



REPUBLIC OF SERBIA
G O V E R N M E N T
Anti-Corruption Council
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B e l g r a d e

REPORT ON UNLAWFUL CLASSIFICATION OF DATA SECRECY BASED ON THE REGULATION ON OFFICE OPERATION OF STATE ADMINISTRATION BODIES

The Constitution provides for that everyone has the right to be accurately, completely and timely informed about issues of public importance¹. The right to free access to information of public importance is regulated by the Law on Free Access to Information of Public Importance², and it can be restricted only exceptionally, if it is indispensable in a democratic society for the protection of serious violation of a prevailing interest based on the Constitution or the Law³. Therefore, a clear mechanism for classification and protection of classified information should exist in order to deny the public the right to information.

The Data Secrecy Law⁴ regulates the system for classification and protection of classified information, and it expressly specifies that this system is uniform⁵, which means that there is no other system for classification and protection of classified information. The Data Secrecy Law, within the uniform system, provides for four levels of secrecy classification of data: Top Secret, 2) Secret, 3) Confidential, and 4) Restricted⁶, and it specifies what data can be classified as secret⁷.

The Amendments to the Regulation on the Office Operation of the State Administration Bodies⁸ (hereinafter: the Regulation) of 27.04.2016, which were published in the Official Herald No. 45/2016 of 06.05.2016, the Government has amended Article 10 of the Regulation, which refers to the recording of documents and cases that are classified by a regulation as secret, as well as the classification of the level of their secrecy in accordance with the Law. Specifically, the mentioned Article 10 specified state, military and official secrets, and this classification grading of information ceased to exist by the adoption of the Data Secrecy Law. Although these provisions should have been reconciled with the above mentioned Law immediately upon its entry into force, this was done only by the mentioned Amendments so that now Article 10 of the Regulation, in Paragraphs 1 and 2, regulates the markings of the four levels

¹ Article 51 of the Constitution of the Republic of Serbia (Official Herald of the RS No. 98/2006)

² Official Herald of the RS No. 120/2004, 54/2007, 104/2009 and 36/2010

³ Article 8, Paragraph 1, of the Law on Free Access to Information of Public Importance

⁴ Official Herald of the RS No. 104/2009

⁵ Article 1 of the Data Secrecy Law

⁶ Article 14 of the Data Secrecy Law

⁷ Article 8 of the Data Secrecy Law

⁸ Official Herald of the RS No. 80/92 and 45/2016

of secrecy: 1) Top Secret, 2) Secret, 3) Confidential, and 4) Restricted, and the classification of one of the four levels of secrecy by officials.

However, a new paragraph was adopted, Paragraph No. 3 of Article 10 of the Regulation, which includes a disputed provision that documents and cases containing data that are not classified as secret data, but which by their nature are sensitive and require restricted distribution, are classified as "Official". It is also stipulated that further handling of documents with this marking is regulated in more detail by the Instruction on Office Operation and by the Regulation on Electronic Office Operation.

Thereby the Government stepped out of the uniform system of the classification of data secrecy prescribed by the Law and introduced another level of classification - "Official", where there are no specified criteria how to recognize what information is "sensitive and requires restricted distribution", or within which group of persons its distribution is allowed. Such a wording is a gross breach of the Data Secrecy Law and the Constitution. The Government has come out of the circle of its competence by adopting regulations during its technical mandate, which includes only the carrying out of the current affairs and it also includes the prohibition of passing regulations except under precisely specified circumstances,⁹ as well as regarding its constitutional powers¹⁰ as the disputed provision of the Regulation was not passed for the purpose of the enforcement of a law (neither the Data Secrecy Law nor the State Administration Law¹¹ whose provisions it is referring to in passing the Regulation). The Constitution is also violated because all the by-laws of the Republic of Serbia must be in compliance with the Law.¹²

Although it is prescribed that the Regulation on the Electronic Office Operation of the State Administration Bodies¹³ and by the Instruction on the Office Operation of the State Administration Bodies¹⁴ regulate in detail the handling of documents marked as "Official", these by-laws do not mention the marking "Official". On the contrary, the handling of documents marked "Official" is further regulated by a legal act which directs and coordinates the work of the state administration bodies in the procedure of the development of the negotiating positions in the process of negotiations on the accession of Serbia to the EU. Specifically, the Government has adopted Conclusion 05 No 337-5081 / 2016 of 31.05.2016 (hereinafter: the Conclusion), by which it has prescribed that the negotiating positions of the Republic of Serbia adopted during the accession negotiations for each individual negotiating chapter be marked by the marking "Official" until the opening of the particular chapter, and exceptionally by a corresponding classification secrecy level in accordance with regulations on data secrecy. The negotiating positions marked with the marking "Official" are only available on a need-to-know basis and they are distributed to the relevant group of persons. Documents marked as "Official" are not available to the public.

Please note that the Anti-Corruption Council does not find disputable the part of the Conclusion that relates to the classification of the level of secrecy in accordance with regulations on data secrecy, as the Data Secrecy Law in Article 8 specifically stipulates the possibility of the classification of one of the four possible levels of the secrecy of data relating to the relations of the Republic of Serbia with other countries, international organizations and other international entities.

⁹ Article 17 of the Law on Government (Official Herald of the RS No. 55/2005, 71/2005 - Corr., 101/2007, 65/2008, 16/2011, 68/2012 – Constitutional Court Decision, 72/2012, 7/2014 – Constitutional Court Decision and 44/2014)

¹⁰ Article 123, Point 3₂ of the Constitution

¹¹ Official Herald of the RS No. 79/2005, 101/2007, 95/2010 and 99/2014

¹² Article 195, Paragraph 1, of the Constitution

¹³ Official Herald of the RS No. 40/2010, "Regulation on the Electronic Office Operation" does not exist in the legal system of the Republic of Serbia.

¹⁴ Official Herald of the RS No. 10/93 and 14/93 – Corr. "Instruction on Office Operation" does not exist in the legal system of the Republic of Serbia.

CONCLUSIONS AND RECOMMENDATIONS

The Anti-Corruption Council has concluded that it is unlawful and worrying because, on the basis of the contested provision of the Regulation, any document or case that contains information about corruption, but also about any other violation of the law, as well as information indicating to corruption or other violations of the law, can be classified and marked as "Official" and remain inaccessible outside the circle of persons who are arbitrarily determined. A document need not even contain information on violations of the law or information indicating to a violation of the law, but it may only on the basis of the marking "Official" remain inaccessible to the public, which is also unacceptable in terms of free access to information of public importance. Non-transparent work of state administration bodies beyond the uniform system of the classification of data secrecy is unlawful and it is not in the interest of the Republic of Serbia and its citizens. Because of all the above stated the Anti-Corruption Council has addressed the Constitutional Court with an initiative to assess the compliance of the provision of Article 10, Paragraph 3, of the Regulation on the Office Operation of the State Administration Bodies, as well as its adoption, with the Constitution and the laws (attached).

The Anti-Corruption Council recommends that the Government of the Republic of Serbia urgently repeal Article 10, Paragraph 3, of the Regulation on the Office Operation of the State Administration Bodies in order to ensure the operation of the state administration in accordance with the Constitution and laws of the Republic of Serbia.

VICE PRESIDENT OF THE COUNCIL

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