THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

DECISION

in the name of the Republic of Latvia

Riga, July 6, 1999

in case No. 04- 02(99)

The Constitutional Court of the Republic of Latvia in the body of the Chairman of the Court session Aivars Endziņš, the judges Andrejs Lepse, Romāns Apsītis, Ilma Čepāne, Ilze Skultāne and Anita Ušacka
with the secretary of the Court session Linda Vīnkalna,

in the presence of the representative of the party of the applicant – i.e. twenty deputies of the Saeima, namely: A.Razminovičs, M.Segliņš, G.Bērziņš, K.Greiškalns, J.Lagzdiņš, M.Vītols, H.Demakova, Dz. Ābiķis, A.Kalvītis, J.Dalbiņš, J.Sproģis, A.Tiesnesis, J.Šņepsts, S.Golde, A.Šķēle, A.Rugāte, J.Škapars, J.Esta, A.Slakteris, A.Kiršteins – A.Razminovičs and

the representative of the Cabinet of Ministers- the institution that issued the normative act which is disputed – V.Cielava

under Article 85 set by the Satversme (Constitution) as well as Article 16 (item 4) and the second part, item 3 of Article 17 of the Constitutional Court Law

in a public hearing on June 15, 21 and 28 in Riga reviewed the case

" On Conformity of the Cabinet of Ministers 21 January, 1997 Regulations No.46 "On Government Agreements" with the 20 November, 1998 "Information Accessibility Law"".

The Constitutional Court established:

On January 21, 1997 under Article 14 (the first part, item 3) of the Law ”The Structure of the Cabinet of Ministers” the Cabinet of Ministers Regulations No. 46 ”On Government Agreements” (henceforth referred to as Regulations No. 46) were issued. The Regulations established the contents of the agreements as well as the procedure of concluding and controlling of implementation of the above by the state administration.

Under the conception of the above Regulations, the government agreements are a written covenant between the contracting parties to achieve effective utilisation of resources envisaged for activity programs and priorities of governmental institutions as well as to ensure implementation of objectives provided for by budget programs, subprograms, laws and other normative acts. At the same time officials would have material incentive to attain results anticipated by the agreement.

In addition to basic terms envisaged in item 10 of Regulations No.46, item 11 determines that other terms may be included in government agreements as well, if the initiator of the agreement is of the opinion that they are of importance to achieve the objective expressed in the government agreement (such as confidentiality of the contents of the agreement, unilateral annulation of the agreement in case of loss of loyalty etc.) and are not at variance with laws and other normative acts.

The third copy of every government agreement shall be submitted to the State Administrative Office (Chancellery), which every three months informs the Cabinet of Ministers about the concluded government agreements, their contents and implementation.

On October 29, 1998 the Saeima passed ”Information Accessibility Law”. Its objective is to ensure public access to information that is at the disposal of the State Administration and Municipal institutions to accomplish functions established in normative acts. The law determines a unified procedure under which physical and legal persons are authorised to obtain information and make use of it. At the same time the law subdivides information into generally accessible and information of restricted accessibility.

The first part of Article 5 of the law determines, that information of restricted accessibility is an information that is envisaged for use of a limited scope of persons because of their employment duties. Making the above information public or losing it may – because of its contents or its nature- inconvenience the activities of an institution or harm the legal interests of persons.

In conformity with the second part of Article 5 of the Law it is established that information is to be considered information of restricted accessibility if:

1) the status of the above has been determined by law;
2) it has been envisaged and established only for internal use of an institution;
3) it deals with secrets of entrepreneurial activity;
4) it informs about personal life of an individual;
5) it concerns the process of evaluation like certification, examinations, competition, submitted projects etc.

Transitional Provisions of the Law determine that the Cabinet of Ministers shall elaborate the conditions of the procedure of making the information, which is at the disposal of an institution, public up to March 1, 1999. Up to the moment of reviewing the case the conditions have not been worked out.

The applicant questions conformity of item 11 of Regulations No.46 (henceforth – the disputed legal norm) with Article 5 of " Information Accessibility Law".

In the application it is stressed that the objective of the "Information Accessibility Law" is to ensure public access to information that is at the disposal of State Administrative institutions to accomplish functions established in normative acts.

The submitter of the application acknowledges that- in accordance with Article 14 (its first part, item 3) of the Law "The Structure of the Cabinet of Ministers"- the Cabinet of Ministers had the right of issuing Regulations No. 46. However, in compliance with general legal principles and legislation, Regulations like the above or parts of the Regulations are valid only up to the moment of the law, regulating the respective issues, taking effect.

The second part of Article 5 of the "Information Accessibility Law" thoroughly enumerates kinds of information that may be considered information of restricted accessibility. Among them one can find the issue regulated by the disputed legal norm. At the same time the Law does not envisage establishing status of restricted accessibility by Regulations of the Cabinet of Ministers.

Thus, the applicant petitions the Court to establish that the disputed legal norm has become invalid since the moment of the "Information Accessibility Law" taking effect, i.e. since November 20, 1998.

At the Court session the representative of the party submitting the application- the Deputy of the 7th Saeima A. Razminovičs sustained the

application. Additionally he pointed out that the right of a person to receive public information on utilisation of taxpayers' money follows from Articles 1 and 104 of the Satversme (Constitution) of the Republic of Latvia (henceforth- the Satversme). In a democratic country information like the above shall not be confidential. Therefore the legislator has stressed it once again in the Law "On State Secrets".

Contents of the government agreements- to their mind- is an information that is at the disposal of state institutions and in accordance with the "Information Accessibility Law" it is either an accessible information or information of restricted accessibility. By vesting the state officials with the right of passing Resolutions connected with restricting accessibility of information, the Cabinet of Ministers has violated the authority determined by the Satversme and Article 14 of the Law "On the Structure of the Cabinet of Ministers".

In the materials submitted to the Court the applicant stresses that confidentiality of the government agreements does not allow supervising utilisation of the state budget that contains information on the use of taxpayers' money. The explanation emphasises that regardless of the fact "whether the state spends the resources in conformity with a civil agreement or administrative act" the information on utilisation of the state budget shall be made public unless stipulated otherwise by laws.

The Cabinet of Ministers in its reply pointed out that the "Information Accessibility Law" and Regulations No.46 regulated different issues. The "Information Accessibility Law" to their viewpoint regulates the right of the society to obtain information, but Regulations No.46 determine contents of the government agreements as well as the procedure of concluding, implementing and controlling of implementation of the agreements.

They are of the opinion that government agreements are not at variance with the existing laws. The disputed legal norm establishes that confidentiality of the agreement is just one of the possible additional terms and may be included in the agreement only if it is not at variance with the laws and other normative acts. To their mind the disputed legal norm does not limit public access to information. According to the third part of Article 24 of "Corruption Prevention Law" all the information on income of the state officials, including the income received on the basis of government agreements, is publicly accessible from the annual declarations of income of the state officials, that shall be submitted to the State Revenue Service within the terms provided for by the law.

At the Court session the representative of the Cabinet of Ministers V.Cielava backed the viewpoint expressed in the written reply of the Cabinet of Ministers and additionally pointed out that in point of fact the government

agreements were not traditional labour contracts but - in conformity with Article 2179 of the Civil Code – company agreements. Labour contract establishes salary for accomplished work, whereas government agreement envisages payment of reward or compensation. Besides, to his mind there has been a possibility to solve the objections of the applicant without submitting the application to the Constitutional Court.

In his comment the representative of the Cabinet of Ministers V.Cielava points out that ” the dispute on competence of item 11 of Regulations No. 46 should be reduced to cases of exemption envisaged by the law”. However, ” to consider that confidentionality (evidently the term used by V.Cielava in his comment and at the Court session should be understood in the sense of confidentiality) of the government agreement may be determined by a specific law, would be profanation of the ”Information Publicity Law” (and any other law as well), as there is no necessity to pass a law on every case of application of a definite law!” The representative of the Cabinet of Ministers expressed the viewpoint that ” by determining the possibility of including confidentiality in the government agreement as a dispositive norm, Regulations of the Cabinet of Ministers ensure adherence to confinements of the government agreements envisaged in the ”Information Accessibility Law”. Confidentiality of government agreements is not based on Regulations by the Cabinet of Ministers but- according to the law- on decision of partners of commitment.” Confidentiality of government agreements may be determined if it has motivation envisaged by the law.

In the above comment V.Cielava refers to the Research Papers of the Latvian University, where one can find the 1980 Recommendation by the Committee of Ministers of the European Council on discrete action at the state administration. He declares that in the sense of the above Recommendation, government agreements could be considered the so-called ”discrete action at the state administration”. The term ” discrete action” has been interpreted as ”free action” in the Recommendation. In its turn the ” Dictionary of Foreign Words” interprets it as ”confidential”. In accordance with ”Corruption Prevention Law” and the ” Information Accessibility Law” information on income of the officials on the basis of government agreements may not be regarded as restricted.

Some deputies have an access to state secrets if they have received special permits. The Ministry of Finance and the State Control realise control over government agreements.

The expert K.J.Druva in his written conclusion explains that Regulations No. 46 by the Cabinet of Ministers may not be at variance with the ”Information Accessibility Law”, as the request of access to information is connected with the procedure of budget performance. Without information on utilisation of the budget funds it is impossible to control implementation of it.

The Transitional Provisions of the ”Information Accessibility Law” established that up to March 1, 1999 the Cabinet of Ministers was obligated to elaborate Regulations on the procedure under which information that was at the disposal of any state institution had to be made public. However, up to the time of the review of the case, the above Regulations have not been worked out. Refusal by the state institutions to disclose the required information is not in compliance with Article 5, item 5 of the Law ”On State Secrets”. The Law states that it is forbidden to grant the status of state secret and restrict access to the information on budget performance and on the salary rates, privileges, alleviations and guarantees determined to the officials and employees of the state and local government institutions.

The expert – the Legal Adviser of the State Administrative Office E.Stankēvičs could not give competent answers to the questions (on control of implementation of the government agreements by the State Chancellery) asked by the judges of the Constitutional Court.

The expert - the Director of the State Administrative Office (Chancellery) A.Vītols explained that the State Chancellery receives the third copy of every government agreement, but does not supervise or control the contents of the agreements. He stressed that the additional payment determined by the government agreements has been granted within the budget framework. To his mind it is impossible to find out particular sums as the government agreements state only the coefficient that is applied to a particular employee or a particular person who has civil service relations. Thus, without knowing the basic salary there is no possibility to calculate the sum of government agreements. Ministries submit quarterly reports on government agreements in a different manner. The State Administrative Office has not signed government agreements with enterprises. To receive information on contents of agreements it is always (in every case) necessary to come to an agreement with the contracting parties. Only then it is possible to pass it over to the third person. The government agreements are concluded with clerks who, while filling their duties, are carrying out ”mentally hard” job, and not only for accomplishment of special and particular assignments. Confidentiality is needed to more easily achieve accomplishment of a special assignment, because then leaders of similar structural units would not know anything about the reward, coefficient or salary of other leaders. Since 1997 the state budget does not specify the sum envisaged for government agreements, but it is included in the salary fund. A.Vītols admitted there was a possibility that the complete information about the sums used to cover the payment for government agreements would be at the disposal of the State Control only after the latter had completed audit in all the institutions.

At the Court session the expert Dz.Galenieks explained that he was not personally responsible for the control of implementation of government agreements. He agreed that a clerk or its candidate may not be engaged in

entrepreneurial activity. To his mind government agreements, which contained state secret, could be regarded as confidential and ”perhaps one could find other cases legally considered confidential”. Legal relations of civil service are established when the clerk is being appointed.
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Evaluating conformity of the disputed legal norm with the ”Information Accessibility Law” and other laws the Constitutional Court **concluded**:

1. The right to freedom of expression, which includes the right to receive information, is an integral component of human rights and fundamental freedoms. The above rights are guaranteed in fundamental laws of democratic states and in international documents on human rights. In compliance with Article 100 of the Satversme ” everyone has the right to freedom of expression which includes the right to freely receive, keep and distribute information and to express their views”. In compliance with Article 116 of the Satversme the above rights may be subject to restrictions only in circumstances provided for by law and only in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals.

   Even though Chapter 8 of the Satversme, determining Fundamental Human Rights, took effect only on November 6, 1998 i.e. later than the disputed legal norm, the advancement of the legislation in the Republic of Latvia from the very first days of renewal of its national independence has clearly proved the will of the legislator and the attitude of the State: to ensure the right of an individual to receive information by consequently observing the standards of international human rights and freedoms. On May 4, 1990 when adopting the Declaration ”On the Renewal of the Independence of the Republic of Latvia” the Supreme Council guaranteed to observe internationally recognised human rights in Latvia. On the same day, when passing the Declaration ” On the Accession to the International Legal Instruments Relating to Human Rights”, Latvia signed the General Declaration on Human Rights and the International Covenant on Civil and Political Rights. The General Declaration on Human Rights is the source of practice of human rights that is acknowledged the world over. All the international instruments on human rights are based on it and the states willingly observe the Declaration. Article 19 of the Declaration appeals to guarantee freedom of information, and also the right to access to information. Since July 14, 1992 the International Covenant on Civil and Political Rights is in force in Latvia. The second part of Article 19 of the Covenant establishes that one of the fundamental freedoms of an individual is to look for, receive and impart different kinds of information.

Convention for the Protection of Human Rights and Fundamental Freedoms, which took effect in Latvia on June 27, 1997, serves as the basis of guaranteeing human rights and freedoms in European democratic states. When ratifying the Convention and in compliance with Article 10 of it, Latvia has confirmed its resolution to acknowledge everyone's right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information. The above Article stresses that first of all the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions and restrictions as are prescribed by law. Secondly –if they are necessary in a democratic society in the interests of national security to protect territorial integrity or public safety, or fundamental rights and freedoms of individuals.

On the moment of its passing i.e. on January 21, 1997, the disputed legal norm was at variance with international standards on human rights. In compliance with Article 13 of the Law "On International Agreements of the Republic of Latvia" the Saeima has resolved to recognise the supremacy of the norms of international agreements, ratified by the Saeima, over national normative acts, with an exception of the norms of the Satversme. When adopting Regulations No.46, the Cabinet of Ministers had to take into consideration the international norms of human rights effective in Latvia.

2. In compliance with Article 1 of the Satversme, authority of which in Latvia was renewed on May 4, 1990, "Latvia is an independent and democratic Republic". One of the features of a democratic and law-based state is guaranteeing human rights and fundamental freedoms. And only in particular cases the above rights and freedoms may be restricted, restricted as are prescribed by law. The Cabinet of Ministers when adopting the disputed legal norm had to follow Article 1 of the Satversme and the Constitutional Law "The Rights and Duties of a Citizen and an Individual". The Law was passed on January 23, 1992 and became null and void at the time of Chapter 8 of the Satversme taking effect. Thus already at the moment of adopting Regulations No.46, Articles 30 and 44 of the above Law contained legal norms on accessibility of information that were similar to those determined in Chapter 8 of the Satversme. Consequently, only the legislator could restrict this right.

   The disputed legal norm is at variance with other Laws of the Republic of Latvia as well: with the Law "On State Secrets" and the "Information Accessibility Law". These laws guarantee accessibility, at the same time establishing restrictions. At the time of passing Regulations No.46, the Law "On State Secrets" was effective. Article 5 of the Law forbids not

only to grant the status of state secrets but also to restrict access to the information on salary rates determined to the officials and employees of the state and local government institutions. Therefore information on reward envisaged in government agreements may not be confidential

The third part of Article 2 of the ”Information Accessibility Law” establishes that all information is accessible to society unless stipulated otherwise by laws. However, the second part of Article 5 of the Law determines information, access to which is restricted. Contents of government agreements does not comply with the above and may not be included in any of the groups. Just as the Satversme, the ”Information Accessibility Law” does not vest the Cabinet of Ministers with the right of regarding information as subjected to restrictions, the more so to delegate the above right to other persons (in this case to the contracting parties).

Consequently the disputed legal norm, envisaging that the partners of commitment of the agreement may (mutually coming to terms) include in the government agreement a condition on confidentiality of its contents if it is not contrary to the laws, other normative acts and is in compliance with the right to receive information, guaranteed in Satversme. The right to receive information may be restricted only by law and only in particular cases. The right may not be restricted just by the decision of contracting parties. Namely, the right of an individual to receive information is unrestricted as far as the law does not provide for it otherwise. Thus, any restriction to receive information is to be interpreted in the narrowest sense.

3. The integral part of functioning of the state administration of a democratic state is its transparency and access to information on utilisation of the state budget funds. In their everyday activities administrative institutions have to observe and apply norms of human rights determined by the Satversme and other laws. In compliance with the Satversme, every person has the right of receiving information on activities of the institutions of the state administration, to make certain that the institutions discharge the functions, entrusted to them by society, effectively, honestly and justly.

   The government had acknowledged the principle of publicity as one of the most important principles of ensuring a democratic administrative system of a state before issuing Regulations No.46. Items 27 and 28 of the Concept on the Reform of Administration of Latvia, confirmed by the Cabinet of Ministers on March 28, 1995 establish that publicity shall be promoted with information on activities of the state. It would make people believe that decisions are adopted taking into consideration the principle of justice and possibilities of conflict of interests are reduced

to the minimum. At the same time information on utilisation of the state funds is to be imparted to the taxpayers in an understandable way.

Applying the disputed legal norm in practice has proved the fact that confidentiality of government agreements means restricting the constitutional right to freedom to information. From the moment of the above norm becoming effective up to this moment complete information on government agreements has not been accessible either to deputies, other members of society or the state institutions. The only exception is the State Control.

Even though in compliance with the Law ”On State Secrets” the deputies of the Saeima have access to state secrets and have the right to use the information when carrying out their official duties, they could receive information on government agreements neither at the State Chancellery nor at the Ministry of Finance. It is proved by the Ministry of Finance February 12,1999 written reply No. 10-08/31 and the State Chancellery February 17,1999 written reply No.50/7-481 addressed to the deputy A.Razminovičs. The written replies state that ”government agreements have been concluded on the basis of the Cabinet of Ministers January 21, 1997 Regulations No.46 ”Regulations on Government Agreements” and rules of the Civil Law of Latvia. The government agreements, according to agreement of the contracting parties are to be considered confidential and may be made known only if both parties agree to it ”. The expert A.Vītols in his explanation at the Court session confirmed the fact.

Contrary to the viewpoint expressed in the written reply by the Cabinet of Ministers, namely, that information on all kinds of income, even for the government agreements, of the officials is accessible in annual declarations of the state officials, Director-General of the State Revenue Service A.Sončiks in his June 14, 1999 written reply to the Constitutional Court points out that ”Corruption Prevention Controlling Department of the State Revenue Service does not ask the state officials to submit declarations dividing their income into salary, income from the government agreements, premium wages, grants etc. He is of the opinion that the sum of the whole income can be declared.”

Unfounded is the statement of V.Cielava that government agreements in compliance with Recommendation No.R(80)2, adopted by the Committee of Ministers of European Council on March 11, 1980 could be regarded the so-called discrete activity at the state administration . He stresses that principles of the above Recommendation refer to administrative acts (see Recommendation No.R(80)2 Concerning the exercise of discretionary powers by Administrative Authorities//

Principles of Administrative Law Concerning the Relations between Administrative Authorities and Private persons. Directorate of Legal Affairs, Strasbourg, 1996, p.251).

On the basis of Articles 30-32 of the Constitutional Court Law

The Constitutional Court

DECIDED:

To declare item 11 in the part on confidentiality of the Cabinet of Ministers January 21, 1997 Regulations No.46 **as not being in compliance** with Articles 100 and 116 of the Satversme **and null and void from the moment of its adoption**.

The Decision takes effect from the moment of its adoption. The decision is final and allowing of no appeal.

The decision was announced in Riga on July 6, 1999.

The Chairman of the Court session
Of the Constitutional Court A.Endziņš

Judge of the Constitutional Court A.Lepse

Judge of the Constitutional Court R.Apsītis

Judge of the Constitutional Court I.Čepāne

Judge of the Constitutional Court I.Skultāne

Judge of the Constitutional Court A.Ušacka