

Colliding Effects of Freedom of Access to Information and Personal Data Protection

Efekti kolizije između slobode pristupa informacijama i zaštite ličnih podataka

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Abstract: Significant efforts were taken in BiH in the adoption of legislation guarantying the rule of law and human rights. In the framework of this activity the Law on Freedom of Access to Information and the Law on Personal Data Protection were adopted. Unfortunately, practice in some cases shows present of conflict in implementation of those two laws. The most recent example is the case in which the Personal Data Protection Agency of Bosnia and Herzegovina conducted the administrative proceedings against the Prosecutor's Office and the Court of Bosnia and Herzegovina for handling of personal data of accused and convicted persons at their official web-sites. As a result of these proceedings, The Personal Data Protection Agency adopted a decision warning the Prosecutor's Office and the Court of BiH to refrain from such illegal complainant's data handling and asking them to block personal data of all the persons comprised in the indictments and court decisions posted on its official web-site. This paper analyzes the consequences of the action of the Agency for Protection of Personal Data from perspective of international human rights standards and international jurisprudence and its impact on the justice, rule of law and human rights in the judicial sector.

Keywords: free access to information, protection of personal data, public interest, test of public interest, prosecutor office, court.

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Sažetak: U BiH su učinjeni značajni naponi u usvajanju zakona kojim se osigurava vladavina prava i ljudska prava. U okviru ove aktivnosti usvojen je Zakon o slobodi pristupa informacijama i Zakon o zaštiti ličnih podataka. Nažalost, praksa u nekim slučajevima pokazuje postojanje sukoba u primjeni ova dva zakona. Najnoviji primjer je slučaj u kojem je Agencija za zaštitu osobnih podataka u Bosni i Hercegovini sprovela upravni postupak protiv Tužilaštva i Suda Bosne i Hercegovine vezano za upravljanje osobnim podacima optuženih i osuđenih osoba na svojim službenim web-stranice. Kao rezultat ovog postupka, Agencija je donijela odluku kojom je upozorila Tužilaštvo i Sud BiH da se suzdrže od nezakonite obrade ličnih podataka optuženih, te im naložila da blokiraju osobne podatke svih osoba koje se nalaze u optužnicama i sudskim odlukama objavljen na njihovim službenim web-stranicama. U ovom radu su analizirane posljedice postupanja Agencije za zaštitu osobnih podataka iz perspektive međunarodnih standarda ljudskih prava i međunarodne sudske prakse, te njen uticaj na pravdu, vladavinu prava i ljudskih prava u pravosudnom sektoru.

Ključne riječi: sloboda pristupa informacijama, zaštita osobnih podataka, javni interes, test javnog interesa, tužilaštvo, sud.

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1. Introduction

Considerable efforts have been made in Bosnia and Herzegovina to adopt legislation that guarantees the rule of law and respect for human rights. As part of these activities, the Law on Freedom of Access to Information was adopted in 2000, and the Law on Personal Data Protection in 2006. Unfortunately, practical experiences have shown that in certain cases there is an opposition of rights set by these two laws. The most recent example is a case where, in 2010, the Personal Data Protection Agency of Bosnia and Herzegovina initiated proceedings against the Office of the State Prosecutor of Bosnia and Herzegovina, in relation to personal data of persons indicted or convicted, presented at the official web-site of the State Prosecutor, and issued a Decision stating that *“The Office of the State Prosecutor of BiH is hereby advised to refrain from unlawful processing of personal data of the applicant at the official web site, and to block personal data of all persons whose personal data are contained in indictments and judgements published at the official web site”*. As regards the State Court of Bosnia and Herzegovina and this issue, the Agency did not conduct administrative proceedings, but instead issued an Opinion No. 03-1-37-1-51-6/10 of 25 March 2010.

2. Legislative framework

In order to understand the context within which the Personal Data Protection Agency acted, it is necessary to indicate the legislative framework, which includes, in particular, relevant provisions of the Law on Freedom of Access to Information, the Law on Personal Data Protection, and the Criminal Procedure Code.

2.1. Law on Free Access to Information

The Law on Freedom of Access to Information prescribes that *“information under the control of a public body is public good of value and public access to such information promotes greater openness and accountability, and all such information are necessary in a democratic process”*. The Law further states that: *“every person shall have the freedom of access to information to the greatest possible extent, pursuant to public interest, and public bodies have a corresponding obligation to publish information”*.

The Law sees personal information as *“information related to a natural person*

who can be identified directly or indirectly through facts such as, but not limited to, identification number, or physical, mental, economic, ethnic, religious, cultural, or social identity of that person”.

Provisions of this Law also prescribe that *“legal acts adopted following this Law and whose aim is not to change this Law shall not limit any of the rights and duties set by this Law.”*¹

Pursuant to this Law, every natural and legal person has the right of access to information under the control of a public body, and every public body has a corresponding obligation to publish such information. This right of access is subject only to formal actions and restrictions, regulated by law as such. Therefore, a competent authority may decide on exceptions from publication, on the basis of examination of each individual case and in relation to functions of public bodies, in relation to confidential commercial information and in cases of protection of privacy, including cases where personal information requested contains information related to the privacy of a third party. Prior to taking a final decision at the level of a public body, once information has been confirmed to be within the category of exceptions from freedom of access to information, and in order to prevent any abuse of such exceptions when they are not justified, the Law on Freedom of Access to Information requires that a “public interest test” must be conducted in each individual case.

In cases when a public body decides that a piece of information may be an exception and that certain damage may be caused by its publication – it should publish such information if it believes that the publication of such information would generate greater benefit for the society. When deciding whether publication is justified by public interest, the public bodies must take into account the facts as well as the circumstances, in order to ascertain if the information contains any evidence of failure to observe legal obligations, unauthorised use of public funds, threat to health or safety of individuals, the society or the environment, and then treat the presence of these factors in such a way so as to give preference to publication.

The right of access to information should be observed in light of the fact that this right ensures transparency, openness and accountability in the work of

¹ Article 26, Para 4, Law on Freedom of Access to Information. Official Gazette of Bosnia and Herzegovina, No: 28/00, 45/06, 102/09 and 62/11.

institutions on all the levels of governance. At the same time, it allows natural and legal persons to reach more easily any information they need in order to exercise their rights and needs, it gives the country its advanced, democratic, and liberal legitimacy, and it increases the possibility for the public to control the work of institutions and all the holders of public office. This reduces the room for unlawful or irresponsible management of institutions, and ultimately strengthens civic and public trust in the institutions, holders of public office and administration. It arises from this that the main goals of the Law on Freedom of Information are:

- To ensure greater transparency and openness of the work of public bodies and their greater accountability in their work and decision-making; this ensures accountability of public bodies in relation to the citizen and the public, and work in compliance with the will of the citizens who elect them and whose revenues finances the work of public bodies;
- To improve democracy by promoting public participation in decision-making, since citizens cannot participate in social interaction unless they have information on what public bodies do and how; by securing access to information, they are given a possibility to control and evaluate the work of public bodies;
- To contribute to the overall efficiency in decision-making and more rational public spending;
- Freedom of access to information contributes in combating corruption and nepotism; it prevents negative phenomena in the society, and bad management in public bodies.

2.2. Law on Protection of Personal Data

At the same time, the Law on Personal Data Protection is aimed at securing for all persons in the territory of Bosnia and Herzegovina adequate protection of their human rights and fundamental freedoms, and in particular the right to protection of the processing of data related to them. The Law defines personal data as any information related to a natural person that allow for identification of that person, whereas the holder of the data is a natural person whose identity can be established or identified, directly or indirectly, on the basis of a personal identification number and one or more factors specific to their physical, physiological, mental, economic, cultural, or social identity.

Article 6 of the Law on Personal Data Protection provides that the controller (data processor) may process data without explicit approval of the holder

of such data, provided that certain conditions have been met. Some of those conditions are, inter alia, that the controller processes personal data in compliance with the law, or if the processing is necessary in order to exercise legally prescribed powers, or if personal data processing is required to fulfil tasks performed in public interest, or is necessary for the protection of legal rights and interests exercised by the controller or the user, and if such personal data processing is not contrary to the right of the data holder to protect his/her own private and personal life.

Pursuant to the Law, the data controller may not give personal data to any user without previous notification to the data holder, and such data may be disclosed to a third party with no approval by the holder, if such disclosure is in public interest.² Also, the holder of the data may not exercise the right to block or destroy personal data if the controller is obliged to process the data under special legislation or if such action would breach the rights of third parties. Personal data processing for the purpose of journalism, artistic or literary expression, shall be exercised in compliance with special legislation and codes of conduct.³

The controller is not obliged to provide notifications on personal data processing, if the data is processed purely for the purpose of statistics, scientific research, or archiving, or if the controller's duty to process the data arises from the law, or if such data is necessary for exercising legally prescribed rights and duties.

Once the holder of the data has established or suspects that the controller or the data processor have violated his/her rights or that there is a direct threat of such a violation, he/she may file a complaint with the Agency in order to ensure the protection of his/her rights. The Agency is an autonomous administrative organisation established for the purpose of personal data protection. The complaint is resolved through a decision of the Agency, forwarded to the application and the controller. Pursuant to the Law on Personal Data Protection, the Personal Data Protection Agency is obliged to secure supervision of implementation of the Law and other legislation on personal data processing, to act on complaints by data holders. At the same time, the Law prescribes that its provisions are to be taken into account in the application of the Law on Freedom of Access to Information.⁴

² Article 17 of the Law on Personal Data Protection, Official Gazette of Bosnia and Herzegovina, No:49/06, 76/11 and 89/11

³ *Idem*, Article 19.

⁴ *Idem*, Article 54.

2.3. Law on Criminal Procedure

In addition to these two laws, the Office of the State Prosecutor of BiH⁵ and the State Court⁶ of BiH base their work on the Criminal Procedure Code⁷, which sets the principle of publicity as one of the basic principles – this is, of course, in reference to general public. The public nature of hearings includes the possibility of attending hearings and publication of judgements in the media. Unlawful exclusion of the public from a main hearing is a significant violation of criminal proceedings.

2.4. Action of Prosecutor Office and Court

In light of the above, within the context of BiH legislation, pursuant to the Law on Freedom of Access to Information, the Office of the State Prosecutor and the State Court can be said to be public bodies that hold information of public interest and are obliged to secure access to information. At the same time, pursuant to the Law on Personal Data Protection, the Office of the State Prosecutor and the State Court of BiH are data controllers. This relates in particular to the data contained in the acts issued by the Office of the Prosecutor and the State Court, such as indictments, judgements or other acts. Article 6 of the Law on Personal Data Protection allows the controller to publish data without explicit consent of the data holder in cases of personal data processing in compliance with the Law or when such processing is necessary in order to fulfil legally prescribed duties and competences, or when necessary in the performance of duties that are in the public interest, and such personal data processing is not in breach of the rights of data holders to protect their private and personal life.

As for the data of the above mentioned applicant who complained to the Personal Data Protection Agency, the Office of the Prosecutor and the Court of BiH processed her personal data in compliance with the Criminal Procedure Code, and such processing is necessary for the Court and the Prosecutor to be able to execute their authority in prosecuting criminal offences, as prescribed by the Law on the State Prosecutor and the Law on the State Court. It is clear that such processing is

⁵ The Law on the Prosecutor's Office, "Official Gazette of BiH", No. 49/09 - Revised text and 97/09

⁶ The Law on the Court of BiH, "Official Gazette of BiH", No. 49/09 - Revised text, 74/09 and 97/09

⁷ "Official Gazette of BiH", No.3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10 and 47/14

necessary in order to administer justice, which is a task of public interest. Since the case related to a person of legal age who was under reasonable suspicion of having committed a criminal offence and was thus indicted, and other data did not indicate that personal data processing by means of publishing an indictment would in any way threaten her private or personal life, the State Prosecutor and the State Court of BiH acted in compliance with the Criminal Procedure Code and the Law on Freedom of Access to Information, and Article 6 of the Law on Personal Data Protection.

3. Action of the Personal Data Protection Agency

In the given case from 2010, the Personal Data Protection Agency reacted to this action by the State Prosecutor and the State Court acted on the basis of the complaint by a citizen, and initiated an administrative procedure against the State Prosecutor, and eventually issued a decision which said that *“the Office of the State Prosecutor of BiH is hereby advised to refrain from unlawful processing of the applicant’s personal data on the official web site, and to block personal data of all persons whose personal data are contained in indictments and judgements published on the official web site”*. No appeal is possible against this decision of the Agency, and the only recourse is an administrative dispute in front of the BiH Court.

At the same time, in relation to the State Court of BiH and the same case, the Agency did not conduct an administrative procedure, but rather issued an opinion No.: 03-1-37-1-51-6/10, dated 25 March 2010, elaborating that *“this opinion wishes to achieve the aim of implementing the protection of the right to privacy in relation to the processing of personal data of persons whose data are published on the official web site of the State Court”*. However, it is interesting to note that the competence for the administrative dispute related to a decision of the Agency rests with the State Court, which is exactly the reason why the Agency issued an opinion and not a decision. In its opinion the Agency requested the State Court to *“issue or initiate the adoption of regulations that would set the rules of anonymity of personal data in indictments and judgements published on the official web site”*. Thus, in one and the same situation with the same party and in relation to two different institutions, the State Prosecutor and the State Court, the Agency adopted two formally different legal acts with identical content.

The Personal Data Protection Agency based its actions primarily on Article 4 of the Law on Personal Data Protection, which states that the controller is obliged

to process personal data fairly and lawfully, and that personal data collected for specific, explicit and lawful purposes must not be processed in any way that may not be in compliance with such purposes, and to process such data only to the extent necessary to reach a particular aim.

It seems that from the point of view of actions of the State Prosecutor and the State Court in the given case, there is an issue of relevance of this provision, because the Prosecutor and the State Court processed personal data fairly and lawfully, in compliance with the Criminal Procedure Code, and they did not process the data in any way that may be in breach of the purpose of criminal proceedings. The data was processed only to the extent necessary to reach the aim of criminal proceedings. So, in the given case, there can be no reference to a new data processing that is not in relation to criminal proceedings, but rather the execution of another legal obligation of the State Prosecutor and the State Court, arising from the Law on Freedom of Access to Information and the Criminal Procedure Code, i.e. to inform the public about cases of greater public interest. The citizens have the right to know about who are the persons threatening public order by committing criminal offences, since publication of judgements is a form of prevention, which sends a clear message to the public as to what type of conduct is forbidden in the society. At the same time, publication of decisions of the State Prosecutor and the State Court gives their work greater transparency, increases their effectiveness, and improves their communication with the public. It should not be neglected that there is an effect of such publication on the victims of criminal offences. Publication of court rulings influences public awareness in relation to consequences of criminal offences and the fairness of punishment of the perpetrators.

Of course, in all this, one should not neglect the need to protect an individual perpetrator, whose rights are clearly set by the Criminal Procedure Code and which follow the principles set by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention).

In the given case, the applicant complained to the Personal Data Protection Agency for unlawful processing of her personal data by the State Prosecutor and the State Court of BiH, which is why the Agency issued a decision and an opinion, requesting these institutions to refrain from unlawful processing of the applicant's personal data on the official web page, and to block personal data of all persons

whose personal data are contained in indictments and judgements published on the official web page.

It seems that in the given case, the Agency stepped outside the scope of decisions only on the basis of complaints filed, since the decision did not refer solely to the protection of personal data of the applicant, but also included personal data of any person that may be contained in indictments and judgements. Therefore, while acting on the basis of an individual complaint, the Agency issued a general act that sets the treatment of an unspecified group of individuals, although the complaint itself did not request it. However, the actual rights of the applicant and the manner in which they were violated by their publication in official decisions of the State Prosecutor and the State Court – remain unspecified.

4. Significance and the Role of the Public Interest Test

Publication of court decisions is a matter of public interest and if there is a requirement to protect personal data of persons indicted or convicted in the interest of their privacy, which includes their personal data, then the competent authority is obliged to specify exceptions. Prior to any final decision at the level of the public authority, once it is decided that a particular piece of information falls within the category of exceptions from free access to information, to prevent the use of such exceptions when it is not necessary, the Law on Freedom of Access to Information requires that a “test of public interest” is conducted in each individual case. However, one should not disregard the possibility that when a public authority decides that a piece of information may be subject to exceptions and that its publication may cause certain damages, the information may have to be published if it is evident that its publication would achieve greater benefit for the society.

When deciding if publication is justified by public interest, the public authority must take into account the issue whether such information contains any evidence on the failure to observe legal obligations, unauthorised spending of public funds, threat to health and safety of individuals or the environment, and treat the presence of such factors in such a way so as to give preference to publication of such information. In the given case, it is exactly the type of information related to the safety of individuals and the society at large, since the information contains data related to a criminal offence and its perpetrator. This fact is indeed a factor that gives preference to publication, even if such information could be treated as an exception.

In the given case, there is clearly a conflict between the right of an individual seeking protection of personal data which are an integral part of a court document confirming unlawful action by this individual that the public should know about. So, there is clearly public interest. The media are usually the transmitter of such information between the public authority and the citizens, which requires the public authority to provide the media with such information, in compliance with its competences and duties as a public authority, since the courts are the safeguards of justice and play a fundamental role in any state with the rule of law, which is why they must ensure public confidence.

5. Practice of the European Court for Human Rights

This issue can also be observed in light of Article 10 of the European Convention, which guarantees the right to freedom of expression, including the right to freedom of thought and the right to receive and transmit information and ideas with no interference from public authorities and regardless of frontier.

Freedom of expression is one of the foundations of democratic society and one of the basic preconditions for its progress and development. With conditions set by paragraph 2, Article 10 is applicable not only to “information” and “ideas” received positively or considered inoffensive or caused by ignorance, but also to those information that insult, shock or disturb the state or one segment of the population. Those are the requirements of pluralism, tolerance and broadmindedness, without which there can be no “democratic society”.⁸

Furthermore, the European Court of Human Rights (hereinafter: the European Court) indicates that “it is not sufficient to have the freedom to receive and give information; access to technical means is equally important”.⁹ This means that Article 10 is not only applicable to the content of information, but also the means of transmitting or receiving such information, and any restriction imposed on such means is an interference with the right to receive or transmit information. In relation to the given case, the Personal Data Protection Agency set a restriction on transmission of information by means of a web site.

⁸ In *Handyside v. UK*, the Court underscored the fundamental nature of the freedom embodied in Article 10 (7 December 1976, Series A no. 24, p. 23, para. 49).

⁹ *Autronic AG*.

Article 10 of the European Convention brings with it certain duties and obligations, which is why it may be subject to certain formalities, conditions, restrictions and sanctions, as set by law and necessary in a democratic society, but only in the interest of national security, territorial integrity or public safety, and for the purpose of preventing public disorder or crime, and to protect health and morals, to protect reputation and the rights of others, or to prevent disclosure of information received in confidence, or to maintain authority or impartiality of the judiciary. It is important to underline that there is an obligation to ensure that such restrictions must be “prescribed by law”, as well as “necessary” and for the purpose of achieving one of the aforementioned “legitimate aims”.

If we examine the given case, we can see that the restriction on publication of acts by the State Prosecutor and the State Court that contain personal data of persons indicted or convicted by the Court is not as such prescribed by law; instead, such a restriction is based specifically on the measure issued by an administrative organisation for personal data protection. The Parliamentary Assembly of BiH as the state legislature has never considered this issue or taken a position on it, which would certainly be an important element, since it was this body that adopted the Law on Freedom of Access of Information and the Law on Personal Data Protection, which are clearly in collision when applied. This situation causes confusion among the public and creates legal uncertainty. This is particularly important from the point of view of victims, who thus see that the state is more concerned with the protection of persons who commit crimes, rather than with the issue of protection of victims of those crimes.

As for the need to have a legal basis, one can refer to a judgement by the European Court in the case of *Vgt Verein Gegen Tierfabriken v. Switzerland* of 28 June 2001,¹⁰ where the Court refers to its own case-law and states that the phrase “in compliance with the law” requires not only that the disputed measures must have a basis in domestic legislation, but also refers to the quality of such legislation, asking that it should be accessible to the person it affects, and to be predictable in terms of the consequences it may cause. There is an obligation under Article 10, paragraph 2, that interference with the freedom of expression must be “prescribed by law”, similar to the obligation contained in Article 5, paragraph 1 of the European Convention, whereby any deprivation of liberty must be “lawful”.¹¹

¹⁰ Application no. 24699/94, para. 52.

¹¹ *Öztürk v. Turkey*, judgement, 28 September 1999, *Reports* 1999-VI, paras 51-57.

As stated by Article 10 of the European Convention, freedom of expression is subject to exceptions which, on the other hand, must be set strictly, and the need for any such restrictions must be set convincingly.¹² For the purpose of Article 10, paragraph 2 of the European Convention, necessity implies the existence of a “pressing social need”. Contracting parties have a certain margin of appreciation when deciding whether such a need exists, but this goes together with European supervision, which includes the law and the decision that implements it, even when such a decision is made by an independent tribunal.¹³

Therefore, the act issued by the Personal Data Protection Agency did not seem to contain the necessity required by Article 10, paragraph 3 of the European Convention, nor was it based on a law; instead, it was issued on the basis of free assessment in the application of the Law on Personal Data Protection. This raises the issue whether the interference was “proportional to the legitimate aim sought to be achieved” and whether the reasons offered as justification were “relevant and sufficient”.¹⁴

The Personal Data Protection Agency justifies its interference with freedom of expression with the need to protect personal data of the applicant, published on the official web site of the State Prosecutor and the State Court of BiH. However, in its administrative act, the Agency did not request the Prosecutor to remove the personal data of the applicant contained in the indictment, but rather warns the Office of the Prosecutor to refrain from unlawful processing of the applicant’s personal data, and to block personal data of any person whose personal data are contained in indictments and judgements published on the official web page”. It arises from this that the Agency itself assessed that the Prosecutor and the Court processed the data unlawfully, although the processing itself was done pursuant to the Criminal Procedure Code and Article 6 of the Law on Personal Data Protection. The actual basis for the Agency, as an administrative organisation, to make an evaluation that the State Prosecutor and the State Court acted unlawfully remains unclear and unresolved, particularly in light of the fact that it is the State Court that

¹² *Handyside v. UK*, judgement, 7 December 1976, Series A no. 24, p. 23, para

49 *Lingens v. Austria*, judgement, 8 July 1986, Series A no. 103, p. 26, para. 41; and *Jersild v. Denmark*, 23 September 1994, Series A no. 298, p. 23, para 31.

¹³ *Lingens*, judgement, p. 25, para. 39.

¹⁴ *Lingens*, judgement, pp. 25-26, para 40, and *Barfod v. Denmark*, judgement, 22 February 1989, Series A no. 149, p. 12, para 28.

is competent to examine complaints in administrative disputes against decisions of the Agency itself.

Therefore, on one hand there is the requirement advocated by the Personal Data Protection Agency, to protect personal data of the applicant, irrespective of the public interest and without conducting a public interest test, asset by the Law on Freedom of Access to Information, since this Law is obligatory for the Agency itself. On the other hand, there is the requirement of public interest in keeping the public informed about the work of the Prosecutor and the Court as an important instrument of transparency, significant for a democratic society. In its action, the Agency failed to demonstrate the existence of proportionality between the applicants's right to personal data protection and the right of the public to receive information about the work of the Prosecutor and the Court, commission of crimes and actions taken against their perpetrators, which is important from the point of view of prevention. This action by the Agency as an administrative organisation questions the independence of the judiciary and is in itself a direct interference with their work. According to the European Court, it is generally accepted that courts cannot operate in a vacuum.

6. Conclusion

Although they are forums for resolving disputes, this does not mean that such disputes cannot be discussed prior to resolution, be it in specialised publications, in the general press or in the public. Furthermore, although mass media must not cross the boundaries imposed by the interest of proper administration of justice, it is their job to transmit information and ideas that come before the court, same as in any other area of public interest. Not only are the media tasked with transmitting such information and ideas, but also the public has the right to receive them. This position was elaborated in the European Court's judgement in the case of *Sunday Times v. UK* (no. 1) of 26 April 1979, Series A no. 30. The Court indicated that the victims' families had the right to information, or rather that they had [...] a vital interest to find out all the basic facts and possible resolutions. They could have been deprived of such information, which were crucial to them, only if it was almost absolutely certain that the provision of such information was a threat to the "authority of the judiciary", which in the given situation was not the case.

When speaking about proportionality in issues of protection of individuals in relation to public interest, it is important to underscore the case *Goodwin v United Kingdom*¹⁵ where the Court did not reach a conclusion that the unquestionable interest of Dr. R. to protect his professional reputation was sufficient to outweigh the important public interest for the press to have the freedom to transmit information of legitimate public interest. In short, the reasons offered by the respondent state, however relevant, were not sufficient to demonstrate that the interference complained of was “necessary in a democratic society.” The Court held that there was no reasonable proportionality between the restrictions imposed by the High Court’s measures on the applicant’s right to freedom of expression and the legitimate aim sought.

Therefore, the principal obligation of the state pursuant to Article 10 is to refrain from unlawful interference with the enjoyment of the right to freedom of expression, which includes prohibition to distribute information. Greater weight needs to be given to the legitimate interest of the public to be informed about criminal proceedings. Such a position is also in the spirit of Article 6, paragraph 1 of the European Convention, where the public nature of court proceedings protects the parties from any judicial decisions being made in secret, with no public control. This is also one of the means for the state to maintain trust in the court system, thus making the judicial function visible; its openness to the public serves the purpose of Article 6, paragraph 1, i.e. the right to a fair trial, which is in itself one of the fundamental principles of any democratic society within the meaning set by the Convention.¹⁶

One should certainly recall the Recommendation of the Committee of Ministers of the Council of Europe to member states on the provision of information related to criminal proceedings through the media, Rec (2003) 13, adopted on 10 July 2003. According to the Recommendation, the public must be able to receive through the media any information related to activities of the judiciary and the police. Journalists must be able to report and comment freely on

¹⁵ *Goodwin v. UK*, judgement, 27 March 1996, *Reports* 1996-II, p. 500, para. 39, and *Fressoz and Roire v. France* [GC], no. 29183/95, para. 54, ECHR 1999-I).

¹⁶ *Golder* judgement, 21 February 1975, Series A no. 18, p. 18, para. 36, and *Lawless* judgement, 14 November 1960, Series A no. 1, p. 13).

the functioning of the judicial system, with restrictions and with the respect for the presumption of innocence, as well as accuracy, which means that the authorities should provide the media only with information that have been confirmed or have been based on reasonable assumptions.

When the press have information on current cases, obtained lawfully from the judiciary or the police, the authorities have an obligation to make such information available to any media that request it, with no discrimination.

The recommendation also indicates that within the context of criminal proceedings that receive particular public attention, the judiciary should inform the media about its substantive action for as long as this does not prejudice the confidentiality of investigation or delays the outcome of the proceedings. In cases of lengthy criminal proceedings, such information should be provided on regular basis. At the same time, provision of information on criminal proceedings must take into account the protection of privacy of the parties for the purpose of Article 8 of the European Convention, with particular focus on the protection of minors, victims, family members of the suspects, etc. The press should attend public hearings and public delivery of judgements, with no discrimination and with no prior accreditation requirement.

Unfortunately, despite the international context set in this way, acting under the decision by the Agency, the Office of the Prosecutor of BiH withdrew all the indictments from its web page, with the possibility for interested parties to file a request to receive indictments, but in an edited form, with all the data related to indicted persons and witnesses blocked, as well as results of investigations, with only the name of the indicted person available as the only element of personal data. In further procedure, in early February 2012, the State Prosecutor issued an internal decision to make all the indictments anonymous, and the same act prohibited any publication of indictments.

Therefore, a complaint regarding publication of personal data in an indictment issued by the State Prosecutor of BiH resulted in an act by an administrative organisation for personal data protection, whose administrative decision secured personal data protection of persons indicted, with total disregard, for public interest.

Similar situations happen in other states and there are different practices. This creates the need for national human rights institutions to take a common position that should be the basis for their action, particularly in order to prevent violations of the right to freedom of access to information. This presentation has been a small contribution to the process of creating an environment that would reaffirm the role of national human rights institutions as the beacon of accountability of transparency, always aimed at securing the right to freedom of access to information.

7. Literature

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