

Case C-336/23

Request for a preliminary ruling

Date lodged:

26 May 2023

Referring court:

Visoki upravni sud Republike Hrvatske

Date of decision to refer:

25 May 2023

Appellant:

HP – Hrvatska pošta d.d.

Respondent:

Povjerenik za informiranje

[...]

[...]
Judge of the Visoki upravni sud
Republike Hrvatske (Administrative
Court of Appeal of the Republic of
Croatia)

[...]

Court of Justice of the European Union

[...]

Request for a preliminary ruling

pursuant to Article 19(3)(b) of the Treaty on European Union [(OJ 2012 C 326 p. 1)] and Article 267 of the Treaty on the Functioning of the European Union (OJ 2016 C 202, p. 1), in accordance with the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2016 C 439, p. 1).

Application for an expedited procedure

pursuant to Article 105 of the Rules of Procedure of the Court of Justice of the European Union of 25 September 2012 (OJ 2012 L 265), as amended on 18 June 2013 (OJ 2013 L 173, p. 65), 19 July 2016 (OJ 2016 L 217, p. 69), 9 April 2019 (OJ 2019 L 111, p. 73), and 26 November 2019 (OJ 2019 L 316, p. 103)

I. Questions

1. Is the term ‘re-use of information’ for the purposes of Article 2(11) of Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information ([OJ 2019] L 172, [p. 56]) (‘the Directive’) to be understood as meaning access to any information which a public sector body/public undertaking has produced or holds, and which a user (natural or legal person) requests from a public sector body for the first time?

2. Can a request for information which a public sector body/public undertaking has produced or which it holds, and which was generated within the scope of its activities or in connection with its organisation and work, be regarded as a request for information to which the provisions of that directive apply, that is to say, do the provisions of that directive apply to all requests for information held by public sector bodies?

3. Are the entities obliged to provide information, listed in Article 2 of the Directive, only those public sector bodies to which requests for re-use of information are made, or do the new definitions concern all public sector bodies and all information held by those bodies, that is to say, are the entities listed in Article 2 of the Directive obliged to provide information they have produced or hold, or are the entities listed in Article 2 of the Directive considered to be obliged to provide information only where the information is re-used?

4. Can the exceptions to the obligation to make information available under Article 1(2) of the Directive be regarded as exceptions by virtue of which public sector bodies may refuse to provide information produced or held by them, or are they exceptions which apply only where requests have been made to the public sector bodies for re-use of the information?

II. Parties to the main proceedings

Appellant: HP – Hrvatska pošta d.d., Zagreb [...]

Respondent: Povjerenik za informiranje (Information Commissioner), Zagreb [...]

Interested party: STAS d.o.o, Dugo Selo [...]

III. Legal background

European Union law:

Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information ([OJ 2019] L 172, [p. 56])

Article 1 Subject matter and scope

1. In order to promote the use of open data and stimulate innovation in products and services, this Directive establishes a set of minimum rules governing the re-use and the practical arrangements for facilitating the re-use of:

- (a) existing documents held by public sector bodies of the Member States;
- (b) existing documents held by public undertakings that are:
 - (i) active in the areas defined in Directive 2014/25/EU;
 - (ii) acting as public service operators pursuant to Article 2 of Regulation (EC) No 1370/2007;
 - (iii) acting as air carriers fulfilling public service obligations pursuant to Article 16 of Regulation (EC) No 1008/2008; or
 - (iv) acting as Community shipowners fulfilling public service obligations pursuant to Article 4 of Regulation (EEC) No 3577/92;
- (c) research data pursuant to the conditions set out in Article 10.

2. This Directive does not apply to:

- (a) documents the supply of which is an activity falling outside the scope of the public task of the public sector bodies concerned as defined by law or by other binding rules in the Member State, or, in the absence of such rules, as defined in accordance with common administrative practice in the Member State in question, provided that the scope of the public tasks is transparent and subject to review;
- (b) documents held by public undertakings:
 - (i) produced outside the scope of the provision of services in the general interest as defined by law or other binding rules in the Member State;
 - (ii) related to activities directly exposed to competition and therefore, pursuant to Article 34 of Directive 2014/25/EU, not subject to procurement rules;

[...]

Article 2 Definitions

For the purpose of this Directive, the following definitions apply:

(1) ‘public sector body’ means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

(2) ‘bodies governed by public law’ means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

(3) ‘public undertaking’ means any undertaking active in the areas set out in point (b) of Article 1(1) over which the public sector bodies may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public sector bodies shall be presumed in any of the following cases in which those bodies, directly or indirectly:

(a) hold the majority of the undertaking’s subscribed capital;

(b) control the majority of the votes attaching to shares issued by the undertaking;

(c) can appoint more than half of the undertaking’s administrative, management or supervisory body;

[...]

(11) ‘re-use’ means the use by persons or legal entities of documents held by:

(a) public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced, except for the exchange of documents between public sector bodies purely in pursuit of their public tasks; or

(b) public undertakings, for commercial or non-commercial purposes other than for the initial purpose of providing services in the general interest for which the documents were produced, except for the exchange of documents between public

undertakings and public sector bodies purely in pursuit of the public tasks of public sector bodies;

[...]

Article 19 Repeal

Directive 2003/98/EC, as amended by the Directive listed in Annex II, Part A, is repealed with effect from 17 July 2021, without prejudice to the obligations of the Member States relating to the time limits for the transposition into national law and the dates of application of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Law of the Republic of Croatia:

Zakon o pravu na pristup informacijama (Law on the right of access to information) (NN 25/13, 85/15, 69/22; 'Law on the right of access to information), in force since 5 June 2022

Terms Article 5 (NN 85/15)

The individual terms in this Law shall have the following meaning:

- (1) 'User of the right to access information and re-use information' ('user') means any national or foreign natural or legal person;
- (2) 'Public bodies' within the meaning of this Law are: bodies of State administration, other State bodies, local and regional authority units, legal persons and other entities exercising public powers, legal persons whose founder is the Republic of Croatia or a local and regional authority unit, legal persons exercising public powers, legal persons which, under separate provisions, are financed mainly or entirely from the State budget or from the budgets of local and regional authority units, that is to say from public funds (taxes, fees, etc.), and also commercial companies in which the Republic of Croatia and local and regional authority units have, individually or jointly, a majority shareholding;
- (3) 'Information' is any data held by a public body in the form of a document, record, file, or register, irrespective of the way in which it is presented (written, drawn, printed, recorded, on a magnetic medium, optical, electronic or by another medium), which the body has produced itself or in collaboration with other authorities or obtained from another person, and which was generated within the scope of its activities or in connection with the organisation and work of a public body;

(4) ‘International information’ means information provided to the Republic of Croatia by a foreign State or an international organisation with which the Republic of Croatia collaborates or of which it is a member;

(5) ‘Right of access to information’ includes the right of a user to request and obtain information, and also the obligation on a public body to provide access to the requested information, that is to say publish information regardless of the request made, when such publication results from an obligation laid down in law or other rules;

(6) ‘Re-use’ means the use of information of a public authority by natural or legal persons for commercial or non-commercial purposes other than the initial purpose for which the information was generated, and which takes place within the scope of activities or tasks customarily considered to be public tasks, as defined in law or other rules. The exchange of information between public bodies in the pursuit of tasks within the scope of their activities shall not constitute re-use;

[...]

IV. RESTRICTIONS ON THE RIGHT OF ACCESS TO INFORMATION

Restrictions and the duration thereof

Article 15 (NN 85/15, 69/22)

(1) Public bodies shall restrict access to information regarding any proceedings conducted by the competent authorities in investigative and criminal proceedings for the duration of those proceedings.

(2) Public authorities may restrict access to information:

(1) if the information has been classified as secret in accordance with the law governing the secrecy of data;

(2) if the information is a business or professional secret, in accordance with the law;

(3) if the information is a tax secret, in accordance with the law;

(4) if the information is protected by rules governing personal data protection;

(5) if the information is protected by rules governing intellectual property rights, other than with the express written consent of the copyright holder;

(6) if access to the information is restricted under international agreements, or if the information is generated in the procedure for concluding or acceding to an international agreement or negotiating with other States or international organisations, until the procedure is completed, or where the information is generated in maintaining diplomatic relations;

(7) in other cases laid down in law.

(3) Public bodies may restrict access to information if there are reasonable grounds to believe that publication thereof would:

(1) prevent the effective, independent and impartial conduct of judicial or administrative proceedings or other proceedings governed by law, or the enforcement of a judicial decision or a penalty;

(2) prevent the work of a body conducting an internal audit in administration or an administrative or compliance review.

(4) Public bodies may restrict access to information if:

(1) the information is in the process of being drawn up within one or more public bodies, and publication thereof prior to the production of the complete and final information could seriously disrupt the process of its production;

(2) the information was generated in the coordination process in the enactment of legislation and other acts and in the exchange of positions and views within one or more public bodies, and the publication thereof could lead to misinterpretation of the content of the information, or jeopardise the process of enacting legislation and acts or the freedom to express views and set out positions.

(5) If the requested information also contains data subject to restriction under paragraphs 2 and 3 of this Article, the remaining parts of the information shall be made available.

(6) Information restricting the right of access on the grounds listed in paragraph (2)(5) of this Article shall become available to the public if so decided by the person to whom the publication of the information could cause harm, but no later than 20 years from the date on which the information was generated, except where a longer period is laid down in law or other rules.

(7) Information referred to paragraphs (2) and (3) of this Article shall become available to the public when the reasons for which the public body restricted the right of access to the information no longer exist.

(8) Access to information referred to paragraph 4(1) of this Article may also be restricted after the information has been completed, in particular if such publication would seriously disrupt the decision-making process and the expression of views or would lead to a misinterpretation of the content of the information, except where there is an overriding public interest in publishing the information.

[...]

VI. RIGHT TO RE-USE INFORMATION

Right to re-use information and open data
Article 27 (NN 85/15, 69/22)

- (1) Every user shall have the right to re-use information for commercial or non-commercial purposes in accordance with the provisions of this Law.
- (2) A public body shall enable users to access open data and re-use information by making public information suitable for re-use or on the basis of requests for re-use.
- (3) The Government of the Republic of Croatia shall encourage public bodies to create and publish information generated in the pursuit of public tasks by adopting policies and action plans by which, in accordance with the principle of openness by design and by default, it shall ensure the development of open data standards, by facilitating conditions for adaptation, (timely) planning of publication deadlines for information on specific thematic categories and creating an open data portal and encouraging the creation of special portals, and also by linking portals with portals at the European Union level.
- (4) The Government of the Republic of Croatia shall support the availability of research data by adopting an open access policy and action plans to ensure that all research organisations and research funding organisations implement an open access policy for publicly funded research data, in accordance with the principle of ‘open by default’, and which are findable, accessible, interoperable and re-usable, taking into account concerns relating to privacy, personal data protection, confidentiality, national security, and legitimate commercial interests, such as business secrets and intellectual property rights of third parties, in accordance with the principle of ‘as open as possible, as closed as necessary’.
- (5) For the purpose of re-use, public bodies shall not be obliged to generate and adapt information or extract parts thereof if this requires a disproportionate consumption of time or resources; nor may a public body be required to update, improve or store the information for the purpose of re-use.
- (6) The other provisions of this Law shall apply *mutatis mutandis* to matters not specifically governed by this Law.

Request for re-use of information and protection of users’ rights
Article 29 (NN 85/15, 69/22)

- (1) In a request for the re-use of information, the applicant must, in addition to the data referred to in Article 18(3) of this Law, state the information he or she wishes to re-use, the form and manner in which he or she wishes to receive the content of the requested information, and also the purpose of the use of the information (commercial or non-commercial purpose).
- (2) The following entities shall not be obliged to act in accordance with a request for re-use of information:

1. educational institutions, scientific research organisations, and research funding organisations;

2. commercial companies in which the Republic of Croatia or a local or regional authority unit exercises, or may exercise, directly or indirectly, a dominant influence by virtue of its ownership of it, financial participation therein or the rules which govern its actions and which:

– carry on activities related to the sectors of gas and heat, electricity, water management, transport services, airports, sea and river ports, postal services, oil and gas extraction, and exploration or extraction of coal or other solid fuels, in accordance with the law governing public procurement,

– act as public service operators under Article 2 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1),

– act as an air carrier operating a public service obligation under Article 16 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3), or

– act as a Community shipowner operating a public service obligation under Article 4 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

(3) The Republic of Croatia or a local and regional authority unit shall be deemed to exercise dominant influence within the meaning of paragraph 2(2) of this Article if it directly or indirectly:

1. holds a majority of the company's subscribed capital, or

2. controls a majority of the votes attached to the shares issued by the company, or

3. can appoint more than half of the members of the company's supervisory, administrative or management body.

(4) The public authority shall determine the request for the re-use of information by way of a decision within 15 days of the submission of the duly drafted request. The decision shall obligatorily contain the type of licence concerned, which shall set out the conditions for use and the amount and method of calculation of costs.

(5) By way of derogation from paragraph (4) of this Article, public bodies shall not issue a decision when they allow re-use through a standard open licence and free of charge.

(6) A public body shall consider the request for re-use of information through electronic means where possible and appropriate.

(7) An appeal against a decision on the re-use of information may be lodged with the Commissioner within 15 days of the delivery of the decision. An appeal against the Commissioner's decision is inadmissible, but administrative court proceedings may be initiated before the Visoki upravni sud Republike Hrvatske (Administrative Court of Appeal of the Republic of Croatia).

(8) Where a public body rejects a request for re-use on the ground of protection of intellectual property rights, it shall be obliged to inform the applicant of the entity to which the intellectual property rights belong, if known, or of the licensee from whom the public body received the information in question.

Information to which re-use does not apply
Article 30 (NN 85/15, 69/22)

(1) The provisions of this Law on the re-use of information shall not apply to the following information:

- (1) information referred to in Article 15(1), (2) and (3) of this Law,
- (2) confidential statistical information, in accordance with the law,
- (3) information in relation to which the user must demonstrate a legal interest,
- (4) logos, crests and insignia,
- (5) information held by public service bodies: radio, television and electronic media,
- (6) information held by educational institutions other than that held by higher education institutions concerning research data,
- (7) information held by scientific research institutions and research funding organisations, including organisations established for the transfer of research results, except where the information concerns research data,
- (8) information held by cultural institutions other than libraries, including libraries of higher education institutions, museums and archives,
- (9) information not collected in the pursuit of public tasks,
- (10) information access to which is excluded or restricted on grounds of sensitive critical infrastructure protection related information as defined in the law governing critical infrastructure,
- (11) information held by commercial companies referred to in Article 29(2)(2) of this Law:

- which is produced outside the scope of the provision of services in the general interest, as defined by law or other rules;
- related to activities directly exposed to competition and therefore, pursuant to procurement legislation, not covered by public procurement rules.

(2) When considering a request for re-use of information under paragraph 1 of this Article, public bodies shall reject the request for re-use of information by way of a decision.

Conditions for re-use of information
Article 31 (NN 85/15, 69/22)

(1) A public body shall make data available to the user for re-use without restriction, for free use and in an open format.

(2) In justified cases, the public body may lay down conditions for re-use. Where conditions for re-use are laid down, their content and application shall not unjustifiably restrict possibilities for re-use or be used to restrict competition in the market.

(3) Conditions for re-use may not be discriminatory in comparison with the same or similar types of information or commercial or non-commercial exploitation, including cross-border re-use.

(4) A public body which re-uses its information as a basis for commercial activities outside the scope of its public tasks shall be subject to the same conditions as other users.

(5) The minister competent for administration shall determine in a regulation the types and content of licences setting the conditions for re-use in accordance with standard open licences.

(6) A public body shall be obliged to publish on its website the licences setting out the conditions for re-use or links to such licences, in accordance with standard open licences.

[...]

IV. Succinct presentation of the subject matter of the dispute

6. The decision of the respondent [Povjerenik za informiranje (Information Commissioner)] annulled the decision of HP – Hrvatska pošta d.d. (also ‘HP’ or ‘the appellant’), by which, following a proportionality and public interest test, HP dismissed the request for information (construction contract, interim payment certificates, declaration of transfer and acceptance, etc.); the Povjerenik za informiranje (Information Commissioner) also ordered HP to provide the requested documents.

7. As the result of an action brought by Hrvatska pošta d.d., the Visoki upravni sud Republike Hrvatske (the Administrative Court of Appeal of the Republic of Croatia) referred the case back to Povjerenik za informacije (Information Commissioner) ('respondent') since the time limit for transposing the Directive had already expired at the time the decision was given. At the same time, the court expressed the view that the obligation regarding information imposed on HP by the respondent should be considered in the light of the new definitions of, and exemptions from, the obligation to disclose information under the Directive.

8. After reconsidering the case, the respondent again ordered that the requested information be provided.

9. HP brought an action against that decision of the respondent, which forms the subject matter of the present administrative court proceedings.

10. The action essentially argues that the contested decision is unlawful, that Directive 2019/1024 has not been correctly transposed into the Zakon o pravu na pristup informacijama (Law on the right of access to information) because the Directive contains different definitions of public bodies and public undertakings, that the *ratio* of the definitions in Directive 2019/1024 applies equally to the right of access to information and the re-use of information, that the requested information is related to the appellant's sectoral activities, and that it constitutes a business secret.

11. However, the respondent points out that this particular case does not concern exercise of the right to re-use information, but exercise of the right of access to information, that the Zakon o pravu na pristup informacijama (Law on the right of access to information) governs two areas: the right of access to information, defined as the 'right of the user to request and obtain information, and also the obligation of the public body to provide access to the requested information, that is to say publish information regardless of the request made, when such publication arises from an obligation laid down in law or other rule' [Article 5(1)(5) of the Zakon o pravu na pristup informacijama (Law on the right of access to information)], and re-use, which means 'the use of information of a public authority by natural or legal persons for commercial or non-commercial purposes other than the initial purpose for which the information was generated, and which takes place within the scope of activities or tasks customarily considered to be public tasks, as defined by law or other rule' [Article 5(1)(6) of Zakon o pravu na pristup informacijama (Law on the right of access to information)]. It concludes that the Directive on open data and the re-use of public sector information, as the name of the Directive implies, establishes a legal framework for the re-use of public sector information and concerns both open data and re-use of public sector information, and not the right of access to information, and therefore does not concern exceptions to the obligation to make information available when making such information available following a request for information.

Presentation of the arguments

12. Hrvatska pošta d.d. was established as a commercial company providing services in the general interest, which is fully owned by the Republic of Croatia, but, in addition to the universal postal service, also carries out other kinds commercial activity. Under Article 5 of the Zakon o pravu na pristup informacijama (Law on the right of access to information), it certainly belongs to the group of entities obliged to provide access to information which it holds, and having regard to the public importance of the service it provides, it also belongs, in the view of the referring court, to the entities obliged under Article 2 of the Directive, known as ‘public undertakings’.

13. The previous case-law of the referring court has accepted the reasoning of the respondent, namely that there are two different procedures: one conducted on the basis of a request for information, to which the general provisions of the Zakon o pravu na pristup informacijama (Law on the right of access to information) apply, and the other conducted on the basis of request for the re-use of information, to which the new provisions of that law, which transposed the Directive, apply.

14. Since in the present proceedings the subject matter of dispute between the parties is whether Hrvatska pošta d.d., after carrying out a proportionality and public interest test, is obliged to provide information which does not directly relate to the provision of services in the general interest, and in view of the dispute as to the meaning of the term ‘re-use of information’ and the resulting different approach to considering a request for information which a public sector body has generated or holds, and consideration of a request for re-use of information, the court has decided to stay the proceedings in the present administrative case pending an answer to the questions raised.

15. Proceedings related to exercise of the right of access to information are of an urgent nature and the case-law is not uniform, owing to different points of view on the content of the Directive, as recently the decisions of the Povjerenik za informiranje (Information Commissioner), reiterating the position that one set of rules applies to a request for information and another to a request for re-use of information, have frequently been upheld. Therefore, since it is important to achieve uniform case-law and consideration of requests for information and requests for re-use of information, we ask the Court of Justice of the European Union to hear the case urgently in order to bring about legal certainty.

At Zagreb, 25 May 2023

[...]

[...] [electronic signature]

[...] [details of attached documents]

[...]

WORKING DOCUMENT