

## 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" by MEER, including the plan 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. Motivations 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" by MEER, including the plan 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 motivations 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 petition 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 APA.

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 or the Certificate for Legal Status of 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 obvious 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" 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" 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:**