REPUBLIC OF SERBIA

COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PERSONAL DATA PROTECTION

011-00-00635/2010-01

PROTECTOR OF CITIZENS

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Ref. No. 16579

B e l g r a d e, 30 September 2010

On the basis of Article 168, Paragraph 1 of the Constitution of the Republic of Serbia (*Official Gazette of RS*, No. 83/06), Article 29, Paragraph 1, Item 1 and Article 50, Paragraph 1 of the Law on the Constitutional Court (*Official Gazette of RS*, No. 109/07) and Article 19 of the Law on the Protector of Citizens (*Official Gazette of RS*, Nos. 79/05 and 54/07), the Protector of Citizens and the Commissioner for Information of Public Importance and Personal Data Protection hereby submit to the Constitutional Court

PROPOSAL

FOR ASSESSING THE CONSTITUTIONALITY OF

1. Article 128 of the Law on Electronic Communications (*Official Gazette of RS*, No. 44/2010) as follows:
   - The parts of Paragraph 1 that read: "in accordance with the law governing criminal procedure" and "in accordance with the laws regulating the work of security services and internal affairs authorities“ and
   - The part of Paragraph 5 that reads: "at the request of competent state bodies in accordance with Paragraph 1 of this Article";
2. Article 13, Paragraph 1 in connection with Article 12, Paragraph 1, Item 6) of the Law on Military Security Agency and Military Intelligence Agency (*Official Gazette of RS*, No. 88/2009) and
3. Article 16, Paragraph 2 of the Law on Military Security Agency and Military Intelligence Agency (MSA and MIA).

The disputed provisions of Article 128, Paragraphs 1 and 5 of the Law on Electronic Communications are inconsistent with the provisions of Article 41, Paragraph 2 of the Constitution of the Republic of Serbia (*Official Gazette of RS*, No. 83/06), because they allow the implementation of special measures, which derogate from the provisions on secrecy of correspondence and other means of communication, not only on the basis of court orders, but also without court orders - where such a possibility is prescribed by law, or at the request of

competent state authorities. Unconstitutionality of such position has already been established by the Decision of the Constitutional Court IUz -149/2008 of 28 May 2009, adopted at the initiative of the Provincial Ombudsman for assessing the constitutionality of Article 55, Paragraph 1 of the Law on Telecommunications (*Official Gazette of RS*, Nos. 44/03 and 36/06).

Article 13, Paragraph 1 in connection with Article 12, Paragraph 1 item 6) of the Law on MSA and MIA is inconsistent with the provisions of Article 41, Paragraph 2 of the Constitution of the Republic of Serbia as they stipulate that "on the instruction of the MSA director or a person authorised by the MSA director", the MSA shall apply special procedures and measures including a "covert electronic surveillance of telecommunications and information systems in order to collect data on telecommunication traffic and the locations of the users, without the insight in the content". The aforementioned procedures and measures derogate from the principle of secrecy of correspondence and other means of communication, and should be allowed only on the basis of court order.

Article 16, Paragraph 2 of the Law on MSA and MIA is inconsistent with the provisions of Article 41, Paragraph 2 of the Constitution of the Republic of Serbia as it provides that MSA "is entitled to receive information from telecommunication operators on their users, communication established, location of communication and other data of importance for the outcomes of the implementation of special measures and procedures". The said information interferes with the secrecy of correspondence and other means of communication and hence, MSA cannot have the "right" to obtain them without a court decision.

It is important to emphasise the undisputable fact that the special measures for obtaining information on the communication of citizens are in applied in practice in this manner - without a court order. Such is the practice of MSA, which invokes the challenged Articles of the Law on MSA and MIA, but also the police (under the Ministry of Internal Affairs) and MIA, and probably other bodies as well. However, the submitters of this Proposal could not identify a provision in the laws regulating the work of the police and Security Information Agency (BIA) that would contravene the Constitution and that could be disputed, but the practice of the police and BIA is based on the interpretation according to which call listings, user locations and other elements of communication are not covered by the concept of communication, and therefore not protected by the provisions of Article 41, Paragraph 2 of the Constitution.

For assessing the constitutionality, it is relevant to note that obtaining and using the following data: with whom a citizen communicates, in which period of time, what kind of connection and what type of device he/she uses (e.g. type of mobile phone or computer), as well as the information about the location from which he/she communicates, particularly when taken all together, undoubtedly represents a derogation from the principle of inviolability of correspondence and other means of communication, which was confirmed in several judgments of the European Court of Human Rights in Strasbourg.

Pursuant to Article 18, Paragraph 3 of the Constitution, human rights provisions shall be construed in accordance with applicable international human rights standards and practices of international institutions which supervise their implementation. The European Court of Human Rights has already for 25 years been taking a stand that collection of information on telephone numbers called, time and length of calls fall under the concept of communication (*Malone v UK, Judgment of 2 August 1984, § 83-84, enclosed herewith*). This position was again confirmed by stating that the notion of privacy and correspondence includes not only telephone communications but also e-mail correspondence and Internet use (*Copland v United Kingdom, Judgment of 3 April 2007, § 43*). It is particularly important that, according to the opinion of the European Court of Human Rights, data on telecommunications traffic (on dialled numbers, time and duration of each phone call) are "integral part of telephone communication" (*Copland v The*

United Kingdom, Judgment of 3 April 2007, § 44, enclosed herewith). According to the presented case law of the European Court of Human Rights, the term "communication", whose confidentiality is protected by Article 41 paragraph 1 of the Constitution, includes not only the content of communication but also the following information: with whom we communicate, when and where communications takes place. It means that the protection of communication covers not only its content but also the secrecy of communication circumstances, including in particular whether, when and how many times a person has contacted or have tried to contact other person.

The same can be concluded from the judgment of the Constitutional Court of the Republic of Germany of 2 March 2009, by which the provisions of Articles 113a, 113b of the Law on Telecommunications (*Telekommunikationsgesetz* – TKG) and the provisions of Article 100g of the Criminal Procedure Code (*Strafprozessordnung* – StPO), were proclaimed unconstitutional at the initiative of some 34.000 citizens and organisations (enclosed herewith).

The Protector of Citizens and the Commissioner for Information of Public Importance and Personal Data Protection, as authorised proposers, hereby submit the Proposal at the initiative (in alphabetical order) of:

- Bar Association of Serbia
- Belgrade Centre for Security Policy
- Belgrade Centre for Human Rights
- Civic Initiatives
- NGO Women in Black
- Coalitions for free access to information of public importance (Coalition members: Civic Initiatives, Lawyers' Committee for Human Rights – YUCOM, Transparency Serbia, Toplice Centre for Democracy and Human Rights, Resource Centre Negotin, Civil Council of Kraljevo Municipality, People's Parliament Leskovac, Forum iuris Novi Sad, Fund for an Open Society – Serbia, Association of Citizens Sretenje Pozega, Centre for Advanced Legal Studies, Centre for Civil Education Vrsac, Centre for Peace and Democracy, Belgrade Centre for Human Rights, Youth Initiative for Human Rights, Civil Association of Hungarians in Serbia "Argus")
- Lawyers' Committee for Human Right
- Independent Journalist Association of Serbia
- Regional Centre for Minorities
- Association of Journalists of Serbia
- Judges Association of Serbia
- Fund for an Open Society
- Helsinki Committee for Human Rights
- Centre for the Development of Non-Profit Sector
- Centre for Regionalism
- Queeria Centre
- A number of citizens.

Based on the aforementioned, the Protector of Citizens and the Commissioner for Information of Public Importance and Personal Data Protection propose to the Constitutional Court to adopt, upon completed procedure, the following

D E C I S I O N

It is hereby established that the provisions of

1. Article 128 of the Law on Electronic Communications (*Official Gazette of RS*, No. 44/2010) as follows:
   - The parts of Paragraph 1 that read: "in accordance with the law governing criminal procedure" and "in accordance with the laws regulating the work of security services and internal affairs authorities" and
   - The part of Paragraph 5 that reads: "at the request of competent state bodies in accordance with Paragraph 1 of this Article";
2. Article 13, Paragraph 1 in connection with Article 12, Paragraph 1, Item 6) of the Law on MSA and MIA (*Official Gazette of RS*, No. 88/2009) and
3. Article 16, Paragraph 2 of the Law on MSA and MIA.

are not in conformity with the Constitution of the Republic of Serbia.

Respectfully to the Constitutional Court of Serbia,

COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PERSONAL DATA PROTECTION

Rodoljub Šabić

PROTECTOR OF CITIZENS

Saša Janković

Enclosures: 4
1. *Malone v UK, Judgment of 2 August 1984,* European Court of Human Rights
2. *Copland v United Kingdom, Judgment of 3 April 2007,* European Court of Human Rights
3. Judgment of the Constitutional Court of the Republic of Germany of 2 March 2009
4. Public statement of the Constitutional Court of the Republic of Germany concerning the Judgment of 2 March 2009

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