

Issuance of Public Information

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Under its decision of 6 August 2003 on the case No. 3b1282, the Appellate Chamber of Administrative Law and Tax Cases of Tbilisi Regional Court repealed the Decision of Tbilisi Mtatsminda-Krtsanisi district court of 3 April 2003 and delivered a new decision, under which it satisfied the claim of the appellant – LLC newspaper “Alia” and obliged the defendant – the General Prosecutor’s Office of Georgia – to allow the plaintiff get familiarised with the requested information – the criminal case file on the suicide of Aslanikashvili.

1. Circumstances of the Case

The plaintiff brought an action at Tbilisi Mtatsminda-Krtsanisi district court against the defendant demanding the divulging of public information, namely the criminal case file of 1986 on the suicide of Aslanikashvili, which was deposited with the archive of the Prosecutor’s Office. The grounds for the claim were the following. On 29 January 2003 the plaintiff applied to the defendant in writing requesting the mentioned public information. Despite two weeks waiting the plaintiff did not receive any answer from the Prosecutor’s Office. According to the General Administrative Code of Georgia, this is regarded as a refusal to issue the information. The plaintiff considered the requested information as public and by virtue of Articles 37-40 of the General Administrative Code the Prosecutor’s Office was obliged to comply with the requirement of the law – to secure the openness of the requested information.

In defence, the defendant rejected the claim on the following basis: the Prosecutor’s Office received the letter on 29 January 2003 and after its consideration sent a substantiated written reply on 31 January stating that the file of the criminal case initiated on the suicide of Aslanikashvili included evidence belonging to the privacy of the deceased and his family members. Under Article 44 of the General Administrative Code the public authority was obliged not to divulge that information without the consent of the person concerned or a court decision, as provided by the law. In the defendant’s opinion, under Subparagraphs (a) and (b) of Article 3 IV of the General Administrative Code, the Code does not apply to bodies, the activities of which are related to criminal prosecution of persons, criminal proceedings and operational-investigation activities.

At the main session of the district court on 3 April 2003 the plaintiff forwarded a solicitation on the expansion of the subject matter of the suit, namely on the invalidation of the response No. 18-0-03 of 31 January 2003 of the Prosecutor’s Office (on the rejection of

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issuance of requested information), as an administrative act. The court satisfied the solicitation. Under the decision of Tbilisi Mtatsminda-Krtsanisi district court of 3 April 2003, the claim of LLC newspaper "Alia" was not satisfied. The court gave the following grounds for its decision: the appealed response of the Prosecutor's Office could not be considered as an administrative act, as it had not caused any legal consequence given the content of the claim. The court upheld the defendant's opinion that according to Subparagraphs (a) and (b) of Article 3 IV of the General Administrative Code, it did not apply to the activities of the Prosecutor's Office, as far as pursuant to the provisions of the Constitution, the Organic Law on the Prosecutor's Office and the Criminal Procedure Code, the Prosecutor's Office conducts criminal prosecution. With a view of securing this constitutional duty it exercises procedural management of investigation and supervises the legitimacy of the inquest. The Prosecutor's Office is obliged not to divulge privacy information, the latter being an imperative requirement of Article 44 I of the General Administrative Code.

The court considered that the requested evidence from the criminal case file included privacy information along with evidence related to the investigation actions. Thus, access to the former could be granted only under official consent of the family members of deceased, Aslanikashvili, which the plaintiff failed to present. The court referred to Article 398 of the Criminal Procedure Code stating that the plaintiff was not among the persons, envisaged by this Article.

The authorised representatives of the LLC newspaper "Alia" appealed against the delivered decision demanding its repeal and satisfaction of the first claim under the following motivation: the appealed decision was unlawful and according to the court opinion, the General Administrative Code did not apply to the activities of the Prosecutor's Office. Later reference is made to Article 44 of the same Code. In the appellant's opinion, the Prosecutor's Office is not a body of executive power. According to Article 91 of the Constitution, it is a judicial authority. The reference to Article 44 of the General Administrative Code is not correct, as, according to Article 27 of the same Code, no person demanded the qualification of evidence from criminal case file containing personal information as privacy information. This was acknowledged by the defendant too. The appellant considered that the appealed response was signed by a not duly authorised person – Zarandia, as at the Prosecutor's Office there was a person responsible for the issuance of public information – the Deputy General Prosecutor Tvalavadze. The district court acknowledged the existence of privacy information in the criminal case file without submitting this case file to the court, given that the conclusion was considered as ill-founded as it was not based on evidence. The court referred to Article 396 of the Criminal Procedure Code, what is a violation of the law.

In submitted defence the counter party rejected the appeal and demanded the refusal to satisfy it and uphold the appealed decision.

After hearing the explanations of the parties, analysis of case evidence and consideration of the case, the court arrived at the conclusion that the appellant's claim was motivated and should be satisfied. Also that the decision of Tbilisi Mtatsminda-Krtsanisi district

court of 3 April 2003 should be repealed and the appellate court should deliver a new decision due to following circumstances:

Upon delivery of the appealed district court decision provisions of a substantive and procedure law were violated, namely, the requirements of Article 393 II of the Civil Procedure Code and Subparagraph (e) of Article 394. The court made recourse to the law it should not have made and misinterpreted the law. The decision was not sufficiently founded.

The district court made recourse to Subparagraphs (a) and (d) of Article 3 IV of the General Administrative Code (it should not have applied) when it considered that by virtue of the above provision, the General Administrative Code should not apply to the Prosecutor's Office given one simple reason: this provision lists the activities of the executive authorities the Code does not apply to. The General Prosecutor's Office of Georgia is not an executive, but a judicial authority as per Article 91 of the Constitution. These two branches of power are explicitly delimited from each other and the fact that the Prosecutor's Office conducts criminal prosecution, supervises the inquiry and supervision of service of a sentence, upholds the state prosecution does not qualify it as a body of executive power.

The court applied Article 44 of the General Administrative Code that is contradictory to this issue. In addition, upon recourse to this provision the court did not make mention of any evidence under which the case file was classified as privacy information.

2. Motivation of the Court

The appellate court considered that the submitted claim was well-founded and should be satisfied. The response (letter) No. 18-0-03 of 31 January of 2003 of the Prosecutor's Office should be invalidated and the defendant should be obliged to divulge the criminal case file regarding the suicide of Aslanikashvili to the LLC newspaper "Alia" due to the following reasons:

The appellate court considers, that the defendant's refusal to the issuance of public information is unlawful as it is established that the criminal case file concerned, which was dismissed was deposited with the archive of the General Prosecutor's Office.

It is acknowledged, that the archive of the General Prosecutor's Office is a departmental archive. As per the letter No. 04-29/136 of the Deputy Chairman of the State Archive Department of Georgia Zautashvili, the state archive of the newest history keeps state custody over the Prosecutor's Office documents, including those of 1974, while the criminal case file regard the suicide of Aslanikashvili is not deposited with the State Archive.

According to Article 8 of the Law of Georgia on the National Archive Stock of 2 May 1995 a document is assigned to the archive stock on the grounds of a document assessment expertise, conducted by a commission of experts.

This normative act establishes special treatment for documents assigned to the national archive stock. By virtue of Article 19 of the Law, access to the documents maintained in the national archive stock is free. Under Subparagraphs (a) and (b) of the same Article access to the following documents are restricted for other persons: a) the documents containing state secrecy and b) the documents containing information on private life and property of citizens, among them to criminal case files for 75 years following their filing.

The appellate court considers, that this Law may not apply to criminal case, initiated on the fact of Aslanikashvili's suicide and dismissed the file being deposited with the archive of the General Prosecutor's Office, inasmuch as this case is not assigned to the national archive stock under the decision of a special commission of experts and it does not enjoy the status of a document of this stock. Thus, the appellate court considers that by virtue of Subparagraph (l) of Article 2 of the General Administrative Code evidence requested by plaintiff is public information maintained by public authority.

Under Article 3 II of the same Code, the application of the Code to the activities of state authorities listed in Subparagraphs (a) – (d) is limited to Chapter III. As far as the Prosecutor's Office is a judicial authority, its activities, by virtue of Subparagraph (d) of Article 3 II of the Code, are subject to application of Chapter III – Freedom of Information.

The appellate court does not uphold the opinion of the district court on the lawfulness of recourse to Article 3 IV of the General Administrative Code and explains, that under this provision, the Code does not apply to the activities of the executive authorities that are related to the prosecution of an individual for the commission of a crime, to the conduct of criminal case proceedings, operational-investigation activities, enforcement of judgements, delivered by court and entered into force. This is logical as far as upon the conduct of these activities the respective authorities apply special laws of substantive and procedure legislation, e.g. the Criminal Procedure Code, the Law on Enforcement Proceedings, and the Law on Conclusion, Ratification and Denunciation of International Agreements etc. This means that upon the conduct of these activities, the executive authorities do not apply the procedure provided for by the General Administrative Code; do not conduct the administrative proceedings.

Article 3 III of the General Administrative Code states that this Code applies to those activities of the authorities mentioned in Article 3 II and officials thereof that are related to the conduct of administrative duties.

The appellate court considers that as far as under Article 3 II of the Code, the application of the General Administrative Code with regard to state authorities listed in the same Article is limited to Chapter III; the wording of Article 3 III – “application of the Code” should be construed as “the application of Chapter III”. As far as given its content Article 3 II imperatively states that only Chapter III of the Code should apply to the listed state authorities, while the clause of Article 3 III makes the scope of application of Chapter III even narrower and limits it only to the activities related to the conduct of administrative

duties. Thus, the activities of judicial authorities (and the Prosecutor's Office among them), related to the conduct of administrative duties are subject to the application of Chapter III of the General Administrative Code.

In the opinion of the appellate court, in this case the General Prosecutor's Office exercised its administrative duties as the criminal case on the suicide of Aslanikashvili was dismissed. This means that no operational-investigation measures, procedural actions, regulated by special laws, were conducted with regard to this case and the case file was deposited with the archive. In specific cases the General Prosecutor's Office of Georgia secures the maintenance and safeguards an archive document, this being an administrative duty of the Prosecutor's Office and not the one provided for by the Constitution or granted by special laws. This duty is manifested in the resolution of various organisational issues and falls within the scope of administration of the authority.

The appellate court considers that the activities of the General Prosecutor's Office in respect to the documents deposited with its archive falls within the scope of administration of the authority. This makes such documents public information provided for by Chapter III of the Code. Thus, the refusal of the General Prosecutor's Office to issue public information is unlawful. It should be invalidated as it is illegally based on Subparagraphs (a) and (d) of Article 3 IV of the General Administrative Code; the reference to Article 44 of the same Code is also unlawful as it is established that no decision was made in accordance with Article 80 of the General Administrative Code on security classification of public information, with regard to any evidence from the criminal case file, the plaintiff was interested in.

The appellate court also considers it established that none of the case materials qualified as privacy information. By virtue of Article 27 of the same Code the decision on qualifying some personal data as privacy information is made by the person the information is about, except for cases provided for by the law. According to the statement of the defendant's representative he talked about it with Aslanikashvili's son but the family members of the deceased did not react in any way, i.e. they did not apply to the Prosecutor's Office requesting qualification of the personal information concerning Aslanikashvili or his family members, maintained by secretariat, as personal data of privacy nature and the Prosecutor's Office to make a respective decision. Taking this into consideration the appellate court regards the district court opinion concerning the existence of privacy information about Aslanikashvili and his family members in the criminal case as absolutely illogical and ill-founded, as far as the family members have not exercised the statutory right and they have not declared such a will.

The appellate court considers that law gave preference to the subject of personal data to define which personal data should be qualified as privacy information. After making a decision by the respective authority, which safeguards personal data, qualified as privacy information by the person concerned, fall under another legal treatment, i.e. are not subject to publicity and are not accessible. Under Article 28 of the General Administrative Code, public information is open except for cases provided for by law and state,

commercial or privacy information classified as such in accordance with the established procedure. The obligation of a public authority not to disclose the privacy information without the consent of a person concerned or a court decision, provided for by Article 44 I of the General Administrative Code arises with regard to the information classified as privacy in accordance with the established procedure. The appellate court did not uphold the defendant's opinion on the application of the rules of the Law on Operational-Investigation Activities as Article 12 of this Law gives the list of authorities exercising operational-investigation activities. The Prosecutor's Office is not among them. Article 21 I envisages the supervision of the Prosecutor's Office over accurate and uniform compliance with law in performing such actions, also the supervision over the legality of decisions made during the conduct of the actions by the Prosecutor General and the prosecutors. The criminal case concerned was initiated and dismissed by the Prosecutor's Office. The defendant failed to confirm whether the operational-investigation actions had been undertaken with regard to this criminal case and to what extent the case file contained data, documents and sources reflecting such activities, the access to which was restricted by Article 5 I of the Law on Operational-Investigation Activities. The court considered that the claim was well-founded and was subject to satisfaction on the grounds of Article 41 I of the Georgian Constitution and Articles 37 I, 28 and 50 of the General Administrative Code. Namely, the response No. 18-0-03 of 31 January of 2003 of the General Prosecutor's Office was invalidated and the General Prosecutor's Office was obliged to divulge the file of the case, initiated on the suicide of Aslanikashvili to the LLC newspaper "Alia".

3. Comment

The decision of the appellate court delivered in respect of this case is very important, as judicial practice in the field of accessibility to public information is scarce and divergent. By itself, the provisions of Chapter III of the General Administrative Code could be explicitly qualified as a daring and progressive step in the development and protection of democratic institutions of the society and human rights. As far as this Code was enforced against the background of the gravest heritage of a post Soviet state with typical for totalitarian system rigid, closed-type of operation of public institutions, the coherent introduction of the rules of administrative law becomes ever more understandable and desirable for exercising statutory powers. The popularisation and practical use of Chapter III, as well as other provisions can play an important part in the establishment of a civil, open society in Georgia and the operation of the mechanism of social control over the activities of government and self-government bodies and the enhancement of legal culture.

The rules on the freedom of information grant particular importance to judicial power enabling a person to apply to the court demanding the repeal or amendment of a decision of a public authority or a public official. In this case the impartiality, competence and fairness of the court are of particular importance. This restores the balance in relations between a person and state authorities.

Through the adoption of Article 41 of the Georgian Constitution and Chapter III of the General Administrative Code, the state firstly acknowledged its liability to provide its citizens with public information maintained by public authorities.

It is worth mentioning that the main users of public information in Georgia are journalists. In the this case the media became interested in a criminal case file, but the General Prosecutor's Office refused access to it.

The decision of the appellate court gave the interpretation to the scope of application of the provisions of Chapter III of the General Administrative Code with respect to such specific public authorities as is the General Prosecutor's Office and explicitly delimited the administrative duty of the General Prosecutor's Office in the capacity of an administrative body and its duty to conduct procedural actions, provided for by the Constitution and special laws. It was ruled that in this case the activities of the General Prosecutor's Office with respect to documents deposited with its archive falls within the scope of an authority administration. Thus, such documents are public information provided for by Chapter III of the General Administrative and are subject to openness.

The other interpretation of the appellate court is of equal importance. According to the law, it is the subject of personal data. A public authority does not enjoy the priority right to decide which personal data to qualify as privacy information unless it is directly envisaged by the law.

In our opinion, the considered decision is an interesting precedent in the field of court disputes on the freedom of public information. It will play a positive role in the impartial administration of justice in the consideration of this category of cases.