

**ACCESS TO PUBLIC INFORMATION
IN BULGARIA 2003
REPORT**

SOFIA 2004

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ACCESS TO INFORMATION
PROGRAMME



Programme for Social Transformation in Central and East Europe
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Access to public information in Bulgaria 2003 Report

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INTRODUCTION

„Certainly the best publicity for an access law is its use and the yield from it.“

William Ferroggiaro, head of the freedom of information program in the National Security Archive

Dear Readers,

Access to Information Programme is pleased to present its report on access to information in Bulgaria for 2003.

The understanding that every state is a process, which depends on its participants, can be applied to the access to public information situation in Bulgaria in 2003. The demand for information continued to grow, reflecting on the increased number of court appeals against decisions on information requests.

At the same time, public institutions have taken steps to create internal procedures for handling information requests, disclosing information, and fulfilling other obligations under the access to information legislation. This is an ongoing process and we hope the positive results will follow.

Trainings for Government officials have been organized both on the local and central level covering the Access to Public Information Act (APIA) and the laws regulating the exemptions from the right to information access - the Protection of Classified Information Act (PCIA) and the Personal Data Protection Act (PDPA). The Institute for Public Administration and European Integration, an institution, subordinate to the Council of Ministers, included this as part of their training curriculum. Trainings have also been initiated and organized by local non-governmental organizations and municipalities.

Although there have been positive developments during the past year, information seekers have continued to encounter difficulties caused by the unpreparedness of the institutions to fulfill their obligations and referrals to formal, procedural reasons to withhold access to public information.

The Protection of Classified Information Act introduced a requirement for public officials to review documents classified before the adoption of the act and within one year decide whether they could be disclosed under the procedures of the Access to Public Information Act. The one-year term was not enough in most of the institutions, while at the same time we can observe an excessive enthusiasm in classifying all recently created documents.

The purpose of this report is to summarize the developments in the freedom of information legislation and its implementation. The problems of the implementation of the right to information access outlined by the reporting team allow us to make certain conclusions on a practical and political level, in an attempt to improve the practices of providing access to information. This is the reason why this report starts with recommendations for the legislative and executive bodies of power in Bulgaria.

The first part of this report reviews in detail the necessary legislative changes that will improve and facilitate the practices of implementing the freedom of information laws.

The second part of the report presents a general overview of last years cases, in which Access to information Programme has been providing legal assistance to citizens, NGOs, and journalists when their rights of information access have been violated.

In 2003 AIP was a partner in a pilot project „Global monitoring on Freedom of information legislation implementation“, conducted simultaneously in five countries. The monitoring results from Bulgaria are also presented in this report. Although the pilot project was limited to only eighteen institutions, its results are confirmed by the cases referred to the office of AIP during the whole year.

In 2003 - like before - no-motive refusals and silent refusals have been the most typical reasons why access to public information has been withheld.

The last part of the report is dedicated to the court practices. Besides summarized presentation of the most characteristic court appeals during the last year, we have attached eighteen annotations of the cases in which AIP has provided assistance and/or representation in 2003.

We believe that the 2003 annual report gives a clear picture of the process of seeking and providing information by public institutions in Bulgaria.

We hope that the recommendations we have made to the bodies of the legislative and executive power will help improve the access to information situation.

Access to Information Programme will continue to support the information seekers and the efforts of the institutions to increase their capacity and ensure accountability and transparency of their activities.

Gergana Jouleva PhD
Executive director of AIP

RECOMMENDATIONS

I. Necessity of legislative changes

□ The following amendments have to be made to the Access to Public Information Act (APIA):

- The Amending act to APIA, introduced to Parliament over a year ago needs to be finally adopted.
- The Act should be brought in conformity with the principles of Decision № 7 of the Constitutional Court of Bulgaria on constitutional case № 1/1996, the provisions of Art. 10 of the European Convention of Human Rights, and Recommendation (2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents.

Exemptions from the right to information access:

- To synchronize the norms of Art. 5, Art. 7 and Art. 37.
- Necessary amendments in Art. 7:
 - Art. 7 para. 2 should comprehensively list the competing rights and interests protected by the exemptions from the right to information access (specified on the basis of the generally formulated exemptions in Art. 5);
 - A new para. 3 should be adopted introducing the harm test, which should apply to all exemptions from the right to information access (similar to the provision of Art. 25 of the Protection of Classified Information Act - PCIA);
 - A new para. 4 should be adopted, similar to Art. 19 of APIA, introducing an obligation for public bodies to perform the balance of interests test;
 - A new para. 5 should be adopted, explicitly requiring the obliged bodies to interpret the exemptions narrowly (in accordance with Decision № 7/1996 of the Constitutional court);
 - The present para. 2 should become para. 6.
- Proposed changes in Art. 13 para. 2 item 1:
 - The provision should be amended by formulating the protected interest test (for example, to guarantee unprejudiced work of the administration);
 - The scope of the exemption should be narrowed down, by specifying the kind of acts (individual or administrative) and the spheres of governance they regulate (e.g. public procurements, administrative proceedings related to public tenders, offerings and competitions).

Changes in relation to the procedures of request handling:

- A new Art. 28a should be created with the following provision:
 - Para. 1 formulating an obligation for the public bodies or authorized official in cases of competing rights or legally protected interests to examine all facts and circumstances significant in determining whether potential harm could be caused, and to discuss the views and objections of the interested citizens or organizations;
 - Para. 2 formulating an obligation for the public bodies or authorized officials in cases of competing rights or legally protected interests to examine the facts and circumstances significant in determining whether there is an overwhelming public interest from providing access to the requested information, and to discuss the views and objections of the interested citizens or organizations;
 - Para. 3 formulating an obligation for the public bodies or authorized officials - in cases when they decide that the need to protect a competing right/interest prevails over the public interest of information disclosure - to provide access to the requested public information in a scope and manner, which will not lead to the disclosure of potentially harming information to the protected right/interest.
- A new Article 28b should be created with two paragraphs. Para. 1: if a classification mark is present on a document, containing the requested information, the bodies are required to review it and bring it in accordance with the requirements of the law. If no grounds for classification are present, or if the classification grounds are no longer applicable/legitimate, classification is removed and access to the requested document is provided. Para. 2 - para.1 is not applicable if the document containing the requested information has been reviewed in the last six months.

The APIA should clearly define an overseeing body for its implementation.

Sanctions in cases of failure to apply the provisions of the Act should be more precisely defined and increased.

In the above cases the affected parties should have the right to claim non-property damages when appealing the information refusal before the court.

- The adoption of internal rules describing and assigning functions under APIA on specific administrative structures in the bodies of the executive should continue and expand.

□ The Protection of Classified Information Act (PCIA) and the instruction for its implementation should be amended in the following way:

- Immediate abrogation of Art. 30 para. 3; if necessary the concept of a „set of documents“ can be reduced to the matters of defense of the state in relation to the requirements of Bulgaria's membership in NATO;

- The competence for document classification should be clearly defined (amendment of Art. 31 para. 1): the classification level should be determined by the body of power, rather than by any official, and the number of people, who are competent to classify documents should decrease proportionally with the increasing level of classification. The authority to mark documents as „top secret“ should be given to a very few officials, occupying the highest state offices;
 - The „balance of interests“ test should be introduced, giving an opportunity of public officials to remove the classification mark and publish the document in cases of overwhelming public interest from disclosure;
 - Art. 25 should be reworded, so it clearly states that defense of the state, foreign policy, and the constitutional order are related with national security, rather than protected in parallel;
 - A more realistic definition of the categories of protected information in the attachment to Art. 25 (removing economical categories, revising categories like „strategically important government commissions“ etc.);
 - Rewording of the definition of national security;
 - Abrogation of Art. 25 para. 2 from the Instructions for PCIA implementation in its current wording.
- ❑ **The following amendments should be made in the Personal Data Protection Act (PDPA):**
- Bringing the definition of personal data (Art. 2) in conformity with the international standards - while abiding to the requirement of the highest level of publicity of information about public officials and balancing between personal data protection and transparency of the decision-taking process. Our specific suggestions are:
 - The term „public identity“, which is an incorrect translation of „social identity“ should be removed from Art. 1. It is also important to substantiate the listed identities, especially the economical and cultural ones.
 - Art. 2 para. 2 should be removed. Its provision includes as protected personal data information connected with membership of individuals in boards, control and supervisory structures and the performance of their functions as state bodies.
 - The concepts of „personal data“ and „information potentially harming the interests of a third party“ in APIA should be clearly distinguished;
 - The registration regime of personal data controllers in the Personal Data Protection Commission (PDPC) should be changed, and the registration should only apply to:
 - state bodies collecting and processing personal data;
 - commercial companies subject to objective criteria (e.g.: scope and scale of their activities, number of employees, database characteristics);
 - other commercial companies only on their initiative or after an express written statement of the PDPC.

- The words „refuse to register“ should be dropped out from Art. 16, para. 3, 4 and from § 3, para. 2 of the Transitional and final provisions, since they do not correspond to the stipulated registration regime;
 - In conjunction with the above, the sanction for citizens and private legal entities who process personal data without being registered with the PDPC should be abolished;
 - Instead, high sanctions should be imposed on citizens and legal entities, which collect, process or transfer personal data in violation of the principles of PDPA.
- ❑ **The following amendments should be made in the Environmental Protection Act (EPA):**
- Increasing the scope of information, which should be published by the institutions on their own initiative and actively communicated to the public (in cases of danger from a substantial pollution or harm to the environment; this obligation should be formulated explicitly in cases of fires and industrial emergencies);
 - Expanding the range of obliged bodies by including persons and legal entities, whose activities affect the state of the environment.
- ❑ **A new Archives Act should be adopted, abiding to the standards set forth in Recommendation (2000)13 of the Committee of Ministers of the Council of Europe. We maintain the specific recommendations, included in our previous access to information report.**

II. Necessity to increase the administrative capacity and create an administrative infrastructure for the implementation of the Access to Public Information Act (APIA)

- ❑ A special policy for the implementation of the Access to Public Information Act is needed, which could be included in general recommendations by the Minister of State Administration to the bodies of the executive power;
- ❑ The process of adopting internal rules in the instructions on APIA implementation based on the general recommendations should continue in all public institutions. This will create common practices in handling requests and providing information;
- ❑ The practice of publishing instructions (including on the Internet) on how to exercise the right of information access should be supported and propagated to all public institutions;
- ❑ A greater number of officials should be authorized to take decisions on information requests - a process, which has already started in a number of institutions from the executive power;

- ❑ Officials authorized to handle and decide on information requests should be appointed in the regional branches of the central bodies of power;
- ❑ All existing information should be managed in a manner that makes it easily accessible by the officials. This will make it possible for them to disclose the available information upon verbal requests;
- ❑ Access to information officials, security of information officials and PRs should better coordinate their activities. This is especially necessary in order to publish certain information on the Internet and in regular bulletins;
- ❑ Special efforts should be devoted to completing the review of classified documents in accordance with the requirements of § 9 of the Transitional and Final provisions of PCIA. The list of declassified documents must be available on the web sites of the institutions;
- ❑ The process of educating public officials on freedom of information issues should continue.

CHANGES IN ACCESS TO INFORMATION LEGISLATION IN 2003

General overview

In 2003 laws and secondary regulations were adopted in an attempt to further regulate the right of information access and the exemptions from this right. In other aspects the necessary legislative changes had not been adopted, while some attempts to make legislative changes in the freedom of information area were definitely regressive in relation to the right of information.

With the adoption of the Protection of Classified Information Act (PCIA) in 2002 and the Personal Data Protection Act (PDPA) the legal framework of the exemptions from the right to access public information has been completed in general. Parallel to the regulation of effective protection of the interests of national security, privacy, and personal data protection, the balance between these exemptions and the right of everyone to seek, receive and impart information should have been rationally settled by law. Only then would the will of the constitutional legislators, interpreted by the Constitutional Court of Bulgaria¹, be fulfilled. The right of information should relate to its exemptions in the same way as principles relate to their exceptions. In this respect the lawmakers and the executive power bodies when implementing the freedom of information legislation continued the tendency that has started in 2004 to interpret the exemptions in a broad way. At the same time no legal mechanism was introduced, which would allow the public officials to make a precise balance between the right to information and its exemptions in specific cases.

Just on the contrary - perhaps because the lawmakers did not correctly understand the necessity of legislative changes, an initiative for amending the Penal code to increase the sanctions for leakage of state secrets and official secrets was started. Ideas were launched to adopt severe criminal sanctions in cases of „incorrect“ classification of documents. This initiative would have stimulated officials to be overly precautions and start over-classifying documents.

Access to Information Programme (AIP) had continuously recommended that the work of the bodies of the executive and their administrations should be synchronized with the Access to Public Information Act (APIA). Unfortunately, this recommendation has not been adopted. No law provides clear procedures of access to archives, including documents of the former Security services and the archives of the General headquarters. Access to information related to a very important sphere such as privatization has not been regulated as well. As we noticed in our previous access to information report, no amendments have been made to the legal arrangement of trade secret.

At the same time attempts are made to adopt secondary regulations in order to designate and specify the obligations of the bodies of power and their administration in the process of APIA implementation. These efforts are an important step towards the effective implementation of the Act, and should be supported, until they cover all bodies of the executive power and their administrations. There should be a close relationship between the information officials and departments under APIA and the structures responsible for information security.

¹ In Constitutional court Decision № 7/1996 on constitutional case № 1/1996.

Specific changes and the lack of them in freedom of information legislation

Amending draft act to the Access to Public Information Act

The amendments proposed to the Access to Public Information Act (APIA) in the end of 2001 have neither been adopted, nor have even entered Parliament for second hearing or discussion². These amendments are imperative, because when adopted they will clarify the concept of „public information“, will provide for administrative control, will increase the number of obliged bodies and introduce other important changes. There are nevertheless other changes that have to be made in APIA.

Exemptions from the right to information access

The exemptions from the right to access public information are still unsatisfactory regulated by the Access to Public Information Act; they are spread through the whole text of the act and lack any systematic order. The exemptions are covered by Art. 5, Art. 7, para. 1, Art. 13, para. 2 item 1-2, Art. 17, para. 2, Art. 19, Art. 31, and Art. 37, para. 1. Besides, all these provisions differ both in terminology and scope. Norms of identical scope are formulated with different terms - Art. 5 lists the competing interests to the right of information access, Art. 7, para. 1 mentions state and other protected secrets, and Art. 37 lists state secret, official secret, the exemption under Art. 13, para. 2 and the protection of third party interests. The provisions referring to specific cases are also in an unclear relationship. Art. 17, para. 2 regulates the cases when a body is obliged under Art. 3, para. 2, item 1-2 of APIA, while in Art. 19 the obliged bodies are the mass media under Art. 3, para. 2, item 3. Both the exemptions and the approach towards them are regulated differently under the provisions of the two articles. The exemption of Art. 17, para. 2 is applicable in cases of trade secret and unfair competition between commercial companies³. Art. 19 covers the personal data protection exemption, the trade secrets, and protection of information sources who wish to remain undisclosed. The provision of the latter article provides for the only clearly formulated opportunity for a balance between competing interests, in this case - between the principles of transparency and economic freedom.

Protection of third-party interests

On the other hand Art.31 regulates the protection of third-party interests. The provision of this article contains a number of ambiguities. The scope of the exemption is fairly large, since a commercial company, another legal entity, a person or even a state body may represent a third-party, although all these subjects are not exposed to the same level of publicity⁴. Therefore the principles guiding the exemptions from the right to information access from any of these bodies should be different.

² We could hardly conceal our surprise when we learned that the last Regular Report on Bulgaria's progress towards EU accession rendered an account of amendments made in APIA in May 2003.

³ It is not clear what other form of an unfair competition could occur from publishing information, except in cases of trade secret disclosure, which in the sense of Art. 35 of the Competition Protection Act (CPA) constitutes a specific hypothesis of the general concept of unfair competition - Art.30 of CPA.

⁴ In principle state bodies are obliged to disclose all information that they create or possess; commercial companies owe only information in the scope of Art. 3, para. 2, item 2 of APIA; mass media - only information covered by Art. 18; and individuals and legal entities - only as far as their activities are financed with funds from the state budget.

In a number of cases the right to third party interest protection overlaps with another acknowledged right of protection⁵. For example, state bodies can use the state secret and official secret exemption to protect certain categories of information; commercial companies can use the trade secret exemption; mass media - the exemption of Art. 19; and finally, all citizens can use the protection of personal data guaranteed by the PDPA, which by the way constitutes another legally protected secret by the terms of APIA.

The next question arising from the provision of para. 1 of Art. 31 is when to seek the consent of the third party concerned. A possible answer is, when an opportunity for this is given in a law. In Bulgaria such an opportunity is only provided by the Protection of Personal Data Act. Another answer is, when there is a danger of harming the rights or interests of the third party. A third possible hypothesis - in all cases except those under para. 5. Arguments in support of all these possible answers could be found in the Constitution or by interpreting the purpose of the Act, or by referring to international standards. One thing is clear though, the current wording of Art. 31 is a source of ambiguities and potential disputes.

There is yet another problem arising from para. 4 of art. 31, connected to the declared consent of the third party. We should underline the fact that the lack of an answer on a consent inquiry is considered as a negative response, i.e. the third party is assumed to have exercised his/her right of protection even without taking any actions⁶. When the requestee establishes the lack of consent of the affected person, it should provide information in a form and manner, which should not disclose data about the third party. If we compare this provision to Art. 19 we could clearly see that it gives no opportunity for a balance of interests between competing rights. The third party is offered absolute protection, not depending on the public interest of disclosure and the nature of the requested information⁷. There is an obvious contradiction between this provision and the Constitution, as interpreted by Decision № 7/1996 of the Constitutional Court.

Obligation of the bodies of the executive power under APIA

Currently the bodies of the executive power are not authorized to perform a balance between the right of information access and its exemptions in every specific case. This need arises from Decision № 7/1996 of the Constitutional court on constitutional case № 1/1996, according to which the obligation to perform a balance of interests covers all bodies of power:

When imposing such limitations the institutions of the legislature, executive and judiciary power shall keep account of the high public significance of the right to free expression of opinion, of the freedom of the mass media and the right to information, from which it follows that the limitations (exceptions), to which these rights can be subjected, shall be applied restrictively, only to protect a competing interest.

⁵ Except in cases under Art. 31 para. 5 of APIA.

⁶ It follows that in cases when the third party acts indifferently, sluggishly, or even does not act at all, his/her rights would still be protected against the right to access public information.

⁷ After a request for access to information about apartments received by public officials from the housing fund of the Council of Ministers, the Personal Data Protection Commission established a similar position.

When taking a decision on specific information requests the bodies of the executive must take into account several circumstances, whose cumulative presence is a condition for restriction of the right to information access:

1. Provision in a law regulating the exemption;
2. Presence of a protected interest/right stipulated in the Constitution;
3. Proportionality of the exemption to its purpose (protection of the competing right or interest);
4. Applying the exemption only in cases where there is a real danger of actually harming the protected right/interest;
5. Balance between the right to information access and the competing right/interest, while the right to information has priority.

These requirements are precisely formulated in Recommendation 2002(2) of the Committee of Ministers of the Council of Europe⁸ and reflect on the standards laid down in Art. 10, para.2 of the European Convention on Human Rights. Currently, the Bulgarian Access to Public Information Act is one of the few laws in Central and Eastern Europe, which do not impose other conditions on the application of the exemptions, besides the requirement to be stipulated in a law⁹. This flaw in the legislation denies the public officials the opportunity to assess the circumstances in each individual case when they receive an information request, an opportunity, which would allow for a narrow interpretation of the exemptions. A clear establishment of the above requirements in a law will ensure objective and motivated narrow application of the exemptions and will improve the control over its lawfulness.

Changes in laws regulating the exemptions from the right to information access

State Secret

Set of documents. Review of the classification decisions

The Protection of Classified Information act has been analyzed in detail in the previous annual report of Access to Information Programme. In practice, some of the criticized provisions turned out to be very problematic.

This was especially valid for the provision of Art. 30 para. 3 of PCIA „a set of materials and/or documents containing information with a different classification level are subject to a security mark corresponding to the highest level of classification of a document or material of the set“. One practical application of that provision was the classification of entire court case files because they contain a single classified document. Because of that, not only criminal case files were classified in 2003, but also administrative and civil ones. For a part of the latter ones this has been a precedent. Classification of court files affects not only the right of information access, but also the right of the parties of a fair trial. Good knowledge of the case evidence, and adequate participation in its

⁸ Access to Information Programme recommended that these requirements should be included in APIA when the Act was being discussed and adopted in 2000.

⁹ Some authority for performing a „balance of interests“ test is contained in Art. 31, para. 4 of APIA - in cases when the right to information access competes with the right of third party interests. Despite of that, the act does not oblige the public institutions to follow above requirements, which guarantee a narrow interpretation of the exemptions from the right to information access.

collection, presentation, proof and evaluation is a necessary condition for an effective legal defense. The classification of a large number of court files, in which a litigant is the Ministry of Interior (MI) or the Ministry of Defense (MD), causes reasonable doubt that in those cases state secret is more of an excuse for gaining advantage during the court proceedings, rather than actually an attempt to protect the interests of national security.

It is true, that the litigants and their representatives may apply for a permission to view the court file under a procedure described in the PCIA. On the one hand this leads to postponing of the court proceedings, and on the other - one of the parties often has control over the other¹⁰. Still another problem is that those willing to receive such permissions are subject to intrusion in the sphere of another constitutionally guaranteed freedom - the protection of privacy. A precondition for receiving permission is the filling of a quite an extensive questionnaire requiring the submission of a large amount of personal data. Last but not least, even if the side is allowed access to the classified file, the court hearing is behind closed doors, i.e. the right of a public trial is violated.

As a conclusion, the classification of court files affects the right of the parties of a fair trial¹¹, the right of a public process¹², the right of protection of privacy¹³ and the right of everyone to seek, receive and impart information¹⁴. Such a serious intrusion in a number of basic human rights, guaranteed by the Constitution should be a subject to an effective review over its lawfulness. Instead, the Protection of Classified Information Act not only provides no judicial control of the lawfulness of the classification, but - just on the contrary - the provision of Art. 31 para. 6 explicitly prohibits a change or removal of the classification level without the consent of the person, who classified the document/material or one of his/her superiors. At the same time, the wording of Art. 31, para. 8 silently excludes a review of the lawfulness of the classification decision, except by the above-mentioned officials. The denial of protection of basic human rights is a violation of Art. 56 of the Constitution¹⁵, a problem that must be solved by amending the current legislation. The opportunity to classify documents, which are not in the scope of the definition of state secret given by Art. 25 of the PICA simply because they are part of a set of documents, should be eliminated. The current provision of Art. 30, para. 3 of APIA is in contradiction with Art. 41, Art. 121 and Art. 32 of the Constitution¹⁶. Its imprecise wording leads to a possibility of violation of the above-mentioned rights, which is not proportional to the protected interests.

¹⁰ The right to access classified information is provided after issuing a permission, preceded by a reliability investigation, done by the security services. Most of these services are subordinate to the Ministry of Interior and the Ministry of Defense, which are often litigants in those cases.

¹¹ Which includes the right of equality and competitiveness of the litigants - Art. 121, para. 1 of the Constitution and Art. 6, para. 1 of ECHR.

¹² Art. 121, para. 3 of the Constitution, Art. 6, para. 1 of the ECHR and Art. 14, para. 1, sent. 2 of the International Pact for Civil and political rights (IPCPR).

¹³ Art. 32, para. 1 of the Constitution, Art. 8, para. 1 of ECHR and Art. 17 of IPCPR.

¹⁴ Art. 41, para. 1 of the Constitution, Art. 10 of ECHR, Art. 19 of IPCPR.

¹⁵ The only provision, which clearly formulates the opportunity of judicial review over the classification decisions, is found in Art. 41, para. 4 of APIA. The question whether it is applicable in cases, when one of the parties requests access to the court file is still open.

¹⁶ See notes 5-8.

Protected interests. Categories of information subject to classification as state secret

In addition to what we already mentioned, we still maintain the findings from our last year's annual report. The definition of state secret should be more clearly and precisely formulated. Art. 25 of the Protection of Classified Information Act enumerates four interests, protected by state secret. Only one of them - national security - corresponds to the listed rights and interests in Art. 41, para. 1, sent.2 of the Constitution, whose protection could serve as a restriction from the right to seek, receive and impart information. We can assume that the lawmakers have been abiding to the text of the Constitution and meant that the other three protected interests listed in Art. 25 can be embodied under the Constitutional ones, and before all under national security and public order. An explicit legal provision in that sense will facilitate the implementation of the PCIA and - above all - the strict compliance with the purpose of the act in cases of document classification¹⁷. For similar reasons it is absolutely imperative to give a more precise definition of national security, now contained in §1, item 13 of the Additional provisions of PCIA, which practically spans over all aspect of public life in Bulgaria. The excessively wide scope of this term can eventually lead to an overlap between the concept of information, connected with the national security and public information¹⁸. Indeed, the presence of an attachment-list to Art. 25 of PCIA narrows down the scope of information, related to national security, but this does not change the fact that the Act contains an obviously inaccurate definition. Because of that, instead of clearly determining the purpose of the act and facilitating the administration in its implementation, the lawmakers have created confusion and ambiguity.

The formulation of the categories of the attachment list under Art. 25 of PCIA is unsatisfactory, besides, they are too many in number¹⁹. Until now, AIP has noticed several problems in connection with the following categories of the list:

1. Information about the lawful usage of intercepts and information received by the usage of intercepts - items 6 and 8 from Chapter II of the List of categories of information subject to classification as a state secret²⁰;
2. Information connected to strategically important government commissions and their implementation - item 26 from Chapter II of the List of categories of information subject to classification as a state secret.
3. Information about the allocated and utilized budget funds and state property, for special purposes related to national security - item 10 from Chapter II of the List of categories of information subject to classification as a state secret;
4. Established information, or information which can help identify persons, which have worked for the national security services and the public order services without being their officials - item 5 from Chapter II of the List of categories of information subject to classification as a state secret²¹;

¹⁷ This subtle change will actually have a significant impact in view of the 2003 tendency of over-classification of information by the bodies of the executive, leading to over-classification in other bodies of power.

¹⁸ Compare the definition of public information given by Art. 2, para. 1 of APIA.

¹⁹ Even before the adoption of PCIA Access to Information Programme warned that the number of categories was significantly increasing in comparison to the acting List of fact and subject constituting the state secret of the Republic of Bulgaria. Similar criticism was expressed in a memorandum of Article 19 (available at http://www.aip-bg.org/documents/zzki_a19_eng.htm) on the PCIA draft.

²⁰ See Decision of SAC № 5700/2002 on administrative case № 1791/02.

²¹ See Decision of five-member panel of SAC № 11658/15.12.2003 on administrative case № 7254/03.

5. Information about the work of control-signaling devices, alarm systems and the guarding regimes, the disclosure of which is likely to harm the interests of national security item 4 from Chapter III of the List of categories of information subject to classification as a state secret²².

The general criticism towards all these categories is that they are too broadly formulated and do not abide with the „balance of interests“ requirement. Preposterously, statistical information about the number of permissions to use intercepts issued by a certain court is classified as state secret, while similar summarized information for 2000 has been made public²³; naturally, no harm or danger for the national security had been caused²⁴. A number of terms have not been defined, which gives public officials the opportunity to make arbitrary interpretations. Examples are „strategically important commissions“ or „special purposes“. Chapter II, item 5 of the List under Art. 25 of PCIA gives an opportunity for classification of information, which had been subject to free access before the adoption of the Act and did not constitute state secret at least in the period between 1994²⁵ and May 2002. It is interesting how the disclosure of information, which had already been available to the public, would endanger national security²⁶.

Last but not least, there is a necessity of legislative changes in order to narrow down the range of officials who have the authority to classify documents. This conclusion naturally follows from the already discussed tendency of over-classification.

Official secret

There is a pre-existing problem with the term of „official secret“ - its concept. In the legislative tradition of Bulgarian it has been viewed as uniting almost all other protected rights and interests²⁷. Currently the application of official secret should be narrowed down to ensuring effective and unprejudiced work of the administration²⁸. In order to overcome the first concept and to firmly establish the second one it is necessary to give a precise definition of „official secret“, which should narrow its applicability. This has not been done yet.

The approach of defining official secret under Art. 26 of PCIA is similar to the one used in defining state secret, but there are some differences. The first is related to the protected interests. The provision of Art. 26 is quite ambiguous; it mentions the interests of the state and other legally protected interests. From the used pronominal „other“ we can conclude that the lawmakers had

²² See Decision of SAC № 939/ 04.02.2004 on administrative case № 2238/03.

²³ Annual report of the Bulgarian Helsinki Committee „Human Rights in Bulgaria in 2000“, published on: <http://www.bghelsinki.org>

²⁴ Besides, in democratic societies this kind of information is not considered state secret at all but is rather viewed as necessary for exercising civil control over the work of the Ministry of Interior services. In 2002 in a court case for disclosure of similar data in Romania the court ruled that the public has the right to access such information.

²⁵ Decision of Parliament, promulgated in SG, issue 86 from 1994; compare with Decision № 974 from 5.02.2003 of the five-member panel of SAC on administrative case № 11111/2002.

²⁶ The right to access such document by the affected persons was provided by the Act for access to documents of the former State Security Services and the former Intelligence Services of the General Headquarters /AADFSSSFISGH/. A broader right of access was provided for information about higher level officials and those performing public activities.

²⁷ The wide applicability of official secret can be seen even in the current wording of Art. 284, para. 1 of the Penal Code, where it protects the interests of the state, the commercial companies, organizations, or private persons.

²⁸ As seen from its name, official secret pertains to the work of public officials, while state secret, for example, is related to the state as a whole. In this sense, the scope of official secret is approximately given by Art. 13, para. 2, item 1 of APIA.

in mind not any interest of the state, but only the legally protected ones. Despite of that the definition is unclear and allows for arbitrary implementation. The Constitution provides a comprehensive list of the rights and interests, which could serve as an exemption from the right under Art. 41, so the correct approach of the legislators requires a comprehensive enumeration of the rights and interests protected by official secret in Art. 26 para. 1 of PCIA²⁹.

Art.26 para.2 of PCIA introduces a requirement that information subject to classification as official secret should be defined by law³⁰. However this provision has not been followed in drafting different legal norms in that area. In several laws, adopted with or after the Protection of Classified Information Act containing „official secret“, the information subject to classification is not precisely defined. For example, Art. 30, para. 1 of the National Auditing Office Act (NAOA)³¹, creates an obligation to „protect information, classified as state or official secret, trade secret, bank secret, or other legally protected secret and withhold information, that have come to the knowledge National Auditing Office (NAO) officials in the course of their work“. Instead, the act should have listed comprehensively the categories of information, subject to classification as official secret.

This is precisely the meaning of Art. 26, para. 2 of PCIA - only information, contained into categories subject to classification, defined by the respective act could be recognized as official secret. The list of categories of information subject of classification in the scope of activities of the organizational units should be established entirely on the basis of the information categories laid down in Art. 26 para. 3 of PCIA. In other words, as opposed to the definition of applicability of state secret, determining the scope of official secret is a two-step process - defining the categories of information in a law and subsequently specifying them in lists of each administrative unit.

In this case it is obvious that the discussed Art. 30 of NAOA is in contradiction not only with the PCIA, but also with Art. 41, para. 1, sent. 2 of the Constitution, as interpreted by Decision № 7/ 1996 on constitutional court case № 1/1996. It is impossible to withhold all information, which came to the knowledge of NAO officials in the course of their work. According to Decision № 7/ 1996 of the Constitutional court the relationship between the rights under Art. 39-41 and the exemptions from these rights is like the relationship between a principle and its exceptions. APIA develops this principle, but does not exclude from its scope any of the bodies of power, including the National Auditing Office. If NAO - and specifically its director - is obliged under APIA, the right to access information is the principle, while the secret is the exception. The Constitution does not allow for withholding all information kept and created by the NAO³².

The term „official secret“ can be found in about thirty acts. In most cases it is contained in blank provisions or referring provisions. A number of acts, however, refer in general to information,

²⁹ According to us, the correct approach here would be to narrowly list only the requirements for ensuring an effective and unprejudiced administration, like specifying the protection of the rights of individuals and public order.

³⁰ The provision repeats the constitutional requirement, formulated with Decision № 7/ 1996 of the Constitutional court on constitutional case № 1/1996 that the exemptions from the rights under Art. 41 of the Constitution, one of which is official secret should be provided for by law.

³¹ Amended with the adoption of PCIA, both promulgated in SG issue 45/2002.

³² Sadly, provisions like this are not an exception. The ban on disclosing facts and circumstances, which come to the knowledge of officials in the course of their work is present Art. 6, para. 3, item 8 of the Mandatory stock of oil and oil products act (adopted in 2003), Art. 3, para. 4 and Art. 12, para. 3 of Internal state financial control act (2001) and Art. 18, para. 1, item 10 of the Gambling Act (amended in SG issue 102 from 2001).

which came to the knowledge of public officials in the course of their work. Limiting the scope of this information to the category of „official secret“ is more of an exception³³. Usually legislators take just the opposite approach - instead of banning only the disclosure of information, classified as official secret, an impression is created that official secret covers all kinds of facts that came to the knowledge of public officials in the course of their work, so their disclosure is prohibited³⁴. By sticking to this approach, the legislators have not and will not bring the laws in compliance with the Protection of Classified Information Act. Moreover, this extends the old tradition to keep secret all information, collected and kept by public institutions, which contradicts with Art. 41 of the Constitution.

The legislators' approach to the exemptions

In the presence of the mentioned important problems, related to the exemptions from the right to information access, the lawmakers should have turned their efforts to improving the legislation. In practice, just the opposite happened. Several proposals for changes and amendments in the Penal code were introduced into Parliament in 2003, two of them providing for increased sanctions for leaking official or state secret by changing the wording of Art. 284, Art. 357 - 360 of the Penal code. Sanctions in cases of „erroneously“ setting the classification level were also stipulated. The increased amount of the sanctions would affect persons, whose official duties did not include the protection of state secret, respectively, they had not been entrusted the possession of information subject to classification³⁵. After a vigorous public debate with the participation of several non-governmental organizations and mass media representatives, the Legal Affairs Committee of Parliament decided to adopt only editorial changes, introducing the term „classified“ information. The Committee rejected the proposals for increasing the sanctions and introducing liability for an incorrectly determined classification level. Unfortunately the lawmakers also missed the opportunity to introduce some positive changes, which would have moved the provision of the draft away from 1968, when it was actually adopted. No protection of whistleblowers - officials who disclose in good faith important public information, although it has been formally classified - has been provided. Criminal liability still has an excessively wide application, instead of narrowing it down to the most important cases in which the interests of national security are indeed likely to be harmed. The question of decriminalization of the disclosure of official secrets should be discussed, and in cases of publishing such information only disciplinary or administrative measures should be taken³⁶.

Changes in legislation, ensuring harmonization with APIA and in secondary legislation related to the effective implementation of APIA

The process of synchronization of the remaining legislation with the APIA is quite slow. From the adopted acts in 2003, including the amending ones, only the Human cells, tissues, and organs transplantation act (HCTOTA) refers to APIA. Art. 39 para. 3 from the HCTOTA provides for the creation and keeping a register, information in which is accessible under APIA³⁷.

³³ For example, Art. 25, para. 1 from the Public officials act protects classified information, constituting state or official secret, which came to the knowledge of the public officials in the course of performing their duties.

³⁴ Not talking about other „ingenious“ legislative techniques. The Financial control commission act introduces the term „professional secret“, along with official secret.

³⁵ The cases under Art. 357 of the Penal Code (PC).

³⁶ We should bear in mind that information can be classified as official secret for a period not longer than two years.

³⁷ On the other hand, the act does not describe what information should be contained in the register.

At the same time, in many acts, providing for the creation and keeping public registers, the question how access to information is provided remains unclear³⁸.

In order to ensure effective implementation of the APIA State bodies need to distribute the obligations they have within the structures of their administration; this is especially important in a number of state bodies, which have territorial branches. The process of providing access to information under APIA is impracticable if an official or a group of officials are not authorized to perform specific functions under the act. Art. 28 para. 2 provides an opportunity for authorizing officials to handle information requests and take decisions on questions in the freedom of information area. In some state bodies these officials have been determined with an order³⁹.

In 2003 a number of internal rules and regulations have been amended in order to determine the functions of officials under APIA or to regulate access to information in general. In that way, obligations in relation to providing access to public information have been given to specific administrative departments of the Ministry of Energy and Energy Resources (MEER), Ministry of Youth and Sports (MYS), Ministry of Agriculture and Forestry (MAF), Ministry of Education and Science (MES), Ministry of Finance (MF), and Ministry of Health (MH). In some of the public institutions obligations in connection to the implementation of APIA are given to inspectorates⁴⁰, which perform control functions, legal service departments, Information and public relations departments⁴¹. A comparison between the functions of the department, which handles information requests and the number of its officials, shows that the relative part of information officials in the ministries varies a lot. In the Ministry of Foreign Affairs (MFA) 27 out of 1897 officials are in charge of information access, in MEER - 19 out of 190 officials, in MH - 7 out of 290, in the MAF - 14 out of 2367, in the ME - 10 out of 544, in the MYS - 10 out of 290, in the MES - 10 out of 315, in the MF - 41 out of 558, in the MJ - 10 out of 742, in the MRDPW- 10 out of 447, in the MTC - 5 out of 298.

Authorizing an official/department under APIA is an important step, since it practically allows for providing information upon requests. Other important conditions for the effective implementation of the right to information access are organizing training seminars for public officials, simultaneous review of the questions concerning access to public information and protection of classified information, explicit authorization of the information officials by law (primary or secondary legislation), and the opportunity for citizens to easily find them and turn towards them when submitting an information request.

At the same time we should note some weaknesses and flaws in the implementation of the act. As mentioned above, the internal regulations of some ministries do not provide for the

³⁸ A few related examples are: according to Art. 35 para. 1 item 2 of the Personal Data Protection Act access to public registers, containing personal data is provided without requiring the consent of the data subject, but is quite unclear which procedures are followed. According to Art. 6 para. 1 of the Publicity of the property of higher state officials act, access to the „public“ registers is limited and is exercised under a procedure, briefly described by the act. According to Art. 62 para. 2 of the Act for municipal property and municipal property deeds are subject to unlimited public access, but under a procedure determined in the regulation for its implementation.

³⁹ In the Council of Ministers, the Ministry of Environment, the Ministry of Justice, the Ministry of Economy, etc.

⁴⁰ In MEER, MYS, MES, etc.

⁴¹ Departments with such functions are created with the internal regulations of the following ministries: MEER, MH, MAF, MES, MOEW, MYS, MF, Ministry of Transport and Communications, Ministry of Justice, Ministry of Regional Development and Public Works (MRDPW), Ministry of Foreign Affairs, Ministry of Labor and Social Policy (MLSP), Ministry of Culture (MC), ME, and MD. In the Ministry of Interior it was created with the Ministry of Interior Act.

implementation of APIA. Some of them regulate it to some degree, but do not authorize an official or a department with specific functions, which causes responsibilities to be diluted. Some of these bodies of the executive power have extensive decision-making capabilities and spend a large amount of funds, including European money. Let's take the Roads Executive Agency for example, in which the work under the APIA is carried out by the executive director as a body of power. From its internal regulation it is seen that there is no administrative structure in charge of access to public information, although nearly 3000 officials work for the agency and it has territorial branches in the whole country. It is obvious that even in the presence of a good will by the officials, without establishing conditions for an effective administration, it is impossible to adequately provide access to public information.

Other legislative problems

We maintain most of the recommendations made by us in the previous annual report. The necessary changes in the Environmental protection act (EPA) have not been adopted, as well as in legislation regulating the privatization process and access to archives.

PERSONAL DATA PROTECTION LEGISLATION

I. General regulation

The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data of The Council of Europe⁴², adopted on Jan. 28, 1981 was ratified by Bulgaria in May 2002. The Convention is in force in Bulgaria since January 2003 and its text was promulgated in the State Gazette in March 2003.

The purpose of the Convention is to secure respect for the rights and fundamental freedoms of individuals, and in particular their right to privacy, with regard to automatic processing of personal data relating to them.

The Convention formulates the main standards that need to be set in the domestic personal data protection legislation of each country.

1. Quality of data requirement in Art. 5 - data should be adequate, relevant, obtained and processed fairly and lawfully, stored for specified and legitimate purposes and not used in a way incompatible with those purposes;
2. Special categories of data requirements in Art. 6 - Personal data revealing racial origin, political opinions or religious, or other beliefs, as well as personal data concerning health or sexual life, may not be collected or processed automatically, unless adequate safeguards are provided by domestic law;
3. Security of data requirement - Appropriate security measures must be taken for the protection of data stored in automated data files against accidental loss or destruction;
4. Additional safeguards for the data subject requirement - each data subject must be ensured access to his/her own personal records and given the opportunity of rectification or erasure of such data in case they had been processed contrary to domestic law;
5. Requirement for minimal restrictions of the right of data inviolability;
6. Requirement for sanctions and remedies for violations of provisions of domestic law.

The Bulgarian legislation provides a general data protection regime, contained in the Personal Data Protection Act (PDPA), in force from Jan. 01 2002. The Act was adopted in the end of 2001 and promulgated in State Gazette issue 01/Jan 04, 2002. In general the Act follows the main standards set in Convention 108. Nevertheless, as we have already noted in our previous Annual report, it contains quite a few disputable provisions, some of which are in direct contradiction to the Access to Public Information Act (APIA)⁴³. The main problems arise from the scope of the definition of „personal data“. The PDPA goes beyond the definition provided in Convention 108 and includes as personal data information connected with membership of individuals in boards of commercial companies and the performance of functions of state bodies.

⁴² Convention № 108 of the Council of Europe from Jan. 28, 1981 for the Protection of Individuals with Regard to Automatic Processing of Personal Data - ratified by the 39th Parliament of Bulgaria on May 29, 2002. - State Gazette issue 56 June 7, 2002; published by the Ministry of Interior promulgated in SG бр. 26 от 21.03.2003 г., in force from Jan. 01. 2003.

⁴³ See „Access to Information Situation in Bulgaria 2002. Annual report“ on http://www.aip-bg.org/l_reports.htm.

Such an extension of the protected personal data is totally inadequate⁴⁴ and is in contradiction to other norms of the freedom of information legislation in Bulgaria⁴⁵. This definition limits the right of a broader information access about public figures, while the importance of this right has been outlined by the Constitutional Court of Bulgaria in its interpretation of Art. 39-41 of the Constitution⁴⁶.

The second serious problem caused by the PDPA is that it determines as data controllers all persons or entities collecting and storing personal data, while at the same time it does not clarify whether all data controllers should be registered.

The Bulgarian Personal Data Protection, following the requirements of Convention 108 establishes an independent body - the Personal Data Protection Commission, which overlooks the implementation of the Act. The Commission was elected by the Bulgarian Parliament on May 23, 2003. The PDPA grants the Commission a number of rights, so that it may effectively ensure the data protection of individuals when their rights have been violated. The Commission may review appeals against personal data controllers, perform inspections, issue binding decisions, order temporary suspension of personal data processing, impose sanctions on persons or entities, who process personal data against the provisions of domestic law. The Commission creates and keeps a register of data controllers. Under the PDPA the Commission must adopt internal rules, regulating its activities, describing the structure of its administration, the procedures for keeping the data controllers register and the procedures for considering appeals, issuing orders and imposing sanctions.

The initially adopted Rules for the work and organization of the Commission provide for an administration of 76 officials, including its members. Until now most of the positions have not been filled in⁴⁷. Two years after the adoption of the Act only 1/7 of the provided officials have been appointed, while all the stipulated departments exist only on paper.

In January 2003 the PDPC adopted new internal Regulations⁴⁸, repealing the ones, adopted in 2002. The new regulation describes in detail the work and the decision making process of the Commission, clarifies the procedures in relation to personal data controller registration, and approves a registration form. The term for filing registration forms was initially set to August 31, 2003, but was later extended until December 1, 2003.

With the adoption of the new internal regulation, the Personal Data Protection Commission was given a good opportunity to interpret the provisions of PDPA, specifically clarifying who was obliged to register as a personal data protection controller. Unfortunately, the Commission adopted a broader interpretation of the law and introduced an obligation of all personal data controllers to register. In

⁴⁴ Such data are contained in public registers - the register of trade companies, etc.

⁴⁵ Art. 2, para. 1 of APIA defines „public information“ through the opportunity of the public to form an opinion about the work of the state bodies.

⁴⁶ Decision № 7/1996 on constitutional case №1/1996.

⁴⁷ In comparison to the Bulgarian Commission, the Personal Data Commissioner of Ireland has an administration of 16 officials, while 40 people work for the Commissioner of Sweden.

⁴⁸ Internal regulations of the Personal Data Protection Commission; published by the Head of the PDPC, promulgated in State Gazette issue 9 of 31.01.2003, amended in issue 15 of 14.02.2003.

practice this meant that every employer with as little as a couple of employees had to register as a data controller⁴⁹, forcing hundreds of lawyers, doctors, and tradesmen to submit registration forms. The problem has been created by the PDPA itself, which unnecessarily broadened the categories of protected personal data and turned every person or entity, which holds information about more than two people into a personal data controller. The Commission could have used its rights under Art. 10 para. 1 items 1 and 5 under the PDPA to make a narrow interpretation of the Act, to prevent the needless registration and to avoid the spending of quite a lot of funds, both for processing registration forms, and spent by business companies.

The Commission could have adopted the approach already working in other countries - mandatory registration only for state bodies, which collect and process personal data, and optional registration for private entities. Optional registration will not introduce additional risks for violating the provisions of PDPA by personal data controllers who have not registered. The Bulgarian PDPA gives enough powers to PDPC in its Art. 16 to investigate persons who collect and process personal data; the Commission is empowered to act not only against those registered as data controllers but also against everyone, who collects, processes or transfers personal data. This is why the mandatory registration requirement is not necessary.

II. Sectoral laws

During the previous year significant changes have been made in various normative acts in order to bring them in accordance with the new data protection standards laid down by the Personal Data Protection Act and Convention 108.

1. Personal Data Protection related to public order and security

Ministry of Interior Amending Act

In the beginning of 2003 amendments in relation to personal data protection were adopted in the Ministry of Interior Act⁵⁰. In Art. 7 para. 4 from Chapter Four of the Act, under the main activities of the Ministry it was added „acquiring, analyzing, and keeping information, including processing personal data and conceding it in cases provided by law“. The amendments also regulate the powers of police officers to collect, process and keep, biometrical identification data about individuals, like fingerprints, photos, and DNA profile samples. Probably the most important amendment to MIA in relation to personal data protection is the explicit ban on the collection of sensitive information revealing racial or ethnical origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life. The second important change⁵¹ is the provision of an opportunity for every individual to access his/her own personal data collected or processed by the Ministry of Interior, even in cases when this has been done without his/her knowledge and consent. Upon request the Ministry discloses a copy on paper of the collected and processed personal data to the data subject.

⁴⁹ Currently, about 1,025,000 entities are recorded in the BULSTAT register, from which about 850,000 under the Trade Act. If ten minutes are needed for registering a single data controller - which is impossible - in order to register half of the administrators (around 876 000) the five members of the Commission will have to work eight hours a day 365 days a year for five years.

⁵⁰ Ministry of Interior Act - Promulgated SG issue 122/19.12.1997; amended in issue 17/21.02.2003; Amending act in issue 26/21.03.2003, in force from 01.01.2003, SG issue 95/28.10.2003; amended issue 103/25.11.2003; amended issue 112/23.12.2003 in force from 1.01.2004; issue 114/30.12.2003.

⁵¹ Art. 182, para.4 of MIA.

A disputable question whether the right of data subjects to access their own personal data could be restricted in the interest of protecting national security has been laid down in Art. 182 para. 7 of the Bulgarian MIA⁵². According to its provisions the bodies of the Ministry of Interior can fully or partially withhold personal data in cases when their disclosure can jeopardize national security or public order or when information classified as state or official secret might be revealed. Access is also restricted under the discretion of MI officials, when there is a danger of revealing information sources, or exposing the secret methods and procedures of information collection or when disclosure of personal information to the data subject would hamper the implementation of their law-provided activities. This formulation of Art. 182 has left an unduly broad opportunity for MI officials to withhold information from the data subjects.

Agreement on co-operation between Bulgaria and the European Police Office (Europol)⁵³

The agreement regulates the transfer of information between the Republic of Bulgaria and the European Police Office (Europol), including the transfer of personal data. The agreement provides guarantees for data protection and integrity. The Republic of Bulgaria takes whole responsibility for damages incurred by an individual as a result of factual or legal errors in any data exchanged as part of the information transfer with Europol.

Regulation for registration with the police offices⁵⁴

The regulation determines the conditions for registering with the police offices, regulating and processing of personal data of Bulgarian and foreign citizens, as well as individuals without citizenship, against whom prosecution has been initiated. Information about police registration of individuals is kept in:

- document information systems - „Police register“, „Police register index“, „Photo index“ and „Dactyloscopic index“;
- Automated information systems - „Central police register“, „Integrated regional police system“, „Automated dactyloscopic identification system ADIS“ and „National DNA database“.

As an important flaw of the Regulation we must note the lack of any guarantees for security of the personal data systems. No sanctions are provisioned for individuals, who misuse information from the information systems.

2. Personal Data Protection related to family law

The new regulation on the adoption procedures, provided in the amending act to the Family Code (FC) assumes an adequate protection of personal data of the birth parents, the adopted children, and the adoptive parents. Two new registers are created, one containing information about the children, subject to adoption and the other one - about the parents wishing to adopt a child.

⁵² In practice this question was brought before the court in the case „Yonchev v. the Ministry of Interior“ - see the attachment AIP court cases.

⁵³ Agreement on co-operation between Bulgaria and the European Police Office (Europol) - ratified by law, adopted by the 39th Parliament on July, 31, 2003, published by the Minister of Interior, promulgated in State Gazette issue 92/17.10.2003 in force from 25.08.2003.

⁵⁴ Regulation № I-221 from 13.10.2003 for registration with the police offices - issued by the Minister of Interior, promulgated in SG issue 95/28.10.2003 in force from 29.01.2004.

Both registers contain information about the health and family status, property and a number of facts and circumstances of the personal and family life of the included individuals. For the first time the Bulgarian legislation allows for a „secret of adoption“ restriction. The adoptive parents or the adopted children upon reaching legal age may request information about the background of the child from the regional court, which took the decision for adoption, in cases of significant importance.

The current provisions of the Family Code do not fully guarantee the protection of such exceptionally sensitive categories of information. The only relevant provision is the obligation of officials to keep secret any information about the adopted children and the adoptive parents, which has become known to them in the course of their work. As you can see, the information from those registers may become a „highly valued commercial product“ and because of that severe sanctions should be provided against unlawful use of data contained in them.

3. Health care sphere

Health Insurance Act (HIA)

In accordance with the requirements of Convention 108 amendments were adopted in the Health Insurance Act⁵⁵. The amendments introduced an explicit requirement for health insurance companies to protect information, concerning the health insurance contracts and information, related to personal data and health of the insured persons. The adoption of these amendments was essential for the protection of personal data, because previously only medical care personnel like doctors, dentists, and nurses were required by law to protect information about the health status of citizens. Access to this kind information is regulated under the Protection of Personal Data Act.

Human cells, tissues, and organs transplantation act (HCTOTA)

On April 30, 2003 the Parliament of Bulgaria adopted the **Human cells, tissues, and organs transplantation act**, which entered into force from January 1, 2004. This act regulates the donation, keeping and usage of information related to transplantations. The Act provides for the creation of a public and an „official-use-only“ register for keeping information about transplantations. The HCTOTA also provides for the adoption of secondary regulations, among which a **Regulation for the scope of information, registration procedures, keeping and utilizing information from the Transplantation Executive Agency**, i.e. data about the donors and the organ recipients. The Regulation will also determine the contents and scope of information kept in the public transplantation register, which will not contain personal data, as required by HCTOTA. Information in the public register will be accessible by everyone under the procedures of the Access to Public Information Act.

The official-use-only register will contain data about the potential donors. All information will be kept in the register for 30 years. Under the provisions of the Personal Data Protection Act all data subjects will have an opportunity to check whether their donation will has been correctly entered into the official register.

Additional guarantees for the protection of personal data in the health care system have been provided in the Blood Donation and Transfusion Act, which prohibits the disclosure and publishing of information making it possible to identify the blood donors and recipients.

⁵⁵ Health Insurance Act, promulgated in SG, issue 70 from 19.06.1998.

At the same time, the recently adopted Regulation № 6 for the sites of specialized medical and psychological examinations and the places of periodic health check-ups⁵⁶ does not provide clear instructions on how to keep the collected information and does not provide guarantees for its protection.

Regulation № 6 for the sites of specialized medical and psychological examinations and the places of periodic health check-ups⁵⁷

The regulation describes the procedures for conducting specialized medical and psychological examinations on applicants, wishing to obtain access to classified information. The procedures of periodical health check-ups for officials, who have been approved to access classified information are also defined by Regulation № 6.

Access to the collected data from medical examinations is granted only to the medical staff that conducted the examination, the examined person, and authorized officials from the institution, which requested it. Although disclosure of the collected information by doctors and psychiatrists for their own benefit is explicitly prohibited, there are no specific sanctions against this in the Regulation.

4. Telecommunications and new technologies sphere

A new Telecommunications Act was adopted in the end of 2004 by the Bulgarian Parliament⁵⁸.

The purpose of the Act was to create conditions for the development of the telecommunication market in line with the new technologies, while at the same time, to guarantee the freedom and confidentiality of communication services, as well as the protection of personal data of the end users.

A problem in the implementation of the Act could be created by the provisions, obliging the providers of universal telecommunication services to prepare and publish both a printed and an electronic version of a phone book of their customers. The Act contains no requirement for the service providers to request consent of the clients when including their numbers and other personal data in the phone books.

Chapter Fourteen of the Telecommunications Act regulates the confidentiality of communications and the protection of personal data in providing telecommunication services. Specifically, the Act introduces an obligation for the service providers to take technical measures guaranteeing confidentiality of the communications. These measures should cover the kind of service, its content and all information related to its provision. Besides technical coverage, service providers are prohibited from disclosing the content of the communications and data related to them, which come to their knowledge in providing their services.

⁵⁶ Regulation № 6 for the sites of specialized medical and psychological examinations and the places of periodic health check-ups from 19.03.2003 - Published by the Minister of Health , promulgated in SG issue 35 from 16.04.2003.

⁵⁷ See note №56

⁵⁸ Telecommunications Act - promulgated in SG issue 88/7.10.2003 in force from 7.10.2003.

A separate section of the Telecommunications Act provides special procedures guaranteeing the protection of personal data of end users, which they submit to the service providers in relation with the provision of communication services.

Recently, the need for personal data protection over the Internet in Bulgaria has been increasing significantly. A growing number of people are using the global network as part of their every-day work. As e-business is entering the homes of Bulgarians, it is becoming essential to guarantee security of electronic commerce and adequate personal data protection of end users. This is especially important because of the wide variety of activities performed by commercial companies online and the services they provide, like web sites for online dating, marketing surveys and online shopping.

We must note here that Bulgarian legislation provides quite inadequate guarantees of the right of personal data protection over the Internet. Only the general norms of the Personal Data Protection Act and the provisions of the Electronic document and electronic signature act provide some - although insufficient - level of protection⁵⁹.

It is worth mentioning that in the end of last year articles 319a - 319e of the Penal code⁶⁰ were amended, making it a crime to publish or distribute system or user passwords with subsequent disclosure of personal data. The stipulated sanction is up to one year of imprisonment, while in cases of malicious usage or substantial harm caused, the lawbreakers can serve up to three years in prison.

As we noted earlier, the existing legislation inadequately guarantees the right of personal data protection. With new technologies being introduced in civic and commercial dealings, the issues of confidentiality are becoming increasingly sensitive. The new conditions and the development of these new social interactions require a new legal arrangement guaranteeing the right of personal data protection of e-government and e-commerce users.

⁵⁹ Electronic document and electronic signature act - promulgated in SG issue 34 from 6.04.2001 in force from 7.10.2001 amended in issue 112 from 29.12.2001, in force from 5.02.2002.

⁶⁰ SG issue 92 from 27.09.2002.

GLOBAL MONITORING RESULTS

Access to Information Programme has been monitoring the implementation of The Access to Public Information Act (APIA) since its adoption in 2000.

The team of the organization and the network of coordinators in the regional towns of Bulgaria monitor freedom of information practices in different ways.

Since its very establishment, our coordinators have been sending us cases of information refusals, referred to them by citizens and legal entities, who request the legal assistance of AIP. These cases are commented by our lawyers and entered into an electronic database. Statistical reports from the database can be viewed at the Internet page of AIP⁶¹. They outline the picture of the **natural demand** for information and the problems emerging in the process of seeking and providing access to information. An analyses of the cases, referred to our organization for legal assistance in 2003 can be found later in this report.

After the adoption of the Access to Public Information Act, AIP has been conducting **systematic monitoring** of the practices of its implementation through specialized surveys, three of them held after the adoption of the Act until 2003⁶². The purpose of these surveys was to indicate the how prepared the bodies of the executive were to **fulfill their obligations** under APIA.

In 2003 the team of AIP was part of an international global monitoring projects for assessing the freedom of information practices⁶³.

In Bulgaria the monitoring started on May 2003 (7th and 19th) with the filing of a total of one hundred requests (sixty-six written and thirty-four verbal ones), in eighteen institutions by ten requestors. A characteristic of this survey is that it provides a complete picture of the process of exercising the right to information access - from filing an information request to information about the organization and the work of institutions under APIA.

The second stage of the monitoring started in July with promotion requests, filed by the heads of the national teams. We wished to obtain information about the administrative preparedness for the implementation of the Act, and access to the annual reports of the heads of administrative structures, prepared under Art. 15 para. 2 of APIA.

The third monitoring stage was a structured interview with the information officials in the institutions, selected in the first two request stages. The purpose of the interviews was to get an explanation of the problems, which had occurred in the first monitoring stages and to get a better picture of how institutions have organized their activities of information publishing and disclosure.

Three types of information have been sought through both verbal and written requests in the first stage of the monitoring⁶⁴: information, which was obviously public and should be immediately

⁶¹ http://www.aip-bg.org/cases_bg.htm

⁶² Results from them were presented in our annual reports and are accessible on the Internet site of AIP: http://www.aip-bg.org/l_reports.htm

⁶³ The survey methodology was developed by Open Society Justice Initiative (OSJI) and was carried out by national teams in five countries - Armenia, Bulgaria, Macedonia, Peru, and South Africa. The charts presented in this report are valid for Bulgaria only.

⁶⁴ The definitions of these types of informational are apparently conditional. Information, which the requestors believed to be clearly public in many cases turned out to be exempt from access, according to the public officials. The monitoring did not include appeals and judicial review of these cases.

provided upon request; information, which is presumably public, but requires some time and efforts to be disclosed; and information, which for some reasons (topics of interest in the public debate) could be viewed as sensitive by the public officials.

For example:

In our opinion, readily available and public information public information was:

- Ministry of Environment and Water: Methodology for monitoring air and water pollution and the number of monitoring stations;
- Regional governors: Funds spent for road construction/maintenance in the region for 2003;
- Ministry of Defense: The internal regulation for working with information requests under APIA.

Examples of information, which we presumed to be public, but required some time and efforts to be disclosed:

- List of all financed farmers, including the allocated funds in 2002 by the National Agricultural Fund;
- Cases of missing weapons from the army in 2002, and the investigation of these cases by the Ministry of Defense;
- The sum of all compensations paid to officials of the Ministry of Education and Science under the State Servant Act in 2003.

Information, which for some reasons (topics of interest in the public debate) could be viewed as sensitive by the public officials was:

- Documents about the office car of the National Health Insurance Fund Director. How was it chosen, copy of the contract, its price;
- List of court files classified after the adoption of PCIA - from the courts;
- List of projects, funds spend, implementing organizations on Phare Programme minority projects - from the Ministry of Finance.

Requests were filed simultaneously in the five countries in similar institutions. In Bulgaria the institutions were: The Council of Ministers, Ministry of Defense, Ministry of Interior, Ministry of Health, Ministry of Finance, Ministry of Education and Science, Ministry of Environment and Water, three regional governors - of the City of Sofia, the Region of Sofia, and the region of Sliven, two municipalities - Sofia and Sliven⁶⁵, three courts - the Supreme Court of Cassation, the Regional Court of Sofia, and the Sofia City Court, and the Bulgarian Telecommunication Company. Two of the institutions were selected by the national teams. In Bulgaria these were the National Health Insurance Fund (a public law entity obliged under APIA) and the National Agricultural Fund.

⁶⁵ The choice of the specific regional governors and municipalities was made by the national teams.

The principle that everyone has the right to access government held information is a standard⁶⁶. „This principle should apply without discrimination on any ground, including that of national origin“⁶⁷. In the Bulgarian Access to Public Information Act the principle of equality is among the basic principles for exercising the right to information access⁶⁸.

The implementation of this principle in exercising the right to information access was also assessed in the course of the monitoring.

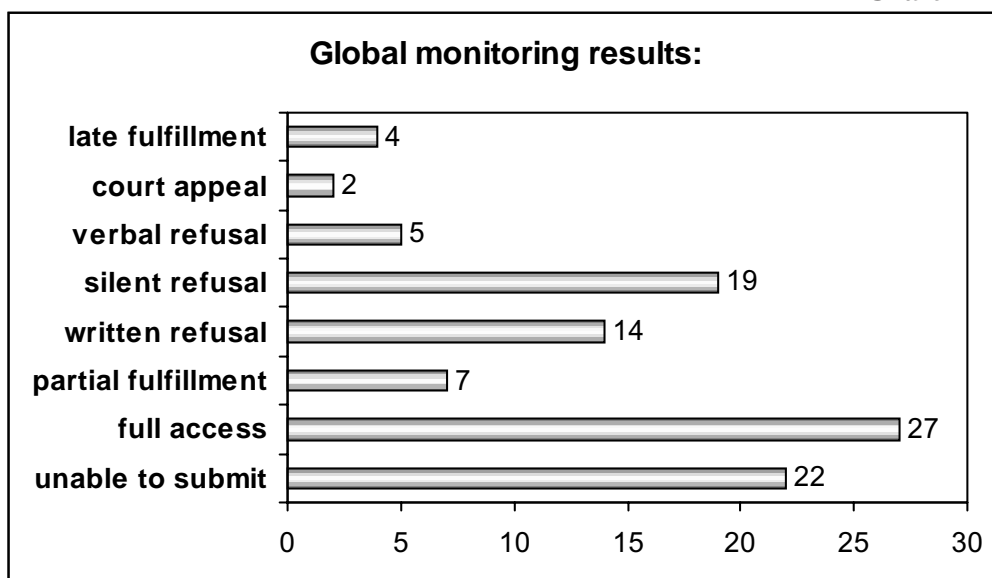
Requests were filed by representatives of different groups - journalists (2), NGOs (3), citizens (3), and socially excluded persons (2).

We should briefly describe the law-provided procedure for filing information requests, so that the results of the monitoring can be better understood.

The procedure starts with either a verbal inquiry or a written request, which could also be filed electronically. The written request follows the verbal inquiry in cases when the latter has not received any answer or the requestor is not satisfied with the quantity or quality of the information disclosed. Requests are reviewed in the shortest possible term and no later than fourteen days after their registration the obliged bodies must take a decision and notify the requestor in writing. The Act gives a few possibilities for extending the decision period: by ten days, in cases when the requested information is contained in a large number of documents and more time is needed for its preparation; by seven days when a consent of a third party is required; clarification of the request in a 30-day period; and forwarding the request in cases when the requestee does not hold the requested information. The requestor must be notified for all these possibilities for extension, and in the latter two cases the 14-days decision period is renewed from the date of notification.

Within two weeks of receiving the decision to provide access - complete or partial - or to withhold information, the requestor has an opportunity to appeal. The appeal is sent to the authority, which has an obligation to resent it to the administrative panels of the respective court.

Chart № 1



⁶⁶ See Recommendation (2002)2 of the Committee of Ministers of the to member states on access to official documents adopted on Feb. 21.2002 <http://www.aip-bg.org/eurolaw.htm>.

⁶⁷ Art. III of Recommendation (2002)2 of the Committee of Ministers of the to member states on access to official documents adopted on Feb. 21.2002.

⁶⁸ See: Art. 6 para. 2 of APIA, promulgated in State Gazette issue 55 from 7.07.2000, amended in issue 1 from 4.01.2002, in force from 1.01.2002, issue 45 from 30.04.2002 <http://www.aip-bg.org/bglaw.htm>.

As you can see from in the above chart from one hundred requests only in thirty-eight cases information has been provided.

In twenty-seven cases all information has been disclosed in the law-provided terms, while four requests have been completely fulfilled after the deadline.

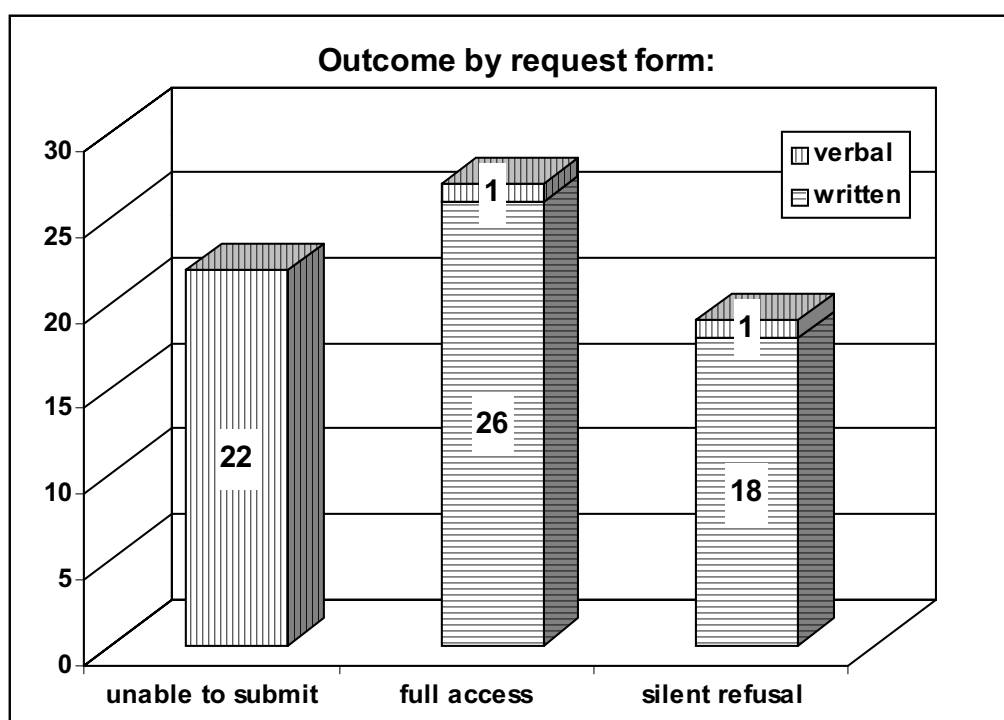
Seven requests have been partially fulfilled⁶⁹.

You can see Chart № 1 that in a significant number of cases the requestors were unable to submit their requests, and there is a large number of requests, which have been left unanswered (the so called „silent refusals“).

There are a number of explanations for these results, which we can interpret on the basis on the promotional requests and interviews from the second stage of Monitoring and from the systematized review of the implementation of APIA, conducted by AIP since the adoption of the act⁷⁰.

These outcomes show that public officials prefer to ignore the law. These results have to be given an adequate explanation, so that the positive developments in the last three years would not be depreciated. This will also help us in formulating more precisely recommendations for the work of the obliged institutions.

Chart № 2



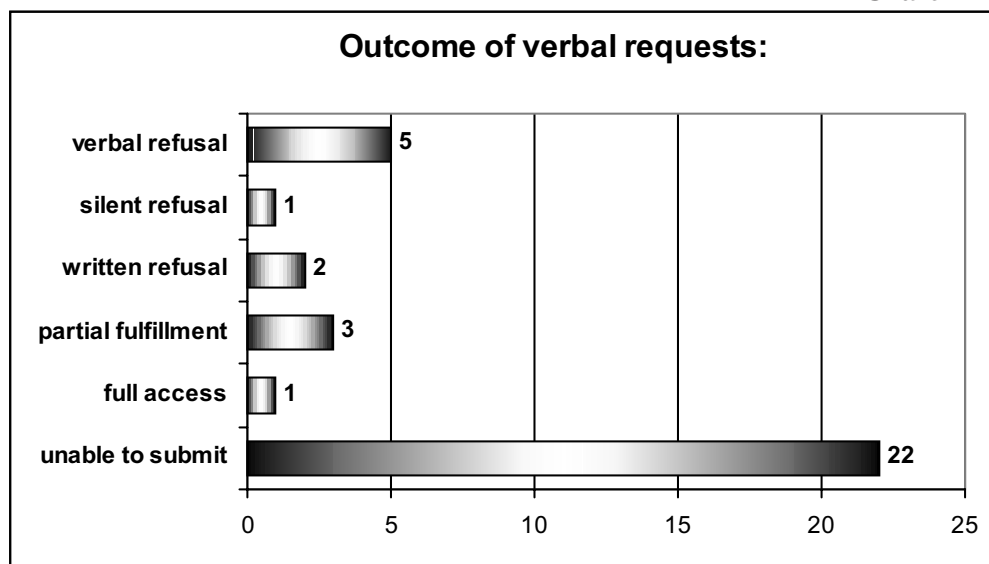
⁶⁹ We are using the term „partial fulfilment“ to differentiate this outcome from „partial access“. In the latter case documents are provided and those parts of them, which could lead to harming a protected interest are blacked out. By „partial fulfilment“ we mean the disclosure of incomplete information or only parts of the requested documents, without examining the possibilities of potential harm of a protected interest.

⁷⁰ The reports on these surveys can be found at: http://www.aip-bg.org/l_reports.htm

Results from verbal requests indicate lack of political will to implement the law

The high number of cases, in which requestors were unable to submit their verbal requests, is especially characteristic for Bulgaria.

Chart № 3



In twenty-two of the total number of thirty-four cases requestors were unable to submit their verbal requests at all, while in only four cases information was provided. The other eight verbal requests resulted in a refusal to disclose information in the following forms:

- Registration of the request followed by a written refusal - 2 cases;
- Registration of the request followed by a silent refusal - 1 case;
- Verbal refusals - 5 cases.

Verbal inquiry is indeed provided as a form of submitting an information request in Art. 24(1) of APIA. As we noted earlier, if the requestor is not satisfied with the decision or with the quality or quantity of information disclosed as a result of the verbal inquiry, he/she may file a written request. This means that according to APIA the written request is seen as a continuation of the procedure following a verbal inquiry.

Most officials authorized to handle information requests do not work in the reception for citizens. Their obligations include preparation of the decision for disclosing information under written requests.

In most of the monitored institutions verbal inquiries are not considered as information requests and often the requestor who turned up in the reception could not even reach the person who was in charge for handling APIA requests. The Ministry of Health was the only institution, in which instructions on where to submit verbal requests under APIA were available. The work of the Ministry of Environment and Water in providing access to information is well organized; citizens can turn to the officials of the Information Center, which works every day from 2 p.m. until 5 p.m. However, the place to file written information request is in another building of the MOEW⁷¹.

⁷¹ See the web page of the MOEW at <http://www.moew.government.bg>

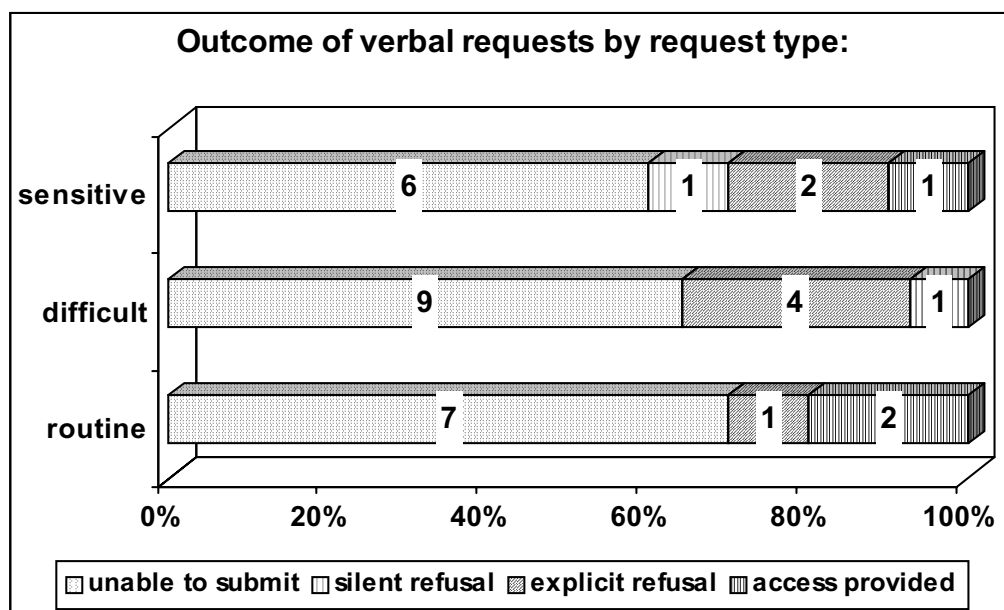
The understanding that verbal requests cannot enter into the administration system, cannot be registered (with only two exceptions), and cannot be charged (with only one exception), is an effect of single-minded efforts to establish the internal procedure for handling written requests, characteristic for the year 2003. Indeed, the second stage of monitoring showed that in many institutions internal rules, regulating the procedures for handling written requests and publishing information have been adopted and in all Ministries where interviews were conducted, an official had been authorized to handle written requests. These internal regulations in most cases were a result of the efforts of the authorized information officials, rather than a political will to implement the law. The officials themselves formulate the lack of rules for processing verbal inquiries as one of the weaknesses of the system for providing information access.

In larger institutions it is not easy for citizens to reach the information officers, due to his/her limited working hours or the security guards⁷². Our requestors were instructed to test whether they were able to submit their information request, rather than to receive the information at all costs. This is why the results show the true ability of citizens to submit verbal inquiries under APIA.

In those municipalities with established information centers it is not a problem for citizens to receive access to information upon verbal inquiries, provided that the official knows how to find the requested documents or when they are accessible through the internal network.

Institutions, in which services for the citizens and legal entities are provided on a daily basis, like municipalities and some regional governments, have created internal systems for handling the information (among them are fifty-six municipalities, which in the process of establishing their centers for information and services for the citizens have created a „single desk“ system for serving citizens). In those municipalities, there are no physical obstacles to reach the information officers, and we should also bear in mind that the centers for information and services work full time. This explains the fact why in those institutions the cases, in which requestors were unable to submit their verbal inquiries were rare.

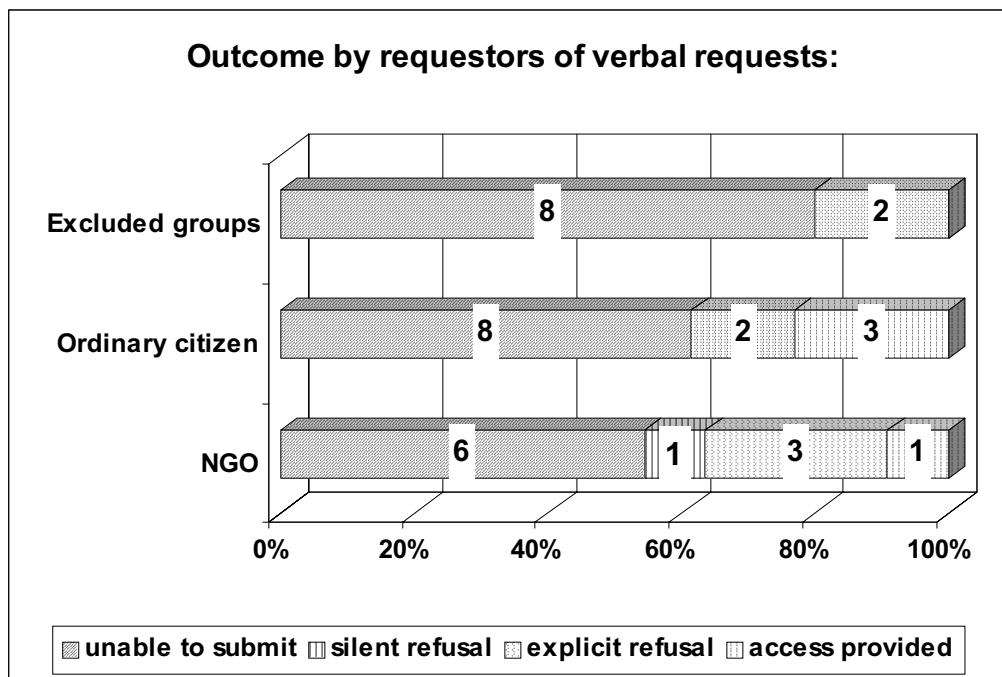
Chart № 4



⁷² In the Ministry of Health there is an instruction for filing verbal information requests. The reception hours of the official handling such requests are between 2 p.m. and 4p.m. Tuesdays and Thursdays. Even if this information had been published on the web site of the Ministry, the limited working hours of the department would present difficulties for the requestors.

We cannot tell whether there is a relation between the request outcomes and the type of the request (routine, difficult, or sensitive) or by type of the requestor, although it is important to note the fact that excluded group representatives did not receive the requested information in any of the institutions.

Chart № 5



Written requests

The sixty-six written requests resulted in eleven explicit refusals and eighteen silent refusals.

Twenty-seven of the requests have been completely fulfilled.

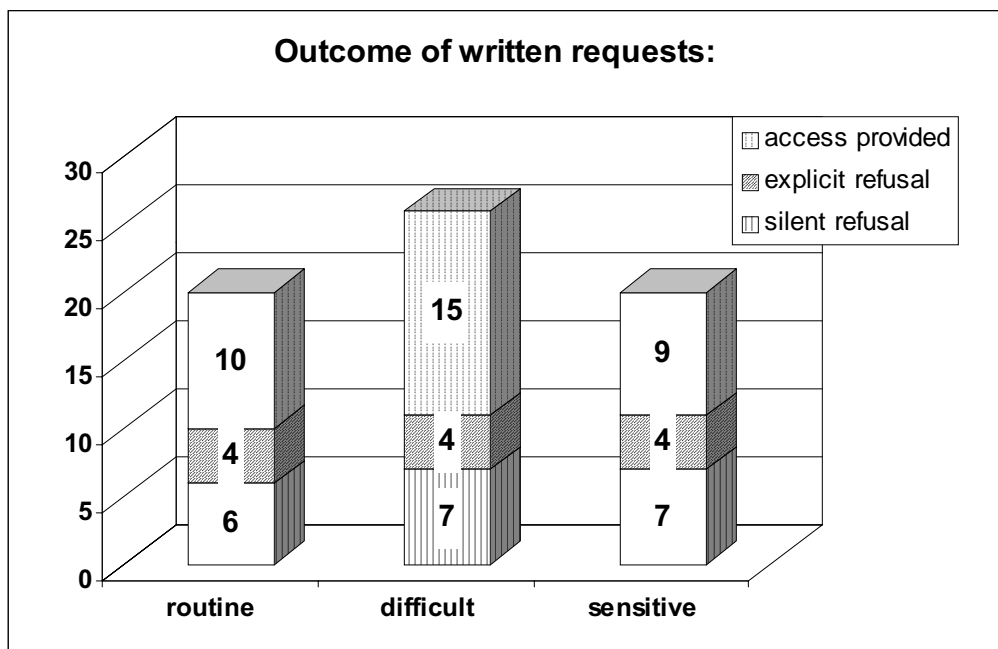
The percentage of „silent refusals“ from the total number of requests is significant - over 27%.

We believe that this high percentage is a result of the lack of administrative control on the implementation of the act, as well as the low fines for officials who fail to take decisions on information requests in the law-provided term (fines are between 10 and 50 Euro). Furthermore, even after a court decision reverses the refusal of public officials to disclose information, the procedure should be started again and the public official should issue a new decision, rather than automatically disclose the requested information. Although the Supreme Administrative Court of Bulgaria proclaimed the "silent refusals" illegal, in such cases the requestors have to resubmit their requests, which introduces additional difficulties on them and leaves the officials with the impression that no penalty could be imposed on them if they fail to fulfill their obligation to answer in the 14-day term.

Another reason for the large number of silent refusals is the lack of political will for the implementation of the act, resulting in poor internal organization in the institutions. In many institutions the information officers are not authorized to take decisions whether to disclose or withhold the requested information. This leads to apprehension and reluctance to take responsibilities without explicit authorization even in clear cases.

The hypothesis that there is a relation between the decision and the request type (clearly public, difficult to process, or sensitive in content) has not been justified according to the monitoring results in Bulgaria, as the results indicate.

Chart № 6



Obviously the current problems of the institutions are connected with establishing a stable internal working system of handling information requests, rather than with the request content. The more active officials are amused by the opportunity to find exemptions from the right to information or to formally follow the procedure⁷³. Some of the officials are fascinated by the opportunity to look for an exemption ground, or to blindly follow the law. Some higher officials believed that information could be withheld from public access only because of an exemption in a law, rather than after careful review of the request⁷⁴.

The hypothesis that journalists and NGOs will have greater success in seeking information than normal citizens and excluded groups also is not fully justified by the results from the written requests filed in Bulgaria. Although the excluded group persons who participated in the monitoring could not receive information requested verbally from any of the monitored institutions, the situation was similar with the other requestors, to a certain degree. (See Chart № 5).

Our observations indicate that sometimes decisions on information requests are taken mainly under the apprehension that a national media would criticize an eventual refusal. Probably this is an explanation why the oppositional journalist (working for a national weekly newspaper) received information in more cases than the one working for a local media.

⁷³ Examples of this were the access fee that the interviewer was required to pay for the interview by an official of the Regional Governor of Sofia, or several cases when both a letter of notification and letter of decision were sent to the requestors.

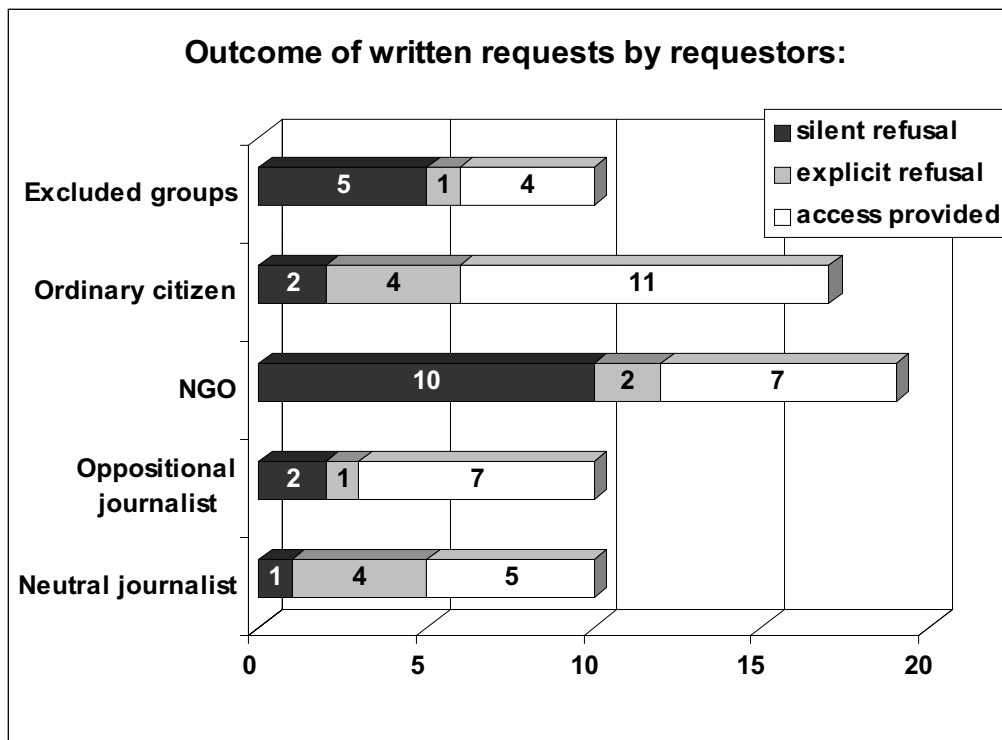
⁷⁴ E.g. the refusal of the Ministry of Interior to disclose information already published on the web page of Europol, using the exemption of Art. 13 of APIA (discretion to withhold preparatory information without a significance of their own).

Example:

In a noteworthy case a journalist, an ordinary citizen, and an excluded group representative requested the same information from the Regional Inspectorate of Environment and Waters in Sofia - all inspection reports and subsequent penal orders imposed on an iron mine near Etropole. The journalist received information within the law-provided term, and was even asked if he would like to receive information by e-mail, while the ordinary citizen and the excluded group person did not receive any information. The ordinary citizen was advised to transform her verbal request into a written one, while the excluded group person received no answer to his handwritten request.

The monitoring showed that the attitude towards NGOs is slightly more complicated. Some interviewed officials were clearly agitated because they believed that those NGOs who sought information were working on their own projects and public officials „(had to) prepare information on their request“.

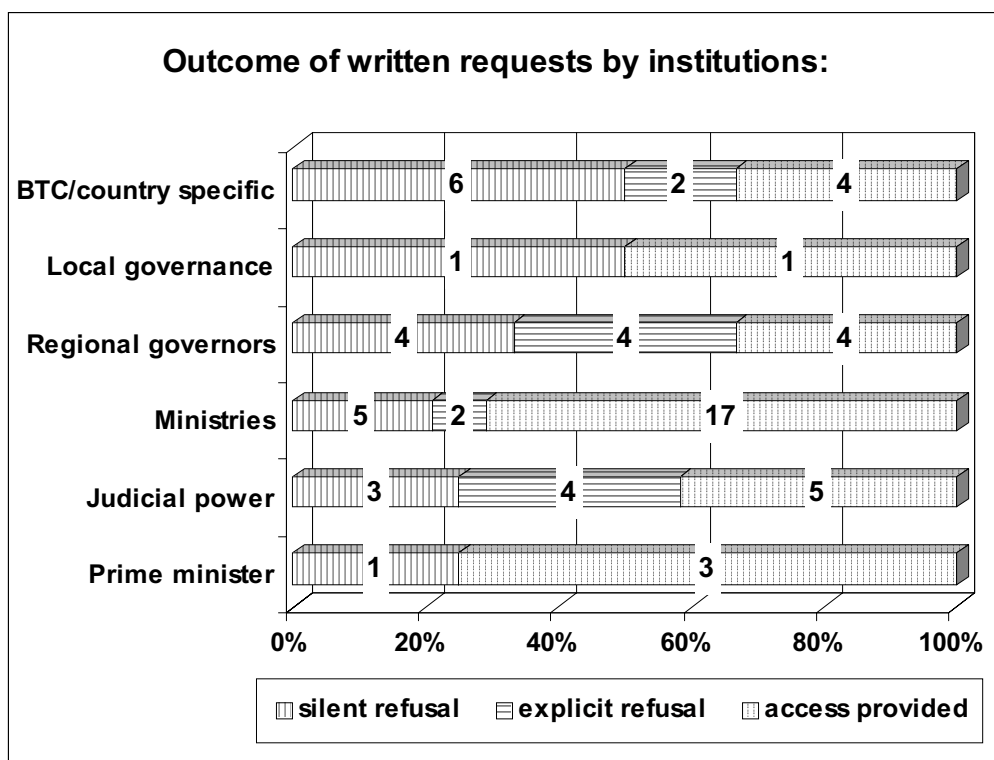
Chart № 7



The monitoring results show that those institutions, which have internally organized their work with written requests, have issued a higher number of decisions to disclose information⁷⁵.

⁷⁵ According to the results from the promotion request, most of the Ministries have adopted internal rules for the work under APIA.

Chart № 8



Conclusions on the problems with the implementation of the APIA

- Certain flaws in the APIA obstruct its implementation.
- Lack of political will for APIA implementation.
- Lack of an official, authorized to take decisions on APIA requests.
- Bad information management.
- Lack of internal administrative control on fulfillment of the obligations under APIA; necessity of making the higher level officials acquainted with the provisions of APIA.
- Lack of internal mechanisms for coordination of the information disclosure process.
- Officials fear that they will make a mistake and could be punished if they disclose information, especially after the Adoption of the Protection of Classified Information Act.

CASES

General overview

The main activity of the **Access to Information Programme Foundation (AIP)** consists of providing legal assistance when access to public information is refused. Cases from citizens, journalists and NGOs are registered in an electronic database after consultation with AIP's legal team.

For the period 01.01.2003 - 31.12.2003 in AIP database are registered a total of 657 cases requesting the foundation's assistance. From that total, 410 cases concern problems encountered during the implementation of the right to information access. In those cases the people accessing information have followed the procedure set by the Access to Public Information Act (APIA), meaning they have made a verbal request or a written one, which has been refused by the concerned institution. In other 108 cases⁷⁶ we have a malpractice concerning the right of every citizen to request, receive and impart information, under article 41 paragraph 1 of the Bulgarian Constitution. Most of those cases concern journalists not allowed to attend public places (courts of law, community buildings) and to reflect public events (press conferences, official meetings). In those cases even if a formal refusal is not issued as understood by the APIA, the right of obtaining information is still hindered.

During the year we often had questions on the registration of personal data controllers following the Personal Data Protection Act (PDPA), the term of which ended at the beginning of December.

People requiring our services have received free legal help in the form of 355 written consultations, 106 consultations on the phone, 20 by e-mail, while 117 written access to information requests have been prepared. In 29 cases legal representation has been provided following court appeals against decisions concerning the right of access to public information.

People looking for information during 2003

The Access to Public Information Act gives the right, to every Bulgarian citizen, foreign citizen or a person without citizenship, as well as Bulgarian and foreign legal entities to request and receive access to information. During the last year the groups using this right the most have been journalists, citizens and NGOs.

1. Citizens

Even if traditionally journalists have been most active in accessing information, their profession requiring it's timely delivery, during the year we note a significant rise in citizens' request for legal help from AIP.

During 2003 we have 166 registered cases concerning citizens where during 2002 their number was 101; and 56 during 2001. Many of those cases for 2003 concern citizens who are not requesting help from us for the first time; a number of them have already benefited from AIP services in previous years. Thus, we can say that the increase is due to citizens' acquaintance with the possibilities offered by APIA for receiving information as well as the already achieved positive results using the procedures under the law.

Once again most frequently citizens have requested legal help for access to documents from governmental authorities which would contribute to solving their other legal arguments or personal

⁷⁶The remaining cases where AIP has been asked for assistance are: 94 - concerning personal data protection, 13 concerning the right of free expression and 32 other consultations.

problems. Those are documents connected with restoring farmlands, industrial estate, real estate, rent contracts where the state or municipality represent one side, etc.

An interesting case is about a woman leading a years-long legal battle with the Ministry of Interior (MI), for the return of a nationalized property. She turned to us during the spring of 2003 because as her case moved to second instance, it was classified. Although she was one of the litigants, she found her self refused all information on the case, and would not even be allowed to read the decision of the first instance court. With a request to the court we asked for a copy of the decision for making the court file as classified, but we received no answer. In order to defend her self our client was forced to use the procedure established by the Protection of Classified Information Act. This was AIP's first experience in dealing with classified court cases.

Another group of cases are brought forward by citizens having a bigger civil sensibility towards social problems, and are very interested in the activities of the states and municipalitys. Thanks to those citizens, often cases concerning the abuse of power, abuse of position, unaccounted spending of public funds, the presence of corruption and others are uncovered.

In January we learned of a case from Vidin, where a citizen filled an information request to the mayor. Her request concerned the caught and placed in isolation homeless dogs during the period 2001-2002; how many of them were put to death and what funds were used from the municipality's budget for this activity like a description of medical expenditures, etc. In response, the requestor received a refusal for public information disclosure signed by the mayor of Vidin. The decision was appealed before the court with the help of AIP, the case won and the refusal was found unlawful. Owing to another case referred to us by the same person we found the interesting fact that in this municipality there is an available form for withholding access to information. In it the only thing left to be filled is the reason for the refusal and the information about the official who has refused access to information.

2. Journalists

During 2003, as in other years, journalists make up the largest group of information seekers. As we have previously noticed journalists prefer verbal questioning as a means of obtaining information. The case for this is obvious: important information has to be timely reflected, for it to be up to date. Because of this the administration uses written requests for information as a sanction on journalists. Thus, last year a permanent practice by the Government Information Service (GIS) was introduced requiring that all journalist questions concerning the activities of the Government be submitted in writing. Furthermore, we received a case where as a result of a written requests, up until the middle of the year a journalist had received the same kind of information for the official trips of ministers during different time periods. After the last two written requests, where the same information - only in more detail - was requested, the journalist received a refusal from the director of GIS. The refusal has been appealed.

From the 368 cases where journalists have requested information, we can say that during 2003 - in contrast with previous years - more journalists have chosen to use the procedure of written requests in order to receive information. Information received in this way is used mainly for journalistic investigations in different areas of public life, because for such research the two weeks waiting period for a response under APIA is not a large barrier.

Under APIA, journalists can be both in the position of information seekers and in the position of obliged entities.

In the month of March last year, for the first time we learned about a case when a journalist - editor in chief of a local newspaper - had received a request for information access, made by a citizen under APIA. The legal right for such a request is provided under Art. 3, which applies to public information created and kept by information agencies and related to the transparency of their activities. In this case the request was about information about the financial standing of the newspaper owner and the newspaper's sales for a specific period of time (Art. 18 paragraph 5 of APIA) as well as other information, concerning the newspaper publisher.

Because the information was not given, the citizen lodged a complaint before the court

With the impending changes in APIA, the requirement of mass media to provide information will be repealed, as their main function is to impart information, using their right under the Bulgarian Constitution. Their current inclusion in the APIA is contradictory to the purpose of the Act - to secure the transparency of the activities of state bodies and their administrations.

3. Non-Governmental Organizations

In 59 cases, during 2003, representatives of NGOs have turned to AIP for legal help. They use the procedures for receiving information under APIA in different cases- when performing analysis and research, during the realization of concrete projects; when their goal is to monitor certain governmental agencies etc. Our experience shows that in most cases, written requests are preferred by NGOs.

The most active from the NGOs are the ones concerned with environmental protection. Environmental information should be given by the state bodies when it is necessary to protect and inform the population in cases of environmental pollution. Yet often environmental organizations have to look for information that has not been disclosed or is incomplete. In most cases they require access to reports on the state of the environment, records on measures and inspections, orders of ministers and so on.

During the summer of 2003, the president of „Ecoglastnost“, a Bulgarian environmental NGO - Montana section, requested access to information from the Minister of Defense, about the destruction of old Bulgarian army equipment in the region of Gabrovnica. Even with the media attention on this issue during the spring, the information provided remained unclear, which promoted the request. Access to the information was refused, the motive being that the data falls in an unpublished register on the Bulgarian Army, issued by the Minister of Defense, meaning that the data was classified. Later, using information from other institutions it was found out that during the burning of the CC-23 missiles' engines (about which the data was requested) dangerous emissions can be released in the atmosphere, much above the accepted safety levels, causing great risks to human health. The case is significant because such information, had been classified as secret, although under the provisions of the APIA and international standards it should be given under state bodies' initiative, since its disclosure could avert threats to peoples lives, health and security.

Most frequently requested information

During 2003 there are no essential changes in the character of the information sought under the APIA. From the received cases, we conclude that the greatest interest is for **financial** information maintained by bodies of the internal financial control and the fiscal administration:

- information on performed financial auditing;
- spending of the state budget;
- inquiries on collected and owed taxes;
- information on the biggest unpaid taxes and who owes them.

There is an important interest from journalists and NGOs in **financial information** compiled by the executive authorities. This relates to contracts made during public tenders, privatization contracts, etc.

Information concerning crime statistics and successfully closed criminal cases is constantly sought. The data in most cases is received from information bulletins of the Police Departments.

As we already said a large part of the cases received, concern requests for access to **environmental information**.

Most frequently used reasons to withhold information:

The most frequent reasons for access to information refusals by the administration and other institutions during the past year are:

- No-motive - 79;
- By a decision of the superior- 37;
- Official secret - 34;
- Because of infringement on a 3rd party interests - 30;
- Silent refusals - 20;
- By official's discretion - 20.

From the data it becomes apparent that this year -like in previous years - issuing **refusals without motive** is the dominant attitude of the administration towards people requesting information. This shows a tendency for automatic refusals to handle information requests, meaning there is no procedure for studying its character and validity.

The second most used reason for refusals is the **discretion of a superior**. Even if in those cases we have a decision, it is still not based on acceptable motives and thus it resembles our first category. When we have such a refusal, in our commentaries we point out that only the APIA or another special law can provide grounds under which information can be refused. All positions taken on the basis of orders or decisions made by superior officials can be seen as unwillingness for independent decision taking.

In 2003 we have encountered more often refusals based on **official secret**; a ground, which last year prevails over the refusals under an official's discretion. Regrettably, after the adoption of PCIA, which was supposed to clarify the restrictions of the right to information assess and define state and an official secret, the administration has not yet put those changes in practice. Instead of using those laws and the state secret exemption to ground information refusals on rare occasions this is turning into a common ground for withholding information.

Another widely used reason for refusing access to information is the protection of **third party interests**. We mean here cases where the requested information concerns a third party, whose written consent for disclosure has not been received. The biggest problem in those cases is that in reality often the consent of the third party is not really sought, no proof is presented of hers/his written consent or refusal, nor is the opportunity - provided under the law - for partial access used.

The **silent refusals** are still very large in number, since this is the easiest way for an information refusal. The failure to render a decision on a written request within the allowed time frame, is an administrative offense under the APIA and the responsible person should be sanctioned under the law. In practice we don't know of such a punishment ever been imposed, thus the sanction provided by the law remains non effective.

Problems most encountered during the year:

From the received cases at AIP we can mark the following typical problems arising during the implementation of the right to access information:

- ❑ Often there are difficulties in receiving information from the territorial subdivisions of the central authorities, since in many cases they are not considered as independent bodies responsible to provide access to information. Because of this, the submitted requests are often transmitted to the higher authorities for approval or response, which greatly extends the time frame for information disclosure. We expect a resolution to this problem with the awaited changes to APIA, where the territorial subdivisions will be explicitly obliged to provide information access.

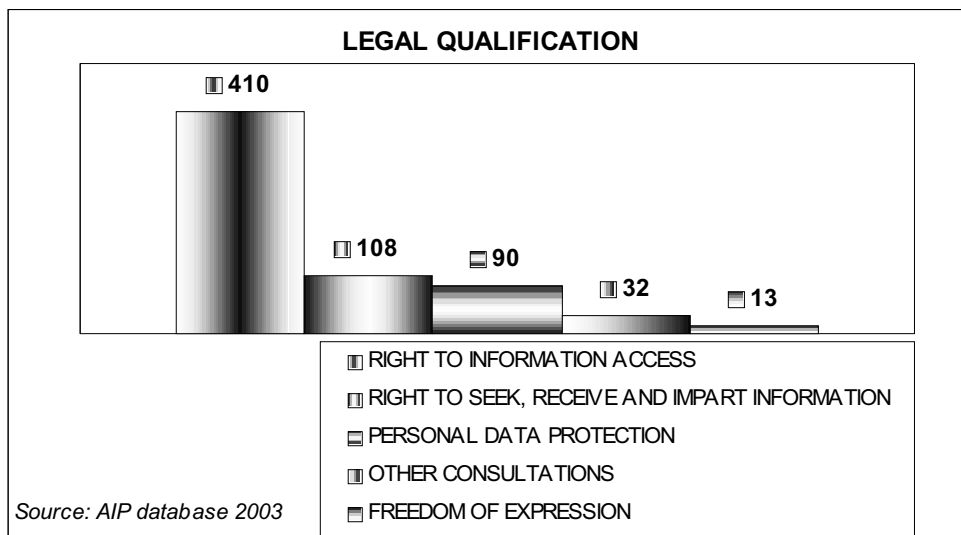
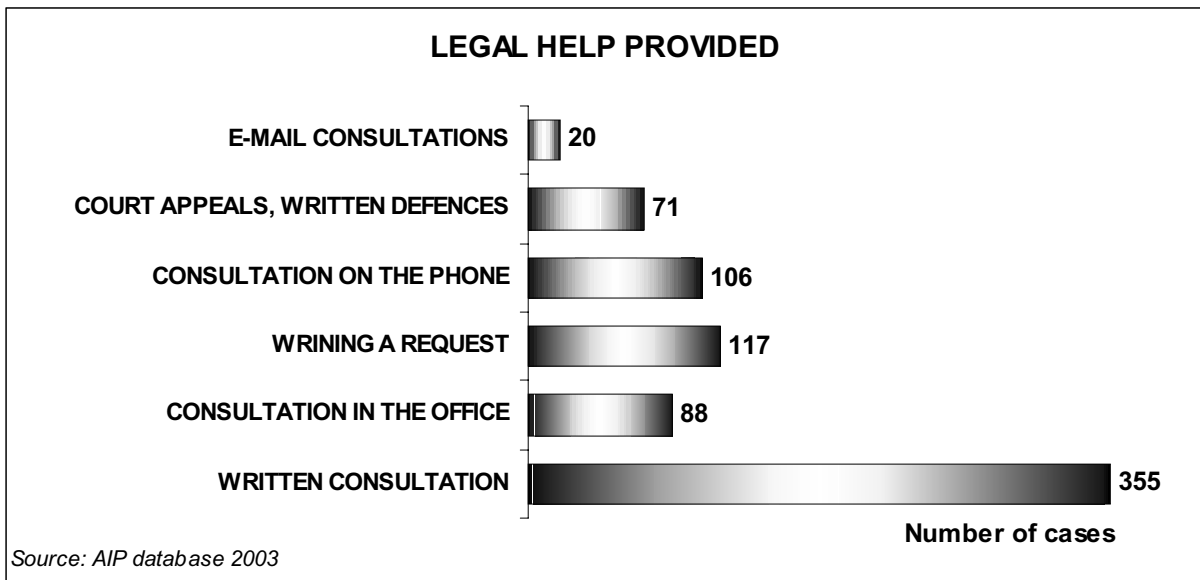
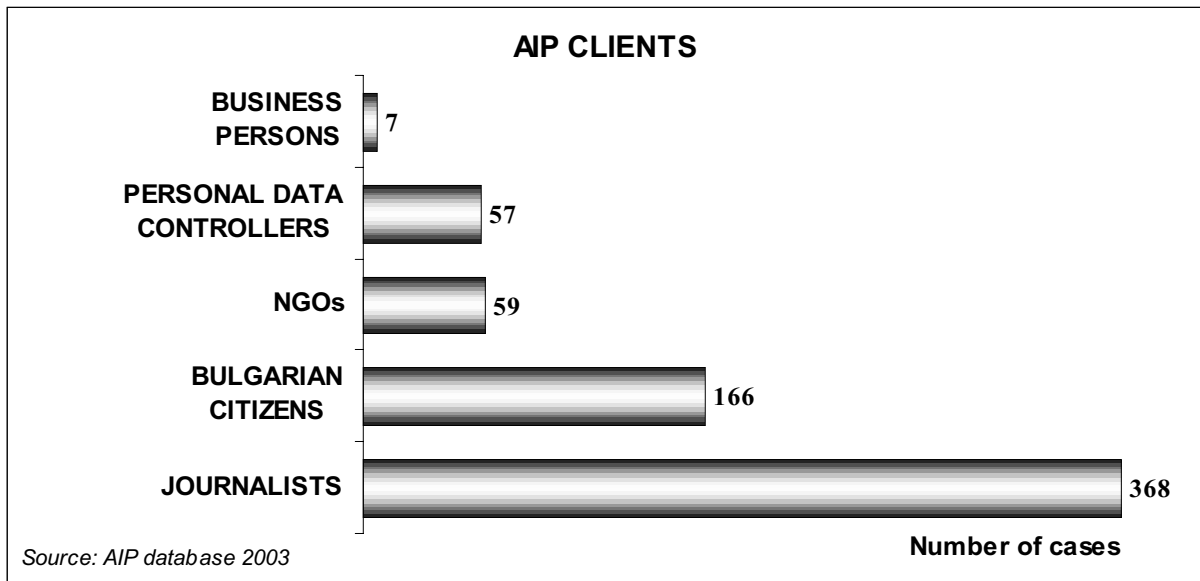
- ❑ The execution of duties under APIA, is still understood mainly in the aspect of citizens, NGOs and journalists being the active party and the authorities and other institutions as having the passive function in the exchange of information. This is not so, since APIA anticipates cases where the information keepers are responsible to publish it under their own initiative (Article 14).

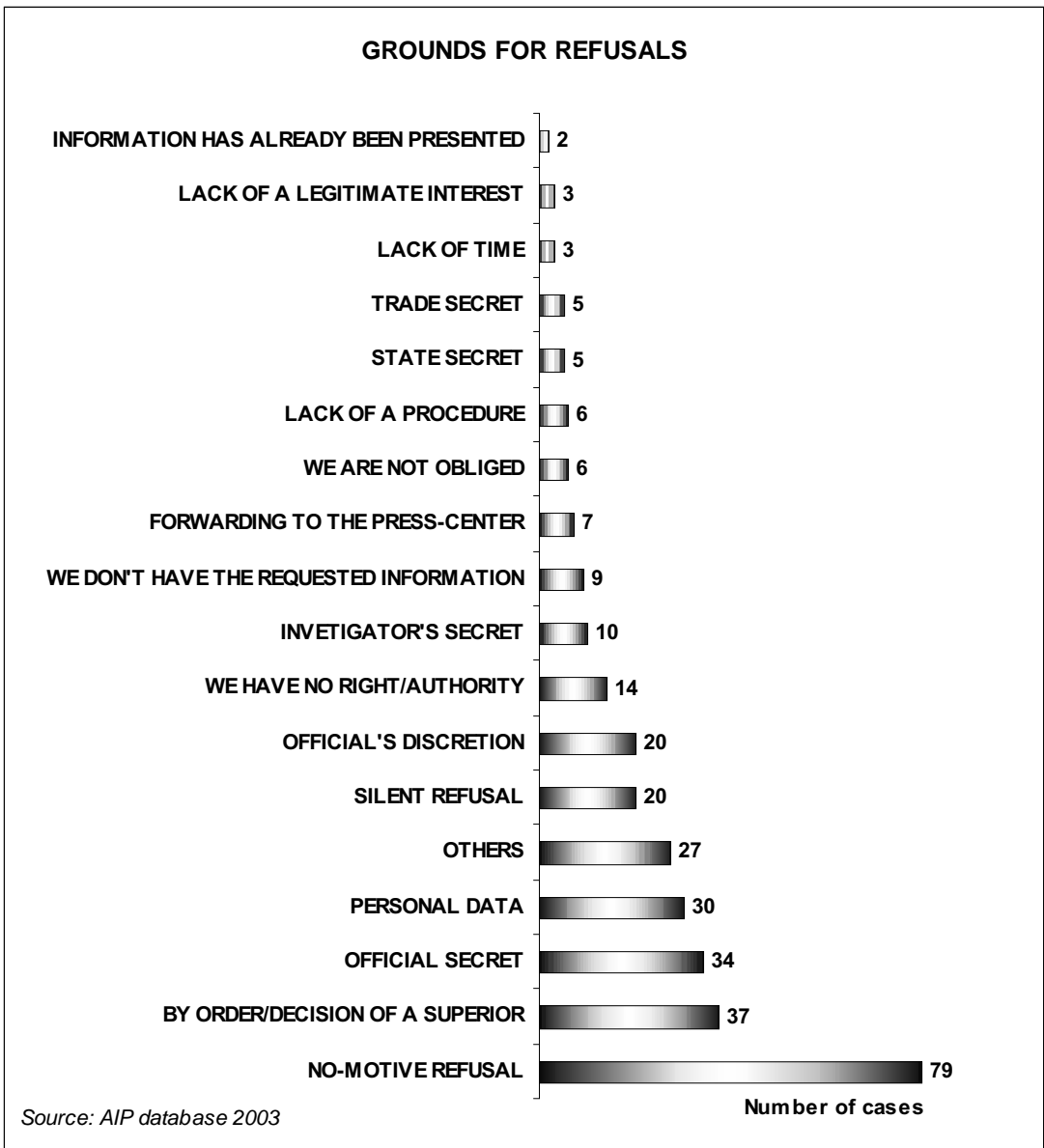
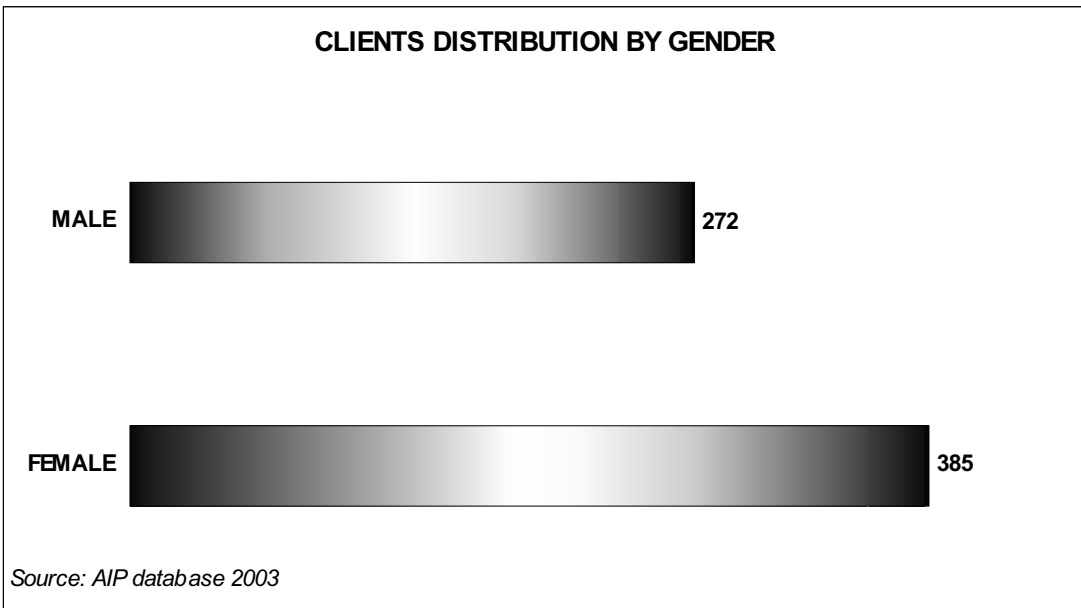
A form of fulfillment of this requirement are the information bulletins prepared by the Ministry of Interior, which have become a subject of dissatisfaction on the part of journalists. In 55 of the registered cases in the electronic database, the main problems concern the mostly general character of the data in the daily bulletins; often information is given after great delay or is incomplete; information of the way crimes were committed is missing, this being important to the public for prevention purposes; and other such inconsistencies. Those problems have a repercussion on the timely and accurate information provided to the public on the accidents happening in the different Police Offices.

- In the practice of AIP, there are often cases where citizens and journalists would like to receive access to information from business organizations, which are not included in those required to provide information under APIA. Most often problems arise, when information is sought from the state monopolies, whose activity, among the other business organizations, should as a matter of principle be to the utmost degree accountable and transparent.

APPENDIX

Statistics from the electronic database of Access to Information Programme 2003





COURT CASES

Twenty-nine court cases under the Access to Public Information Act (APIA) were conducted with the legal assistance of AIP in 2003. We would like to start with statistical data from cases conducted in defense of the right to access government held information, continue with a short presentation of the most important issues from the court practice and finally offer to your attention short annotations of eighteen selected cases.

Statistics

In thirteen of the total twenty-nine cases court appeals have been filed by citizens. Ten cases were initiated by non-governmental organization and seven - by journalists. The sum of these numbers is thirty, because the information request and the subsequent appeal against the decision of the Minister of State Administration to withhold a copy of the contract between the Government and Microsoft was submitted by both AIP and two MPs.

In twenty-two cases appeals were filed against decisions of state bodies. Three appeals were submitted against refusals of local governance bodies and refusals of public law entities, different from state bodies in the sense of Art. 2 para 2. item 1 of APIA (these were the National Health Insurance Fund - 2 and the Bulgarian Export Insurance Agency - 1). Only one appeal has been filed against a decision to refuse information of a legal entity financed by the state budget in the meaning of Art. 3, para. 2, item. 2 of APIA (A local „chitalishte“ - community center in the region of Burgas).

From the twenty-two appealed decisions of state bodies, three were delivered by the Council of Ministers, eight by ministries, five by state agencies, two by judicial institutions (Regional court of Yambol, Supreme Cassation Prosecution), two by agencies subordinate to ministries, and two by the Director of the National Auditing Office.

Ten appeals were filed against silent refusals, while in 19 cases there has been an explicit refusal with different grounds. In four cases refusals were grounded with Art. 13 para. 2 item 1 of the APIA - administrative information with no significance on its own. The state secret exemption and the official secret exemption were both used three times, while in one case the refusal stated that information had been classified, without specifying whether it constituted state or official secret. Art. 37 para. 1 item 1 (the requested information concerns a third party and no consent for disclosure has been received) had also been used three times in denying access to an information request. In one case the state body argued that the submitted request has been for access to personal data, rather than public information. Twice the requestee argued that the Access to Public Information Act was not applicable to the requested information and in one case the institution representative claimed that the institution was not obliged under the APIA (the case against the Bulgarian Export Insurance Agency). In only one case the subject of the appeal was not a decision to withhold information, but rather a refusal to disclose information in the requested form - copy on paper, i.e. a decision not to comply with the form of access preferred by the requestor was appealed before the court.

COURT PRACTICE

Practice under Art. 41, para. 3 and 4 of APIA

We should note in the first place that the court practice under Art. 41, para. 3 and 4 of APIA was established in 2003. The provision of these two paragraphs gives the court the right to obtain documents in cases when access has been refused using the state secret or official secret exemption. After reviewing them in camera the court can judge both on the lawfulness of the classification and the lawfulness of the decision to withhold the requested documents from public access. The formed court practice is a natural consequence of the Protection of Classified Information Act, after the adoption of which in 2002, the number of referrals to state and official secret exemptions in decisions to withhold information has increased.

For the first time the court used its right to obtain and review the requested information in a closed hearing in order to decide on the lawfulness of the classification and the refusal in the case of *„Access to information Programme v. the Council of Ministers“*. AIP had requested the *Regulation for keeping the state secrets of the Republic of Bulgaria* adopted with a Council of Ministers Decree № 30 from 1980. After requiring the Council of Ministers to present the Decree and the Regulation itself, the three-member panel of the Supreme Administrative Court (SAC) established that the six pages of Decree № 30 were marked as „highly confidential“ and the seventy-nine pages of the Regulation were marked as „confidential“. A similar thing happened in a court case, constituted after an appeal against the Minister of Finance to disclose a copy of the contract with Crown Agents, a British consultancy company in charge of the customs reform in Bulgaria. After an „in camera“ inspection a three-member panel of SAC established that the 110 pages of the contract between the Minister of Finance and the British consultancy agency had been marked as „secret“. Interestingly enough, the court did not rule on the lawfulness of the classification on these cases neither in its rulings, nor in its final decisions. This can be explained by the lack of any grounds whatsoever for classification of the requested documents in the two cases. Because of this the court reversed both refusals to withhold information and decided that the lack of a referral to a specific legal classification provision makes the refusals groundless. The court also found that when interpreting the provisions of APIA and PCIA it should not „complement“ the decision of the obliged body by looking for and referring to arguments supporting the refusal. Only the obliged body under APIA should supply arguments in support of its decision.

The situation in the court case *„Bulgarian Helsinki Committee v. Supreme Cassation Prosecution“* was slightly different. The Sofia City Court ruled on the lawfulness of the classification, although the decision to withhold information did not refer to a specific legal ground when marking the document as secret. Here is a quote of the ruling of the SCC: *„The court considered that the facts and circumstances in the requested report have been collected under the Special Investigative Means Act and constitute official secret in the sense of Art. 26 of the Protection of Classified Information Act. The court found that according to the provisions of Art. 28, para. 3 of PCIA the requested report has been rightfully classified as „for official use only“. This is why the request by the appellant's representative is unjustified“*. After having established this the court will have to rule on the lawfulness of the refusal to disclose the requested report. In the two previous cases the lack of a decision of the court on the attributes of the security mark (the official that placed it, the date and the specific classification grounds) could be explained by the fact that those attributes were not required before the adoption of the PCIA. We think that since in the latter case the documents has been classified under PCIA without the presence of these requisites, the decision for classification should be considered unlawful.

Jurisdiction

The year 2003 continued the disoriented practice of both the Sofia City Court (SCC) and the Supreme Administrative Court in trying to determine the competent court in several specific cases when the refusals to disclose information had been signed by authorized officials, rather than the obliged bodies under APIA.

For example, in the court case *„Institute for Market Economy v. the Council of Export Insurance (CEI)“* the appealed decision was issued by the CEI and signed by the deputy Minister of Economy, who is one of the council members. Initially the appeal was filed before the Sofia City Court but the court proceedings were suspended and the case was sent to the Supreme Administrative Court, because SCC found that the Council of Export Insurance was subordinate to the Council of Ministers. With a subsequent ruling the SAC also ceased the proceedings and returned the case to the city court, judging that both as a deputy Minister of Economy and as a member of the CEI the body that had signed the decision is outside of the bodies covered by Art. 5 of the Supreme Administrative Court Act (SACA).

In the case *„Vasil Chobanov v. Council of Ministers (CoM)“* the appeal against the decision of CoM was addressed to the Supreme Administrative Court, but the refusal had been signed by the Head of the Government Information Service (GIS) department. With a ruling the three-member panel of SAC again ceased the court proceedings because the head of the GIS department was not among the bodies covered by Art. 5 of SACA. The ruling was later appealed before the five-member panel of the same court with the argument that the Head of GIS had been authorized by an order of the Prime minister to take decisions on information requests, but this fact does not turn him into an administrative body in the sense of APIA, or under the Administration Act, which determines who the bodies of power are. The five-member panel of SAC turned down the appeal and left the ruling of the three-member panel in effect, returning the case to the SCC. In its decision the court adopted the view that the expression „notify... the applicant of his decision“ (Art. 28 of APIA) unequivocally means that the authorized official takes his/her own decisions, rather than acting as a representative of the obliged body. Because of this - according to the judgement of the court - the provision of Art. 40 para. 1 of APIA should be interpreted broadly, i.e. decisions to withhold information are subject to appeal before the competent court depending on the body **or** the official who issued them.

This vicious court practice was abandoned by SAC in the case *„AIP v. Council of Ministers“*, in which the appealed decision had again been signed by the Head of GIS. In a court hearing from June 6, 2003 the representative of the CoM requested from the court - in view of the existing court practice - to cease the court proceedings and send the case to SCC. Again, the arguments were that the decision had not been signed by any of the bodies covered by Art. 5 of the SACA and that the Head of GIS had been authorized by an order of the Prime minister to handle information requests. After the authorization order was presented to the court the judges **did not** cease the proceedings, but instead continued them, stating that they would decide on the jurisdiction objection of the respondent in their final decision. In the decision itself the court judged that with reference to the subject of the case and the presented authorization order the case should be heard by the Supreme Administrative Court. The motives of the decision were that *„... when a state body (or legal entity under Art. 3 para. 1), receives a request to disclose public information kept or created by its administration, the fact that an official had been explicitly authorized to take a decision on the request cannot "switch" the obliged body under APIA. In the hypothesis of such an authorization, when the official who prepared and signed*

*the decision differs from the authorizing body, the competent court does not change. The determining factor whether the appeal should be filed before SAC or SCC is **which is the obliged body under APIA** (collective or one-man state body), rather than the fact who actually took a decision in the sense of Art. 28, para. 2 of APIA and what administrative department in the system of the state body he/she was head of“.*

Form v. content

In 2003 the Supreme Administrative Court in several decisions adopted the view that the Access to Public Information Act guarantees the citizens access to information, rather than documents. Furthermore, if a citizen files an information request wishing to obtain access to a document, public officials either have no obligation to respond, or can apply the provision of Art. 29 of APIA, which covers the cases when the request is too broadly formulated. In such a case the requestor is informed accordingly and is given an opportunity to specify his/her information request.

For example, in the decision on the Crown Agents case SAC established that Art. 25 para. 1 item 1 requires the requestor to **describe the requested information**, and from the filed information request it had been obvious that it contained no such description. Merely requesting a copy of the **contract** could not fulfil the requirement of Art. 25 para. 1 item 3 of APIA - the court believed - since the contract was simply the material carrier of the requested public information, but could not be qualified as information in the sense of the legal definition of Art. 2 of APIA. Similar arguments were used in 2002 by the Supreme Administrative Court in the case against the refusal of the Council of Ministers to disclose a copy the minutes from its first session. Despite these conclusions the court reversed the decision of the Minister of Finance to disclose a copy of the contract with Crown Agents as issued in violation of the procedures of administrative law. The Minister of Finance appealed the decision of the three-member panel before a five-member panel of the same court. Interestingly enough, the decision was appealed **even in its part** where the court established that the Minister should have asked the requestor to specify what information he wished to obtain access to. The arguments of the requestee were that the request had **not at all been** unclear, and the Minister had already rendered a decision to withhold the requested copy of the contract signed between him and the British company Crown Agents. Furthermore, according to the respondent, the request had contained **clear and specific** description of the desired information - access to the contents of the signed contract, or at least those parts of it, which did not constitute classified information.

Public law entities - applicability of exemptions

In 2003 a quite positive practice of both the Sofia City Court and the Supreme Administrative Court was established on the usage of exemptions from the right to information access by public law entities, obliged under Art. 3, para. 2 of APIA.

In the case *„Institute of Market Economy v. National Health Insurance Fund“* the Sofia City Court concluded for the first time that public law entities, obliged under Art. 3 para. 2 of APIA can **only** use the exemption of Art. 17 para. 2 of APIA when they decide to withhold access to information. The provision of this paragraph covers only the cases when the requested information constitutes trade secret or its disclosure is likely to lead to unfair competition. In order to reach this conclusion the SCC first established that the National Health Insurance Fund (NHIF) was a public law entity in the sense of Art. 3, para. 2 of APIA, because it is a legal entity subject to public law, but is not

part of the system of state bodies or the bodies of local governance obliged under Art. 3, para. 1 of APIA. Consequently, the Supreme Administrative Court confirmed the conclusions of the first instance court, and established that as a public law entity the NHIF could not apply the exemption of Art. 13 para. 2 of APIA. The provision of the latter paragraph regulated the usage of the exemption of „administrative secret“, which, according to the legal definition of Art. 11 of APIA, is information collected and kept in connection to official information in the course of the work of the bodies under Art. 3 para. 1 of the Act. This meant that public-law entities obliged under Art. 3 para. 2 of APIA could not apply the exemptions under Art. 13 para. 2 of the Act, which regulated the activities of bodies, under paragraph 1 of the same article - namely state bodies and local governance institutions.

The court case „*Zaekov v. NHIF*“ developed in an identical manner. The refusal of the NHIF director referred to the exemption of Art. 13 para. 2 item 1 of APIA - preparatory information without a significance on its own. The first instance court (SCC), after establishing that the NHIF was a public law entity under Art. 3 para. 2 of APIA, concluded that information that they create and keep in connection with their work on mandatory health insurance constitutes neither official-use-only, nor administrative public information. By reason of that, the provision of Art. 13 para. could not be applied and the refusal was unlawful.

APPENDIX

LITIGATION - SUMMARY

APPENDIX

LITIGATION - SUMMARY

1. The Institute for Market Economy versus the National Health Insurance Fund

1st Instance Court - Administrative Case No. 2295/2001 SCC AD Panel IIIc

2nd Instance Court - Administrative Case No. 2471/2003 SAC 5th Division

Application:

The Institute for Market Economy (IME) served an application in writing to the Director of the National Health Insurance Fund (NHIF), requesting access to the following information: the budgets and reports of Regional Health Insurance Funds for 2000; the list of banks recommended by the Ministry of Finance (MoF) and the Bulgarian National Bank (BNB) to operate with the NHIF resources; the decision of the NHIF Managing Board on the selection of the bank/s; and information on the NHIF assets in deposits and government securities.

Refusal:

A decision in writing to refuse access pursuant to Art. 37, para 1 APIA: the information constitutes an administrative secret within the meaning of the Tax Procedure Code (TPC), the NHIF budget and report are subject to approval by Parliament and promulgation in The Official Gazette, and the application for access to the decision of the Managing Board is to be served to the Managing Board itself.

Appeal:

The appeal against the refusal was based on the argument that there was no point of fact in violation of Art. 38 APIA. The reference to TPC was unjustified; moreover, no specific case out of several possible provisions regulating the official secret was pointed out. The referral to the Managing Board was unlawful either because the authority with obligations under APIA in NHIF represented by its Director.

Developments at the 1st Instance Court:

At the first court session, the NHIF representative claimed that it had already provided part of the requested information by sending the NHIF budget and annual report to the applicant.

Judgement:

With its judgement of 2 August 2002, the Sofia City Court reversed the refusal of the NHIF Director as unlawful and obligated the latter to provide access to the requested information. The arguments of the court were that the NHIF could not invoke the constraint relating to the administrative secret or Art. 13, para 2 APIA since the Fund is a public law entity different from the government authorities within the meaning of Art. 3, para 1 and, in this capacity, it could refuse access to information only on grounds of Art. 17, para 2 - commercial secret and unfair competition.

Developments at the 2nd Instance Court:

The NHIF Director appealed against the SCC judgement, continuing to claim that the application concerned official information and that the constraint under Art. 13, para 2, subpara 1 APIA was applicable, and also that it was not within the purview of his powers to provide access to the list of banks recommended by MoF or the decision of the Managing Board on the selection of a bank.

Judgement:

With its Judgement No. 5286 of 29 May 2003, the Supreme Administrative Court declared the cassation appeal to be unjustified and left the judgement of the first-instance court in force.

2. Green Balkans Association versus the Roads Executive Agency

1st Instance Court - Administrative Case No. 882/2001 SCC AD Panel III b
(Administrative Case No. 2564/2002 SAC 5th Division)

2nd Instance Court - Administrative Case No. 5496/2003 SAC 5th Division

Application:

The Association served three applications in writing to the Directors of the Roads Executive Agency (REA), requesting information about the design works of Struma Highway. The first application requested access to the contract signed with the Italian company SPEA for the design works of the highway, all annexes thereof, the reports of the company on the implementation of the contract, and the report on the environmental impact assessment (EIA). The other two applications requested information about previous contracts signed with design companies and contracts with companies or experts for the preparation of EIA reports on previous projects for the construction of the highway.

Refusal:

The REA Director failed to send a reply within the prescribed time limits.

Appeal:

The silent refusal was attacked on grounds that there was a violation of the substantive law and that the failure to observe the requirement to have the refusal given in writing was a material breach of the procedural rules.

Developments at the 1st Instance Court:

REA produced a letter from the Director of the PHARE project, stating that the contractual relations between REA and SPEA were confidential. It also produced the subsequent refusal by the REA Director on those grounds.

Without taking into account the fact that the claimant had not been informed of the explicit refusal by the REA Director, the Sofia City Court issued a ruling to drop the proceedings on grounds of early submission of the appeal against the silent refusal. The ruling was attacked with a private appeal and SAC 5th Division reversed the SCC ruling with its Ruling No. 7501 of 25 July 2002 and referred the case back to SCC for hearing it on merit.

Judgement:

SCC issued its judgement of 28 January 2003 to reverse the silent refusal of the REA Director on the second and third applications of the Association and referred the case to him for a new decision. As regards the first application of the Association, the court found the refusal to be lawful with respect to the contract with SPEA and the documents thereof and unlawful with respect to the requested EIA report.

Developments at the 2nd Instance Court:

The SCC judgement was attacked with cassation appeals both by the Association and REA. The Association attacked that part of the judgement which rejected its appeal against the refusal of REA to provide the contract with SPEA and the documents thereof, while REA attacked that part of the judgement which reversed the refusal and obligated the REA Director to provide the existing EIA report.

Having heard the case in one session, SAC scheduled it for judgement.

3. Bulgarian Helsinki Committee versus the Supreme Prosecutor's Office of Cassation

1st Instance Court - Administrative Case No. 642/2002 SCC AD Panel III g
(Administrative Case No. 10727/2002 SAC 5th Division)

Application:

The Bulgarian Helsinki Committee Association served an application in writing to the Supreme Prosecutor's Office of Cassation (SPOC) for access to its report on the use of special surveillance means.

Refusal:

A decision to refuse access was issued in writing on grounds that the requested information was not public and constituted an official secret.

Appeal:

The refusal was attacked on grounds that it was unlawful to invoke the constraint related to official secrets without specifying a point of law.

Developments at the 1st Instance Court:

The Sofia City Court (SCC) issued a ruling to drop the proceedings since it found that there were insufficient data to prove the representative powers of the person from BHC who had authorised a lawyer to serve the appeal. The SCC ruling was attacked with a private appeal and SAC 5th Division issued Ruling No. 868 of 3 February 2003 to reverse the attacked ruling and referred the case back to the City Court to renew the proceedings because three judgements of SCC, Company Division were produced in the case to show that the person who had authorised a lawyer to serve the appeal was the same person who was registered as the representative of BHC.

After the case was referred back to SCC, at the first court session the SPOC representative made a statement that he was not aware of the requested report to be kept at SPOC.

At the second court session the representative of the Prosecutor's Office made a statement that it was established upon an inquiry assigned by the court that the requested report was kept at SPOC but it was classified. The representative of the claimant pleaded the court to exercise its powers under Art. 41, paras 3 and 4 APIA and demand the report from SPOC to examine it in camera and rule on the lawfulness of its being classified.

Having examined the report at a session held in camera, the court issued a ruling that the report was classified properly as information „for official use only“ because the facts contained in it had been collected under the Special Surveillance Means Act and constituted an official secret within the meaning of Art. 26 of the Classified Information Protection Act. The court rejected the request to declare the classification unlawful and stated that it would rule on the lawfulness of the refusal in its final judgement, rescheduling the case for a public session.

4. Vanya Barbutova versus the National Audit Office

1st Instance Court - Administrative Case No. 1365/2003 SCC AD Panel III a

Application:

Ms Barbutova served an application in writing to the Chairman of the National Audit Office (NAO) for access to a summary report on all checks performed by NAO within the territory of the city of Sliven under the NAO Act of 1995 and on the audits performed as of the end of 2002 within the territory of Sliven under the NAO Act of 2001.

Refusal:

No reply was received from the NAO Chairman within the prescribed time limits.

Appeal:

The silent refusal was attacked on grounds that there was a violation of the substantive law since the requested information was public and also that the failure to give the refusal in writing was a material breach of procedural rules.

Having received the appeal, NAO failed to send it together with the whole file to the court of law.

The claimant served an application to the court with a copy of the appeal and the court demanded the file from NAO.

Developments at the 1st Instance Court:

At the first session the NAO representative claimed that APIA was not applicable because of the existence of Rules on the Conditions and Procedure for Disclosure of Information on the Audits and Other Activities of NAO, as well as Rules on the Official Newsletter of NAO. The case was stayed pending the submission of the said Rules.

At the second session the NAO representative claimed that NAO did not have the requested information.

The arguments of the representative of the claimant were that the NAO Rules were inapplicable to the legal dispute because they were not promulgated and did not constitute legal instruments within the meaning of the Legal Instruments Act and hence they did not possess the nature of a special law as regards APIA. NAO had the requested information because it performed its controls on the basis of the approved annual plan by divisions and regional subdivisions. Each check was assigned with an order of the NAO Chairman given in writing. The divisions and regional subdivisions of NAO produced regular and annual reports to NAO on their controlling activities.

After the second court session SCC scheduled the case for judgement.

5. Access to Information Programme versus the Council of Ministers

1st Instance Court - Administrative Case No. 9898/2002 SAC 5th Division

2nd Instance Court - Administrative Case No. 11243/2003 SAC Five-member Panel

Application:

The Access to Information Programme (AIP) served an application in writing to the Director of the Government Information Service (GIS) of the Council of Ministers (CoM) for access to a copy of the Rules for the Organisation of the Work for Protecting the State Secret in the People's Republic of Bulgaria as adopted with Council of Minister's Decree No. 30 of 1980.

Refusal:

A decision was given in writing to refuse access on grounds of the Rules being classified.

Appeal:

The refusal was attacked on grounds that it lacked any point of law. The Rules were a legal instrument within the meaning of the Legal Instruments Act and constituted official information within the meaning of Art. 10 APIA. Even though it was classified, pursuant to § 9 of the Classified Information Protection Act (CIPA) the markings and time limits for classification were changed and the protection term of the Rules had long expired.

Developments at the 1st Instance Court:

The Council of Ministers did not send a representative at the first court session. The public prosecutor found the appeal to be unjustified since the one-year term under § 9, para 2 CIPA for review of the stock and its adjustment to the requirements of the law had not expired as of the date of serving the application. The court scheduled the case for judgement.

Subsequently the court reversed its ruling on hearing the case and demanded the Rules from CoM to be examined in camera pursuant to Art. 41 APIA.

At its session held in camera the court issued a new ruling to establish the marking „strictly confidential“ on the CoM's Decree adopting the Rules and „confidential“ on the Rules themselves, and rescheduled the case for a public session.

At the second court session the CoM representative raised the objection that the case was within the jurisdiction of the Sofia City Court because the refusal was signed by the GIS Director. The court suspended the case and demanded from CoM to produce the order by the Prime Minister authorizing the GIS Director to make decisions on applications for access to public information.

At the third court session the court declared that it would rule on the objection concerning the jurisdiction in its final judgement and continued the proceedings. The representative of the claimant requested that the court declare the classification of the Rules unlawful due to the lack of any grounds thereof both prior to and after the adoption of CIPA. The CoM representative claimed that the Rules had to be reviewed at the State Archive Records because they had to be kept there as prescribed by law.

Judgement:

SAC issued its Judgement No. 10640 of 25 November 2003 to find the appeal admissible since the jurisdiction depended on the person with obligations to provide information under APIA rather than on the person designated by an order to give answers to applications. It reversed the refusal by the GIS Director due to lack of point of law and justification. The court referred the case back to CoM for a new decision on the application.

Developments at the 2nd Instance Court:

The judgement of the three-member panel of SAC was attacked with a cassation appeal by CoM on grounds that, notwithstanding the provisions of § 9, para 2 CIPA, the Council of Ministers was of the opinion that the requested information was still classified.

The case was heard in a single session and scheduled for judgement.

6. Ivailo Ganchev versus the Ministry of Education and Science

1st Instance Court - Administrative Case No. 8518/2002 SAC 5th Division

2nd Instance Court - Administrative Case No. 3964/2003 SAC Five-member Panel

Application:

Mr. Ganchev served an application in writing for access to the following information: the order by the Minister of Education and Science to open a public tender or competitive bidding procedure for leasing part of the corridor in the building of the Ministry, which was been leased to a private person for advertisement purposes; the order of the Minister specifying the winner in the public tender or competitive bidding procedure; and the contract signed.

Refusal:

A decision was given in writing to refuse access on grounds that the orders by the Minister and the contracts signed were kept at the State Archive Records (SAR). The legal grounds invoked were the provisions of Art. 8, para 2 APIA.

Appeal:

The refusal was attacked on grounds that there was no point of fact for its issuance. The State Archive Records Act and the rules on its application established the procedure for assessing „the value“ of a document in order to keep it there.

Developments at the 1st Instance Court:

At the court session the representative of the claimant served a certificate from SAR to prove that the latest documents received from the Ministry of Education and Science (MES) dated back to 1991. After the certificate was produced, the representative of the Minister admitted that there was no order on the opening of public tendering procedure and no lease contract was signed.

At the same court session the representative of the Minister raised the objection that the lack of the requested information rendered the appeal senseless and that the applicant had no interest in having the refusal reversed.

Judgement:

SAC issued Judgement No. 2383 of 17 March 2003 to reverse the refusal by the Minister as unlawful (invoking an inapplicable legal provision) and refer the case back to the Minister for a new decision.

With regard to the objection raised by the defendant, the court noted that the applicant had not been granted access to the requested public information that he deemed to be in existence. Hence his right was not exercised and, furthermore, his right to obtain an adequate reply from the administrative authority in accordance with the points of fact and law was not granted either.

Developments at the 2nd Instance Court:

The judgement of the three-member panel of SAC was attacked by MES with a cassation appeal on grounds that after the admitted lack of the requested information before the first-instance court the legal interest of the claimant in reversing the refusal was no longer in existence.

Judgement:

The five-member panel of SAC issued Judgement No. 5878 of 16 June 2003 to reverse the judgement of the first-instance court, taking no action on the appeal by Mr. Ganchev and dropping the proceedings. The arguments of the court were that, although the Minister had failed to fulfill his obligation under Art. 33 APIA to inform the applicant on the lack of the requested information, the latter was informed thereof at the court session and therefore his legal interest ceased to exist.

7. Kiril Terziiski versus the Ministry of Finance

1st Instance Court - Administrative Case No. 3080/2003 SAC 5th Division

2nd Instance Court - Administrative Case No. 38/2004 SAC Five-member Panel

Application:

Mr. Terziiski served an application in writing to the Minister of Finance, requesting a copy of the agreement signed between the Bulgarian Government and the British consulting company Crown Agents. In case the agreement contained any classified parts, the applicant requested partial access.

Refusal:

A decision in writing was given to refuse access on grounds that the requested information was classified as a state secret. The classification was substantiated with the argument that *the relevant legal framework existing at the time of the execution of the agreement provided for the relevant grounds*. The legal grounds were found in Art. 37, para 1, subpara 1 APIA. Partial access was also refused.

Appeal:

The refusal was attacked on grounds that the words „relevant legal framework“ and „relevant grounds“ did not constitute any points of fact or law within the meaning of Art. 38 APIA. No specific provision of the Classified Information Protection Act (CIPA) or specific category from the list under Appendix No. 1 to Art. 25 CIPA was referred to as grounds for lawful classification of the agreement.

Developments at the 1st Instance Court:

At the first court session the representative of the claimant requested the court to exercise its powers under Art. 41, para 3 APIA by demanding the agreement and assess the lawfulness of its classification at a session held in camera.

Having examined the agreement in camera, SAC issued a ruling which only stated that the agreement was marked as classified.

At the second court session the representative of the claimant requested the court to ask the defendant under CPC when the agreement was classified - before or after the adoption of CIPA. The court did not grant the request as it was the Minister rather than his representative in court that was competent to answer that question.

Judgement:

SAC issued Judgement No. 11682 of 15 December 2003 to reverse the refusal by the Minister as having been issued in material breach of administrative procedural rules and to refer the case back to him for a new decision on the application. The court assumed that the lack of reasons to be pointed out by the Minister as to the criteria and grounds to believe that the agreement was a state secret prevented the court from assessing its correctness and exercising effective control on the lawfulness of the attacked refusal.

Developments at the 2nd Instance Court:

The Minister of Finance served a cassation appeal to attack the judgement of the three-member panel of SAC on grounds that undoubtedly the provisions of Art. 37, para 1, subpara 1 APIA were applicable to the case as it involved information classified as a state secret. The case was heard in a single session and scheduled for judgement.

8. Hristo Hristov versus the Ministry of Interior

1st Instance Court - Administrative Case No. 1524/2003 SAC 5th Division

2nd Instance Court - Administrative Case No. 8355/2003 SAC Five-member Panel

Application:

Hristo Hristov, a journalist from Dnevnik newspaper served an application in writing to the Minister of Interior for access to public information kept at the archives of the Ministry of Interior (Mol). Mr. Hristov wanted to study the letter files of BBC, Deutsche Welle and Free Europe radio stations over the period from 1970 to 1978, when the Bulgarian writer Georgi Markov assassinated in London worked for the three western radio stations.

Refusal:

No reply was received from the Minister within the prescribed time limits.

Appeal:

The silent refusal was attacked on grounds that there was a violation of the substantive law because the requested information was public and that the failure to fulfill the requirement for the refusal to be given in writing was a material breach of the procedural rules.

Having received the appeal, the Minister did not send it together with the whole file to the court of law but sent the applicant instead a decision in writing to refuse access, stating that the inquiry conducted led to the conclusion that the MoI archives did not keep any information on the topic specified by the applicant.

The claimant served an application to the court of law with a copy of the appeal and the court demanded the file from MoI *ex officio*.

Developments at the 1st Instance Court:

In the court room the representative of the claimant requested the court to continue the proceedings under Art. 14 APA and to rule on both the silent refusal of the Minister and the subsequent explicit refusal.

The arguments of the defence were that the Minister had not complied with the Instructions on the Procedure for Providing Access to Information Contained in the MoI Archives, Reg. No. I-113/24 June 2002, which the Minister himself signed to authorise access in case of studies and research. The Minister had to provide access to the letter files of the three radio stations so that to enable the applicant to do his research and assess on his own whether they contained the information of interest to him or not.

Judgement:

SAC issued Judgement No. 7476 of 16 July 2003 to reject the appeal as unjustified. The reasons of the court pointed out that, in fact, the claimant wanted uncontrolled access to the MoI archives, whereas neither APIA nor the Instructions provides for such form of access to information.

Developments at the 2nd Instance Court:

Mr. Hristov attacked the judgement of the three-member panel of SAC with a cassation appeal. His arguments were that the court was wrong in establishing the points of fact and thus it violated the substantive law because Art. 26 APIA explicitly provided for review of information on the spot as a possible form of access.

The case was heard in a single session and scheduled for judgement.

9. Jury Ivanov versus the Public Internal Financial Control Agency

1st Instance Court - Administrative Case No. 1902/2003 SCC AD Panel III a

Application:

Mr. Ivanov served an application in writing to the Director of the Public Internal Financial Control Agency (PIFCA), Sliven as far back as 2001 to request copies of two audit statements on audits conducted in the Sliven College at the Technical University - Sofia (TU) and the Engineering Teachers Department at TU - Sofia. The Director of PIFCA, Sliven referred the application to the Director of PIFCA, Sofia. Who refused access to that information on grounds of its being administrative secret. The refusal was attacked before the Sofia City Court (SCC), which rejected the appeal but subsequently SAC reversed the SCC judgement and the refusal, referring the case back to the Director for a new decision.

Refusal:

A new decision was given in writing to once again refuse access; this time on grounds that the information concerned the interests of the two educational establishments and they had not given their consent with providing access to it.

Appeal:

The refusal was attacked on grounds that the requested information did not affect the interests of a third party and, even if that was the case, its consent would not be necessary by virtue of Art. 31, para 5 APIA because TU - Sofia was a legal entity receiving its funds from the budget and hence it had obligations under APIA.

Developments at the 1st Instance Court:

The first court session is yet to take place.

10. Vassil Chobanov versus the Council of Ministers

1st Instance Court - Administrative Case No. 1913/2003 SAC 5th Division
(Administrative Case No. 3559/2003 SAC Five-member Panel)

1st Instance Court - Administrative Case No. 1822/2003 SCC AD Panel III h

Application:

Mr. Chobanov, a journalist from Radio Free Europe served an application in writing to the Director of the Government Information Service (GIS) at the Council of Ministers (CoM), requesting a transcript from the verbatim report of the CoM meeting held on 23 January 2003. The meeting in question discussed whether state-owned companies of strategic importance to the Republic of Bulgaria should be privatized upon the approval of the Council of Ministers and Parliament.

Refusal:

A decision in writing was given to refuse access on grounds that the verbatim reports of CoM meetings constituted official information the access to which could be restricted under Art. 13, para 2, subpara 1 APIA.

Appeal:

The refusal was attacked on grounds that pursuant to Art. 41 of the Constitution the right to seek and obtain information could be restricted only to defend constitutional rights or legitimate interests, while the refusal by the GIS Director did not claim that such grounds existed.

Developments at the 1st Instance Court:

SAC issued Ruling No. 2600 of 20 March 2003 to give no hearing to the appeal and referred it to the jurisdiction of the Sofia City Court (SCC). The argument of the court was that the decision to refuse access was not made by a minister, head of institution at CoM or another body under Art. 5 of the Supreme Administrative Court Act but it was made by a director of a directorate.

The ruling was attacked with a private appeal before a five-member panel of SAC but Ruling No. 4535 of 13 May 2003 left the ruling of the earlier panel in force and the case was referred to the SCC jurisdiction.

SCC heard the case was heard in a single session and scheduled it for judgement.

11. Todor Yanakiev versus the General Prison Administration

1st Instance Court - Administrative Case No. 3167/2003 SCC AD Panel IIIg

Application:

In the beginning of 2002, Mr. Todor Yanakiev served an application to the Director of the General prisons Administration (GPA) at the Ministry of Justice for access to the prison files of dissident Ilya Minev as he was conducting research aimed at publishing a monograph about Ilya Minev. He was granted access and, as a result, reviewed the existing two prison files on the spot several times.

When in 2003 Mr. Yanakiev tried to obtain copies of those two prison files, it turned out impossible. Initially his application for obtaining copies of the files was lost at GPA and therefore he re-applied and was refused access.

Refusal:

A decision was given in writing to refuse access without any reference to points of law. In his letter the GPA Director suggested to the applicant to specify his creative intentions within the framework of a narrative story rather than „a monograph“ as a collection of archive documents.

Appeal:

The letter in reply was attacked on grounds that it did not constitute refusal to grant access to public information because the applicant had already received access to it but it was refusal to grant the request related to the preferred form of access because what was refused was copies in paper. However, pursuant to Art. 27, para 1 APIA the authorities have the obligation to take into account the preferred form of access by the applicant, and the cases, where the authority may refuse to take it into account, are given in an exhaustive list.

Developments at the 1st Instance Court:

The Sofia City Court issued Judgement No. 359 of 23 January 2004 to reject the appeal as unjustified, assuming that the requested information contained facts and information whose dissemination in an uncontrollable manner and among an unlimited number of persons threatened to infringe upon the rights of third parties by giving publicity to facts of their private life or official activities, which was impermissible under Art. 5 APIA reading that the right of access to public information could not be directed against the rights and good name of third parties.

12. Ivan Yonchev versus the Ministry of Interior

1st Instance Court - Administrative Case No. 2070/2003 SCC AD Panel IIIh

Application:

Mr. Yonchev served an application in writing under the Personal Data Protection Act (PDPA) to the Director of the Human Resources Department (HRD) of the Ministry of Interior (Mol), requesting access to his personal administrative file containing data collected about him in his capacity of a former Mol serviceman.

The reason for serving the application was that Mr. Yonchev had made unsuccessful attempts at getting access to the findings of the psychological tests used in Mol in connection with the recruitment and selection of staff.

Refusal:

There was given a decision in writing to refuse access. The grounds for the refusal invoked Art. 1, para 4 PDPA (*its provides for the processing of and access to personal data to be regulated in special laws*) in connection with the Instruction of the Minister of Interior of 1996 which was not promulgated but stated that personal administrative files of existing and former servicemen were strictly confidential and the access to them was restricted.

Appeal:

The refusal was attacked on grounds that pursuant to Art. 26, para 1 PDPA any person had the right of access to personal data referring to him or her. The instruction of the Minister was not a special law within the meaning of Art. 1, para 4 PDPA because it was not promulgated and hence it did not constitute a legal instrument within the meaning of the Legal Instruments Act (LIA). Only the information classified as a state secret could be marked as „strictly confidential“ under the

Classified Information Protection Act (CIPA), whereas the personal administrative files of servicemen were not included on the list under Appendix No. 1 to Art. 25 CIPA.

Developments at the 1st Instance Court:

In the court room the representative of the HRD Director challenged the appeal on grounds that the Director did not have and had never had the capacity of a personal data administrator within the meaning of Art. 3, para 1 PDPA and the Minister was the only one authorised to serve in that capacity.

Judgement:

The Sofia City Court (SCC) issued its Judgement of 17 November 2003 to declare the refusal null and void and refer the case back to the competent authority, i.e. the Minister of Interior, for a new decision on the application. The reasons of the court were that even prior to the amendment (The Official Gazette, No. 17 of 2003) to the MoI Act reading explicitly that the Minister was a personal data administrator within the meaning of PDPA, he had the same capacity by force of the Regulations on the application of the MoI Act which read that the Minister was to establish the terms and procedure for keeping and using personal administrative and official files.

Developments at the 2nd Instance Court:

The HRD Director served a cassation appeal against the SCC judgement on grounds that the court had to give no hearing to the appeal and drop the proceedings since PDPA provided only for attacking a decision of the personal data administrator. Since the HRD Director did not have and had never had the capacity of a personal data administrator, there was not case of an attackable refusal to provide access to personal data.

The Supreme Administrative Court will hear the cassation appeal. The first court session is yet to take place.

13. Peter Penchev versus the Ministry of Defence

1st Instance Court - Administrative Case No. 9498/2003 SAC 5th Division

Application:

Mr. Penchev, Deputy Chairman of the Ecoglasnost National Movement, Montana Chapter served an application in writing to the Minister of Defence, requesting access to the following information: whether processing or destruction of elements of old armaments of the Bulgarian Armed Forces (BAF) took place in the vicinity of the village of Gabrovnitsa and, if yes, whether any measurements of the environmental components were taken.

Refusal:

No reply was received within the prescribed time limits.

Appeal:

The silent refusal was attacked on grounds that there was a violation of the substantive law since the requested information was public and did not fall within the scope of any restrictions provided for in APIA and that the failure to observe the requirement to have the refusal given in writing was a material breach of the procedural rules.

After the appeal was sent to the court through the Minister, the decision of the Ministry of Defence (MoD) to refuse access was received. According to the Head of Office of the BAF General Staff who signed the refusal, the requested information was classified within the meaning of Art. 25 of the Classified Information Protection Act (CIPA) and Order No. OX-420/8 July 2003 of the Minister on the List of Information Items Classified as Official Secret in MoD, the structures subordinated to the Minister of Defence, and BAF.

Developments at the 1st Instance Court:

The first court session is yet to take place.

14. The Access to Information Programme, Stoicho Katsarov and Ivan Ivanov versus the Minister of Public Administration

1st Instance Court - Administrative Case No. 9502/2003 SAC 5th Division

Application:

AIP and Ivan Ivanov and Stoicho Katsarov, Members of Parliament served an application in writing of March 2003 to the Minister of Public Administration, requesting access to the following information: the whole content of the contract signed with Microsoft for the supply of 30,000 software packages for the needs of the public administration, as well as all related documents such as the offer, any additional agreements, and any contract with an intermediary.

Refusal:

No reply was received within the prescribed time limits.

Appeal:

The silent refusal was attacked on grounds that there was a violation of the substantive law since the requested information was public and did not fall within the scope of any restrictions provided for in APIA and that the failure to observe the requirement to have the refusal given in writing was a material breach of the procedural rules.

The appeal was sent to the Supreme Administrative Court (SAC) through the Minister.

On the following day, the Minister sent the applicants an answer, providing in the form of a summary in writing only part of the content of the contract and specifying arguments to support the selection of a supplier. Then the Minister failed to send the appeal together with the whole file to the court of law.

Finding their right of access to information to have been infringed, the appellants sent an application to the court with a copy of the appeal and the court started proceedings by demanding the file from the Minister *ex officio*.

Developments at the 1st Instance Court:

The Minister sent no representative at the first court session. It turned out that the Minister failed to fulfill his obligation under Art. 16, para 2 of the Supreme Administrative Court Act (SACA) to send the appeal and the whole file to the court of law. The court panel reported the request of the Minister to give no hearing to the appeal and drop the proceedings due to lack of any legal interest in attacking the refusal since the requested information was provided to the applicants.

The representative of the claimants requested the court to demand the file from the Minister because his reply did not provide the requested information.

The court stayed the case and instructed the Minister of Public Administration to put together and send the file.

15. Vanya Paunova versus the Regional Healthcare Centre, Veliko Turnovo

1st Instance Court - Administrative Case No. 18/2003 VTRC

2nd Instance Court - Administrative Case No. 8302/2003 SAC 5th Division

Application:

Ms Paunova, a reporter of Yantra DNES newspaper served two applications in writing to the Director of the Regional healthcare Centre (RHC), Veliko Turnovo, requesting access to information related to the RHC activities such as the number of reports/signals against outpatient healthcare providers received at RHC, the amount of the central budget transfer to RHC, details of the procedure for selection of the RHC Director, details of the morbidity rate and the demographic situation in the region, etc.

Refusal:

The information was not provided to the applicant within the prescribed time limits. Instead, a letter was sent to the editor-in-chief of Yantra DNES newspaper from RHC, making comments on Ms Paunova's stories published in the newspaper, expressing an opinion on her work as a journalist, and suggesting to designate another reporter to cover healthcare issues. The letter contained summaries related to the health and demographic situation in reply to only one of the items in the first application.

Appeal:

The letter from the Director was attacked on grounds that it constituted a refusal to provide access to public information since it obstructed the appellant's right of access to information. The refusal was unlawful because it specified no reasons and no points of fact or law.

Developments at the 1st Instance Court:

At the first court session the representative of the RHC Director submitted the order of the Director to establish a three-member commission for examination of applications served to RHC under APIA and the minutes from a meeting of that commission, where the two applications of Ms Paunova were not examined at all because they specified no address for correspondence. Objections were raised with regard to the inadmissibility of the appeal since the letter did not constitute an administrative act and an attackable refusal under APIA for that matter. A defence plea in writing was produced to put forward also the argument that it was Yantra DNES as a legal entity to be a party to the administrative procedure and that no evidence was given to prove that Ms Paunova was duly authorised.

The representative of the claimant submitted defence plea in writing to state that by specifying her place of work (Yantra DNES newspaper) the claimant fulfilled the requirement to give an address for correspondence because the address of the newspaper was generally known. The letter to the editor of the newspaper expressed *inter alia* an attitude to the application and therefore it constituted a refusal. The fact that the RHC Director sent his reply to the editor of the newspaper rather than to the applicant did not change the parties to the procedure of providing access to information.

Judgement:

The Veliko Turnovo Regional Court (VTRC) issued Judgement No. 299 of 20 June 2003 to reverse the refusal by the RHC Director and referred the case back to the latter for a new decision. The reasons of the judgement assumed that the letter from the Director did not constitute an explicit refusal and it had the nature of correspondence instead and hence there was a silent refusal to provide the access requested in the applications.

Developments at the 2nd Instance Court:

The RHC Director served a cassation appeal against the VTRC Judgement on the grounds put forward before the first-instance court, i.e. lack of procedural legitimacy of the appellant and lack of an attackable administrative act.

Judgement:

Judgement No 793 of 30 January 2004 of SAC stated that the cassation appeal was unjustified and left the VTRC judgement in force. In its reasons the court assumed that the intention of Art. 25, para 2 APIA was not to examine applications, where no contact could be established between the applicant and the authority, while in that particular case the specified place of work was sufficient to establish contacts.

16. Lyubov Guseva versus the Municipality of Vidin

1st Instance Court - Administrative Case No. 34/2003 VRC

2nd Instance Court - Administrative Case No. 8751/2003 SAC 5th Division

Application:

Ms Guseva, member of the Managing Board of the Animal Protection Society in Vidin served an application in writing to the Mayor of Vidin, requesting access to information about the number of stray dogs caught and placed at the municipal „isolator“ over the period 2001 - 2002, the number of animals subjected to euthanasia, the municipal budget resources spent for the consumables and medicines in connection with the operations of the „isolator“ as described in the application, etc.

Refusal:

A decision to refuse access was given in writing pursuant to Art. 37, para 1, subpara 2 APIA.

Appeal:

The refusal was attacked on grounds that it specified no reasons and contained no point of fact. No legal provision concerning the subjective rights of third parties was invoked. Pursuant to Art. 31, para 4 APIA, where the consent of the third party is not given, the authority may provide access to the requested information in the volume and manner that will not disclose the information concerning the third party.

Developments at the 1st Instance Court:

No representative of the municipality appeared in court and the case was scheduled for judgement.

Judgement:

Judgement No. 98 of 27 June 2003 of the Vidin regional Court (VRC) reversed the refusal as unlawful and referred the case back to the Mayor of Vidin, obligating him to provide access to the requested information without disclosing any data concerning third parties. In its reasons the court assumed that the authority with obligations under APIA, i.e. the Mayor, had failed to make due effort as stated in Judgement No. 7/1996 of the Constitutional Court on Constitutional Case No. 1/1996 to strike proper balance between competing rights and legitimate interests, i.e. the claimant's right of access to information and the legitimate interests of third parties to the extent to which they existed in that particular case.

Developments at the 2nd Instance Court:

The Mayor of Vidin attacked the VRC Judgement with a cassation appeal.

The Supreme Administrative Court (SAC) heard the case in a single session and scheduled it for judgement.

17. Lyubov Guseva versus the Municipality of Vidin

1st Instance Court - Administrative Case No. 35/2003 VRC

2nd Instance Court - Administrative Case No. 8752/2003 SAC 5th Division

Application:

Ms Guseva, member of the Managing Board of the Animal Protection Society in Vidin served an application in writing to the Mayor of Vidin, requesting access to the contract between the Municipality of Vidin and Chistota EOOD on the assignment of the task to reduce the number of stray dogs in Vidin as organised and financed with municipal resources.

Refusal:

A decision to refuse access was given in writing pursuant to Art. 37, para 1, subpara 2 APIA and the answer of the Manager of Chistota EOOD was sent.

Appeal:

The refusal was attacked on grounds that the consent of the company in question was not necessary because it was a municipal company with a public mission and financed with public resources and hence the applicable provisions were those of Art. 31, para 5 APIA. There was no case of infringement upon the rights of a third party because in his letter attached to the file the manager of the company refused to give his consent to have the information provided to the appellant because he had bad relations with her.

Developments at the 1st Instance Court:

The case was heard in a single session and scheduled it for judgement.

Judgement:

The Vidin Regional Court (VRC) issued Judgement No. 95 of 27 June 2003 to reverse the refusal by the Mayor of Vidin as unlawful and to obligate him to provide access to the requested information. In its reasons the court stated that the mayor was wrong to assume that the interests of a third party would be infringed upon and to refuse access in view of the lack of its consent because the requested information was public and the provisions of Art. 31, para 5 APIA were applicable to the case.

Developments at the 2nd Instance Court:

The Mayor of Vidin attacked the VRC Judgement with a cassation appeal.

The case was heard in a single session and scheduled for judgement.

18. Apostol Stoichev versus Hristo Botev Community Centre, village of Banevo, Municipality of Burgas

1st Instance Court - Administrative Case No. 210/2003 BRC

2nd Instance Court - Administrative Case No. 8825/2003 SAC 5th Division

Application:

Mr. Stoichev served an application in writing to the Chairman of Hristo Botev Community Centre (*chitalishte*), requesting access to information as described in detail in eight items concerning the membership of the Board of Trustees, the minutes taken at the General Meeting, the expenditures from the central/municipal budget transfer, etc.

Refusal:

No reply was received from the chairman of the community centre within the prescribed time limits.

Appeal:

The silent refusal was attacked on grounds that there was a violation of the substantive law since the requested information was public and did not fall within the scope of any restrictions provided for in APIA and that the failure to observe the requirement to have the refusal given in writing was a material breach of the procedural rules.

Developments at the 1st Instance Court:

In the court room the representative of the chairman of the community centre challenged the appeal as unjustified since it was accounting information rather than public information that was requested access to. Furthermore, he claimed that the provisions of Art. 3, para 2, subpara 2 APIA were inapplicable since the requested information did not concern budget financed activities of the community centre.

Judgement:

Judgement No. I-135 of 15 May 2003 of the Burgas Regional Court (BRC) reversed the silent refusal as unlawful and obligated the community centre to provide the requested information. The reasons of the court were that the community centre was an entity with obligations under Art. 3, para 2, subpara 2 APIA. The court did not share the opinion of the defendant that the requested information was of accounting nature. The minutes taken at the meetings of the representative bodies of the community centre and the reports on their activities, as well as the reports on the spending of budget resources were not accounting documents.

Developments at the 2nd Instance Court:

The community centre attacked the BRC judgement with a cassation appeal.

The Supreme Administrative Court (SAC) heard the case in a single session and scheduled it for judgement.

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