[SK] Refusal to Disclose information Confirmed by Court

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On 2 April 2013, the Supreme Court's (hereinafter "Court") ruling of 28 February 2013 was published. It confirmed the decision of the Supreme Audit Office of the Slovak Republic (hereinafter "Audit Office"). With reference to the Act on Free Access to Information (hereinafter "Information Act"), the Audit Office refused to disclose information about a controversial public tender carried out by the Ministry of Construction.

The Information Act represents a frequently used and thus valuable investigation tool for journalists in all types of media (print, audiovisual or online). The importance of its effective usage has been described by the deputy editor of the major quality newspaper "Sme" (also provider of the on-demand audiovisual media service "TV Sme"): "The Legislation is satisfactory. The actual problem is the willingness of the authorities to 'act'. If an authority refuses to provide information, it is virtually impossible to get it because to obtain a court order takes too long, and when the court finally delivers a decision, the information is out of date - which usually means it's useless."

In 2007, the Ministry of Construction carried out a public tender for an amount of almost EUR 120 million. Despite its significance, the public tender was solely issued on the billboard inside the Ministry's building. The non-governmental organisation (NGO) "Fair-Play Alliance" requested disclosure of the tender submission, the proposals and the final evaluation of this tender based upon the provisions of the Information Act. The Ministry of Construction refused this request, reasoning that they no longer possessed these documents. The documents had been sent to the Audit Office after the official inspection had started. Therefore, the NGO addressed the Audit Office with the same request. The Audit Office refused to disclose information since "it concerns the performance of an inspection by a public authority".

The NGO took legal action against this decision arguing that the information did not concern the performance of the inspection but the information itself was subject of the inspection. The mere fact that information becomes a subject of inspection by a public authority cannot prevent a journalist from obtaining access. The purpose of the Information Act is to allow public control of governmental bodies. The interpretation that enables the governmental body to avoid public control simply by referring to governmental inspection is in clear conflict with the

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purpose of the Information Act.

The Court rejected these arguments. It agreed that if the Ministry had possessed the information at the time of the request they would have had to disclose it. However, since the documents had been forwarded for official inspection, they then concerned the administrative performance of the inspection and thus might be refused to be disclosed by the Audit Office.

The Court did not acknowledge a difference between information that is subject to inspection and information that concerns the performance of inspection. On the contrary, the Court stated that such information (subject of inspection) will always concern the performance of the inspection. Regarding constitutional aspects, the Court did not see an interference with the right to access to information as long as the requirements of the Information Act are fulfilled. The proportionality of the decision or the requirements of the Information Act have not been assessed by the Court.

On the contrary, the Court advised the NGO in its ruling to use the tools of the Information Act for “effective” public control only and not as an instrument “for meaningless and formalistic court trials”. The Court stated that the NGO should have waited upon the request until the completion of the inspection. It did not consider the great public interest in the governmental tender procedure at the time when the subject was topical.

The NGO expressed its intention to file a complaint with the Constitutional Court due to a violation of their basic rights and freedoms.

Najvyšší súd, 28/02/2013

http://www.fair-play.sk/pdf/130228_rozsudok_NS.pdf

Decision of the Supreme Court of 28 February 2013

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