

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 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. Arguments were made that the issuance of the administrative act violated the material law Релевират се доводи за постановяване на административния акт при нарушение на материалния закон; 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 impermissible. 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 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. 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 Service (NSS), together with the National Intelligence Service (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 administrative 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 administrative 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 motivated. 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 motivations 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 motivations possess a fundamental significance for the court as well, allowing it to make the correct decision on a dispute. In this case, such motivations 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 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.