Република Србија
Заштитник грађана

Ombudsman

REPORT

ON A PREVENTIVE CONTROL VISIT BY THE PROTECTOR OF CITIZENS TO THE SECURITY-INFORMATION AGENCY WITH RECOMMENDATIONS AND OPINIONS

REPORT

ON A PREVENTIVE CONTROL VISIT BY THE PROTECTOR OF CITIZENS TO THE SECURITY-INFORMATION AGENCY

WITH RECOMMENDATIONS AND OPINIONS

Disclaimer: The views herein expressed are solely those of the author and contributors and do not necessarily reflect the official position of the OSCE Mission to Serbia."

Introduction

Proceeding from the constitutionally and legally prescribed obligation and duty of the Protector of Citizens (Ombudsman) to look after the protection and advancement of human (and minority) liberties and rights[1]; taking into consideration that the security services enjoy authority and possess means to, in accordance with the Constitution and the law, apply special procedures and measures which result in derogations from the principle of inviolability of certain human rights and freedoms, the Protector of Citizens conducted in the January-February 2010 period a preventive control visit to the Security-Information Agency (BIA). The principal objective of the visit was to gain insight into the legality and correctness (appropriateness, proportionality, promptness, etc.) of the BIA's work in the performance of the activities within its purview which affect guaranteed civil rights and liberties and, as necessary, to issue recommendations with the aim of guaranteeing the legality and soundness of the BIA's operations and the advancement of human rights in general. Particular attention was devoted to the extent to which the procedures applied by the BIA in its work have a constitutional and legal foundation, their completeness, and how fully they are documented and, in general, the correctness of the procedures the BIA applies in its work.

The regulations which contain the basis for the preventive control visit of the Protector of Citizens to the BIA and are in other ways of importance for the realisation and purpose of the control visit are as follows:

- The Constitution of the Republic of Serbia,
- The European Convention for the Protection of Human Rights and Fundamental Freedoms[2]
- The Law on the Protector of Citizens – articles 1 and 2 (competences, independence and autonomy, operational framework); 17 (the scope and character of control); 21 (obligation of administrative authorities to co-operate with the Protector of Citizens, right of access to data and premises and other control powers, obligation of maintaining confidentiality for the Protector of Citizens and employees of his bureau); 24 (right to conduct procedures and to act preventively); 33 (submission of reports to the National Assembly),
- The Law on the Protection of Confidential Data, articles 38, 39 and others[3]
- The Law on the Foundations of the Organisation of the Security Services of the Republic of Serbia[4];

1 Law on the Protector of Citizens (Official Gazette of the RS Nos.79/2005 and 54/2007), Art.1 § 2.

2 Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of Serbia and Montenegro – International Agreements Nos. 9/2003 and 5/2005)

3 Official Gazette of the RS No. 104/2009

4 Official Gazette of the RS No. 116/2007

- The Law on the BIA[5]
- The Law on the Protection of Personal Data[6]
- The Criminal Procedure Code[7]
- The Law on the Police[8]
- The Decree on the Manner of Registering, Processing, Keeping, Using, Protecting and Transferring to Other Competent Authorities Information and Documents on Activities within the Purview of the BIA[9]
- The Decree on the Determination of Activities of Security Protection Conducted Directly by the Ministry of Internal Affairs, the Security-Information Agency, the Military Security Agency and the Military Police[10]
- other positive law.

The control procedure encompasses the following:

1. A preparatory meeting
2. A special meeting of the Protector of Citizens and the Director of the BIA
3. Control meetings
4. A clarification meeting
5. The drafting and presentation of reports and recommendations, notification of competent authorities and the public about them
6. The BIA's action according to the recommendations, and notification thereof.

The control consisted of a meeting with the Agency's managing officials and employees, access to certain premises and direct inspection of documentation, in the seat of the BIA (Kraljice Ane Street bb, Belgrade) and in the temporary offices of the Protector of Citizens in the 'Serbia' Palace (Bulevar Mihajla Pupina No. 2, Belgrade).

The following persons took part directly in the control activities: on the Ombudsman's side, Saša Janković, the Protector of Citizens - Ombudsman, and the Head of the Department for Drafting Reports and Publications in the Professional Service of the Protector of Citizens, Aleksandar Resanović; and on the side of the BIA, its Director, Saša Vukadinović, Special Advisor to the Director of the BIA Miroslav Panić, the Head of the BIA Director's Office, Jovan Stojić, the head of the Technical Office, the deputy head of the Technical Office, the assistant head of the Office for Analytical Activities, professional associates in the Central Records Registry, an operator in the System Supervision Department and two documents officers. Indirect support was rendered

5 Official Gazette of the RS Nos. 42/2002 and 111/2009

6 Official Gazette of the RS Nos. 97/2008 and 104/2009

7 Official Gazette of the FRY Nos. 70/2001 and 68/2002 and Official Gazette of the RS Nos. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009 and 72/2009)

8 Official Gazette of the RS Nos. 101/2005 and 63/2009 – Constitutional Court Decision

9 Official Gazette of the RS No. 68/2002

10 Official Gazette of the RS No. 12/2009

by employees of the Professional Service of the Protector of Citizens and BIA staff members.

SPECIAL MEETING OF THE OMBUDSMAN AND THE BIA DIRECTOR: ELECTION OF JUDGES

The objective of the special meeting was to collect data needed for an assessment by the Protector of Citizens of a number of complaints received by his Office from candidates for judicial office relating to the correctness of the election procedure, or more precisely, information that had appeared in the public about the possible involvement of the BIA in the election process.

The BIA's Director informed the Protector of Citizens that the BIA had not, for the purpose of general dismissal and subsequent election of judges, either on its own volition or at the insistence of other organs of authority, implemented measures or performed other activities for which it is empowered, in particular security checks, or forwarded data, opinions or other information about the candidates for judicial function in the procedure of their impeachment/election.

The Protector of Citizens stated that positive law in the Republic of Serbia did not provide for any possibility of the BIA carrying out any measures within its purview in connection with the procedure of electing judges, nor of its involvement in that procedure by providing data or information from within its purview. The legal order of the Republic of Serbia requires that a legal basis for any BIA action in the procedure of selecting judges (or any other holders of office or other positions) be enshrined in a law, which was not the case at the time when the procedure of electing judges was conducted. It was also clarified that the Decree of the Government of the Republic of Serbia on Activities of Security Protection Performed by Police, Security, Military Security and Military Police Organs is subordinate legislation, the aim of whose adoption was the protection of certain state organs of authority and of officials therein, so that it could not represent a basis for the engagement of the BIA in the procedure of electing judges.

The Protector of Citizens firmly maintains that security checks for appointment to judicial (or any other) office would have to be explicitly foreseen by an appropriate law. Such legislation would then have to prescribe a procedure by means of which candidates would be able to efficiently challenge the validity of such security checks, i.e., the data and information provided about them.

THE ELEMENTS AND PROCEDURE OF THE CONTROL

The Preparatory Meeting

The aim of the preparatory meeting was to establish a detailed plan and methodology for the control visit. It was held on 29th January 2010 at the BIA's headquarters and lasted four hours, assembling the Protector of Citizens, the BIA's Director, the advisor to the Protector of Citizens, the head of the BIA Director's Office and a special advisor to the BIA's Director.

The following activities were carried out at the preparatory meeting:

- A plan for the control visit was determined:
  1. control activities (preparatory meeting, control meetings, clarification meeting),
  2. reporting activities (drafting of reports and recommendations by the Ombudsman and notification of the BIA, the National Assembly and the public thereof),
  3. implementation of the recommendations (BIA actions according thereto, notification of the Ombudsman about such actions).

- Topics to be covered at control meetings were determined and a method of work for each topic was agreed, as follows:
  1. Introductory considerations, mapping of a course for implementation of individual measures

     Method: presentations by BIA personnel, questions and answers, review of internal normative acts

  2. Assessment of documentation on concrete cases

     Method: selection of random samples; analysis; questions and answers

     The followings types of cases were chosen for analysis:

     a) derogations from the principle of inviolability (respect) of home, on the basis of a decision by the president of the Supreme Court (later the Supreme Court of Cassation) of Serbia/a judge designated by the president of the Court, or upon an order issued by an investigating judge
     b) derogations from the principle of inviolability of correspondence on the basis of a decision by the president of the Supreme Court (later the Supreme Court of Cassation) of Serbia/a judge designated by the president of the Court, or an order issued by an investigating judge

c) surveillance of electronic communications, on the basis of a decision by the president of the Supreme Court (later the Supreme Court of Cassation) of Serbia/designated judge, or an order issued by an investigating judge

d) use of technical measures aimed at collecting data on telephone traffic (without monitoring the content of the communication), on the basis of a decision issued by the BIA's Director

e) application of measures on the basis of written authorisation issued by the President of the Supreme Court (later the Supreme Court of Cassation) of Serbia without a prior formal decision (Article 15 of he Law on the BIA)

3. Inspection of conformity of documentation with the actions actually taken

   Method: Discussion with the managing officials and operatives of the technical sector in the presence of managing staff.

- It was established at the proposal of the Protector of Citizens that the control activities would be guided by the principles of completeness and proportionality. These principles ensure that the Protector of Citizens receives all the information and data he needs to adopt an objective and accurate assessment so as to fulfil the purpose of the procedure he is conducting, but not more than that.
- It was noted that the Protector of Citizens and his staff are obliged to keep secret any confidential data received during their work, as it is already prescribed by the Law on the Protector of Citizens and other regulations. It was also noted that data deliberately classified as confidential in order to conceal a criminal offence, exceed authority or abuse office, or conduct another unlawful act or activity by the organ of public authority, could not be regarded as confidential data[11].

The Course of the Control Meetings

The first control meeting was held on 2nd February 2010 and lasted seven hours. Representatives of the BIA presented their introductory statements, the course of the implementation of certain measures was mapped, and the first concrete cases were reviewed.

The second control meeting was held on 3rd February 2010 and lasted five hours. During this meeting an assessment of concrete cases was completed and concluding observations were made by the Protector of Citizens and the BIA's Director.

Part One – Introductory Remarks and Clarification

The Head of the BIA Director's Office and his Special Advisor presented introductory remarks informing the Protector of Citizens about legal grounds for the activities of BIA, as laid down in the Constitution, laws and bylaws, especially those of importance for the exercise of guaranteed civil rights and liberties. They especially referred to the provisions of Articles 40, 41 and 42 of the Constitution of the Republic of Serbia, rel-

11 Law on the Confidentiality of Data, Article 3

evant provisions of the Criminal Procedure Code, the Law on the Security-Information Agency, the Law on the Confidentiality of Data, the Law on the Protection of Personal Data, and other legislation, as well as numerous provisions in subordinate legislation, in particular the Decree on the Determination of Activities of Security Protection Conducted Directly by the Ministry of Internal Affairs, the Security-Information Agency, the Military Security Agency and the Military Police.[12] They also pointed to provisions of internal acts, for example the Instruction on Rules of Work of the Security-Information Agency (issued by the BIA's Director on 1st October 2002, classified). Emphasis was laid on provisions regulating questions of offensive and defensive operational technical means and methods, physical technical surveillance, secret electronic spatial and communications surveillance, electronic surveillance of telecommunications and information services, etc.

BIA officials pointed out that under its internal regulations the BIA is prohibited from collecting, storing, processing and forwarding data and information which lay outside the legally-prescribed purview of the BIA's operation, and that no BIA document is allowed to contain such data.

Part Two – Access to the Central Register and Selection of Cases for Analysis

The Protector of Citizens gained access to the official premises of the BIA containing the Central Records Registry, where documentation is stored about all measures implemented which derogate from the principle of the inviolability of guaranteed human rights.

After conducting a control of the premises and a brief discussion with employees of the Central Register, using a random sample method the Protector of Citizens selected four cases from the 2003 – 2009 period. Although randomly sampled, the cases were selected so as to enable insight into cases in which the measure was ordered or authorised by the Supreme Court of Serbia, an investigating judge and the BIA's Director.

In the presence of the Protector of Citizens the files were taken to the room where the work was conducted. Upon the ombudsman's proposal, in the original documentation the identities of the persons affected by the special measures were temporarily veiled as to render them anonymous (the principles of completeness and proportionality).

Part Three – Case Analysis

The selected cases were analysed with respect for their legality and regularity. The Protector of Citizens evaluated the documentation and posed questions to which BIA representatives gave exhaustive and detailed answers. The findings are contained in the appropriate section of the report.

12 Official Gazette of the RS No. 12/2009

The following were analysed:

Case No. 1 – secret control of communications and spatial electronic surveillance without a formal decision, but with prior permission from the President of the Supreme Court of Serbia – Under Article 15 of the Law on the BIA, in urgency, especially in cases of terrorism, the Director of the Agency may order implementation of measures which interfere with privacy of communications even without the prior decision of a court, but with the previous written permission of the President of the Supreme Court of Cassation, or a judge authorised by the President[13].

Cases Nos. 2 and 3 – secret control of communications and spatial electronic surveillance on the basis of a decision of the President of the Supreme Court of Serbia, or a judge authorised by the President – Restrictions of constitutionally-guaranteed rights on the basis of a decision of the President of the Supreme Court of Serbia are envisaged by Article 14 of the Law on the BIA and intended to be invoked for the protection of the security of the Republic of Serbia (rather than documenting criminal offences which are the subject-matter of criminal proceedings). After it was noticed in the files that the Agency had asked and was granted the extension from the President of the Court, the supplementary case was also sought from central records and analysed together with the initial case.

Cases Nos. 4 and 5 – secret control of communications and spatial electronic surveillance on the basis of an order issued by an investigating judge – The restriction of constitutionally-guaranteed rights on the basis of an order from an investigating judge is envisaged by Article 504e of the Code of Criminal Procedure and is used to document criminal offences within the purview of the Agency. After it was noticed that during the implementation of the measure the Agency had proposed that it be expanded to cover another person, the corresponding case was sought from the central records and analysed together with the initial case.

Case No. 6 – collection of data on established and attempted telephone communications and the user's locations (so-called statistical surveillance) – Under Article 9 of the Law on the BIA, the Agency's Director may issue a decision on implementing operational and technical methods and means to collect data on the telephone communications of a certain individual, in which process the communication itself is not intercepted but only the telephone numbers called and actual links established and their locations identified. Under existing regulations, the Agency has access to records about the owners of fixed telephone numbers and post-paid mobile telephone numbers.

13 Article 15 has been much criticised for creating room for extensive abuses.

Clarification Meeting

A clarification meeting was held on 13th February 2010 in the Ombudsman's temporary premises in the "Serbia" Palace and lasted for three hours. Certain linguistic disagreements were eliminated at the meeting (the use of professional and legal terminology was harmonised) with regard to the draft of the Report with recommendations, and an agreement was reached that the Report and the recommendations should not contain elements demanding a confidentiality designation.

FINDINGS

General Assessment

Based on the inspection performed of the Central Records Registry and the documentation kept by the BIA on cases in which it had applied some of its special methods, measures or actions, i.e., means derogating from certain guaranteed human rights, as well as on the basis of statements made by the Agency managing officials and officers, it may be concluded that when it in its work it restricts certain civil rights and freedoms guaranteed by the Constitution of the Republic of Serbia, the BIA respects positive law. The manner in which documentation of the implementation of special procedures and measures is carried out is such that any abuses would be recorded and the perpetrators identified.

However, there do exist the need and the opportunity to increase the protection and observance of human rights and liberties which may be restricted by the Agency's operation, at the following levels:

1. legal regulations
2. subordinate legislation
3. procedures applied in the Agency's work.

Detailed Findings

- After inspecting the Central Records Registry, the Protector of Citizens noted the proper use of security, fire-prevention and micro-climate measures. All file folders are properly kept in locked safes and marked with the years and numbers of the cases they contain. The cases in the files are kept in chronological order, as are the documents in each case inspected by the Protector of Citizens. All documents are duly signed by authorised staff, or a facsimile signature is used. Some court documents exist in several identical and original copies, only one of which bears the filing stamp.

- The Ombudsman noted that each one of the cases selected for inspection contained a duly signed and reasoned initiative for the implementation of the appropriate measure by the locally competent operational centre, a reasoned proposal of the managing official of the coordinating or referring organisational unit at administration level, a reasoned proposal by the BIA's Director and decision of the President of the Supreme Court of Serbia (authorised judge), or an order issued by an investigating judge.
- In the case of measures implemented on the basis of a decision of the Agency's Director, under Article 9 of the Law on the BIA, the Director's decision was present in the case files.
- In all cases the documents were arranged in an orderly fashion and in chronological order, so that the latest document was on top.
- The documents are classified according to obsolete regulations, which have been substituted for the Law on the Confidentiality of Data. This is because the Government of Serbia still has not determined more detailed criteria for determining degrees of confidentiality of data in accordance with the Law on the Confidentiality of Data, and the classification of secret data has not been harmonised with the new Law.
- In all cases inspected by the Protector of Citizens except one, after receiving a decision of the President of the Supreme Court of Serbia, or an order issued by the investigating judge, the Agency's Director issued appropriate formal decisions on the implementation of measures corresponding to the content of the said decisions or orders.
- In one case (dating from 2007), it was noted that, along the measure encompassed by the court decision, the Director of the Agency had ordered an additional measure which is regarded as separate under internal Agency acts, and as such is especially identified.

  According to BIA staff, this irregularity was the result of a technical error which was rectified at a meeting of the President of the Supreme Court of Serbia and BIA representatives, organised immediately after the irregularity was spotted in the Agency: the possibility of repetition was eliminated by reaching agreement that the President of the Supreme Court should issue decisions with wording that encompasses not one, but all types of related measures. The Agency representatives presented a few later cases to the ombudsman to prove that the irregularity had really been eliminated in practice in the aforementioned manner, beginning in January 2008.
- In all cases, controlled documentation confirmed that the measures had been applied from the date of receiving the decision of the President of the Supreme Court/order issued by the investigating judge/formal decision by the director, or at the latest on the following day, until the expiry of the deadline set by the decision/order. When the need arose to extend the duration of the measure, the procedure applied during the initial authorisation was repeated.

- In one of the cases controlled, implementation of the measure concerned was suspended before the expiry of the time-limit determined in the original decision, as the person concerned had left the Republic of Serbia, and this was duly recorded in the documentation.
- In one of the cases controlled the BIA had submitted a proposal and received an order from an investigating judge to conduct surveillance of telephone communications of a person suspected of having committed a number of serious criminal offences and of planning to perpetrate new ones. It was noted that the proposal had been directed properly at the investigating judge.
- In one of the cases controlled the BIA submitted a request to the Supreme Court of Serbia and received the requested decision to apply measures against a person suspected of posing a threat of violating the security of the Republic of Serbia. In view of the circumstances of the case, it was noted that the proposal had been properly directed at the President of the Supreme Court of Serbia.
- It was noted that in the cases controlled which included the measure of electronic surveillance of communications, there was no special act – formal decision, order, official memorandum or other – which would document the fact that electronic surveillance had been discontinued. It was found that such acts are not made, but that the electronic system automatically suspends surveillance after the expiry of the time-limit for which the measure had been approved. The data about surveillance system being turned off automatically exists in reports the system generates on its own.
- In a number of cases controlled it was noted that formal decisions on the application of measures signed by the Agency's Director cite in the preamble by-laws and internal, unpublished legislation, rather than laws.
- Representatives of the BIA said during a discussion about one of the cases controlled that data collected on the basis of a decision of the President of the Supreme Court of Serbia could not be used as evidence in criminal proceedings.
- Since 2003, according to BIA representatives, the provision for the implementation of measures under Article 15 of the Law on the BIA (application of the measure of control of content of communications according to a formal decision issued by the Agency Director and written authorisation of the President of the Supreme Court of Serbia) was used only once.

  In that case, which was controlled by the Protector of Citizens, the Director of the BIA decided in accordance with Article 15 of the Law on the BIA on the application of the measure of controlling communication media without a decision of the President of the Supreme Court of Serbia, and after the Agency had obtained from a judge duly authorised by the President of the Supreme Court written consent to apply the measure. The Protector of Citizens asked why, in view of the nature of the offences (among other things assassinations) with which the Agency had linked the person in question, it had not sought authorisation to apply the measure from an investigating judge, as criminal procedure should have

ultimately been expected, but had instead asked the President of the Supreme Court to decide on the measures (first by issuing permission, and then a decision). Agency representatives cited reasons of urgency – a decision from the President of the Supreme Court in the period concerned could be obtained faster than an order from the investigating judge, and priority was thus granted to the possibility of commencing without undue delay surveillance of the said person's communication with possible accomplices and thereby creating the necessary conditions to prevent possible criminal offences, instead of to the option of conducting criminal proceedings after the commission of an offence that could not have been prevented had the information not been acquired.

- Given that none of the randomly chosen cases had concerned some of the guaranteed rights and freedoms that also may temporarily be restricted by the Agency's operation, the Protector of Citizens enquired about actions infringing these rights and freedoms. BIA representatives replied that the Agency took account of the principle of proportionality and that since its foundation to the date of the control no need had arisen to implement measures which would restrict the rights and freedoms in which the Protector of Citizens had shown interest.
- Given that none of the cases reviewed contained data that would indicate the application of police powers in accordance with Article 12 of the Law on the BIA, Agency representatives told the Protector of Citizens on his insistence that such authorisation was being used only in extremely restricted circumstances, illustrating this by saying that since the time of its foundation Agency staff had deprived only one person of liberty and had transferred that person without delay to a detention unit.
- Asked about the security of the electronic system used for communications surveillance, BIA representatives pointed out that every single access to that system was duly recorded, in accordance with an appropriate regulation of the Republican Telecommunications Agency which was the subject of the prior intervention and recommendation of the Protector of Citizens. They stated that every application of the measure was being duly recorded and that the system was highly protected in many ways. They pointed out that unauthorised access to the system would be noticed and that persons who might abuse the system could be identified.
- Control of Internet communications is realised on the basis of a decision/order which is only presented to Internet providers for inspection but not given. When the need arises to control Internet communications of a certain user, Agency representatives give the provider the data needed to apply the measure. No regulation exists which determines which data are communicated to the provider, nor the manner of that communication, but it is done according to the circumstances of the individual case.
- In cases where the BIA applies the measure directly through the provider who possesses the necessary technical requirements, that provider is not privy to the fact that the measure of controlling Internet communications of an individual user is being implemented.

RECOMMENDATIONS AND OPINIONS

Based on information collected in conversations with authorised representatives of the BIA, access to certain premises, as well as inspection of a number of randomly chosen cases, and all with the aim of improving the work of the BIA from the perspective of observance of human rights and civil rights, pursuant to Article 24 paragraph 2 of the Law on the Protector of Citizens, the Protector of Citizens submits the following:

RECOMMENDATIONS TO THE SECURITY-INFORMATION AGENCY

- In the process of proposing and making decisions on the application of measures, it is necessary that the Agency should request only the application of those measures which may be expected to lead to results, rather than all available measures. A request by the Agency for an order or decision on the application of measures should specify the measures whose implementation is seen as necessary and is thus being requested, for example in accordance with the classification already performed in internal Agency regulations.
- In the manner described in the preceding recommendation, the measures approved by the Agency's Director should be separated into the identification of subscribers' numbers and the determination of the location, and as the need arises one or the other should be used, and both together only when such use is genuinely necessary;
- The general legal rule that only published documents may be a source of law must be respected. Unpublished documents may contain norms such as internal instructions, but not material legal norms;
- In every administrative act, for example a formal decision, the BIA needs to identify in the preamble the legal basis for its issuance, instead of citing sub-law legislation which is not yet published;
- The electronic system for controlling communications should be upgraded so that it does not only record every access to the system and its use, but also prevents abuses which might arise for example if an ill-intentioned operator enters fake details of a decision for implementing the measure (a double-key method should be introduced). This would (to a greater extent) prevent abuses, rather than only make them traceable;
- Cases in the Central Records Registry should alongside other documentation on the application of the measure also contain a document, for example an official memo signed by the responsible BIA officer, that the application of the measure was indeed terminated at the expiry of the measure's last day, or that officer should sign the automatically generated report of the electronic system;

Besides the recommendations whose implementation is within the exclusive purview of the Agency, the Protector of Citizens also submits to the Agency recommendations whose implementation is primarily the task of other public authorities (the National Assembly, the Government of the Republic of Serbia, the President of the Supreme Court of Cassation, as well as the authorised judge, investigative judges, the Republican Telecommunications Agency), but the BIA has a capacity to contribute to their implementation:

- It is necessary to speed up work on drafting a working text of a new Law on the Security-Information Agency which would regulate in a more comprehensive, precise and accurate manner the way of performing activities within the purview of the Agency that affect guaranteed human rights and freedoms, and to build into the draft recommendations of the Protector of Citizens that relate to legal matters;
- When drafting the new Law on the BIA, a careful analysis of the constitutional norms and comparative law should be done to assess whether the collection of data on established telephone links and locations (without monitoring the content) can continue to be regarded as not a violation of privacy of communication and therefore may continue to be ordered directly by the Agency's Director, without a court decision;
- When drafting the new law on the BIA, the possibility should be excluded of the BIA initiating implementation of a measure without a court decision, but instead with prior written authorisation from the President of the Supreme Court of Cassation, or an authorised judge (Article 15 of the Law on the BIA). The Protector of Citizens is convinced that modern text-processing means enable the President of the Supreme Court of Cassation to issue a formal decision on the application of measures within the purview of the BIA in the same period of time needed to write said authorisation, and that the aforementioned legal provision is unnecessary and thus unsustainable; in the meantime, the Agency should avoid the practice of asking the President of the Supreme Court of Cassation for written authorisation rather than a decision on the implementation of measures.
- In the process of drafting a working text of the future Law on the BIA, a procedure should be prescribed for the exercise of the rights of citizens subjected to the collection of data through the application of special measures on the basis of a court decision after the purpose of the application of measures is fulfilled, including a right to be informed about the data collected and the actions taken with those data;
- It is necessary to initiate with the Republican Telecommunications Agency the drafting of a general legal act to regulate the manner in which Internet providers are to be informed about decisions on the application of surveillance of Internet communications of certain users and the data in the relevant decision that must be passed on to the provider. It should be considered that the data be the number of the decision of the Supreme Court of Cassation, or the number of the

investigating judge's order and the court's seat. It is necessary that all providers are notified in an identical manner in identical cases;

- It is necessary to initiate changes to appropriate regulations adopted by the Republican Telecommunications Agency (RATEL) in order to harmonise regulations on technical requirements for fixed-telephony operators with standards of Technical Requirements for the Internet, and to amend both with provisions about which data in the order to apply measures may and must be available to the provider, or to include those provisions in another corresponding regulation;
- RATEL should be asked to implement necessary measures to make operators fully comply with the Technical Requirements for the Internet, or to change articles of this act if they are impossible to implement;
- It is necessary to consider with legal experts the aptness of the existing interpretation, or the appropriateness of such a legal situation if the existing interpretation is the only possible one, according to which data collected upon a decision by the President of the Supreme Court of Cassation cannot be used as evidence in criminal prosecution. It is the opinion of the Protector of Citizens that what must be taken into account is that under Article 42 of the Constitution personal data may, besides the purpose for which they were collected, also be used for that of conducting criminal proceedings or for the protection of the security of the Republic of Serbia, and that subordinate legislation or their interpretations should not be deprived of a possibility that data collected on the basis of a decision of the President of the Supreme Court, hence in a lawful manner, may be used as evidence in criminal proceedings;
- Upon receiving a decision from the President of the Supreme Court of Cassation, it would be more appropriate for the BIA's Director to issue an order for the implementation of the relevant measure rather than a formal decision, as envisaged by the existing Law on the BIA, because the very nature of these documents shows that they are in effect work orders for the performance of an action that has already been decided on;

The Security-Information Agency will pursuant to Article 31 § 3 of the Law on the Protector of Citizens inform the ombudsman about action taken according to the recommendations given.

Abiding by the provisions of Article 138 § 2 of the Constitution of the Republic of Serbia, acting pursuant to Article 1 § 2 and Article 24 § 2 of the Law on the Protector of Citizens, aspiring towards an advancement of the protection of human rights and liberties, the Protector of Citizens submits the following

OPINION TO THE NATIONAL ASSEMBLY

- It would be expedient to adopt a new Law on the Security-Information Agency to regulate in a more comprehensive, precise and generally more fitting manner the performance of activities within the purview of the Agency which affect guaranteed human rights and liberties;
- In the process of adopting a new Law on the BIA it would be expedient to regulate in a new manner the adoption of a decision on the collection of data on established telephone links and locations (without monitoring the content). In the view of the Protector of Citizens the existing solution, in which the measure is decided autonomously by the BIA's Director and implemented by the Agency, diverges from the practice of a considerable number of European countries;
- A new Law on the BIA should not contain the possibility that the Agency begin to apply measures which derogate from constitutionally-guaranteed human rights without a court decision (after the Agency obtains the written consent of the President of the Supreme Court of Cassation, or authorised judge – Article 15 of the Law on the BIA). It is the view of the Protector of Citizens that modern text-processing means enable the President of the Supreme Court of Cassation, or authorised judge, to issue a decision on the application of measures within the purview of the BIA in the same time it takes to write a consent, and that the aforementioned legal provision is unnecessary and thus unsustainable;
- It is also expedient to consider the aptness of the existing interpretation, or the justification for such a legal solution if the existing interpretation is the only possible one, according to which data collected according to a decision issued by the President of the Supreme Court of Cassation cannot be used as evidence in criminal prosecution. In the view of the Ombudsman, it must be taken into consideration that under Article 42 the Constitution personal data may, besides the purpose for which they were collected, also be used for the purpose of conducting criminal proceedings or for the protection of the security of the Republic of Serbia, and that subordinate legal acts or their interpretations should not be deprived of a possibility for the data collected on the basis of a decision of the President of the Supreme Court, hence in a lawful manner, to be used as evidence in criminal proceedings;
- When adopting the future law on the BIA, it should be ensured that it contains procedures for the exercise of the rights of citizens about whom data were collected by the application of special measures, after the purpose of the

measures' application has been fulfilled, including the right to be informed of the data collected and the actions taken with those data.

- The National Assembly should reconsider, as part of its legislative activities, the justification for including provisions in the laws on the BIA, the military security services and the police which enable those public authorities/services to apply measures derogating from certain constitutionally-guaranteed human rights and freedoms on the basis of a decision by the President of the Supreme Court of Cassation, or a judge authorised by the president. Besides the theoretical legal question of whether acts of the President of the Supreme Court of Cassation can be said to have the characteristics of a "court decision" as specified in Article 41 § 2 of the Constitution of the Republic of Serbia and other provisions, there is good reason to question the need for such provisions in view of the possibility of requesting for those same measures permission (a decision) from an investigative judge.

Abiding by the provision of Article 138 § 2 of the Constitution of the Republic of Serbia, and acting pursuant to Article 1 § 2 and Article 24 § 2 of the Law on the Protector of Citizens, aspiring towards the advancement of the protection of human rights and freedoms, the Protector of Citizens submits the following

OPINION TO THE PRESIDENT OF THE SUPREME COURT OF CASSATION AND INVESTIGATIVE JUDGES

- It would benefit the exercise of the principle of proportionality in derogation from guaranteed human rights if the President of the Supreme Court of Cassation / investigative judges were to individually designate in their decisions / orders the application of specific measures which they are approving, so as to avoid generalised wordings which leave room for the application of all measures, although the need for the implementation of each of them in the concrete case is not explained in the proposal to apply the measure, or does not even exist (e.g., the wording may be such that it does not enable always both surveillance of space and interception of telephone communications, where one of these measures would be sufficient to achieve the purpose of the derogation);
- It would benefit the fuller exercise of human rights if the President of the Supreme Court of Cassation were to refrain from issuing prior written consent for the application of measures derogating from certain constitutionally-guaranteed human rights (Article 15 of the Law on the BIA), but were instead in such cases to direct the Agency to seek a regular decision on the application of the measure. The view of the Protector of Citizens is that modern text-processing means enable the President of the Supreme Court of Cassation to issue decisions on the implementation of measures within the purview of the BIA in the same time it takes to draft a consent.

Acting pursuant to the provisions of Article 1 § 2 and Article 24 § 2 of the Law on the Protector of Citizens, aspiring towards advancements in the protection of human rights and freedoms, the Protector of Citizens submits the following

RECOMMENDATIONS TO THE REPUBLICAN AGENCY FOR TELECOMMUNICATIONS (RATEL)

- A general regulation needs to be adopted to regulate the manner in which Internet providers are notified about decisions to apply measures of intercepting Internet communications of individual users and the data from such decisions that must be communicated to the providers. It might be considered that the data concerned should be the number of the decision of the President of the Supreme Court of Cassation, or the number of the order of the investigating judge and the location of the court. It is necessary that all providers are notified identically in identical situations;
- Certain regulations adopted by RATEL need to be revised: regulations on technical requirements for fixed telephony operators should be harmonised with technical standards for the Internet, and both should be amended with provisions about which data in the order on the application of measures may and must be accessible to the provider, or those provisions should be placed in another appropriate regulation;
- Measures should be implemented to ensure the observance by operators of the regulation "Technical Requirements for Sub-systems, Hardware, Equipment and Installations of the Internet Network", or those requirements should be revised if they are impossible to implement.

Pursuant to Article 31 § 3 of the Law on the Protector of Citizens, RATEL will notify the Protector of Citizens about actions taken according to the recommendations.

PROTECTOR OF CITIZENS
Saša Janković

To be forwarded to the following:
- The Security-Information Agency
- The National Assembly
- The President of the Supreme Court of Cassation
- The Prime Minister of the Republic of Serbia
- The Republican Telecommunications Agency
- The President of the Republic (in his capacity as the president of the National Security Council), for his information
- The Commissioner for Information of Public Importance and Personal Data Protection (for his information)
- The public (through the Ombudsman's website and in other appropriate manner)

Organization for Security and
Co-operation in Europe
Mission to Serbia

The OSCE Mission to Serbia supported the printing of this publication