Institute for Development
of Freedom of Information

Opinions of "Institute for Development of Freedom of Information" on Legislative Amendments Necessary to Ensure Access to Court Decisions

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Introduction

The Constitutional Court of Georgia, by its decision of June 7, 2019, ruled that the provisions of the Law of Georgia on Personal Data Protection, specifically Article 5 and paragraphs 1 and 3 of Article 6 were unconstitutional as they prohibited access to the full text of court decisions delivered within the scope of public hearings by Common Courts of Georgia.

The Constitutional Court held that the high public interest in accessibility of court decisions exists by default regardless of the legal issue concerned, addressee of a judgment or the importance attached to an individual decision at a specific time.[1]

The Court held that the disputed norms would be void from May 2020 and thus gave the Parliament of Georgia time to harmonize existing legislation with the requirements of the Constitution.

IDFI presents its opinions on the legislative amendments that are necessary to execute the Constitutional Court's decision.

Amendments to the Law on Personal Data Protection

IDFI is considering two alternative approaches regarding the amendments to the Law on Personal Data Protection.

Approach 1:

Articles 5 and 6 of the Law on Personal Data Protection provide an exhaustive list of the grounds of data processing, which indicates that in the absence of the grounds provided for in this provision, personal data will not be processed/made public.

With regard to the court decisions, the Constitutional Court altered this balance and established that any decision rendered in the process of adjudication should be open unless there is a substantiated necessity to restrict its accessibility.

Therefore, the following ground for data processing should be added to articles 5 and 6: Data processing/disclosure is necessary to ensure openness of court decisions, except when there is a legislative ground for its restriction and a prevalent interest to protect the rights and freedoms of the data subject (especially minors).

The Constitutional Court also considered that there may be circumstances where the legislator will need to strike a balance in favor of privacy rights, and the personal data included in court decisions will not be disclosed without the consent of the data subject. Legitimate restrictions might be established in cases where due to its content, subject, form, timeframe, method of revelation or other circumstances, disclosure of information will have an intrusive impact upon private life. For example, data regarding juveniles or information about intimate aspects of private life may be included in this category.[2]

Such interpretation by the Constitutional Court makes it clear that disclosure of information about a person's conviction, without other additional information, may not infringe on his privacy in a way that would make it necessary to establish a balance within which personal data would usually not be

[1] Judgment of the Constitutional Court of Georgia of June 7, 2019 on the case "Media Development Fund" and "Institute for Development of Freedom of Information" v. the Parliament of Georgia. § 51.

[2] Judgment of the Constitutional Court of Georgia of June 7, 2019 on the case "Media Development Fund" and "Institute for Development of Freedom of Information" v. the Parliament of Georgia. § 66.

disclosed. Therefore, the legislation should include a clear and exhaustive list of exceptions which call for increased measures of confidentiality.

To this end, a separate article may be added to the "Rights of the Data Subject" chapter of the law, which would allow the data subject to request a ban on disclosure of data contained in the court decision delivered within the scope of public hearing. This article should exhaustively list the exceptional cases in which the data subject will have the right to submit such a request.

The Constitutional Court further explained that a range of factors should be taken into consideration when an exceptional case is present, such as the public interest value of the information, the category of data under scrutiny, the nature of the parties to the case, or other facts that may outweigh any interest in confidentiality. For example, if a court decision concerns a public official, the public interest in disclosure may take precedence over privacy concerns.[3]

Accordingly, the law on Personal Data Protection should also explicitly state that, in the event of an exceptional case, the data processor has the right not to comply with the data subject's request to cover personal data if there is significant public interest in its accessibility. It should also be noted that the data processor should make a decision by achieving the balance between protection of privacy and the interest of access to court decisions.

Approach 2:

Articles 5 and 6 of the Law on Personal Data Protection regulate the processing of any information containing personal data, however, the Constitutional Court only evaluated the issue of access to court decisions, as the constitutional complaint did not apply to all information considered in disputed provisions. Accordingly, the Court established a different legal regime for one particular type of public information - court decisions.

Therefore, an alternative solution to this issue may be to no longer apply the Law on Personal Data Protection to court decisions. To this end, Article 3 (scope) of the law must explicitly state that the law does not apply to court decisions. In this case, the issue of access to court decisions should be regulated by other legislative acts.

Amendments to the Organic Law on Common Courts

According to Article 13, Paragraph 3[1] of the Organic Law on Common Courts, "A court decision made at an open session as a result of hearing a case on the merits shall be fully published on the website of the court, and if a court decision is made at a closed session as a result of hearing a case on the merits, only the resolution part of the decision shall be published on the website of the court. The issue of disclosing personal data of a person that is included in the court decisions shall be resolved in accordance with the law."

Given that organic law is hierarchically superior to laws, IDFI believes that in order to provide additional solid guarantees, the Organic Law on Common Courts must reflect the constitutional standard and the balance established by the Constitutional Court: all decisions made in the course of administering justice must be open, unless there is a reasonable need for restricting access to it.

Therefore, it is recommended to change the above-mentioned provision in a way that guarantees open access to the full text of the court decisions (including disclosure of personal data), except when it is necessary to ensure confidentiality of data, based on specific grounds provided by law.

[3] Judgment of the Constitutional Court of Georgia of June 7, 2019 on the case "Media Development Fund" and "Institute for Development of Freedom of Information" v. the Parliament of Georgia. § 66.

Amendments to the General Administrative Code of Georgia

The procedure of issuing information by public institutions is regulated by the General administrative Code.

Amending the General Administrative Code may not be necessary, if the legislator opts for the first approach to amending the Law on Personal Data Protection (adding specific grounds for processing of data and providing an exhaustive list of exceptions). According to Article 27[1] of the GAC, personal data and relations associated with their protection and processing shall be governed by the Law of Georgia on Personal Data Protection, therefore, amending this law would ensure the disclosure of personal data included in court decisions, unless exceptions apply.

If the legislator opts for the second approach to amending the Law on Personal Data Protection (excluding court decisions from the scope of the law), it will be crucial to include this matter in the General Administrative Code - the legislative act regulating Freedom of Information.

In this case, a special clause should be added to the 3rd chapter of the GAC („Freedom of Information"), which will ensure the publicity of court decisions delivered at open sessions, taking into account the exceptions established by the Code. Furthermore, in accordance with the decision of the Constitutional Court[4], the GAC should contain an explicit indication that despite the established exceptions, a court's decision may still be disclosed as public information if there is significant public interest towards its accessibility.

Procedure of Concealing Data under Exceptional Circumstances

According to the decision of the Constitutional Court, a system may be created within the framework of which the protection of personal data reflected in the court decisions will depend on whether the data subject is directly interested in protecting its confidentiality. Furthermore, in case the data subject does have such an interest, the decision regarding openness of the court judgment will be made based on the balance between the interests of publicizing the court decision and the interest of protecting the confidentiality of personal data reflected in it. Such a system, on the one hand, would prevent the disclosure of personal information against the will of the data subject, and, on the other hand, would be a less restrictive means of access to information on court decisions. At the same time, such a system does not create an unreasonable administrative burden for the data processor.[5]

IDFI believes that the system proposed by the Constitutional Court may be reflected in procedural law and the trial judge should be given the opportunity to find out whether the participant in the process has an interest in maintaining the confidentiality of their data. The legislation should envisage the possibility of submitting a motion by the data subject. The motion must be based on one of the exceptional cases provided by the law, where the data subject may request concealment of data.

If one of the exceptions provided by law apply, the judge must make a reasoned decision whether or not to conceal a person's confidential/personal data. In such a case, the court decision should be publicized in such a way that the identifying information of the person is not disclosed.

[4] Judgment of the Constitutional Court of Georgia of June 7, 2019 on the case "Media Development Fund" and "Institute for Development of Freedom of Information" v. the Parliament of Georgia. § 66.

[5] Judgment of the Constitutional Court of Georgia of June 7, 2019 on the case "Media Development Fund" and "Institute for Development of Freedom of Information" v. the Parliament of Georgia. § 33; 67; 70.

Furthermore, it is essential that the judge does not make this decision automatically, but as a result of balancing the interests of publicizing the court decision and the interest of protecting the confidentiality of personal data reflected in it. The judge should ascertain whether or not the case has significant public interest value, which, taking into account the category of data under scrutiny, the nature of the parties to the case, or other relevant facts, may outweigh any interest in confidentiality.[6]

In addition, the legislation should envisage the possibility that the court, by its own initiative or at the request of the parties, may at any stage change its decision regarding concealment of data.

Access to Court Decisions Delivered Prior to the Enactment of the Legislative Amendments

According to the Constitutional Court, it is important to implement a mechanism which will ensure that access to court decisions will only be restricted for confidentiality if the data subject explicitly requests the protection of his/her personal data. This standard, established by the decision of the Constitutional Court, applies to both, ongoing and already completed court proceedings.[7]

Therefore, it is necessary to give the opportunity to request data confidentiality to those data subjects whose personal data are reflected in court decisions delivered before the enactment of the legislative amendments, and one of the exceptions provided by the law is present.

In order to ensure the accessibility to court decisions delivered before the enactment of the legislative amendment, the new legislation must include transitional regulation, which will gradually give the data subjects the opportunity to submit a request.[8] The gradual submission of requests is necessary to prevent the courts from being overburdened and to ensure that the claims are reviewed in a timely manner. The personal data of persons who do not submit the request within the established time frame should be automatically made public after the expiration of the term provided by the law.

If the decision of the court has entered into legal force, it is advisable for the data subject to submit a request to the instance of the court that made a final decision.

Furthermore, at the first stage, it is desirable to have the request reviewed by the court's FOI Officer and check whether the application includes the exceptions provided by the law, on the basis of which the data subject requests confidentiality. If the application includes such legal ground, the decision should be made by the judge who considered the case, and in the absence of a particular judge, the request should be assigned to another judge through the electronic program based on the principle of random distribution.

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[6] Judgment of the Constitutional Court of Georgia of June 7, 2019 on the case "Media Development Fund" and "Institute for Development of Freedom of Information" v. the Parliament of Georgia. § 66..

[7] Judgment of the Constitutional Court of Georgia of June 7, 2019 on the case "Media Development Fund" and "Institute for Development of Freedom of Information" v. the Parliament of Georgia. § 70.

[8] For example, those whose data are reflected in the decisions of 2018-2020, be given the opportunity to submit a request within 1 month of the enactment of the law; Individuals whose data are reflected in the 2015-2017 decisions should be given the opportunity to submit a request 1 month after the entry into force of the law and they should also be given a one-month period and so on.

In this case, the judge should also make a decision based on achieveing a balance between the interests of confidentiality of private data reflected in the court decision and the public interest towards its accessibility.