



614-506/14 Belgrade

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# REPORT ON OVERSIGHT OF THE SECURITY INFORMATION AGENCY REGARDING THE USE OF COVERT SURVEILLANCE

# **SUMMARY**

When conducting the covert search, the Security Information Agency (SIA) respects the constitutional right of the inviolability of the home.

SIA conducts the covert search as stipulated by bylaws of the Agency and upon the decision of the director. The covert search has to be regulated by the law and conducted only upon decision of the court or other body, independent from the SIA. The knowledge of the SIA members, as well as the internal control, have to be improved, so as not to exceed the existing decision during the covert search. It is necessary to revise and to improve the interpretation of the term "xxxxxxxxxxxxxxxxxxxxxxxxxxxxx" in the work of SIA, in accordance with the constitutional guarantees of human rights and the values of democratic society. It is necessary to improve procedures and IT programs in order to reduce the possibility of abuse and the occurrence of mistakes during the administrative processing of documents.

The fulfilling of legal obligations of SIA (allowing access to premises and data, talks with the management and the members) as well as the overall cooperation with the Protector of Citizens during oversight have been implemented in accordance with the best European experiences in this field.

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#### **INTRODUCTION**

After publicly announced information that the SIA has conducted the covert search measures in a larger number of cases, the Protector of Citizens has decided to initiate oversight of the SIA regarding the legality and regularity of the use of such measures. The following measures have been considered during decision-making:

- The content of the measure of "covert search", which allows a significant violation of rights arising from the right to a private life<sup>1</sup>,
- The fact that the measure of "covert search" is neither expressly stipulated by the Law, nor are the conditions for its implementation, the processing and the use of results regulated by the Law, but rather bylaws with the high security level, which jeopardizes the principle of legality of work and increases the danger of irregular implementation of regulations and civil rights violations.

#### **PROCEEDING**

The oversight proceeding begun with the letter of the Protector of Citizens No 614-506/14 from 27 March 2014 in which the SIA was informed about the initiation of the oversight procedure, as well as the subject and the goals thereof, according to Article 29 paragraph 1 of the Law on the Protector of Citizens.

On 16 April 2014, the Protector of Citizens held a preparatory meeting with the director of the SIA, during which the planned course of the action was presented.

On 22 April 2014, the Protector of Citizens sent a letter to the director of SIA, in which he precisely defined, for the purpose of efficacy, the type of data and information which the Agency is required to submit in order to achieve the goals of the oversight procedure.

On 12 May 2014, in the premises of the SIA, the Protector of Citizens inspected the work of its Registry Office in which the cases with documents designated as confidential are being administratively processed. Within the oversight procedure, the Protector of Citizens talked to the SIA's IT manager.

At the SIA Registry Office, the Protector of Citizens accessed the information on all procedures in which, over the period of one year prior to the oversight, the SIA had conducted the covert search or for which the warrant had been granted. Of all the procedures, the Protector of Citizens chose a representative sample of nine cases, using the following criteria: time of the application of the measure, place of the application, type of illegal action which was stated in the proposal for application of the measure as the grounds for which the application of this measure was requested, as well as the citizenship of persons subjected to search, in an attempt to include as many different cases as possible.

Immediately after that, nine selected cases were moved to a separate room, with complete documentation, where the Protector of Citizens gained insight in the content thereof, in order to control the legality and regularity of the Agency's procedures during the covert search. During the inspection of the documentation, four SIA representatives provided additional information and explanations. In every single case the following issues were considered: proposal for

 $<sup>^{\</sup>rm 1}$  Article 8. of the European Convention on Protection on Human Rights and Basic Freedoms ("Official Gazette of SCG (Serbia and Montenegro) - International Treaties", No 9/2003, 5/2005 and 7/2005; "Official Gazette of the Republic of Serbia – International Treaties", No.12/2010)

conducting the covert search, the decision on granting the covert search and the report on the measures conducted (after the conduction thereof), and in individual cases, in which beside the covert search other covert measures and procedures were performed, the documents on the application of those measures and procedures were inspected.

On 27 August 2014, the Protector of Citizens submitted to the SIA a draft report for comments, in order to correct possible factual inaccuracies and to point to possible parts of the Draft report that should be left out because they contain data or circumstances which, according to law, cannot be made available to public.

On 29 August 2014, the director of the SIA informed the Protector of Citizens that, in his opinion, the Draft did not contain factual errors, or such parts, that should be deleted on the grounds of the protection of classified information and application of the principle of conspiracy in the work of the Agency, except for the parts which the Protector of Citizens, according to the law, deletes, so as not to jeopardize the realization of the procedures in course.

On 3 September 2014, the final text of the Report was prepared and submitted to SIA, as well as the restrictive version of the Report, which was submitted to the National Assembly and made publicly available.

#### **FINDINGS**

# 1. Complying with the constitutional right of inviolability of the home

SIA statement: The director and the authorized representatives of the SIA told the Protector of Citizens on several occasions that the covert search was never conducted in homes (houses, apartments), or spaces that can be considered as home, since this would represent the violation of constitutional rights of inviolability of the home², in which case the procedure according to constitutional right of inviolability of the home has to be initiated, i.e. the court decisions has to be acquired and the presence of two witnesses provided, which would then represent the measure of search, but not the measure of covert search.

Established facts: During the inspection, after having gained a detail insight in the representative number of cases, not a single case was found in which the SIA had conducted the covert search in an apartment, i.e. home.

# **Conclusion:**

When conducting the covert search, the SIA respects the constitutional right of the inviolability of the home.

# 2. Legality and regularity of the covert search

Regulations: The Law on the SIA does not specifically regulate the application of the measure of the covert search, but it is rather regulated with internal acts of the Agency, which are marked confidential and are not available to the public. After the inspection of the internal acts regulating (also) the procedure of the covert search, it was established that they especially regulated the proposal for, the conduction of and the reporting on the application

<sup>&</sup>lt;sup>2</sup> The Constitution of the Republic of Serbia, article 40.

of the measure of the covert search, as well as the content thereof. The procedure is characterized by a multilevel approach.

Established facts: After the inspection of the selected cases, it was established that all cases contained the proposals for the application of the measure of the covert search, the proposals for granting the measures and, after the conduction thereof, the reports on the application of the measure. The proposals for application of the measures contain clear and understandable justification; the granting of the proposal is based on a multilevel approach within the Agency. The proposal is finally granted by the director or deputy director, according to the internal regulations of the Agency. The application of the measure begins after the measure has been granted and ends within the defined deadline, or it is not conducted at all if there were no grounds for the conduction thereof. Reports prepared on the conducted measures contain the description of the measure as well as the results.

#### **Conclusion:**

The Agency respects the procedure of the application of the measure of the covert search, as regulated by its bylaws.

3. The need for improving the observance of the right of citizens regarding the application of the measures of the covert search (opinion and recommendation)

With respect to the nature and content of the measures of the covert search, i.e. the intensity and broadness of the violation of the citizens privacy, and with respect to the significance of the principle of legality and legal certainty in the application of the measures restricting human rights, the following

# Opinion and recommendations are given:

It is necessary that the measure of the covert search be regulated by the Law, and, among other things, to regulate the conditions for the application of measures, as well as the way of using the results achieved by the application thereof.

It is necessary to legally regulate the consent for the application of that measure to be granted by the authority independent from the SIA, whereby the urgency of the procedure must be provided.

# 4. Application of other measures, beside the measure of the covert search

Immediately before, during, and after the application of the measure of the covert search due to the nature of such measure - there was often a need and the possibility to violate the citizens privacy regarding the content or certain methods, for which, according to regulations, the special court decision was necessary. In several inspected cases, it was observed that the SIA, when applying the measures of the covert search, had also applied the measure of inspection of the content and other data on communication, for which the court decision was previously obtained.

 

#### Conclusions and recommendations:

As a general rule, when before, during or after the application of the measures of the covert search the restriction of some rights or freedoms need to be conducted, in a way and to the extent for which the previous court decision, according to the law, is necessary, the SIA firstly obtains such a decision. A deviation from this rule was also noticed, which is justified by an omission.

It is necessary, through the education of employees, to prevent the cases of restriction of rights of citizens which is not based on legally defined procedures and conditions, due to an omission, negligence, ignorance or other reasons.

The persons responsible for committing the omission have to be appropriately sanctioned, and the Protector of Citizens should be informed on the action taken.

The data collected during the application of the measure for which the formal legal or essential conditions were not met, must be destroyed without delay and the Protector of Citizens should be informed on the action taken.

In relation to one of the examined cases, the Agency applied the measure of the covert search together with a number of other special measures and procedures, within its competence, for the application of which a previous court decision needed to be obtained. After the inspection, it was discovered that every measure stated in the decision of the preliminary proceedings judge was conducted in accordance with the Law.

However, although the preliminary proceedings judge initiated the criminal proceedings, based on the grounded proposal and made a decision on the application of the measures within the competence of the SIA, which restrict the constitutionally guaranteed rights, the Protector of Citizens stated that, in this particular case, the application of measures, although lawful, was irregular.

# Recommendation:

SIA has to revise and improve its interpretation of the term "xxxxxxxxxx xxxxxxxxx", in accordance with democratic heritage and the essence of the freedom of xxxxxxxxxxxxxxx, as stipulated and protected by the Constitution of Serbia and the ratified international documents.

# 5. The processing of confidential cases in the Registry Office

The Protector of Citizens accessed the Registry Office in which the confidential cases are administratively processed and inspected its procedures and methods of work; he also accessed the software for filing and administrative processing of cases and talked to the employees in the Office, who answered all his questions.

The Office is well organized and equipped and the employees are well acquainted with their duties and the workflow.

The Protector of Citizens noticed that possible change xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx in a relative simple way, so it was not visible in subsequent reports on the case. The system administrator told the Protector of Citizens that identified such that all omissions in programs were in way 

#### Recommendation:

# SUMMARY: CONCLUSIONS, OPINIONS AND RECOMMENDATIONS

- 1. In the application of the measure of the covert search, the SIA respects the constitutional right of the inviolability of the home.
- 2. The Agency respects the procedure of the application of the measure of the covert search, as regulated by its bylaws.
- 3. It is necessary to regulate the measure of the covert search by the Law, and, among other things, to regulate the conditions for the application of measures, as well as the way the results achieved by the application are used.
- 4. It is necessary to legally regulate the consent for the application of that measure to be granted by the authority independent from the SIA, whereby the urgency of the procedure must be provided.
- 5. As a general rule, when before, during or after the application of the measures of the covert search the restriction of some rights or freedoms need to be conducted, in a way and to the extent for which the previous court decision, according to the law, is necessary, the SIA firstly obtains such a decision. A deviation from this rule was also noticed, which is justified by an omission.

- 6. It is necessary, through the education of employees, to prevent the cases of restriction of rights of citizens which is not based on legally defined procedures and conditions, due to an omission, negligence, ignorance or other reasons.
- 7. The persons responsible for committing the omission have to be appropriately sanctioned, and the Protector of Citizens should be informed on the action taken.
- 8. The data collected during the application of the measure for which the formal legal or essential conditions were not met, must be destroyed without delay and the Protector of Citizens should be informed on the action taken.
- 9. SIA has to revise and improve its interpretation of the term "xxxxxxxxxx xxxxxxxxx", in accordance with democratic heritage and the essence of the freedom of xxxxxxxxxxxxxxxx, as stipulated and protected by the Constitution of Serbia and the ratified by international documents.

SIA shall inform the Protector of Citizens on the implementation of the recommendations within 60 days upon the receipt of this document.

PROTECTOR OF CITIZENS

Saša Janković