosed. The current case relates to the execution of official functions by Mr. Uzunov in his capacity of mayor of the Municipality of Razgrad – information whose disclosure would give a possibility to form opinion on the activities of the executive body within the municipality as an obliged under the law body. That was why the court panel deemed that the requested information should be classified as administrative public information as under the provision of Art. 11 of the APIA. It was also pointed out that it had not been proved in the course of the proceedings what part of the requested accounting documents encompassing a period of 15 years was available and what had been destroyed pursuant to the terms for keeping provided by Art. 42 of the Accounting Act. Consequently, the stated ground for the issuing of the contested refusal did not substantiate its lawfulness.

# DECISION

## No. 9097
## Sofia, 21 September 2006

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the twelfth of September in the year two-thousand and six, in a panel composed of:

**PRESIDING JUDGE:** MILKA PANCHEVA
**PANEL MEMBERS:** DIANA DOBREVA, IVAN RADENKOV

in the presence of court stenographer Anelia Stankova and with the participation of prosecutor Viktor Malinov, heard the report by Judge DIANA DOBREVA on Administrative Case No. 5319 of 2006**.**

These proceedings were held pursuant to Art. 33 *et seq*. of the Supreme Administrative Court Act (SACA).

The case was initiated by a cassation appeal from the Center for Non-Governmental Organizations in Razgrad against Decision No. 19/10 March 2006 on Administrative Case No. 1/2006 by the Razgrad District Court, which rejected the association's complaint against a refusal by the mayor of the Municipality of Razgrad to provide access to public information following a request with Incoming No. 94-G-118.2/22 November 2004.

The grounds indicated by the cassation appellant for overturning the disputed decision are found in Art. 218b, Para. 1, b. "v" of the CPC – incorrectness due to violation of the substantive law, fundamental violations of the rules of judicial procedure and lack of grounds. Concrete arguments are set forth that emphasize the fact that in this case the requested information – "the number, purpose and duration of business trips, the amount of business trip expenses within the country and abroad accrued by Mr. Venelin Uzunov, mayor of the Municipality of Razgrad, from 1991 until the moment of the request" – can-

not be defined as personal data in the sense of Art. 2 of the PDPA, since they do not concern a concrete physical person, but rather relate to the fulfillment of the mayor's administrative functions. Since the information requested is entirely focused on the activities of a body of the municipality's executive authority, it is public in nature, thus access to it should not be restricted.

The respondent – the mayor of the Municipality of Razgrad – did not express a position.

The representative of the Supreme Administrative Prosecutor's Office offered a motivated argument for the unfoundedness of the cassation appeal.

In order to pronounce a ruling, the court of the present instance consider the following:

The appeal is procedurally admissible, since it was submitted within the timeframe and by the proper party. Examined on its merits, it is grounded.

Incorrectly and in violation of the substantive law, the District Court held that the appellant sought access to information that was not public in the sense of Art. 2, Para. 1 of the APIA. The data requested are not personal data according to Art. 2, Para. 1 of the PDPA, since they do not concern the concrete physical person Venelin Uzunov, who could be identified in such a capacity through their disclosure. In this case the information concerns Uzunov's fulfillment of his administrative functions as mayor of the Municipality of Razgrad; such information would provide the possibility to form one's own opinion about the activities of a body of the municipality's executive authority as a subject obliged under the law. For this reason the present court finds that the information requested should be classified as administrative public information in the sense of Art. 11 of the APIA.

Furthermore, the evidence in the case does not support the claim that such information constitutes an official secret and as such is classified within the appended list prepared and established according to the PCIA and the regulations regarding its implementation. It is not clear the court which information contained within the 52 kinds of documents classified with the level "for administrative use" applies to the data sought by the association. Thus, there are no grounds for supporting the mayor's refusal on the basis of provisions in Art. 9, Para. 2 of the APIA, without further concretization in that respect.

The case does not provide evidence as to what portion of the requested accounting documentation from the 13-year period is available and what por-

tion has been destroyed in accordance with the deadlines for preservation under Art. 42 of the Accounting Act. For this reason, this argument in support of the disputed refusal also does not provide grounds for its legality.

In light of the above-mentioned considerations, the present court does not share the laconic reasoning of the District Court, which held that the mayor did not have to honor the association's request in any way and that his refusal was in accordance with the law. For this reason, the decision under appeal should be overturned and instead another pronounced in its place that addresses the merits of the dispute and which honors the complaint submitted by the Center for Non-Governmental Organizations in Razgrad; after the repeal of the procedural refusal, the case should be returned as a file to the relevant body for new processing and for satisfaction of the demand for access to public information in accordance with the documentation existing in the municipality.

Guided by the above considerations and on the basis of Art. 40, Para. 3 of the SACA, the Supreme Administrative Court, Fifth Division,

**HEREBY RULES:**

TO OVERTURN Decision No. 19/10 March 2006 on Administrative Case No. 1/2006 by the Razgrad District Court and instead to PRONOUNCE:

TO OVERTURN the refusal by the mayor of the Municipality of Razgrad to provide access to public information according to request Ingoing No. 94-G-118.2/22 November 2004, submitted by the Center for Non-Governmental Organizations in Razgrad.

TO RETURN the case as a file for new processing in accordance with the given instructions.

THE DECISION is final.

**True to the original,**
**PRESIDING JUDGE**: (signature) Milka Pancheva
**PANEL MEMBERS**: (signature) Diana Dobreva, (signature) Ivan Radenkov

# CASE

***Silvya Yotova (Novinar Newspaper) vs. the Ministry of Regional Development and Public Works (MRDPW)***

## Silvya Yotova (*Novinar Newspaper)* vs. the Ministry of Regional Development and Public Works (MRDPW)

*First Instance Court – Administrative Case No. 6363/2005, Supreme Administrative Court, Fifth Division*
*Second Instance Court – Administrative Case No. 7669/2006, Supreme Administrative Court, Five-member panel of SAC*

**Request:**

In May 2005, the journalist Silvya Yotova from *Novinar Newspaper* submitted a written request for access to information to the Minister of Regional Development and Public Works. She demanded a copy of the concession contract signed between the Ministry of Regional Development and Public Works (MRDPW) and Highway Trakia JSC, as well as copies of the legal analyses of the concession, which were prepared under the provisions of the Concession Act.

**Refusal:**

The Minister refused access to the requested contract since it contained data that due to its content constituted classified information, namely an official secret according to the Protection of Classified Information Act (PCIA). Access to this type of information would negatively affect the interests of the state and would harm other legitimate interests.

Complaint:

The refusal was challenged before the court with the argument that the grounds claimed under the PCIA were not sufficient to justify the refusal. The law under which the requested information had been classified as an official secret should have been indicated as well. More importantly, pursuant to the Concessions Act, the Minister was obliged to submit the information requested to the Council of Ministers' Public Register of Concessions. This Register was supposed to be accessible via the Internet.

**Developments in the Court of First Instance:**

Meanwhile, the concession contract was provided to the Access to Information Programme (AIP) by the new Minister of Regional Development and Public Works. The journalist's right of access to information, however, has yet to be respected, since the analyses done under the Concessions Act were not made available publicly.

In February 2006, the case was heard at a single session and scheduled for judgment.

**Court Decision:**

With decision No. 5451 of May 22, 2006, a panel of the Supreme Administrative Court repealed the refusal of the minister and sent the case file back to him for a decision based on the case's merit. In their judgment, the court panel stated that access to information that could be defined as public under the provision of Art. 2, Para. 1 of the APIA had been demanded with the request. The requested concession contract contained information about the conditions under which the state had established the right of exploitation of an object that was exclusive state property. That information was related to public life, thus its provision would allow citizens (in this case through the mass media) to form their own opinions about the way the state body authorized to sign contracts had fulfilled its assigned tasks. In deciding that the public information requested had to be protected since it constituted an official secret, the minister had not founded that decision on a law that would define the information as such, nor on a personally approved list of categories of information subject to classification as official secrets within the structure of the Ministry of Regional Development and Public Works. The grounds stated by the Minister of Regional Development and Public Works were too broad and could not be defined as justifiable grounds for the issuing of the administrative act.

**Court Appeal:**

The decision of the SAC was appealed by the Minister of Regional Development and Public Works before a five-member panel of the same court.

**Developments in the Court of Second Instance:**
The case was heard in a single court session and scheduled for judgment.

**Court Decision:**
With decision No 10731 of November 1, 2006, a five-member panel dismissed the Minister's appeal and upheld the decision of the lower instance court. Given the absence of data in support of the minister's statement that the information was classified under the provision of Art. 26 of the Protection of Classified Information Act (PCIA), the court did not have the opportunity to check its validity. The mere statement that the information contained in the concession contract signed between the Minister of Regional Development and Public Works and Highway Trakia JSC and the analyses under the provision of Art. 6, Para. 2 of the Concessions Act (repealed) fell under a category that constituted an official secret was not sufficient to identify the information as such. The refusal by the body obliged under Art. 3, Para. 1 of the APIA stated only that the information belonged to a particular category pursuant to Art. 26 of the PCIA, but did not state the criteria and the grounds on the basis of which the requested public information had been identified as an official secret. That fact did not allow the court to exercise efficient control on the lawfulness of the refusal for the provision of that information.

# DECISION

## No. 5451
## Sofia, 22 May 2006

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Fifth Division,** in a court sitting on the twenty-seventh of February in the year two-thousand and six, in a panel composed of:

**PRESIDING JUDGE:** ANDREY IKONOMOV
**PANEL MEMBERS:** ZHANETA PETROVA, TANYA VACHEVA

in the presence of court stenographer Svetla Paneva and with the participation of prosecutor Ognyan Topurov, heard the report by Judge ZHANETA PETROVA on Administrative Case No. 6363 of 2005**.**

Silvia Nikolaeva Yotova has appealed Order No. PD-02-14-294/26 May 2005 by the minister of regional development and public works, which refused access to public information requested by her in Request No.V8-783/11 May 2005. A complaint was made regarding the unlawfulness of the administrative act and she has requested that it be overturned with a judgment awarding the expenses incurred.

The minister of regional development and public works has requested that the appeal be dismissed.

The representative of the Supreme Administrative Prosecutor's Office has argued that the refusal was lawful and thus should remain in force.

The Supreme Administrative Court, after examining the lawfulness of the administrative act, finds the appeal grounded.

With Request No.V8-783/11 May 2005 to the minister of regional development and public works, Silvia Nikolaeva Yotova, a journalist for the newspaper *Novinar*, asked to be provided with all information related to a concession contract signed between the minister of regional develop-

ment and public works and the company Highway Trakia Jsc, as well as information contained in the evaluations pursuant to Art.6, Para.2 of the Concessions Act.

With Order No. PD-02-14-294/26 May 2005 the minister of regional development and public works refused access to the information requested arguing that the data in its entirety constituted an official secret according to Art. 26 of the Protection of Classified Information Act (PCIA) and access to it would reflect unfavorably on the interests of the state or would harm another legally protected interest.

The administrative act issued contradicts the law. The request from the journalist Silvia Yotova demanded access to information that can be defined as public in the sense of Art. 2, Para. 1 of the Access to Public Information Act (APIA). The concession contract to which the request demanded access contains information about the conditions under which the government established the company-concessionaire's right to use an object that was exclusively state property. This information is related to public life and access to it would allow citizens, in this case through the means of mass information, to form their own opinions about the way the government body authorized to enter into such a contract fulfills its fundamental duties.

In order to refuse access to the requested information, the administrative body cited Art. 26 of the PCIA, which contains a definition of the categories of information that constitute an official secret. When public information is classified information because it constitutes a state or other protected secret, the right of access to it can be restricted. Administrative information created or stored by state bodies or local government bodies that is not a state secret is considered protected if unregulated access to it would reflect unfavorably on the interests of the state or would harm another legally protected interest. Information subject to classification as an official secret is defined by law. The director of every organizational unit is required to prepare a list of the categories of information that constitute an official secret within the sphere of the organizational unit's activities.

In considering the requested information as protected because it constituted an official secret, the administrative body did not refer to a law that defined it as such, nor did it cite an approved list containing the categories of information subject to classification as an industry secret within the sys-

tem of the Ministry of Regional Development and Public Works. The arguments provided by the minister of regional development and public works were too general, thus they cannot be considered essential grounds for the administrative act. The formal approach to the grounds in the act hinders the ability to check its compliance with the normative requirements and constitutes grounds for its rejection.

Due to violations of Art. 15, Para. 1 of the APA, the order by the minister of regional development and public works must be overturned, and the file must be returned to the administrative body for a decision on its merits. In its new consideration of the request, the administrative body must offer concrete arguments for its decision to restrict access to the requested information that is contained in the concession contract signed with the company Highway Trakia Jsc and the information in the evaluations pursuant to Art. 6, Para. 2 of the Concessions Act. Since the provisions of Art. 6, Para. 2 of the Concessions Act had been repealed long before the date that the request was submitted, the administrative body must follow the procedure in Art. 29, Para. 1 of the APIA to clarify its content in the section which requests access to information about the evaluations pursuant to Art.6, Para.2 of the Concessions Act, which accompany the concession offer.

Considering the result of the case and on the basis of Art. 50 of the SACA, the party submitting the appeal is awarded expenses incurred in the sum of 10 leva.

Given the arguments above and on the basis of Art. 28 of the SACA in connection with Art. 42, Para. 3 of the APA, the Supreme Administrative Court rules

**HEREBY RULES:**

**TO OVERTURN** Order No. PD-02-14-294/26 May 2005 by the minister of regional development and public works, which refused to provide access to public information requested by Silvia Nikolaeva Yotova in request No.V8-783/11 May 2005.

**TO RETURN** to the minister of regional development and public works the administrative file concerning the request submitted by Silvia Nikolaeva Yotova, No. V8-783/11 May 2005, for reconsideration of its merits. TO ORDER the Ministry of Regional Development and Public Works to pay Silvia Nikolaeva Yotova of Sofia expenses in the sum of 10 leva. The decision can be appealed before a five-member panel of the Supreme Administrative Court within 14 days of the time the parties are informed of it.

**True to the original,**
**PRESIDING JUDGE:** (signature) Andrey Ikonomov
**PANEL MEMBERS:** (signature) Zhaneta Petrova,
(signature) Tanya Vacheva

# DECISION

## No. 10731
## Sofia, 1 November 2006

## IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – Five-Member Panel – Collegium II,** in a court sitting on the nineteenth of October in the year two-thousand and six, in a panel composed of:

**PRESIDING JUDGE:** KONSTANTIN PENCHEV
**PANEL MEMBERS:** VANYA ANCHEVA, VIOLETA GLAVINOVA, MARIETA MILEVA, ILIANA DOYCHEVA

in the presence of court stenographer Grigorinka Lyubenova and with the participation of prosecutor Lilyana Krastanova, heard the report by Judge VANYA ANCHEVA on Administrative Case No. 7669 of 2006**.**

These proceedings were held pursuant to Art. 33 *et seq*. of the Supreme Administrative Court Act (SACA), concerning Art. 40, Para. 1 of the Access to Public Information Act (APIA).

The cassation appeal was initiated by the minister of regional development and public works against Decision No. 5451/22 May 2006 on Administrative Case No. 6363/2005 by a three-member panel of the Supreme Administrative Court, Fifth Division. With detailed arguments concerning violations of the substantive law in the pronouncement of the judicial decision under appeal, the appellant requested it be overturned on the basis of Art. 218b, Para. 1, b. "v," first proposition of the CPC.

The respondent, Silvia Nikolaeva Yotova, through her authorized legal representative, has expressed the position that the cassation appeal is unfounded.

The representative of the Supreme Administrative Prosecutor's Office has argued that the court decision is correct.

The Supreme Administrative Court, Fifth Division, after discussing the evidence gathered in the case related to the cassation complaint filed, holds the following as established:

The cassation appeal was submitted within the timeframe stipulated in Art. 33, Para. 1 of the SACA, by the proper party who has the right and interest to appeal, thus it is procedurally admissible. Examined on its merits, the appeal lacks grounds.

The decision under appeal overturned as unlawful Order No. PD-02-14-294/26 May 2005 by the minister of regional development and public works, which had refused access to public information requested by Silvia Nikolaeva Yotova, a journalist from the newspaper *Novinar*, in Request No. V8-783/11 May 2005 г.

To reach this decision, the three-member panel found that there had been a violation of Art. 15, Para. 1 of the Administrative Procedure Act (APA) with respect to the requirements for the administrative body to provide a grounded decision. The administrative act did not contain facts that could serve as a basis for the refusal to provide access to the requested public information. Due to the lack of arguments for the issuance of the act, it was not possible to evaluate its compliance with the substantive law; this, according to the judicial panel, led to its being overturned. In parallel with this, arguments were developed that the procedure pursuant to Art. 29, Para. 1 of the APIA should also be conducted for the clarification of the contents of the request in the part which demands access to the evaluations accompanying the concession, pursuant to Art. 6, Para. 2 of the Concessions Act (repealed). Given these arguments, the SAC three-member panel overturned the order under dispute and returned the administrative file for new processing of the submitted request on the legal basis of Art. 24 of the APIA.

The decision conforms to the law.

The deciding panel correctly stated that the order under appeal did not contain specific facts that were taken into consideration by the administrative body as grounds for issuing the refusal of access to public information. Given the lack of data supporting the minister of regional development and public works' claims that the requested information was classified in the sense of Art. 26 of the PCIA and taking into consideration the lack of explicit factual grounds for defining why the information contained in the

documents cited by the request constitutes an official secret, the court was not able to verify its correctness. The mere claim that the information incorporated in the concession contract signed between the cassation appellant and Highway Trakia Jsc and accordingly the evaluations pursuant to Art. 6, Para. 2 of the Concessions Act (repealed) fall within the category of official secrets does not automatically identify it as such. The decision by the administrative body pursuant to Art. 3, Para. 1 of the APIA states only that the information belongs to a relevant category of information according to Art. 26 of the PCIA, but does not provide grounds as to what criteria and on which grounds it was decided that the requested public information constitutes an official secret; this lack of grounds, for its part, does not allow the court to exercise effective control over the legality of the refusal to provide such information. Through an interpretation of the provisions of the APIA and the PCIA, the court cannot discover arguments leading to the disputed refusal of access to public information that would complement the contents of the act. This action must be undertaken by the administrative body itself, which is an obliged public-law subject under the APIA, namely, the minister of regional development and public works or an individual designated by him according to Art. 28, Para. 2 of the law.

The lack of grounds for the refusal by the administrative body to provide the public information sought by the requester does not allow the court to evaluate the legality of the order under appeal. The violation of the requirement concerning the form of the act pursuant to Art. 15, Para. 2, Item 3 of the APA constitutes absolute grounds for its rejection. The order was overturned only on these grounds – following an argument in Art. 41, Para. 3, second proposition of the APA, in connection with Art. 11 of the SACA; for this reason the decision under appeal is correct. The remaining cassation complaints are not relevant to this conclusion, thus discussion of them is pointless, since even if they were grounded, they would not change the correctness of the court's final conclusion about the unlawfulness of the refusal.

Neither party claimed legal expenses, thus none are awarded.

Guided by the considerations above and on the basis of Art. 40, Para. 1, first proposition of the SACA, the Supreme Administrative Court, Fifth Division

**HEREBY RULES:**

**TO UPHOLD** Decision No. 5451 of 22 May 2006 on Administrative Case No. 6363/2005 by the Supreme Administrative Court, Fifth Division.

**True to the original,**
**PRESIDING JUDGE:** (signature) Konstantin Penchev
**PANEL MEMBERS:** (signature) Vanya Ancheva, (signature) Violeta Glavinova, (signature) Marieta Mileva, (signature) Iliana Doycheva

# CASE

***Hristo Hristov vs. the National Intelligence Services***

## *Hristo Hristov*
## *vs. the National Intelligence Services*

*First Instance Court – Administrative Case No. 687/2005,*
*Sofia City Court, Panel III-g*
*First Instance Court – Administrative Case No. S 31/2005,*
*Sofia City Court, Panel III-g*
*Second Instance Court – Administrative Case No. 3C-321/2006,*
*Supreme Administrative Court, Fifth Division*

**Request:**

At the end of 2004, a journalist from *Dnevnik* newspaper, Hristo Hristov, submitted a request to the Director of the National Intelligence Services (NIS). Mr. Hristov demanded access to documents from the Archive of the First Bureau (the Intelligence Office) of the former State Security Services from the period 1971-1979. He requested the information for the documentary book he was writing about the murder of the dissident writer Georgi Markov in London in 1978.

**Refusal:**

No response to the request was received within the legally prescribed period of 14 days.

**Complaint:**

The silent refusal was challenged before the Sofia City Court (SCC). Besides offering arguments about the unlawfulness of the refusal, the complaint stated that the journalist had already obtained access to and studied the archives of the Ministry of Interior, the Ministry of Foreign Affairs, the State Archive, and the Supreme Cassation Court. Furthermore, Mr. Hristov had published on the topic many times before, which justified his request for access.

**Developments in the Court of First Instance:**

At the first session of the court, the journalist presented a mass of evidence in support of his statement that he had already studied documents on

the same topic in other archives. The court stayed the proceedings with the argument that the other party in the process should have an opportunity to get acquainted with the evidence and to present their own as well.

At the second session, the representative of the defendant claimed that he did not know whether the requested information existed in the archive of the National Intelligence Services (NIS), since they could not find it in the files of documents they held. The lawyer of the complainant insisted that Supreme Administrative Court practices had shown that a mere statement unaccompanied by evidence that a certain document cannot be found is not sufficient grounds for a refusal of access to information. In such cases, the respective administrative body should provide evidence that the document has been destroyed after a decision by an expert commission; or that it had been archived and data had been given allowing it to be traced; or that it had been lost and a protocol verifying its loss had been issued.

The case was scheduled for judgment.

**Court Decision:**

With a decision on March 14, 2006, a panel of the Sofia City Court (SCC) repealed as unlawful the silent refusal of the Director of the NIS to provide the requested information and obligated the Director of the NIS to provide access to the requested information after applying the mandatory procedure for declassification of the information under the Protection of Classified Information Act (PCIA). The court found the objection of the defendant that he was not an obliged body under the provision of Art. 3 of the APIA unjustified, citing the provision of Sect.1, Item 1 of the Additional Provisions of the PCIA pursuant to which the NIS is identified as *security services*. However, in formulating that definition, the law does not exclude the competence of the body as a state body, stipulated by Art. 3 of the APIA, for which the obligation under the APIA was absent.

In relation to the arguments presented during the court proceedings by the representatives of the NIS regarding the reason why they claimed that access to the requested information should not be provided since it had been classified as a state secret, the court stated the following:

It was obvious from the evidence presented at the proceedings that on the first page of each of the requested documents there was a "Top Secret" stamp with dates of classification falling within the period of 1971 – 1979. Given the provisions of Art. 41, Para 4 of the APIA, the court was entitled to exercise control on the security stamp markings. The implementation of that provision had been hampered, since the body which had done the respective classification did not legally exist. The documents were issued by subdivisions of the former State Security Services, which did not fall under the list of *security services* in Sect. 1, Item 1 of the PCIA. The documents were created and classified as protected information before the PCIA came into effect. Therefore, in the current case the provision of Sect. 9, Item 1 of the Final and Transitional Provisions of the PCIA should be applied, under which the documents created before the law came into effect and marked with a "top secret" stamp were deemed marked with a "secret" classification level. The classification terms were calculated pursuant to Art. 34, Para. 1 of the PCIA and were counted from the creation of the documents. Consequently, all documents requested for the period 1971–1979 should be reviewed for expired terms under the PCIA: 30 years for documents stamped "top secret of particular importance," and 15 years for "top secret" documents.

The court found that no evidence was presented that the administrative body had fulfilled the requirement of Sect. 9, Para. 2 of the Final and Transitional Provisions, which stipulated that all heads of administrative structures are obliged to bring all documents containing classified information into compliance with the law and the regulations for its implementation within one year after the PCIA came into effect.

The provisions of Art. 34, Para. 3 of the PCIA stipulate that after the expiration of the above-stated terms for protection, the level of classification should be removed and access to the information should be realized under the procedures of the APIA. Art. 33, Para 2 of the PCIA stipulates that within one year after the expiration of the classification term, the information should be sent to the State Archive Fund.

According to the justices, the silent refusal by the Director of the NIS to provide access to public information should be repealed as unlawful and

the body should be obligated to provide the requested information on the grounds of Art. 41 of the APIA, following the legally prescribed procedure for declassification.

**Court Appeal:**

The decision of the SCC was appealed by the Director of the NIS before the SAC.

**Developments in the Court of Second Instance:**

In February 2007, the case was heard in a closed session and scheduled for judgment.

**Court Decision:**

In its decision, as of June 11, 2007, the Supreme Administrative Court (SAC) upheld the decision of the Sofia City Court (SCC) which had repealed the tacit refusal of the Director of the National Intelligence Services (NIS) to provide journalist Hristo Hristov access to documents related the murder of the Bulgarian dissident writer Georgi Markov. In its decision, the SAC rejected the arguments stated by the NIS in the court appeal. The justices assumed that the legislator did not exclude the NIS from the bodies obliged to provide information to the citizens under the Access to Public Information Act. The right of access may be subject to restriction if the requested information was classified. Even in those cases, the justices emphasized, citizens had the right to receive the requested information. In cases under Art. 34, Para. 3 of the Protection of Classified Information Act (PCIA), when the time period for the protection of classified information had expired, the status of classification should be removed. According to the justices, the Sofia City Court had rightly raised the question why, considering the existing circumstances, the information had not been submitted to the State Archive pursuant to Art. 33, Para. 2 of the PCIA. The argument of the NIS that the information was not public since foreign persons' interests were affected had been rejected. According to the court panel, the requested information was public since the requestor may have formed opinion about the activities of the security services during the socialist times. The court decision stated that it was not the obligation of the requestor to prove that the institution

held the requested information. Thus, the argument of the NIS that it had not been proved that NIS was the institution holding the documents was ungrounded. Even the contrary, it was the institution which best knew the kind, volume and form of the information which it held and should state that in its response to the requestor under the APIA.

The court file was classified as far as it contained classified documents provided by the NIS in the course of the proceedings.

The court decision is final.

**ACCESS TO INFORMATION**
**LITIGATION IN BULGARIA**
**2005 – 2008**

VOLUME 4

SELECTED CASES

**Authors:**
**Alexander Kashumov**
**Kiril Terziyski**

*English*

Editor *Michail Gochev*
Desing *Damyan Damyanov*
Typesetting *Nadezda Tosheva*
Layout *Bojidar Stoyanov*

Format 70/100/16 Quire 17

Ciela Soft and Publishing
bul. Patriarh Evtimii 80, Sofia 1463
tel/fax (02) 954 10 30
www.ciela.net
www.ciela. bg
e-mail: booksales@ciela.net
Printing centre – Ciela