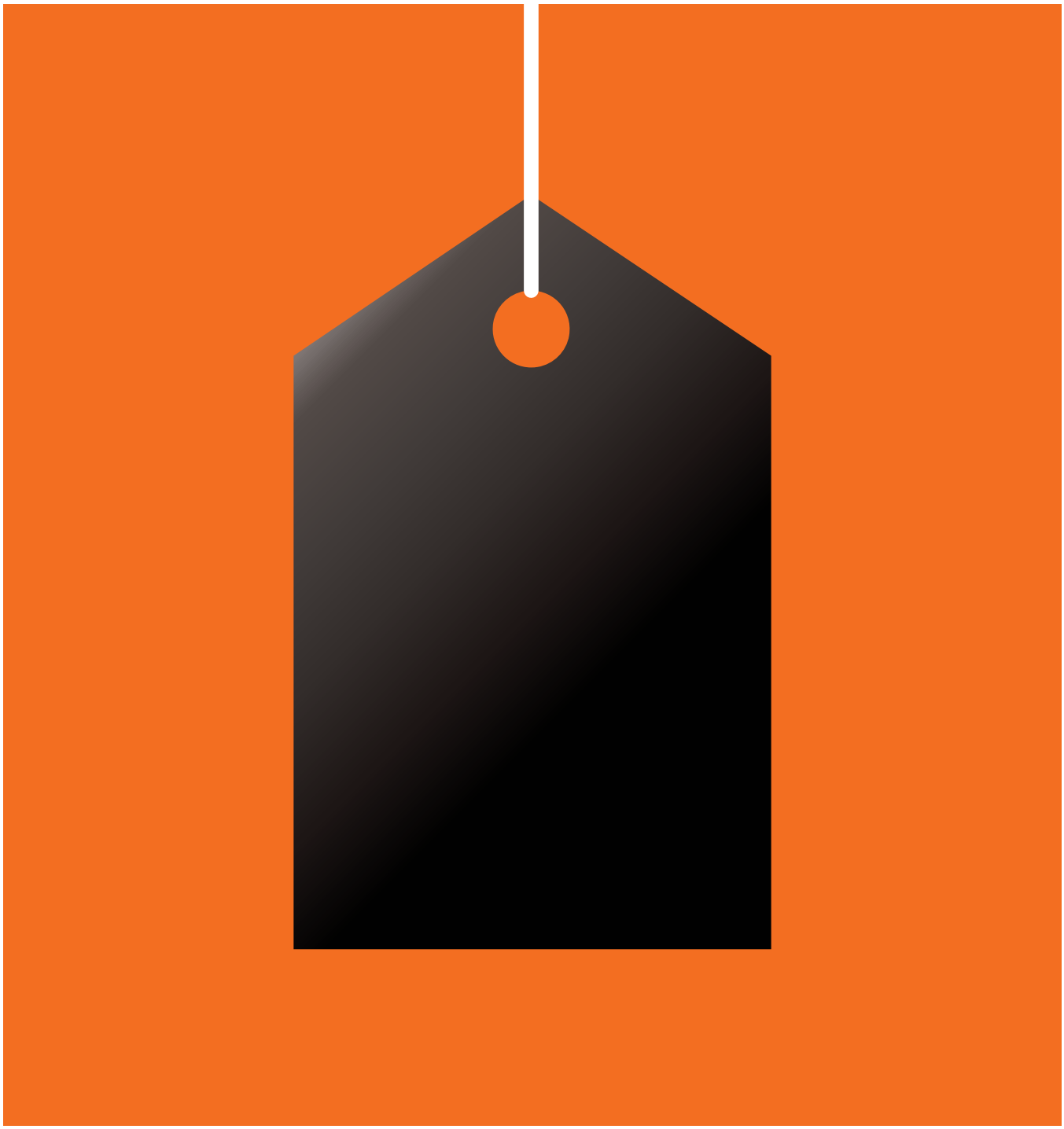

CASE STUDY

SECRECY AS A PRACTICE

CRTA:

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A monument to Stefan Nemanja was recently unveiled on the reconstructed Sava Square in Belgrade. The colossal monument, the work of a famous Russian sculptor, received a lot of public attention long before the works on its erection began. A question that a lot of Serbian citizens asked was, of course, its price. As the authorities did not publish the data on their own initiative, five professors of the Faculty of Philosophy decided to try to obtain information using the mechanism of free access to information of public importance. They addressed the Secretariat for Culture of the City of Belgrade and demanded that it make available to the public information on the costs of the entire competition procedure, construction, transport and erection of the monument, on companies and individuals engaged and on the dates of all contracts, as well as on the source of funding for those costs. Since they did not receive any response to their request within the legally prescribed deadline, they filed a complaint with the Commissioner for Information of Public Importance and Personal Data Protection. Only then, the Secretariat informed the Commissioner that it was unable act upon the request of the information seekers because the amount of the earmarked transfer was classified by the Government's conclusion from 2018 as confidential information[1]. The expert public reacted by stating that hiding the price of the monument from the citizens who had paid for it was not justified, primarily because in this particular case it could not be claimed that announcing the price would seriously damage the interest of the Republic of Serbia, which was necessary to declare a datum confidential in accordance with the Data Secrecy Law. Besides, the Budget System Law proclaims transparency as one of the principles and emphasises that it is the obligation of all bodies that have public funds to make this information available to the public and that they can only exceptionally withhold it for three reasons: national security, national defence and international relations. Although the justification for declaring this information confidential triggered numerous controversies, the Secretariat for Culture did not make an effort to act in accordance with the obligations arising from the Law on Free Access to Information of Public Importance when deciding on the Request for Access to Information, and to substantiate its allegations with evidence that the interest protected by confidentiality outweighs the interest of the public to know.

Hiding data on the value of monuments is the most current example, but it is actually just one in many examples of public authorities calling for the secrecy of data in a way that has no basis in law. This case sheds yet again light on a problem that the Commissioner has been constantly pointing out for more than fifteen years of his work. In the search for solution of this problem, different institutions at different levels of power have been setting the hurdles, in an orchestrated manner.

1 Nova.rs, *The government will be hiding the cost of the monument to Stefan Nemanja until 2023*, 24.11.2020. https://nova.rs/vesti/drustvo/vlast-krije-cenu-spomenika-stefanu-nemanji-do-2023-godine/

DATA CONFIDENTIALITY DENIES FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE

The right to information, and within it the right to access data kept by state bodies and organisations with delegated public powers, is guaranteed by article 51 of the Constitution of the Republic of Serbia. The Law on Free Access to Information of Public Importance further acknowledges this right and establishes a mechanism for its exercise. The right to free access to information is not an absolute right, but is subject to certain restrictions and exceptions, under conditions precisely determined by law.

The rights provided for in this Law may, in exceptional circumstances, be subject to limitations set out therein, to the extent necessary in a democratic society to prevent a serious violation of an overweighing interest based on the Constitution or law. In doing so, no provision of the Law may be interpreted in a manner that would lead to the abolition of a right recognised by the Law or to its restriction to a greater extent than the one permitted by the Law.

Rights, i.e. interests, the protection of which may be a reason for restricting the right to free access to information, are prescribed by the provisions of articles 9 and 14 of the Law and no right or interest other than those listed in these two articles of the Law can be grounds for denying the right to free access to information.

Denial of access to information can, therefore, occur only when the body, conducting the so-called public interest test, determines that all the conditions prescribed by law have been cumulatively met:

1. that one of the rights or interests prescribed in article 9 or 14 of the Law is opposed to the interest of the public to know;
2. that in order to protect that right or interest from a serious violation, it is necessary to restrict the right to access certain information, and
3. that the protection of that interest, according to the standards of a democratic society, prevails over the interest of the public to know.

One of the grounds for denying access to information is the one prescribed by the provision of article 9, paragraph 1, item 5) of the Law, which stipulates that the authority will not make available information or a document qualified by regulations or an official document based on the law as state, official, commercial or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and override the access to information interest.

Fifteen reports on the implementation of the Law on Free Access to Information of Public Importance have been published since the establishment of the institution of the Commissioner. In each of them, except for the 2016 report[2], the Commissioner quoted a reference to the confidentiality of documents as the most common reason why the authorities withheld the requested information. By doing so, the Commissioner has often pointed out that **public authorities invoke the confidentiality of data as a reason for withholding information in many cases without any or without relevant evidence proving any overriding interest that could be seriously harmed by disclosure, despite the fact that the Law imposes such an obligation on them**.

In their longstanding practice, the Commissioner has pointed out numerous decisions where the authority would deny access to the requested information by applying the provision of article 9, paragraph 1, item 5) of the Law, although in accordance with article 8, the authority was obliged to **prove fulfilment of the following two conditions:**

1. that it is an information or a document qualified by regulations or an official document based on the law as state, official, commercial or other secret, i.e. that such a document is accessible only to a specific group of persons,
2. that it is an information or a document the disclosure of which could seriously legally or otherwise prejudice the interests that are protected by the law and override the access to information interest, i.e. it is necessary to determine whether that interest would be seriously prejudiced by the access to information, **whereby we are not talking about a hypothetical possibility of prejudice but about an actual, genuine prejudice.**[3]

Ergo, the current Law on Free Access to Information of Public Importance does not recognise any absolute exception to the right to free access to information of public importance, not even the one that would refer to classified documents. Conversely, it obliges the authority to assess in each case the predominance of interests – the public's interest to know and the interests protected by confidentiality. Such an approach is in line with the Recommendation R (2002) 2 of the Committee of Ministers of the Council of Europe, which conditions the denial of access to an official document by the certainty of the occurrence of damage,

2 The percentage of requests that the authorities did not act on, pleading the confidentiality of data, was high in 2016 (27.75%), but in that year in most cases (37.8%) as a reason for refusing to provide information, the authorities stated abuse of rights by the petitioner. Read more in: Commissioner for Information of Public Importance and Personal Data Protection, *Report on the Implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection for 2016*, Belgrade 2017, 41.

3 Decision no. 071-01-3501/2017-03 dated 04.03.2019 of the Commissioner for Information of Public Importance and Personal Data Protection

but also by weighing the predominance of the public's interest to know.[4] The same concept is taken over in the Council of Europe Convention on Access to Official Documents 205 (2009).[5] The Convention, which entered into force on December 1st, 2020, was signed by Serbia on June 28th, 2009, but has not yet been ratified.[6]

RELATIVISATION OF THE RIGHT TO ACCESS INFORMATION OF PUBLIC IMPORTANCE THANKS TO THE PROVISIONS OF SPECIAL LAWS

In their practice, the Commissioner took the position that, in the matter of availability of information, **the Law on Free Access to Information of Public Importance takes precedence over all other laws restricting the right of access to information**.[7] This position is supported by the Joint Declaration of the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the Rapporteur for Freedom of Expression of the Organisation of American States from 2004.[8] Although non-binding, **the Declaration is explicit that, in case of inconsistencies, the law governing free access to information takes precedence over other laws.**

This is especially important in cases when the law regulating the matter of access to information is not the only law related to this right, but other laws (such as the law dealing with data secrecy) supplement the list of exceptions to access established by the Law on Free Access to Information, and consequently, restrict the right to free access to information – thus undermining the principle of full openness proclaimed by the Declaration.

The unified system for determining and protecting the confidentiality of data of interest to national and public security, defence, interior and foreign affairs of the Republic of Serbia is regulated by the Data Secrecy Law.[9] This law determines which information can be classified as secret (article 8); that the secrecy of data is determined by an authorised person and, by exhaustive enumeration, it is prescribed who are the persons authorised to determine the secrecy of data (article 9), as well as the procedure for determining the secrecy of data, secrecy markings, and time limit of secrecy (articles 10-16). Moreover, the law stipulates that an authorised person of a public authority shall declassify data or documents containing secret data, and enable the petitioner, i.e. the applicant, under the decision of the Commissioner for Information of Public Importance and Personal Data Protection, in appeal procedures or based on the ruling of the competent court in proceedings upon complaint, to exercise their rights, in accordance with the law regulating free access to information of public importance and the law regulating personal data protection (article 25).

In their reports drafted in recent years, however, the Commissioner singled out as a particular problem the fact that **the adoption of certain sectoral laws violated the unity of the legal order in relation to this matter, which significantly endangers the exercise of the right to access information.[10] As a matter of fact, in the course of 2018, the Law on Amendments to the Law on Defence and the Law on Amendments to the Law on Security Intelligence Agency were adopted, which prescribe absolute exceptions to the public's right to know in relation to certain categories of information, without the possibility of applying the public interest test. According to the Commissioner, in that way, the Ministry of Defence, the Army and the Security Intelligence Agency are practically excluded from the unified system of freedom of access to information, regulated by the Law on Free Access to Information of Public Importance.[11] Furthermore, The Commissioner also points to similar harmful provisions on confidential data referred to in article 45 of the previously adopted Law on Protection of Competition.**

As a state body, authorised to initiate proceedings for the review of constitutionality and legality, the Commissioner submitted proposals to the Constitutional Court in 2018 for the review of the constitutionality of these three laws.

4 Recommendation R(2002)2 Committee of Ministers of the Council of Europe dated February 21st, 2002, section IV, item 2. https://rm.coe.int/16804c6fcc

5 Convention 205 of the Council of Europe, article 3, item 2. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084826

6 The Commissioner also pointed out the postponement of the ratification of the Convention in their Report for 2019: *When it comes to international documents, the Commissioner once again points out that the Minister of Justice of the Government of Serbia signed in 2009 the Convention of the Council of Europe on Access to Official Documents dated June 18th 2009, but that the Government has not yet initiated the procedure for ratification of this Convention by the National Assembly. The significance of this Convention, when it enters into force, is that it would be the first general legally binding document of the Council of Europe regarding access to official documents, regardless of the fact that the Law on Free Access to Information of the Republic of Serbia in some segments provides a higher level of rights in comparison to the minimum imposed by the Convention, and which the Convention itself allows.*

7 Decision no. 071-01-3645/2019-03 dated 5. 12. 2019 of the Commissioner for Information of Public Importance and Personal Data Protection https://www.poverenik.rs/images/stories/dokumentacija-nova/Publikacije/9Publikacija/9Publikacija.pdf

8 Joint Declaration of the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the Rapporteur for Freedom of Expression of the Organisation of American States dated December 6th, 2004: https://www.osce.org/files/f/documents/6/f/38632.pdf

9 Data Secrecy Law "Official Gazette of the Republic of Serbia", no. 104/2009)

10 Commissioner for Information of Public Importance and Personal Data Protection, Report on the implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection for 2018, Belgrade 2019, 15.

11 Statement of the Commissioner for Information of Public Importance and Personal Data Protection dated June 14th, 2018 https://bit.ly/3towEyk

1. PROCEDURE FOR ASSESSING CONSTITUTIONALITY OF ARTICLE 102 OF THE DEFENCE LAW

Article 102, paragraph 1 of the Defence Law foresees that classified data pertaining to the defence system, marked as data of interest for the national security of the Republic of Serbia, as well as secret data emanating from the work of commands, units and institutions of the Serbian Army, the disclosure of which would cause damage to unauthorised persons shall be protected in accordance with the law governing the protection of data secrecy and **may not be made available to the public**.

In their proposal for the assessment of constitutionality[12], the Commissioner underlined that : *the manner in which article 102 of the Law on Defence, a priori, declares certain categories of data to be classified, represents a deviation from the unified system for determining classified data which is regulated by the Data Secrecy Law. At the same time, the absolute exclusion of the availability of this data to the public represents a deviation from both the Law on Free Access to Information of Public Importance and the Data Secrecy Law.*

The Commissioner pointed out that: *the Constitutional guarantee of the right to access information kept by state bodies and organisations with delegated public powers, pursuant to article 51, paragraph 2 of the Constitution, can only be achieved by consistent compliance with the Law on Free Access to Information of Public Importance, which, among other things, requires that in each individual case the relationship between the public interest to know and another legitimate interest, including the interest protected by the Data Secrecy Law be measured, and as well by consistent compliance with the Data Secrecy Law regarding the authorisation and procedure for determining the secrecy of certain data.*

On February 26th, 2019, the Constitutional Court issued a conclusion[13] rejecting the Commissioner's proposal. The proposal was rejected at the session of the Small Council of the Constitutional Court, on the basis of article 36, paragraph 1, item 5) of the Law on the Constitutional Court, as obviously unfounded.

Reasoning the conclusion, the Constitutional Court stated that: *the disputed provisions of article 102 of the Law on Defence are not in conflict with the constitutionally established right to information under article 51 of the Constitution, bearing in mind that access to data held by state bodies is guaranteed in accordance with law, which means that the law may exclude or restrict access to classified information relevant to the defence system of the state.*

2. PROCEDURE FOR ASSESSING CONSTITUTIONALITY OF ARTICLE 45, PARAGRAPH 4 OF THE LAW ON PROTECTION OF COMPETITION

In the Law on Protection of Competition[14] it is envisaged that, at the request of a certain participant in the procedure before the Commission for Protection of Competition, a measure of protection of data sources or of certain data may be imposed, if it is assessed that the interest of the petitioner is justified and significantly higher than the public interest in that matter. These are protected data, for which article 45, paragraph 4 of the Law on Protection of Competition stipulates that they **do not have the status of information of public importance in the sense of the law governing free access to information of public importance**.

This provision deviates from the definition of information of public importance, in terms of the Law on Free Access to Information of Public Importance, which defines it as information available to a public authority, created in the work or in connection with the work of public authorities, contained in a certain document, and it refers to everything that the public has a legitimate interest to know.

In the reasoning of their proposal[15], the Commissioner pointed that article 45, paragraph 4 of the Law on Protection of Competition, contrary to the Law on Free Access to Information of Public Importance, denies the character of information of public importance to the entire category of information available to the Commission for Protection of Competition and in that way absolutely denies the possibility of exercising the public's right to access this information. The Commissioner underlined that the disputed legal norm, depriving this information of the character of information of public importance, encroaches on the essence of the right to access information of public importance, guaranteed by article 51 of the Constitution and regulated by the Law on Free Access to Information of Public Importance. In the Commissioner's opinion, this is inadmissible from the point of view of the principle of unity of the legal order of Serbia, which requires that the basic principles and legal institutes provided by the law which systematically regulates one area of social relations be respected also, unless this system law explicitly prescribes the possibility of different regulation of the same issue. The Commissioner pointed out that, in this particular case, the systemic law (Law on Free Access to Information of Public Importance) stipulates that the right to free access to information may be subject only to the restrictions provided

12 Proposal for the assessment of constitutionality of Article 102 of the Law on Defence https://www.poverenik.rs/images/stories/dokumentacija-nova/pismaorganima/OcenaustavnostipredlogZakonoBIA_2.docx

13 Conclusion of the Constitutional Court IUz 165/2018 dated February 26th, 2018.

14 Law on Protection of Competition "Official Gazette of RS", no. 51/2009 and 95/2013.

15 Proposal for the assessment of constitutionality of article 45, paragraph 4 of the Law on Protection of Competition https://www.poverenik.rs/images/stories/dokumentacija-nova/pismaorganima/zastitakonkurencijePredlogneustavnost.docx

by that law, and suggested to the Constitutional Court that article 45, paragraph 4 of the Law on Protection of Competition is not in accordance with the Constitution.

The Constitutional Court rejected the Commissioner's proposal as obviously unfounded.

The Court did not adjudicate on the merits of this proposal, but while conducting the preliminary procedure, it once again observed the provision of a special law which derogates from the provision of the Law on Free Access to Information of Public Importance. As a matter of fact, the Court proceeded from the fact that *prescribing the protection of obtained data or protection of sources of such data, at the request of the person who submitted such data to the Commission for the procedure and on the basis of criteria established by law, is a special procedural measure envisaged for unhindered implementation of the procedure before the Commission, and concluded that, in this case, this constitutionally established right had not been violated, as the Constitution stipulates that the right to access data held by state bodies and organisations entrusted with public authority is exercised in accordance with the law, because the Law on Protection of Competition regulates the procedure before the Commission, and within that procedure a special procedural measure in order to protect the parties to the procedure, i.e. third parties who submitted certain information or documentation at the request of the Commission.*[16]

Judge Korhecz Tamás[17] presented the issue of the Constitutional Court's attitude towards the Commissioner, but also towards the entire concept of access to information of public importance, in a separate opinion. This separate opinion of course, does not change the position of the Constitutional Court set out in the Conclusion. Nevertheless, it clearly indicates that there is no unequivocal belief among the judges of the Constitutional Court that the Commissioner's claims are unfounded. Judge Korhecz referred primarily to the fact that the Constitutional Court rejected the Commissioner's proposal without deciding on the merits:

> *I am convinced that, if a state body specialised in the exercise and protection of the right to information of public importance, which has been developing its administrative and professional capacities in this narrow field of human rights protection for a decade, submits a proposal to the Constitutional Court, that proposal deserves to be thoroughly and seriously considered by the Constitutional Court, an independent state body whose basic, constitutionally defined function is the protection of human and minority rights and freedoms, as well as the protection of constitutionality and legality.* ***Rejection of the proposal of the specialised ombudsman due to the obvious unfoundedness of the proposal represent for me an unacceptable attitude towards the Commissioner.***

Presenting his position on the issue of compliance of article 45, paragraph 4 of the Law on Protection of Competition with the entire legal regime of information of public importance, the judge made the following observations:

> *By analysing and interpreting the provisions of the Law on Free Access to Information of Public Importance [...] we can unequivocally conclude that* ***the Law on Free Access to Information of Public Importance is a systemic law which comprehensively regulates one legal area in this case the legal regime of information of public importance and the manner of exercising freedom of access to information of public importance****. [...] According to the interpretation and understanding of the Constitutional Court of the Republic of Serbia, the constitutional principle of unity of legal order implies mutual harmonisation of all legal regulations within the legal system of the Republic of Serbia, which in principle excludes the possibility that the law governing one legal area may change or supplement certain legal solutions contained in the law governing another legal area.*

The judge ended his words holding position that: article 45, paragraph 4 of the Law on Protection of Competition exempted an entire category of data of public interest from the regime prescribed by the Law on Free Access to Information of Public Importance, including protection provided by the Commissioner. With this, ***the legislator violated the principle of unity of the legal order from article 4 of the Constitution, but also restricted the constitutionally guaranteed human right from article 51, paragraph 2, contrary to the principles from articles 18 and 20 of the Constitution****.*

16 Conclusion of the Constitutional Court IUz 185/2018 dated April 25th, 2019.

17 Separate opinion of the judge *Korhecz Tamá PhD*, in relation to the Conclusion of the Constitutional Court IUz – 185/2018 dated April 25th, 2019.

AMENDMENTS TO THE LAW ON FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE

In March 2018, the Ministry of State Administration and Local Self-Government opened a public debate on the Bill on Amendments to the Law on Free Access to Information of Public Importance. The focus of the debate was put on the provisions that threatened to exempt a large number of companies with majority state capital from the obligations provided by the Law, as well as on the provisions that enabled the authorities to initiate an administrative dispute against the Commissioner's decision. The next version of the Bill, submitted to the Commissioner in December 2018, provided for the exclusion of the National Bank of Serbia from the competence of the Commissioner. More precisely, it foresees that the seeker of the information seeks protection against the decision of the National Bank of Serbia, or in case that the NBS fails to proceed in accordance with the demand, uniquely before the Administrative Court. In the following months, the Ministry did not provide any information on the work on the Bill, and in November 2019, the Information on the work on amendments to the Law on Free Access to Information of Public Importance was published[18], accompanied by the document: An overview of the provisions that are changing in the Law on Free Access to Information of Public Importance.[19] It is the document that is not named *Bill* and that has never been discussed during an organised public debate. Nonetheless, in this document, the amendment of article 9, paragraph 1, Item 5) of the Law has been approached in a completely new way. In other words, according to the latest Decision made available to the public by the Ministry, the authority will not allow the applicant to exercise the right of access to information of public importance: *if it makes available information or a document for which regulations or an official act based on the law stipulate that it be kept as secret information or represent a business or professional secret, i.e. which is available only to a certain circle of persons*, **while the following part of the norm from the Law in force is deleted**: *and the disclosure of which could have serious legal or other consequences for the interests protected by law that outweigh the interest in access to information.*

If this solution were to be adopted, when rejecting a request for access to information on the grounds of confidentiality, public authorities would be released from the obligation to prove in each case that the submission of information would cause real damage to the interests protected by law.

Following the review of provisions that amend the Law on Free Access to Information of Public Importance, it has been envisaged to add a new provision that foresees the following: *if a datum is kept secret or represents a business or professional secret, the reasoning of a decision shall contain all the reasons due to which the datum is determined as secret information, i.e. business or professional secret, unless the marking 'classified' has been determined by another body.* However, such a solution cannot adequately replace the existing obligation to prove **serious consequences for the interests protected by law that outweigh the interest in access to information that would arise from the disclosure of information**.

Nevertheless, it is important to note that the process of drafting was suspended until the end of 2020 when it was announced that a Working Group would soon be created and that it would deal with amendments to the Law. In the middle of January 2021, the Working Group started working on the Bill, and the mentioned Review of Provisions was used as a starting point for its work. At this moment, the public does not have access to the data on the manner in which the announced changes to the provision of article 9, paragraph 1, item 5) of the Law were approached.

18 *Ministry of State Administration and Local Self-Government, Information on the work on amendments to the Law on Free Access to Information of Public Importance, November 5th, 2019*: http://mduls.gov.rs/javne-rasprave-i-konsultacije/informacija-o-radu-na-izmenama-i-dopunama-zakona-o-slobodnom-pristupu-informacijama-od-javnog-znacaja/

19 An overview of the provisions that are changing in the Law on Free Access to Information of Public Importance: http://mduls.gov.rs/wp-content/uploads/Pregled-odredaba-koje-se-menjaju-zakon-o-slobodnom-pristupu-informacija-od-javnog-znacaja.docx

THE CULTURE OF SECRECY IN THE PUBLIC SPHERE

Back in 2013, the European Court of Human Rights recalled that national authorities should take active steps to address the culture of secrecy that continues to prevail in public sector in many countries, including the provision of sanctions for those who deliberately prevent access to information.[20] However, few institutions in Serbia have genuinely dealt with the culture of secrecy.

If we look back at the example of withholding the information on the costs of the monument to Stefan Nemanja, we can see that the deputy mayor of Belgrade also expressed his position on this case, stating that the price of the monument is not secret and that the price was not revealed at the sculptor's request, announcing that after the completion of the monument and the permission of the sculptor, the price will be announced. Reacting to this deputy mayor's statement, the Commissioner actually wrapped up the entire issue of access to information in Serbia: I have no insight into the contract. That Vesić's statement should not be the reason for denying information. **The other question is how to get that information**.[21]

The question posed by the Commissioner most vividly shows the extent to which the effective implementation of the Law on Free Access to Information of Public Importance implies the cooperation of various institutions. The decisions of the Commissioner remain only a dead letter whenever the Government fails to help enforcing those decisions, whenever the Administrative Inspection does not submit a request to initiate misdemeanour proceedings or whenever the Misdemeanour Court allows the procedure for violation of that law to become obsolete. The problem gets more complicated when the National Assembly adopts special laws the provisions of which derogate from those of the Law on Free Access to Information of Public Importance, when the Constitutional Court does not deign to consider the Commissioner's proposals on the merits, or when the Ministry of State Administration and Local Self-Government proposes amendments to the laws that make the rights to free access to information meaningless. Practice has shown that: whoever is the weak link in this chain, they will not bear adequate responsibility for denying citizens the constitutionally guaranteed right to access information of public importance.

20 The position of the European Court of Human Rights, stated in the judgment dated 25.6.2013. in the case "Youth Initiative for Human Rights" verus Serbia, according to petition no 48135/06.

21 Nova.rs, *A sculptor cannot hide the price of a monument*, 28.01.2020. https://nova.rs/vesti/politika/ne-moze-vajar-da-sakrije-cenu-spomenika/