



**REPUBLIC OF SERBIA
G O V E R N M E N T
Anti-Corruption Council
72 No: 010-00-7024/2016
Date: 02 August 2016
Nemanjina 11
B e l g r a d e**

CONSTITUTIONAL COURT

Subject:

- **The Initiative for Assessment of the Constitutionality and Legality of the Regulation Amending the Regulation on the Office Operation of the State Administration Bodies (Official Herald of the RS No. 45/2016)**
- **The Initiative for Assessment of the Constitutionality and Legality of the Provision Referred to in Article 10, Paragraph 3, of the Regulation on the Office Operation of the State Administration Bodies (Official Herald of the RS No. 80/92 and 45/2016)**

The Anti-Corruption Council is addressing you with an initiative for the assessment of the constitutionality and legality of the above by-laws.

CONTESTED PROVISIONS

By the amendments to the Regulation on the Office Operation of the State Administration Bodies¹ (hereinafter: the Regulation) made by the Regulation Amending the Regulation on the Office Operation of the State Administration Bodies, dated 05.27.2016, which was 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 marking of the four levels 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.

¹ Official Herald of the RS No. 80/92 and 45/2016

However, a new paragraph No. 3 of Article 10 of the Regulation was adopted , which contains a disputable provision that documents and cases containing information that is 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 are regulated in more detail by the Instruction on Office Operation and by the Regulation on Electronic Office Operation.

Here we are pointing out that neither the Regulation on Electronic Office Operation of the State Administration Bodies² nor the Instruction on Office Operations of the State Administration Bodies³ regulate either the general or detailed handling of documents marked as "Official".

THE CONSTITUTION AND LAW PROVISIONS THAT ARE VIOLATED

The Regulation Amending the Regulation on the Office Operation of the State Administration Bodies (Official Herald of the RS No. 45/2016) is inconsistent with:

- Article 17 of the Law on the Government,
- Article 123, Paragraph 3~~2~~₁ of the Constitution.

Article 10, Paragraph 3, of the Regulation on the Office Operation of the State Administration Bodies (Official Herald of the RS No. 80/92 and 45/2016) is inconsistent with:

- Articles 51 and 195 of the Constitution,
- Article 8, Paragraph 1, of the Law on Free Access to Information of Public Importance,
- Articles 1, 8 and 14 of the Data Secrecy Law.

The provision of Article 17 of the Law on the Government stipulates that the Government whose mandate has expired can carry out only current affairs and cannot issue regulations unless their adoption is related to a legal deadline, or is indispensable because of the state needs, the interests of defense or natural, economic or technical disaster.

The provision of Article 123, Point 3, of the Constitution provides that the Government shall adopt regulations and other enactments for the purpose of the enforcement of the laws.

The provision of Article 51 of the Constitution stipulates that everyone has the right to be accurately, completely and timely informed about the issues of public importance.

The provision of Article 195 of the Constitution provides that all by-laws of the Republic of Serbia must be in compliance with the law.

The provision of Article 8, Paragraph 1, of the Law on Free Access to Information of Public Importance⁴ stipulates that the right to access information of public importance can be restricted only

² Official Herald of the RS No. 40/2010. "Regulation on Electronic Office Operation" does not exist in the legal system of the Republic of Serbia.

³ 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.

⁴ Official Herald of the RS No. 120/2004, 54/2007, 104/2009 and 36/2010.

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 law.

The provision of Article 1 of the Data Secrecy Law regulates a system for classification and protection of secret information, and it expressly specifies that this system is uniform.

The provision of Article 8 of the Data Secrecy Law stipulates that data can be classified as data of interest for the Republic of Serbia, whose disclosure to an unauthorized person could cause damage, if the need to protect the interests of the Republic of Serbia prevails over the interest of free access to the information of public importance. These data particularly relate to:

1) national security of the Republic of Serbia, public safety, and defense, foreign policy, security and intelligence activities of public authorities;

2) the relations of the Republic of Serbia with other countries, international organizations and other international entities;

3) systems, facilities, projects, plans and structures that are associated with the data referred to in points 1) and 2);

4) scientific, research, technological, economic and financial activities related to data from points 1) and 2).

The provision of Article 14 of the Data Secrecy Law prescribes four levels of the secrecy classification of data: 1) Top Secret, 2) Secret, 3) Confidential, and 4) Restricted.

EXPLANATION OF THE INCONSISTENCY WITH THE PROVISIONS OF THE CONSTITUTION AND LAW

The Government has come out of the circle of its competence by adopting regulations during its technical mandate, breaching thus Article 17 of the Law on the Government because a government whose mandate has expired can carry out only current affairs and cannot pass regulations unless their adoption is to be accomplished by a legal deadline, or unless it is indispensable because of the state needs, the interests of defense or natural, economic or technical disaster. As there was no legal deadline for the adoption of the Regulation Amending the Regulation on the Office Operation of the State Administration Bodies, and as the adoption of the Regulation Amending Regulation on the Office Operation of the State Administration Bodies was not required because of the needs of the state, the interests of defense or natural economic or technical disasters, we find that such conduct of the Government was not in accordance Article 17 of the Law on the Government.

The introduction of the Regulation Amending the Regulation on the Office Operation of the State Administration Bodies, the Government referred to Article 82, Paragraph 2, of the Law on State Administration⁵, which does not mention any kind or level of secrecy. Consequently, the contested provision of the current Article 10, Paragraph 3, of the Regulation is in no way related to the enforcement

⁵ Official Herald of the RS No. 79/2005, 101/2007, 95/2010 and 99/2014

of Article 82, Paragraph 2, of the Law on State Administration. Thus Article 123, Point 3, of the Constitution has been breached.

By the adoption of Article 10, Paragraph 3, of the Regulation the Government stepped out of the uniform system of the classification and protection of classified information prescribed by Article 1 of the Data Secrecy Law and introduced another level of classification - "Official". This level of classification is not provided for in Article 8 of the Data Secrecy Law. As there are no specified criteria, it is not possible to recognize what information is "sensitive and requires restricted distribution", or within which group of persons its distribution is allowed. In order to deny the public the right to information, there should exist a clear mechanism for classification and protection of classified information, and this clear mechanism for classification and protection of classified information must be regulated by the law. Therefore, we find that the provision of Article 10, Paragraph 3, of the Regulation is incompatible with the provisions of Articles 51 and 195 of the Constitution, Article 8 of the Law on Free Access to Information of Public Importance, because it unfoundedly restricts access to information of public importance. It is also inconsistent with the provisions of Articles 1, 8 and 14 of the Data Secrecy Law as it deviates from the uniform system of classification and protection of classified information, creates a new level of secrecy classification and introduces new criteria for marking the level of classification secrecy of data.

VICE PRESIDENT OF THE COUNCIL

Prof. Miroslav Milićević, PhD