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ENVIRONMENTAL INFORMATION HELD  
BY PUBLIC ENTERPRISES AND THE  
POSSIBILITY OF DENYING IT ON THE  
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HELD BY PUBLIC ENTERPRISES AND THE POSSIBILITY OF  
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*"The best weapon of a dictatorship is secrecy, but the best weapon of a democracy should be the weapon of openness" - Nils Bohr.*

In Serbian legislation, the right to access information of public importance<sup>1</sup> is regulated by the Law on Free Access to Information of Public Importance (hereinafter "the Law"), in order to achieve and protect the public interest to know and to achieve a free democratic order and an open society. The right to access information enables public access to information held by public authorities, i.e. certain information regarding the activities of public authorities that they are obliged to publish in accordance with the Law. This right also applies to information that citizens have the right to request from the authorities.

The Law in question plays an important role in the protection of the environment because it also regulates the issue of access to information concerning the environment. The confirmation of the 2009 Aarhus Convention<sup>2</sup>, which, among other things, regulates the right of "every person" to access information related to the environment, has a significant role in the development of legislation governing environmental protection.

There is a presumption of public interest to know about information on the environment held by public authorities, while access to it may be restricted in exceptional cases. In that sense, the Law prescribes exceptions to the right to access information, i.e. cases in which the authority may limit or deny the right of the applicant to access information.<sup>3</sup>

However, in the practice of public authorities, the right of access to information is often denied, referencing that the information is a trade secret, and in these cases the authority refuses to make the information available to the public, citing Article 9, paragraph 1, item 5. of the law that prescribes the possibility of denying access to information on the basis of a trade secret, the disclosure of which could cause severe consequences for legally protected interests.

If the applicant is denied the right to call for the confidentiality of information, he/she has the right to appeal to the Commissioner for Information of Public Importance and Personal Data Protection.<sup>4</sup>

## HOW TO EXERCISE THE RIGHT TO ACCESS INFORMATION IN A SITUATION WHERE THE FIRST INSTANCE BODY REFUSES TO MAKE IT AVAILABLE, CLAIMING THAT IT IS CONFIDENTIAL INFORMATION THAT REPRESENTS A TRADE SECRET?

<sup>1</sup> Law on the Free Access to Information of Public Importance ("Official Gazette of RS", Nos. 120/04, 54/07, 104/09, 36/10 and 105/21)

<sup>2</sup> Law on the Ratification of the Convention on Access to Information, Public Participation in Decision-Making and the Right to Legal Protection in Environmental Matters ("Official Gazette of RS - International Agreements", No. 38/09)

<sup>3</sup> Article 22 of the Law on Free Access to Information of Public Importance

<sup>4</sup> Article 22 of the Law on Free Access to Information of Public Importance

In the procedure to resolve appeals, the practice of the Commissioner shows that the first instance body may deny the right to access information of public importance with a call for confidentiality, i.e. secrecy of requested information, but provided that the **formal and material** conditions arising from Article 8 and Article 9, Item 5 of the Law are met. The formal condition is that this is information or a document that is **determined by regulation or official act based on the law to be kept secret and available only to a certain circle of persons, and the material, the essential condition is that this is such information or a document that would result in a serious violation of the overriding interest, i.e. that could have severe legal or other consequences for the interests protected by law** or the constitution, and that restricting the public's right to know is necessary in a democratic society.<sup>5</sup>

In that sense, in order to deny access to information of public importance with a call for the confidentiality of information, the authority is obliged to state in the reasoning of the decision of refusal the reasons for determining secrecy *ab initio*<sup>6</sup> as well as the reasons why the information should continue to be kept secret. In this regard,

in order for the first instance body to fulfill the formal condition, it can, for example, **submit an official act** by which the requested information is declared information that is kept as a trade secret because it is not enough to refer to an internal act. Necessary fulfillment of the formal condition is also shown by the practice of the Commissioner in the procedures of resolving appeals against the decisions of refusal of the first instance bodies.<sup>7</sup>

In addition, in order for the conditions prescribed by law to be met, the first instance body is obliged to **prove** in the conducted procedure that it is **necessary in a democratic society to protect the overriding interests** from Article 9, item 5 of the Law in relation to the public interest.

Therefore, rejecting the request of the applicant with reference to the secrecy of information **implies the obligation of the authority, which is responsible for proving, to prove that access to the requested information could have serious legal or other consequences for interests protected by law and that those interests prevail over the interest of access to information.**

**IN OTHER WORDS, THE AUTHORITY IS OBLIGED TO CONDUCT AND APPLY AN INTEREST TEST<sup>8</sup>, I.E. A TEST THAT ASSESSES THE RELATIONSHIP BETWEEN TWO PROTECTED INTERESTS: THE INTEREST IN PROTECTING CERTAIN INFORMATION AND THE PUBLIC INTEREST TO KNOW.**

<sup>5</sup> The decision of the Commissioner for Information of Public Importance and Personal Data Protection No. 07-00-00865 / 2014-03 of 30 May 2014; The decision of the Commissioner for Information of Public Importance and Personal Data Protection No. 071-01-2758 / 2020-03 of July 6th, 2021

<sup>6</sup> Latin expression meaning "from the beginning"

<sup>7</sup> The decision of the Commissioner for Information of Public Importance and Personal Data Protection number 071-01-2078 / 2020-03 of 17/03/2021

<sup>8</sup> Article 8 of the Law on Free Access to Information of Public Importance

This implies convincing evidence of possible real harmful consequences in the event that the information is made available to the public, and not highlighting only the formal reason, i.e. the fact that the information is a trade secret.

It is also important to emphasize that, in accordance with the law, before the first-instance body refuses the Request to access information, it is obliged to consider the possibility of a partial access to information, i.e. by separating information, to provide the interested party an insight into part of the documents that contain the isolated requested information.<sup>9</sup>

Namely, public companies, such as the public company "Elektroprivreda Srbije" ("**EPS**"), often decline the requests to access information by referring to the exemption provided by the Law, i.e. exemption in cases when making information or a document available can cause difficulties for

the public company to achieve its justified economic interests, as well as referring to the fact that the requested information is considered a trade secret. In this regard, it is important to stress that, for the purpose of restricting the right to access information, unlike the classical authorities for which the Data Protection Law<sup>10</sup> represents a legal framework, public companies apply the Trade Secrets Protection Law.<sup>11</sup>

It should be noted that this procedure by public companies is further enabled thanks to the extremely fluid definition of the term trade secret arising from the new Trade Secrets Protection Law. This law, adopted in 2021 for the purpose of harmonization with the European Directive, which relates to the protection against illegal acquittal, use and revelation of trade secrets contributes to the fact that practically every information can be declared a trade secret.<sup>12</sup>

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<sup>9</sup> Article 12 of the Law on Free Access to Information of Public Importance

<sup>10</sup> Law on Information Secrecy ("Official Gazette of RS", No. 104/09)

<sup>11</sup> Law on the Protection of Business Secrets ("Official Gazette of RS", No. 53/21)

<sup>12</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with EEA relevance)

## AN EXAMPLE FROM PRACTICE: THE SECRET LIFE OF PC EPS

On June 4th, 2020, RERI submitted a request to access information of public importance to EPS PC, seeking information regarding the conclusion of the contract between "EPS" and the „POWER CONSTRUCTION CORPORATION OF CHINA“ for the construction of the new Thermal Power Plant Kolubara B.

EPS declined the request for free access to information, stating that the conditions for the implementation of exemption to the right to free access of information have been met, as this would make available information or a document that has, according to the law, i.e. the Law on Protection of Business Secret, been designated as a state, official, trade or other secret, i.e. that is only available to a certain circle of persons, and that the release of which could lead to serious legal or other consequences of lawfully protected interests which are greater than the interest to access information. By issuing a refusal decision, EPS has acted without rationalizing the reasons as to why it believes that the interest of a company with 100% state participation in the structure of its capital, should prevail over public interest, when previously EPS has already published information on the conclusion of the contracts regarding which the general public has justifiable interest to know.

RERI issued a complaint against the said decision, stating that the legally prescribed cumulative formal and material conditions have not been met, and that EPS did not meet the necessary

conditions to deny the right of access in accordance with the above provisions of the Law.

Acting on the complaint by RERI, the Commissioner annulled the decision of EPS, pointing out that the fact that, according to the Law on Protection of Business Secrets, the information is a trade secret is not in itself a sufficient condition to exclude access to information according to the law, as well as that the requested information refers to an investment project of great value and importance for the Republic of Serbia, that for this information there is always a justified and increased public interest to know, and that such information must always be available to the public and be transparent.<sup>13</sup> With the decision in question, the Commissioner found that the interest of the public to know outweighed the interests invoked by the first instance body as it did not prove or point to any circumstance that would justify denying access to the requested information.

Therefore, the requested information cannot be considered information that can be classified as a trade secret pursuant to the Law on Protection of Trade Secrets, because it **does not represent information whose commercial value is reflected in the fact that it is secret, and it especially cannot be deemed information that would in any sense bring economic benefit to the claimant.**

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<sup>13</sup> The decision of the Commissioner number 071-01-2758 / 2020-03 of 06/07/2021, which annuls the decision of the Public Company "Elektroprivreda Srbije" number: 12.01.383712 / 2-20 of 04/09/2020

HAVING IN MIND ALL OF THE ABOVE, IT CAN BE CONCLUDED THAT THE FIRST INSTANCE BODIES MAY EXCLUDE THE APPLICANT'S RIGHT TO ACCESS INFORMATION ON THE BASIS OF INFORMATION CONFIDENTIALITY ONLY IF THE REQUESTED INFORMATION PROVES THAT CUMULATIVE FORMAL AND MATERIAL CONDITIONS ARE MET, I.E. THAT IN THE EXPLANATION OF THE REJECTING DECISION, THE REASONS FOR KEEPING THE REQUESTED INFORMATION CONFIDENTIAL ARE STATED OR TO PROVE THAT THIS INFORMATION IS CONSIDERED TO BE INFORMATION OF INTEREST TO THE REPUBLIC OF SERBIA, THE DISCLOSURE OF WHICH WOULD CAUSE PROVEN HARM TO AN UNAUTHORIZED PERSON, AND THAT THE NEED TO PROTECT THE INTERESTS OF THE REPUBLIC OF SERBIA OUTWEIGHS THE INTEREST IN FREE ACCESS TO INFORMATION OF PUBLIC SIGNIFICANCE.

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