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AVAILABILITY AND USE OF SENSITIVE PERSONAL DATA: FONDS OF THE CANTONAL PROSECUTOR'S OFFICE OF THE CANTON OF SARAJEVO – CASE STUDY FROM THE HISTORICAL ARCHIVES SARAJEVO

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Abstract:

The authors of the paper present certain provisions of the Act regulating the issue of accessibility and use of archives, the availability of the archival fonds of the Cantonal Prosecutor's Office of Sarajevo Canton, which was acquired by the Historical Archives Sarajevo in terms of use, sensitivity of data, personal data, publications, conditions and manner of use as well as access limitation periods for using individual archival documents.

Key words:

archives, availability, use, archival data sensitivity, personal data, archival practice, archival users, access limitation periods

Izvleček:

Dostopnost in uporaba občutljivih osebnih podatkov: fond Kantonalno tožilstvo Kantona Sarajevo – študija primera

V prispevku so predstavljene določbe zakonodaje, ki ureja vprašanje dostopa do arhivskega gradiva in njegove uporabe z vidika (občutljivih) osebnih podatkov, objave, pogojev in načinov uporabe ter rokov dostopnosti. Predstavljen je konkreten primer uporabe in dostopa do arhivskega fonda Kantonalnega tožilstva sarajevskega kantona, ki ga je prevzel Zgodovinski arhiv Sarajevo.

Ključne besede:

arhivi, uporabnost, uporaba, občutljivost podatkov, osebni podatki, arhivska praksa, uporabniki, roki nedostopnosti

1. INTRODUCTION

Historical Archives Sarajevo (hereinafter: the Archives) is a public institution, a cultural, educational and administrative organization whose basic activity is regulated by the Law on archival activities¹ (hereinafter: the Law). In the process of adoption, the Law has passed all the necessary procedures, with a special emphasis on the obligation to harmonize and to be in compliance with international regulations and standards related to this activity.

Considering the Archives is a public institution, founded from public funds with primary tasks such as:

- recording and surveillance of registries, creators and holders of current and archival records;
 - acquisition, storage and protection of archival records;
 - arranging and processing of archival records;
 - providing, publishing and presenting archival records for cultural, scientific, educational and public-legal purposes,
- the right of access to public archives as a fundamental right of citizens arises.

2. GENERAL PROVISIONS ON THE USE AND ACCESSIBILITY OF ARCHIVAL RECORDS

Access to archival records is a right and it must be provided to all users, regardless of their nationality, position or occupation and represents the respect of democratic values of a system in order to allow access to public archival records, or to make them available.

General provisions of the Law on archival activities define the terms and definitions used in the Law. Thus, Article 2, item m., states that accessibility and use represent the right to inspect information from archival records, in compliance with the basic rules and conditions and applies to all natural and legal persons, without any discrimination.

In the same article, item n., it is defined that protected personal data, the use of which would seriously compromise the privacy or important interests of a person, in particular life, health and physical integrity, is protected under laws, other regulations or decisions of competent authorities.

Access and use of archival records are defined in Articles 26 to 31 of the Law.

The basic principle, when it comes to access and use of archival records, is defined in the provision of Article 26, which reads as follows:

"All users have the right to use public archival records kept in archives under same conditions."

One of the provisions of Article 27 defines access to "special types" of archival records (archival documents containing personal data, data on persons and security service). It is thus established that archival records can be used for official or cultural purposes, for scientific research, publishing, teaching, exhibiting, for the protection of personal rights and other social needs. The deadlines for access to public archival records (30 years from the date of their creation), are also determined, but can also be shortened upon approval from the creator.

¹ Published in the Official Gazette of Sarajevo Canton, no. 50/16.

Public archival records containing information related to the defence of the country and national security, internal affairs and work of political organizations, as well as to the economic and other interests of the state whose publication could cause damage to national interests and national security, are available for use after the expiration of a period of 50 years from the date of their creation, unless otherwise specified by a special regulation.

It has been established that public archival records containing personal data (registry books, personal files, history of illness and medical documentation, tax and financial documentation, court and other) are available for use after the expiration of 70 years from the date of their creation, or 100 years from the birth of the person to whom they relate.

Exceptions to special provisions on the use of archival records, or the conditions under which the archival institutions may authorize the use of materials before the elapsed specified time periods, are foreseen in Article 28 of the Law.

If the scientific and research needs require the use of archival records before the expiration of the deadline specified in Article 27 of the Law, archival institutions may authorize the use of such material if the protection of public interests, that is, privacy, rights and interests of third parties, is provided in accordance with the Law.

It has been established that public archival records can be used without restriction by creators who created them, for the purposes for which they were created.

When transferring public archival records to the archival institution, the creator defines the provisions of access or specifies certain restrictions related to its use. The creator is obliged to specify individual documents to which the restrictions apply.

In the case of private archival records, acquired by an archival institution, Article 36 of the Law provides the right of access as for public records, unless otherwise specified in the acquisition minutes or in the acquisition contract.

3. WIDER LEGISLATIVE FRAMEWORK FOR THE AVAILABILITY OF ARCHIVAL RECORDS

Access to archival records is regulated by the Law on Archival Activity while the Law on Freedom of Access to Information², the Law on Protection of Personal Data³, the Law on the Protection of Classified Information⁴ and the Copyright and Related Rights Law⁵ also partly regulate the availability of archival records. Very often, some of the provisions of these laws are in collision with the Law on Archival Activity, or vice versa. The problem lies in access limitation dates that are regulated by the Law, whereas in the Law on Freedom of Access to Information these limitations are not applicable.

Depending on the type of data contained in archival records (personal or classified data), there are various types of restrictions. The archival institution is obliged to keep the confidentiality of the information contained in them.

Article 1 of the Law on Protection of Personal Data states that the purpose of this law is to ensure the protection of human rights and fundamental freedoms, in particular the right to privacy and data protection, to all persons, regardless of their nationality or

² Published in the Official Gazette of BiH, no. 28/00, 45/06, 102/09 and 62/11.

³ Published in the Official Gazette of BiH, no. 49/06, 76/11 and 89/11.

⁴ Published in the Official Gazette of BiH, no. 54/05 and 12/09.

⁵ Published in the Official Gazette of BiH, no. 63/10.

residency, in the territory of Bosnia and Herzegovina, regarding the processing of personal data relating to them. The provisions of Article 24, paragraph 2, item a. of the same law regulate the right of access to personal data, in such a way that the controller is not obliged to notify the processing of personal data if the data is processed solely for statistical, scientific research or archival purposes.

Valid state legislation is bound to establish guarantees to protect the rights of people and to determine additional conditions for processing sensitive data, which is, defined by international privacy standards characterized as:

- data affecting the most intimate sphere of people or data which could, in the case of misuse, cause unlawful or arbitrary discrimination or a serious risk to the data holder;
- in particular, personal data revealing aspects of racial or ethnic origin, political orientation, or religious and philosophical perceptions as well as data relating to health or sexual life.

Valid national legislation may establish other sensitive data categories when the conditions in the preceding paragraph are met.

The Law on the Protection of Classified Information, passed in 2009, regulates: the common ground for a single system of determination, access, use, custody and protection against unauthorized disclosure, destruction and abuse of classified information from the jurisdiction of Bosnia and Herzegovina, entities and other levels of State Organization of Bosnia and Herzegovina, which refer to security, defence, external affairs or intelligence and security activities; the termination of confidentiality of such data and the procedure of security clearance and the issuance of a security clearance for access to secret data.

The provisions of Article 25 define the termination of data or documents confidentiality after:

- a) a specific date,
- b) ending a certain event,
- c) at the expiration of a specified time and
- d) when the authorized person terminates the confidentiality.

If it is not possible to determine the time of confidentiality termination of the data, its confidentiality ceases at the expiration of the time specified in the Law on Archival Material⁶ on state level.

An authorized person may change the manner and access limitation date, if there are grounded reasons for this, and all who have access to that information must be notified.

Important thing to emphasize is that the Law on Protection of Personal Data, passed in 2011, refers to the application of the deadlines established by the Law on Archival Material when it comes to availability.

Certain discrepancies regarding the availability of archival records and the application of the Law may make archival work more difficult and the application of the principle of access to archival records may be difficult.

⁶ Published in the Official Gazette of BiH, no. 16/01.

4. ARCHIVAL FONDS OF THE CANTONAL PROSECUTOR'S OFFICE OF THE SARAJEVO CANTON

At the request of the Cantonal Prosecutor's Office of Sarajevo, Historical Archives of Sarajevo acquired archival records originating from 1945–1991. The transfer of archival records was carried out on the basis of Article 16 of the Law on Archival Activities (2000, 2005) and pursuant to Article 33–38 of the Decree on the Organization and Manner of Performing Archival Jobs in Administration Bodies and Federation of Bosnia and Herzegovina Administration Services⁷. Acquired archival records were arranged and listed by type, date of creation and quantity, i. e. arranged as regulated by the legal provisions governing this matter.

The total amount of archival records, acquired from the Cantonal Prosecutor's Office of the Sarajevo Canton, is 132 meters. The acquisition was carried out on three occasions successively, after which a report about the acquisition was made, containing the provisions of the creator about the manner and terms of use, method of storage, time of use, as well as restrictions on the use. Namely, the submitter of archival records, in accordance with Article 16 of the Law on Archival Activities (2000, 2005), which was in force before the adoption of the present Law, restricted the use of records to natural and legal persons without the consent of the Cantonal Prosecutor's Office of the Sarajevo Canton. The time limit for this restriction was not specified.

4.1 General Information

The Cantonal Prosecutor's Office of the Sarajevo Canton is a public body founded on December 15, 2003, and as such represents the legal successor to the Municipal Prosecutor's Office I Sarajevo, the Municipal Prosecutor's Office II Sarajevo, and the Cantonal Prosecutor's Office Sarajevo, which were all founded after the Bosnian War in 1996.

Here, it should be reminded that due to the burden of the history of Bosnia and Herzegovina this body as a legal successor which inherited all archival records and available materials of the so-called „Military Prosecutor's Office“, which was functioning between 1992 and 1995, and of which the Cantonal Prosecutor's Office Sarajevo, in accordance with the provisions of the time was the legal successor. In Former Yugoslavia during the period between 1945 and 1992 the Municipal Prosecutor's Office I and II and the District Prosecutor's Office existed in Sarajevo.

4.2 Legal Framework

The entire history of the Cantonal Prosecutor's Office of the Sarajevo Canton as a specific body within the judicial system has always been established by specific laws, and in a social context there have always been prosecuting bodies that have undergone various reform cycles. Unfortunately, other than the law, the legal system, even though there have been proposals, did not treat this type of body separately, but instead in terms of archival records acted through so-called „General Provisions“.

To be specific, at this moment the Cantonal Prosecutor's Office is established by the Law on the Cantonal Prosecutor's Office of the Sarajevo Canton,⁸ whereas in the context of legal framework the Law on Archival Activities, defined the practical framework

⁷ Published in the Official Gazette of FBiH, no.22/03.

⁸ Published in the Official Gazette of Canton Sarajevo, no.20/02, 22/02 and 30/08

on dealing with archival records. Furthermore, it should be emphasized with regards to the this subject: Law on Administrative Procedure FBiH and the provisions and acts that regulate office operations within the Prosecutor's Office as well as provisions on archival activity that regard administrative bodies are generally in use. At this moment, it is impossible to not emphasize the direct impact of relatively two provisions at the state level of the institutions of Bosnia and Herzegovina. This namely the Law on Protection of Personal Data and the Law on the Protection of Classified Information as well as the additional „lower legal acts“ that follow.

4.3 The nature of the archival records

Besides general administrative acts, all other material refers to criminal matters. Primarily, it regards all cases of criminal matter in the field; general, economic, and juvenile. The List of document categories with retention periods in the Cantonal Prosecutor's Office of the Sarajevo Canton No. A-852/13 from December 25, 2013, represents a list of all types of documents, directories, records and other registry materials, with retention periods determined on their scientific, historical, cultural and operational significance and value (in Further text: List of categories). The nature of archival records of the Cantonal Prosecutor's Office of the Sarajevo Canton logically stems from the activity for which it was established. According to the previously determined Criteria for the determination of retention periods, those are based on the contextual and operational value of the documentation, the historical circumstances of the creation of documents and the determining of individual categories for permanent storage by special regulations in individual areas. Normally, from the file the initial document the prosecution's decision and its corresponding invoice are not extracted. If there is no important archival records in one registry, then less important materials that contains the same information will be selected for permanent storage.

Unfortunately, because of the turbulent history Sarajevo is known for (two World Wars and one Aggression), archival documents created in a certain period of time or in a particular area were wholly or partially destroyed or have disappeared. For this reason, the selection of archival records is done with special care, taking into account that this data is needed for history, science, other social needs and the needs of the citizens. Thus, the legislator prescribed the deadlines for storage, selection and disposal of records created at the end of 1945 or in the period 1992 to 1995, which are not to be destroyed. It is also necessary to emphasize the fact that this group also includes cases which were motivated and officially conducted under policies of that time, which are especially from the historical aspect important for the cases tried immediately before the beginning of the Bosnian war, like the cases of the affair "Agrokomerc", "Neum", "Military industry" or the death of the then-Yugoslav prime Minister, Džemal Bijedić or the case against the constitution known as "Alija Izetbegovic and others". Furthermore, the rich collection of the Prosecutor's Office consists of cases that were led during the time after war events in BIH (1946–1960). Also, of great historical value are all cases in the so-called "KV register", i.e. cases led by the Military Prosecutor's Office in the period from 1992 to 1995 and which are fully preserved. It is necessary to emphasize that one of the most important collections, created as a result of the work of the Prosecutor's Office, are cases led after the Second World War against the members of the Axis powers.

4.4 Availability of archival records

In 2011 the administration of the Cantonal Prosecutor's Office of the Sarajevo Canton recognized the problem regarding archival records, primarily the problem of inadequate storage, the lack of material-technical support, as well as the limitations within the legal framework itself. Taking into consideration the General Provision of the Law (Criminal law and Archival law), the Prosecutor's Office of the Sarajevo Canton started drafting the Policy on Archival Records of the Cantonal Prosecutor's Office Sarajevo, for which it obtained consent in 2013, and approval from the Archive in accordance to provisions. Furthermore, the List of documents categories with retention periods (CPOSC-No. A-852/13 from December 25, 2013) has been complemented two times in the upcoming period. Archival documents dealing with the Second World War and the local war, are thus prepared to be proclaimed as cultural heritage and could be used in scientific, historical, cultural research or for other purposes in the future. Unfortunately, at this point, due to the relationship between the politics and the transitional path of BiH, for a number of reasons this has been prevented. In certain exceptions, according to the contract signed with the archives, only with the prior approval of the Prosecutor's Office can the archives grant access to archival records of the Cantonal Prosecutor's Office Sarajevo.

5. CONCLUSION

The Prosecutor's Office in Bosnia and Herzegovina, while highly respecting and recognizing all the legal context of Regulation (EU) 2016/6791 and the legislation of Bosnia and Herzegovina, has not until this day resolved classification marks from the time of the Socialist Republic of Bosnia and Herzegovina. Today, within the legal system there remains a „legal void“ because this very important issue has not been settled. Lawmakers in Bosnia and Herzegovina have either accidentally or intentionally prevented normal institutional activity where collections could be available to the public.

Irrespective of the data contained in archival records and its sensitivity, there is no legal basis whereby „any data“, except for the statistical analytical data, could be made available because the materials are classified as confidential using confidentiality labels. However, the confidentiality label has been placed by an authority of a state that does not exist today. Practically this means that, from the aspect of legal regulations, we are in a position to protect information of a State that no longer exists, while still there is no established state-level body that has the jurisdiction to declassify these documents. Furthermore, it should be emphasized that the Law on the Protection of Personal Data stated to all authorities in Bosnia and Herzegovina the citation of „controllers or processors“ of personal data, and in Article 17 prevented the disclosure of personal data before informing its owner.

In the end, the question that arises regards what the overall purpose of transferring the material to the Archives is, if it can not be made available. We are referring to documents which are over 50 years old and, from the Prosecutors point of view carry no social danger nor special sensitivity of information. Changes to the legal regulations on the basis of the Regulation 2016/ 679 of the European Parliament and the Council, it is certain that part of the information will be available to the public relatively soon, and without prior permission of the Prosecutor's Office. Of course guaranteeing at all times all rights including the rights to the Protection of Personal Data that according to the decree, however, unlike the current legal solutions in BiH cannot be absolute.

POVZETEK

DOSTOPNOST IN UPORABA OBČUTLJIVIH OSEBNIH PODATKOV: FOND KANTONALNO TOŽILSTVO KANTONA SARAJEVO – ŠTUDIJA PRIMERA

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Avtorja predstavljata določbe zakonodaje, ki ureja vprašanje dostopa do arhivskega gradiva in njegove uporabe z vidika (občutljivih) osebnih podatkov, objave, pogojev in načinov uporabe ter rokov dostopnosti. Predstavljen je konkreten primer uporabe in dostopa do arhivskega fonda kantonalnega tožilstva sarajevskega kantona, ki ga je prevzel Zgodovinski arhiv Sarajevo.

Tožilstvo Bosne in Hercegovine še vedno ni razrešilo problema dostopa do tajnih podatkov, ki so bili kot takšni označeni še v obdobju Socialistične republike Bosne in Hercegovine. Zato danes ostaja nekakšna pravna praznina, ki je zakonodajalci še niso uspeli razrešiti. Ne obstaja namreč pravna podlega, ki bi omogočila dostop do dokumentacije ne glede na njeno vsebino in morebitno občutljivost, saj ne obstaja državno telo, ki bi imelo pooblastila, da oznako tajnosti prekliče. Zatorej smo se znašli v položaju, ko ščitimo gradivo države, ki je več ni, Zakon o zaščiti osebnih podatkov pa uradnim ustanovam nalaga, da je potrebno pred razkritjem osebnih podatkov o tem obvestiti osebo, na katero se podatki nanašajo.

Postavlja se vprašanje, kakšen je sploh namen predaje tovrstnega gradiva pristojnemu arhivu, saj do njega ne bo mogoče dostopati. Gre za dokumente, ki so stari več kot 50 let in ki s stališča tožilstva ne predstavljajo nevarnosti za družbo niti ne vsebujejo posebno občutljivih podatkov.