



**REPUBLIC OF SERBIA**  
**PROTECTOR OF CITIZENS**  
17-1966/10  
Belgrade



Заштитник грађана  
Zaštitnik građana

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Ref. No. 26927 Date: 26/12/2011

### SECURITY-INFORMATION AGENCY

11000 BELGRADE  
Kraljice Ane bb

Dear Mr. Vukadinović,

Acting in the procedure of complaint filed by A.A. from C... against the work of the Agency and having established all the facts and circumstances relevant to the assessment of the merits of the complaint, I am hereby informing you about the following:

The filed complaint and the response of the Security-Information Agency (BIA) indicate the following indisputable facts:

- BIA provides Serbia and Montenegro Air Traffic Control Agency (ATCA) with counter-intelligence protection, the legal basis for which derives also from the *Decision on Determining the Activities of Counter-Intelligence Protection of Federal Agencies and Organisations Performed Directly by the State Security Service at the Federal Secretariat for Internal Affairs (Official Gazette of SFRY - Confidential Bulletin, No. 15/1991)*.
- *Decision on Determining the Activities of Counter-Intelligence Protection of Federal Agencies and Organisations...* is the regulation that has been applied, but has never been published. Besides, the Decision is out-dated - both in terms of identifying the body that provides security protection, and as regards the bodies under the counter-intelligence protection, but also as regards the state to whose authorities it refers.
- In providing counter-intelligence protection according to the *Decision on Determining the Activities of Counter-Intelligence Protection of Federal Agencies and Organisations...* BIA conducts security checks of the employees of the ATCA;
- Performing a security check of A, BIA has learned a piece of information that was assessed as security threat for which this person should not perform her duties at her workplace;
- BIA informed the supervisor in the ATCA about this assessment;
- Director of ATCA issued a decision on termination of A's employment;
- A. A. approached the court to protect her labour rights, considering the dismissal unlawful;
- During the proceedings initiated upon the A's claim, the court requested from BIA to present the security check;
- BIA informed the court that it could not provide the court with the security check.

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This body (the Protector of Citizens - PoC) takes a stand that the court is competent in all respects and an eligible body to decide on (un)lawfulness of the termination of A. A's employment. This body will not consider the merits of the BIA's refusal to provide the court with the requested act since the court has at its disposal both powers and measures to obtain all the documentation it needs to adjudicate on the basis of complete and indisputably established facts.

The PoC shares the concern of this citizen because the court has asked BIA whether the conditions have been met to "lift the obligation of secrecy" from one document, even though according to positive laws and logical reasoning, only individuals can be released from such an obligation. It is, hence, understandable why A. has been concerned regarding the authority, independence and impartiality of the court. The PoC, since he is not authorised to control the legality and regularity of courts, can only hope that the contents of correspondence is a result of haste, but that it will not affect the legality and regularity of the proceedings before the court or the exercise of citizens' rights to a fair trial. However, if necessary, the appellate court will be able to decide on the legality and regularity of the proceedings, while the competent authority will decide on the judge's expertise.

Dealing, within its competence, with the work of BIA, this body has reviewed the complaint allegations, the response and the supporting documentation submitted by BIA, and also conducted an interview with the authorised representatives of the Agency.

Since the complaint was filed with the PoC during the proceedings for the protection of labour rights before the court, this body has investigated whether BIA acted particularly incorrectly towards A.A. (Article 25 Paragraph 5 of the Law on the PoC).

We controlled the legality of BIA's actions from the aspect of regulations indicated by the Agency as legal basis, but also the correctness of actions in terms of appropriateness, proportionality, justifiability, non-discrimination, absence of conflicts of interest, the principle of protection of citizens' rights and other principles and rules that guarantee the fairness of the actions of public authorities.

As regards the regulations indicated by BIA as legal basis for their actions, one of them is apparently out-dated, exactly the one which the Agency sees as the legal basis of its authority and duty to conduct a security check in this particular case.

*The Decision on Determining the Activities of Counter-Intelligence Protection of Federal Agencies and Organisations Performed Directly by the State Security Service at the Federal Secretariat for Internal Affairs* from 1991 was adopted for other states and other bodies, both in terms of who performs safety checks, and in relation to a body whose employees or potential employees are security checked. However, it is true that it is possible to follow the line of succession from the former federal state to the present Republic of Serbia, and from the body specified in the Decision to the present Serbia and Montenegro ATCA.

However, the fact that the *Decision on Determining the Activities of Counter-Intelligence Protection of Federal Agencies and Organisations...* is applied without ever being published is much more devastating for the legal system and the constitutionally established principle of the rule of law than the obsolescence of regulations as a result of shifts in states and authorities. The Constitution provides that laws and other general legal acts are to be published before the entry into force, and that they enter into force on the eighth day after their publication (or earlier if

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there are particularly justified reasons, specified at the time of their adoption)<sup>[1]</sup>. However, the *Decision on Determining the Activities of Counter-Intelligence Protection of Federal Agencies and Organisations* ...has never been published, and hence, it cannot be considered a valid general legal act within the meaning of the provisions of the Constitution.

BIA, in accordance with the Law on BIA and other regulations, performs security protection activities, which normally include counter-intelligence protection. Security check is a procedure consisting of a set of measures and actions to be performed within these activities. According to the Law on Data Confidentiality<sup>[2]</sup>, the security check is a procedure carried out by the competent authority prior to issuing certificates for accessing classified information, in order to collect data about possible security risks and difficulties regarding the reliability of access to classified information.

Having in mind the type of operations performed by the Serbia and Montenegro ATCA, it is expected that there are no facts and circumstances concerning the employees in specific positions in the Agency, who have access to classified information, which would pose a security risk to air traffic and passengers.

**Given the presented and available facts and circumstances, the PoC DID NOT FIND THE GROUNDS TO CONCLUDE THAT BIA, when carried out a safety check of the employee engaged in certain activities of the Serbia and Montenegro ATCA, and informed the manager in that organisation about the results of that security check, ACTED PARTICULARLY INCORRECTLY towards A.A. In the opinion of the PoC, particularly unfair treatment in this case would occur, for example, in the situation of establishing an unlawful reason for the BIA's safety check or biased findings of such a check. This body has not found the grounds for such conclusion.**

**However, regardless of the reason for conducting it, the security check consists of a set of measures and procedures that interfere with the privacy of citizens and must be conducted in accordance with regulations and in compliance therewith, and without leaving any room for arbitrariness and legal uncertainty. These regulations must meet the criteria applied to legal acts in a democratic society - among other things, they must be known to those to whom they concern and sufficiently precise and specific as to allow everyone to adjust their conduct accordingly.**

**The PoC has established deficiency of the legal basis for carrying out the security check in the case of A.A. The competent court will decide whether those deficiencies, or other circumstances, have significantly affected the legality of the termination of employment contract.**

**However, as regards the actions of BIA, the PoC has found the basis and purpose, in accordance with his powers under Article 31 Paragraph 2 of the Law on the PoC, to refer to the BIA the following**

## RECOMMENDATION

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[ <sup>1)</sup> Article 196 of the Constitution of the Republic of Serbia

[ <sup>2)</sup> *Official Gazette of RS*, No. 104/09

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**The BIA shall start, without delay, drafting regulations which, in accordance with the principles of rule of law and legal state, will determine the bodies to be provided with counter-intelligence protection by that Agency, as well as measures and actions applied in performing that work.**

The BIA shall inform the PoC within 2 months of receiving this recommendation about its acting upon the recommendation, and shall submit the documentation based on which we can safely conclude that the recommendation has been implemented.

Given the position of the PoC about the unacceptability of the existence of secret rules in a democratic society, the complainant was served a copy of the *Decision on Determining the Activities of Counter-Intelligence Protection of Federal Agencies and Organisations ...*, published in the *Official Gazette of the SFRY - Confidential Bulletin*, No. 15/1991.

Please find enclosed a copy of the PoC' act sent to the A's attorney.

I appreciate your kind cooperation.

Protector of Citizens

Saša Janković

***Enclosure: one***

*Send to:*  
- BIA