Georgian Young Lawyers' Association

Freedom of information becomes more critical when it concerns the creation of information by a public institution. In such a case, a citizen is typically requesting an information in a form and shape in which the information does not exist. The main questions that arises in this case is whether a public institution is obliged to give the information to a requesting person in a form requested, or should the public institution release the information in a form it possesses in a given moment. We can initially discuss a relatively simple issue that concerns a translation of a document. The court's position is clear with respect of the translation of a document, the judgment says: "any information stored in a public institution is a public information. [...] According to Article 38, a public institution should provide access to copies of the public information. In case of request for the information, the public institution is in no circumstances required to create a new document, or translate it etc. The request only relates to search and locating various documents, classification and systematization [...]. " It is also interesting that according to the court judgment, a public institution is required to search, locate, systematize and classify the information, although the spirit of the same judgment is arguable when the court talks about creating a new document. In this case the main argument is that if the public institution is required to create information and in a given moment it does not have this information, a need for creation of the information may arise. The Georgian Supreme Court has an interesting position on this issue. In one of its judgments the Georgian Supreme Court decided the following: "[...] information about natural disaster of 2006 in Georgia and about an amount of damage caused by it is not in any form a protected, received, processed, created or sent information that might have been sent by an analytical group to the Administration of the President of Georgia. The author of a cassation appeal is not able to refer to any legal norm that would require an analytical group within the Administration of the President of Georgia to process the information or to deliver it in a written form. The cassation chamber stresses that in exercising operative connections with supervisor, subordinate and other institutions, a governance institution of any level can, within its own competency, and based on specifics of each particular case, use a way of exchange of information without material documents: ver

Freedom of Information in Georgia

Main tendencies of the case-law

2008-2010

FREEDOM OF INFORMATION IN GEORGIA

Main tendencies of the case law
(2008-2010)

Tbilisi
2011

The research has been prepared by Georgian Young Lawyers' Association within framework of **Promoting Transparency and Accountability in Georgia** with the financial support of **Open Society Institute (OSI).**

Authors: **VAKHUSHTI MENABDE**
ANNA SHALAMBERIDZE
TATULI TODUA

Assistant of the research: **MARIAM GOGOSASHVILI**

Editor: **KHATUNA KVIRALASHVILI**

Proofreading and styling: **MAIA MENAGARISHVILI**

Tech. Editor: **IRAKLI SVANIDZE**

Responsible of publication: **TAMAR CHUGOSHVILI**
TAMAR KORDZAIA

Was edited and published
in the Georgian Young Lawyers' Association
15, J. Kakhidze st. Tbilisi 0102, Georgia
(+99532) 93 61 01, 95 23 53
Volume: 250 units

CONTENT

1

1. Introduction

In 1999 the Parliament of Georgia adopted a General Administrative Code of Georgia and its chapter 3 regulated issues relating to freedom of information. Back then this step was assessed as the braviest step towards introducing and enforcing freedom of information and transparency of work of public agencies in the entire post Soviet area. Since then the chapter 3 of the General Administrative Code of Georgia has been amended and some of the amendments have been scrutinised. A few law suits have been filed to the Constitutional Court of Georgia, some of which have been already examined by the court, and the others are still in process. However, from the very begining, right interpretation of law and its right implementation have been very hotly debated. The Georgian Young Lawyers' Asscoiation believes that discussing each of these issues is very importand in order to understand the developmrnts in the country. For this reason, after adoption of the Act on Freedom of Information, the Georgian Young Lawyrs' Association peridocally publishes research about the state of freedom information in Georgia. The current research is the fifth research.

Within the scope of the present research, persons in interest will have an opportunity to get familiar with all important judgments that have been rendered in a period from 1 January 2008 till 1 September 2010. We also hope that the information and materials of this research will help interested persons to develop and exploit effective ways of protection of freedom of information.

1.1. Objective and methodology of the research

The present research aims at monitoring the judgments of Georgian courts. It is a continuation of the previsous researches as the Georgian Young Lawyers' Association monitors every judgment of the court relating to the freedom of information.

Within this research, we studied all judgments of the Constitutional Court of Georgia with respect to the freedom of information rendered untill 2011 and the judgments rendered by the general courts of Georgia (here we mean any act rendered by the court) rendered between the first of January 2008 and the first of September 2010 relating to the freedom of information.

The present research aimed at detrmining the following: (1) what is the statistical data with regard to judgments relating to freedom of information rendered by the courts; (2) What is the standard applied by the Constitutional Court of Georgia in proceedings relating to the freedom of information and how does it interrelate with the standards applied by the general courts of Georgia; (3) What is the standard for freedom of information applied by the general courts of Georgia and how the provisions of law on freedom of onformation are interpreted in judgements of the general courts of Georgia.

1.2. Obstacles on the way of obtaining materials for the present research

In order to achieve the objectives listed above, we, in the first place, requested all judgments rendered during the period set by this research. When processing the replies, often we faced the need to file additional applications, requests, claims or administrative claims to the general courts that have released the documents to us in violation of law, or completely rejected to release the documents. The Georgian

Young Lawyers' Association filed law suits against the Appellate Court of Kutaisi and the Appellate Court of Batumi, because these courts released their judgments to us upon barring both sides.

Based om the ligic of both public institutions, information about the parties to a dispute is a personal data, and it should not be released to third parties without either a consent of the parties or an appropriate court judgment.

The Georgian Young Lawyers' Asscoaition believes that a public institution can not possess personal data (in disputes over freedom of information one of the parties is always a public institution), since personal data is nothing other than a component of a right to privacy, and the state can not be a subject of this right.

Kutaisi City Court decided in favor of the Georgian Young Lawyers' Association with regard to its law suit of 4 February 2011 against Kutaisi Appellate Court.

1.3. Main results of the present research

As we mentioned in the introduction, the present research aims at uncovering the tendcies of last years reflected in judgments of Georgian general courts and the Georgian Constitutional Court. In the research we paid a particular attention to those court judgments which will help the reader to better understand the standard nowadays applied by Georgian courts in discputes relating to freedom of information.

The research uncovered the following tendencies:

1.3.1. The standard of the Constitutional Court

The Georgian Constitution sets high standards and provides strong guarantees for freedom of information. The standards for regulation of protection of freedom of information are spread in Articles 24, 41, and 37 of the Georgian Constitution. The Constitutional Court clarified the importance of these articles in its jurisprudence.

We are interested in Article 41 of the Georgian Constitution, since this Article provides access to information stored in a public agency.

The scope of protection of Article 41 of the Georgian Constitution:

- Information relating to a person requesting the information;
- Official documents not relating to a person requesting the information;
- Information containing state, commercial or professional secret;
- Data recorded in official records that relate to personal issues.

The Constitution of Georgia determines three kinds of undisclosed information: personal, commercial and state secret.

As the analysis of jurisprudence of the Constitutional Court of Georgia demonstrated, when the right to freedom of information conlficts with any other right, it must be determined in each individual case, based on a propotionality test, which right prevails.

1.3.2. General courts of Georgia

Apart from the Constitution of Georgia, issues relating to freedom of information are also regulated by chapter 3 of the General Administrative Code of Georgia, the Georgian Law on State Secret, the Tax Code of Georgia, and other normative or sub-normative acts. Practical implementation of these laws is significantly influenced by the case law of Georgian courts. The research revealed the following issues:

1.3.2.1. Pesonal Data

During the last few years a competition between personal data and freedom of information has become outstanding in a jurisprudence of Georgian courts.

The court defined the personal data and included in it materials of corporate registration of legal entities, as well as so called December 10 Reports due to the President of Georgia and the Parliament of Georgia according to Article 49 of the General Administrative Code of Georgia, as well as home address, acts of pardoning and a number of people escaped from residential institutions and the dates of their escape. The court also decided that the list of employees of public agencies is an open information, but the information relating to their salaries, bonuses and business travel expenditures, according to the case law, is a personal secret and thus is an undisclosed public information. For having access to the undisclosed information it is necessary to either have a consent of the person to whom the information relates to, or demonstrate a specific public interest that prevails the person's interest to keep his/her personal information secret.

1.3.2.2. Commercial secret

The court established two standards with respect to a commercial secret:

Based on the first, requirements relating to a commercial secret apply even when the state is at the other side of the agreement, and this circumstance is not a ground for automatically making the information public. Even in this case, in order to obtain the commercial secret, similarly to any other undisclosed information, a proportionality test must be used. Based on the second standard, the procedure for recognizing information as commercial secret determined by court is no less important.

1.3.2.3. State Secret

In order to recognize information as a state secret, the following is necessary: the information content wise must be a state secret and must be a subject to protection by a procedure provided by law. Sadly, Georgian courts do not investigate these circumstances and often in court cases the evidence is missing whether the information is really recognized as a state secret.

1.3.2.4. „Creation" of public information

One more outstanding issue is a "creation" of public information by public institutions. The court judgments demonstrate that an administrative body relies only on data in its

possession when collecting public information. It does not take responsibility to take proactive measures to help a specific person requesting an information and to use tools available to it that implies forwarding a request for information to an adequate respondent.

Based on the definition of the Supreme Court of Georgia, if a plaintiff demonstrates that a specific public institution has a general obligation to possess the requested information, in such a case, even if the information does not exist, the specific public institution is required to create the information and release it to the requesting person. But if the plaintiff can not prove such an obligation of the public institution, the law suit will not be satisfied.

With respect to a volume of information, according to an approach taken by the general courts of Georgia, the volume of information cannot be a ground for rejection of release of the information.

1.3.2.5. Terms

One of the wide spread problems is a violation of term for release of public information. The case of genarl courts of Georgia demonstrates that mere violation of a term for release of public information (unless it caused any material or moral damage) cannot serve as a ground for establishing a violation of a right itself.

1.3.2.6. Compensation of damages

According to practice, a court should not automatically award compensation for violation of standards of freedom of information. In order to be entitled to compensation of damages when refused access to information, a plaintiff must pass a test of having undergone certain moral suffering, which casts doubt on the principle of state's automatic liability upon violation of human rights.

1.3.2.7. Burden of proof

In discputes over freedom of information the general courts distribute a burden of proof equally, allocating its portion to plaintiffs (in disputes over freedom of information a public institution is always a defendant). Such a blanket judgment on this issue, instead of distributing a burden of proof though execising a specific test in each particular case, increases the liklehood that the court's approach is in conflict with standards of rule of law.

1.3.2.8. Interpretation of legal norms

It is important to mention that the Georgian Constitutional Court and Georgian general courts differently interpret the issue of application of Chapter 3 of the Georgian General Administrative Code relating to freedom of information to some of the Constitutional bodies and to certain duties of these bodies.

Georgian general courts apply unconstitutional standards by limiting the scope of application of Chapter 3 of the Georgian General Administrative Code and not applying

requirements of freedom of information to all aspects of a relationship, but instead, applying them to only to the part that derives from exercising an administrative duty, which leads to a violation of rights caused by superficial and wrong reading of law.

As the present research demonstrated, Georgian general courts recognise the importance of freedom of information in a democratic society, however, it often turns out to be difficult to put this principle in a real context and implement it. As a result, the existing case law of the Gergian general courts, in some cases, raises questions with respect to a correct interpretation of human rights.

Finally, the Georgian Young Lawyers' Association thanks the general courts of Georgia which released their acts to GYLA.

The present research is published within a scope of a project – "Transparency and Accountability", which is implemented with the financial support of the "Open Society Institute" Foundation.

2. Statistic

Following courts examined cases relating to freedom of information:[1]

Tbilisi City Court – 12 judgments and 18 decisions

Batumi City Court – 2 judgments and 1 decision

Rustavi City Court – 1 judgment

Gori District Court – 2 decisions

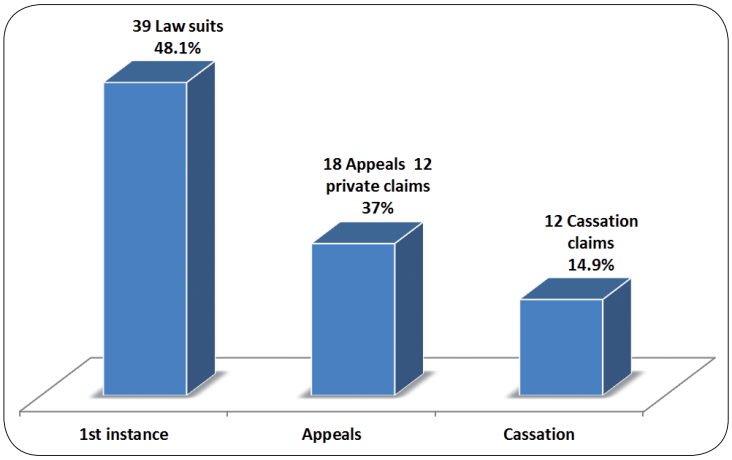
Signagi District Court – 1 decision

Telavi District Court – 1 judgment

Mtskheta District Court – 1 decision

2.1. General Data

The general courts of Georgia in their all three instances heared 81 cases[2], 39 out fo these cases were based on a law suit, 18 – based on appeals, 12 – based on private complaint,[3] and12 were based on cassation complaint. In the court of first instance 3 cases were decided fully in favor of the plaintiff (3.7%), with none in appellate or cassation courts.

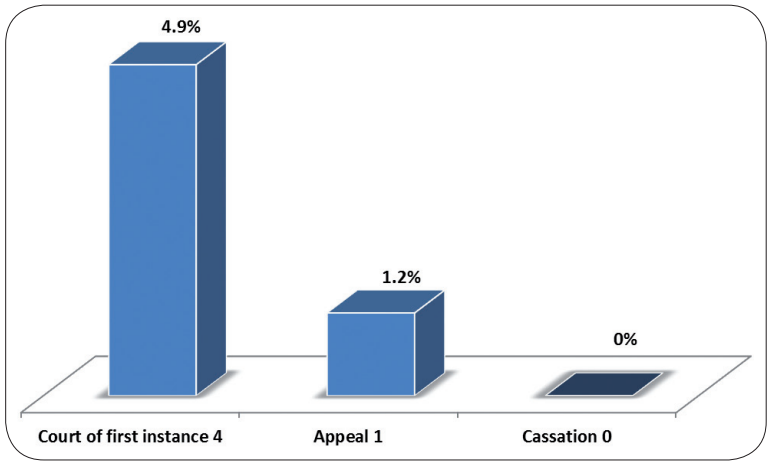


[1] The present statistics relies on information requested by the Georgian Young Lawyers' Association from general courts of Georgia.

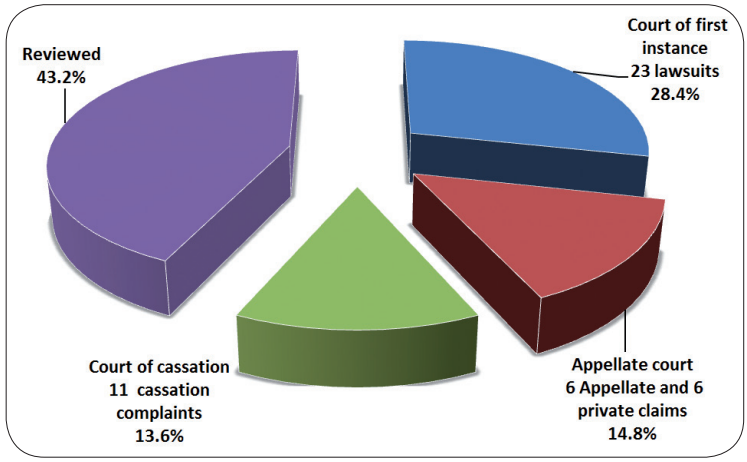
[2] Among these, in two cases both a Georgian citizen and an administrative agency applied to a court;

[3] Besides, there was a private complaint, that was appealed only with regard to state levy;

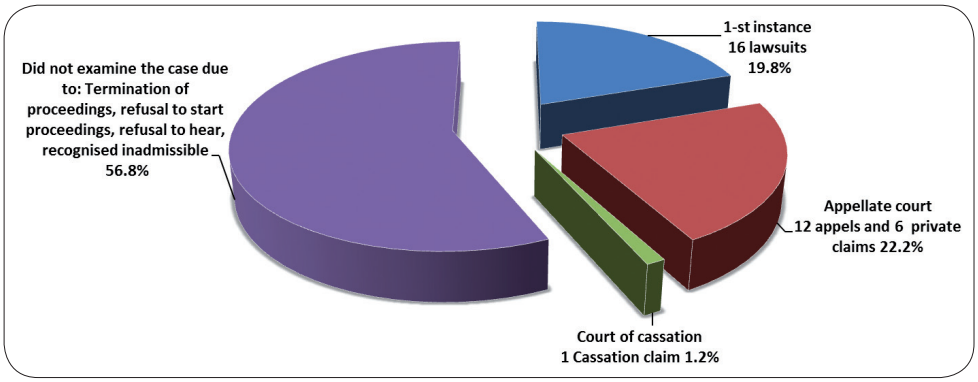
In the court of first instance 4 cases have been decided in favor of a citizen, 1 case in appeals court, and none in the court of cassation.



The Georgian General Courts substantially reviewed 35 cases, and did not review substantially 46 cases. 26 law suits among case not reviewed were in a court of first instance, 12 law suits – in court of second instance (6 appeals and 6 private complaints), and 11 cassation complains were in cassation court.

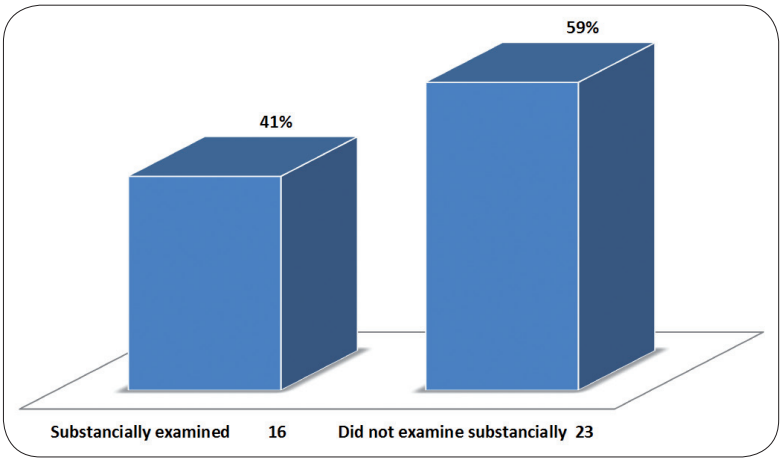


Out of 35 cases in general courts the court of first instance reviewed 16 law suits, the court of second instance reviewed 18 (12 appeals and 6 Private complaints), 1 cassation complaint –n the cassation court.

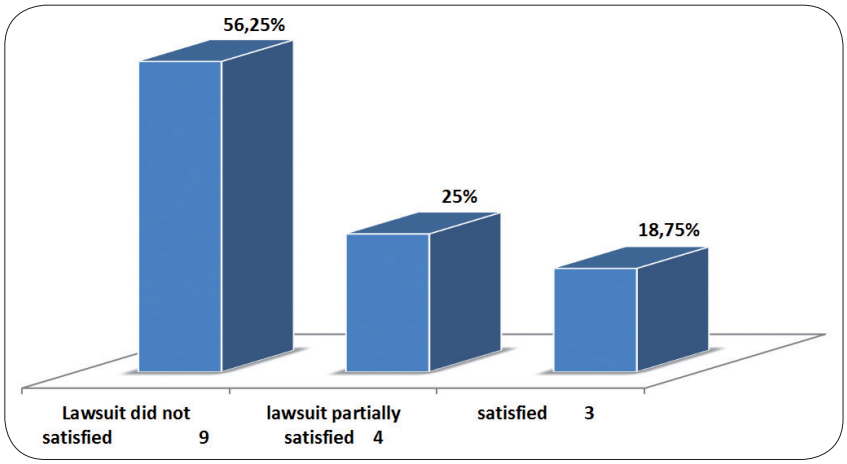


2.2. First Instance

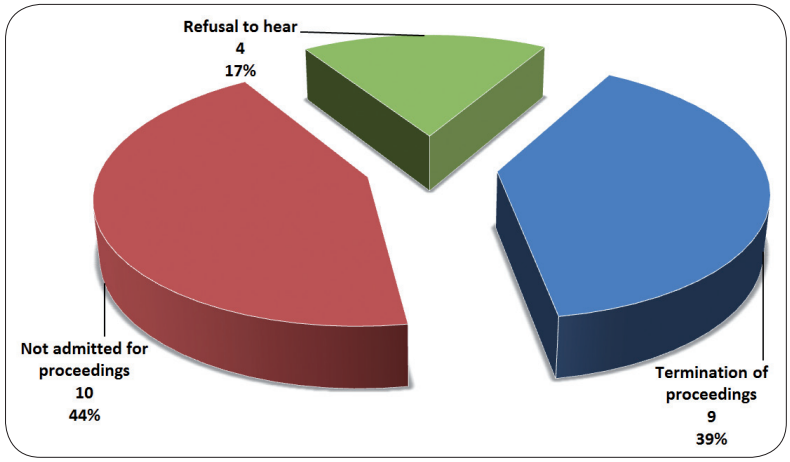
Total number of law suits filed in the first instance court was 39. The court substancially reviewed 16 law suits, and did not substancially review 23 law suits.



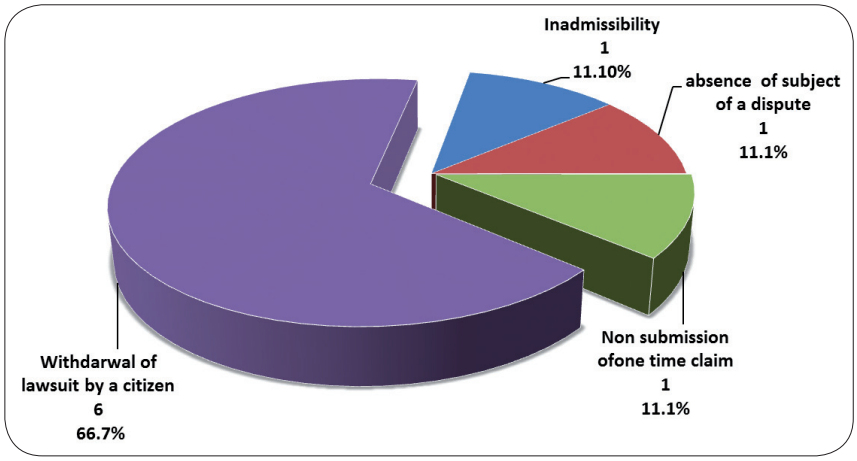
Among cases substantially reviewed in a court of first instance, citizens' law suits have not been satisfied in 9 cases, were partially satisfied in 4 cases, and fully satisfied in 3 cases.



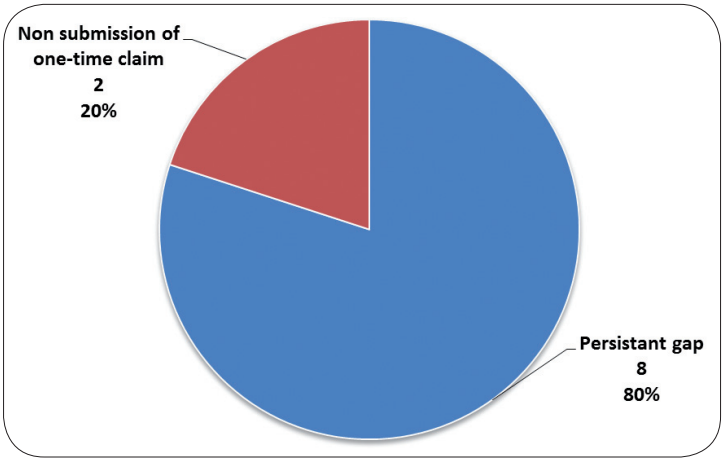
The court of first instance disimissed the law suit in 10 cases, left the case without review in 4 cases, and terminated rpoceedings in 9 cases.



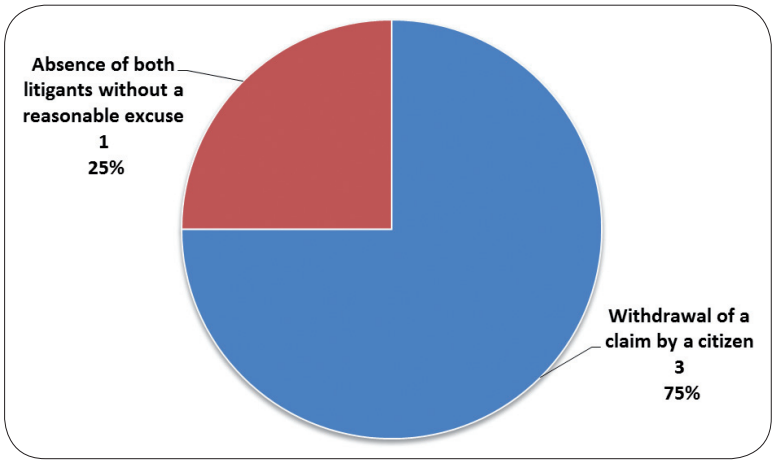
In the court of first instance the following are referred to as grounds for termination of court proceedings: Withdrawal of law suit by a citizen (6); inadmissibility (1); Non existence of the cause of action, i.e. the matter of the dispute (1); violation of a procedure for one-time appeal (1).



In the court of first instance in 10 cases the court dismissed the law suit, in 8 case out these 10 not filling the gaps was referred to as a ground, and in 2 cases – violation of procedure for one-time appeal.



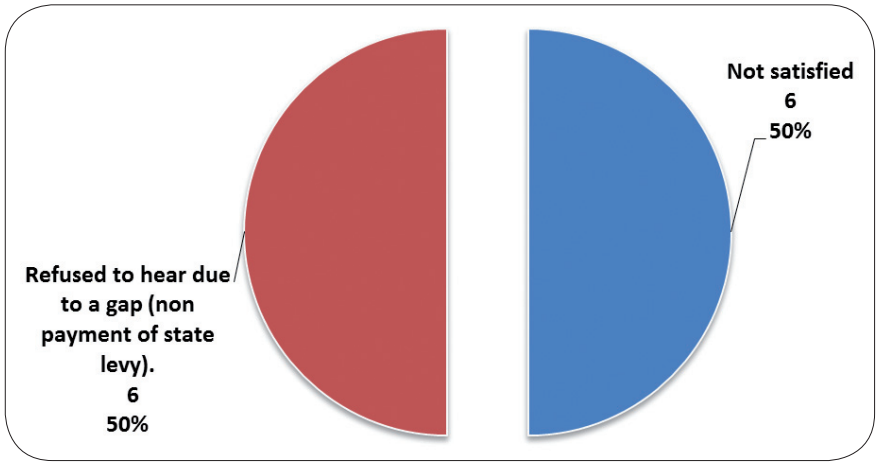
In the court of first instance the following are referred to as grounds for dismissal of cases by the court without litigation: Absence of litigants for no reasonable excuse (1), withdrawal of a law suit by the plaintiff (3).



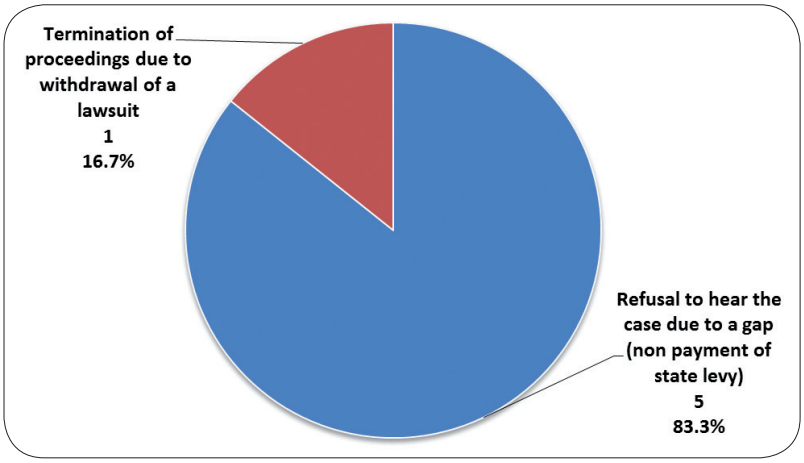
2.3. Appellate court

13 Plaitiffs filed private complaints in the appellate court (first instance). Among them 6 cases were abandoned by the court due to gaps unfilled, and 6 were not satisfied.

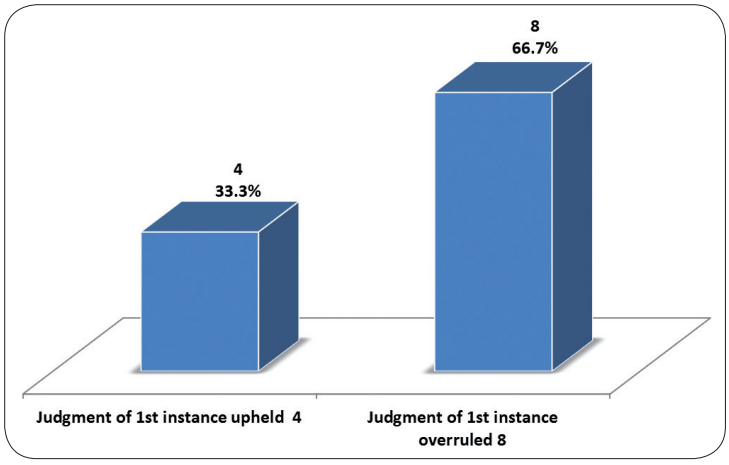
Note: One private complaint was satisfied, however, it was appealed only with respect to state levy and therefore it is not included in the statistics.



Out of 6 dismissed appellate complaints: in 1 case the appellate court referred to a termination of the case due to withdrawal of the law suit as a ground for dismissal, and in 5 cases the ground for dismissal was a gap, in particular, nonpayment of state levy.

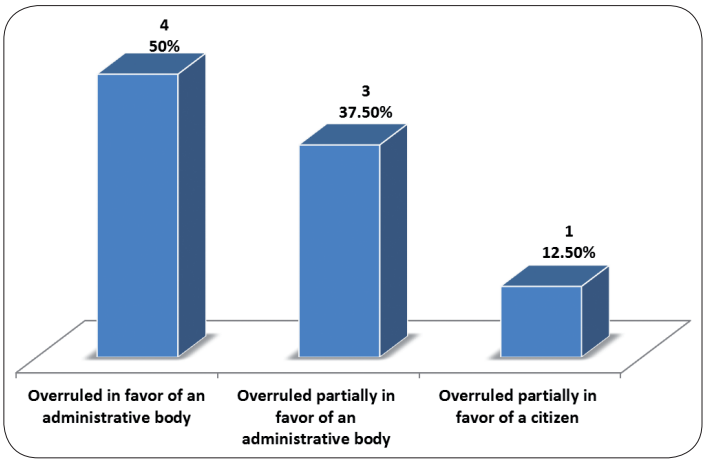


The Appellate court upheld the judgments of the court of first instance in 4 cases, and overruled it in 8 cases.

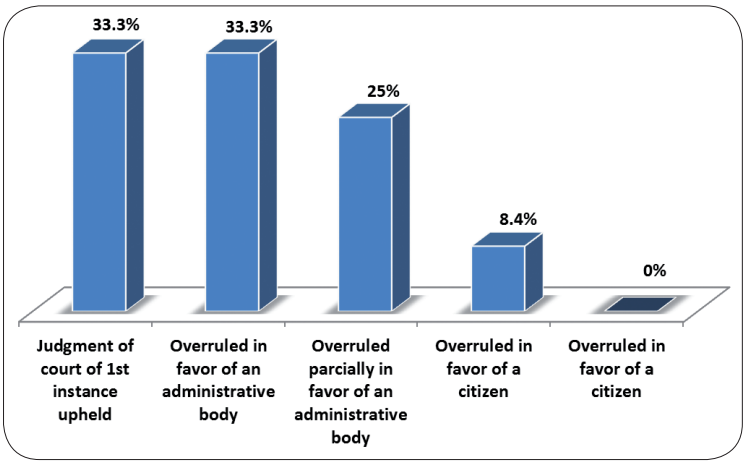


18 appeals were filed in the court of second instance. In 12 case of of these 18 the plaitiffs of the first instance were the authors of appealls,and in 8 cases it was an administrative body. In 2 cases both litigants filed the compliants. The court rendered 5 judgments and 13 decisions.

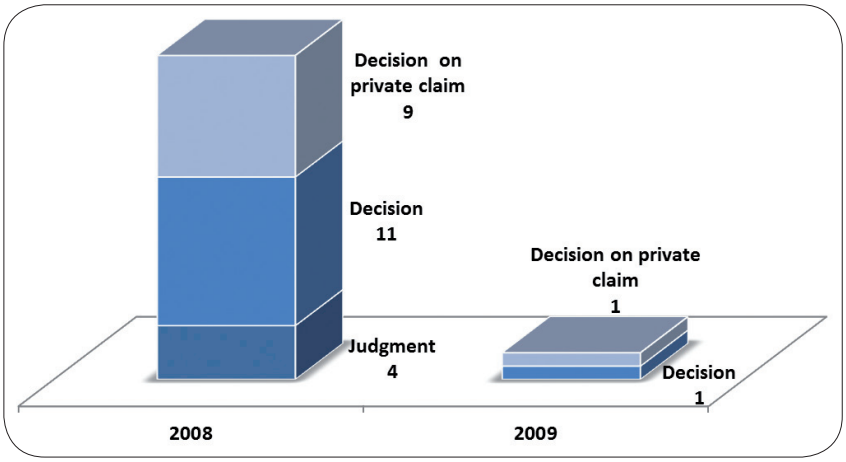
The Appellate court overruled the judgment of the court of first instance in favor of administrative body in 4 cases, partially upheld 3 complaints of administrative bodies, and partially overruled a judgment in favor of a citizen in 1 case.



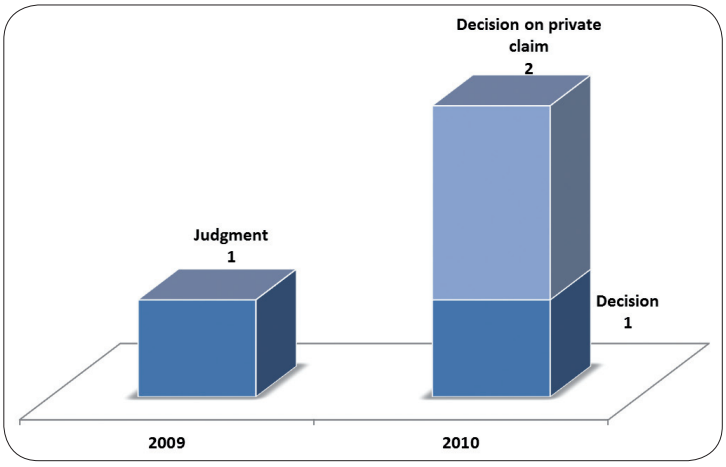
The Appellate court overruled the judgment of the court of first instance in favor of administrative body in 4 cases, partially upheld 3 complaints of administrative bodies, and partially overruled a judgment in favor of a citizen in 1 case. The appellate court has not overruled the judgment of the court first instance completely in favor f a citizen in any case at all.



Among the cases heard in 2008, Tbilisi Appellate Court rendered 9 decisions over private complaints, 11 decisions, 4 judgments, and in 2009 it rendered 1 decision on private complaint and 1 judgment.[4]



Kutaisi Appellate Court rendered only 1 judgment in 2009, and in 2010 it rendered 2 decisions on private claim and 1 judgment.[5]

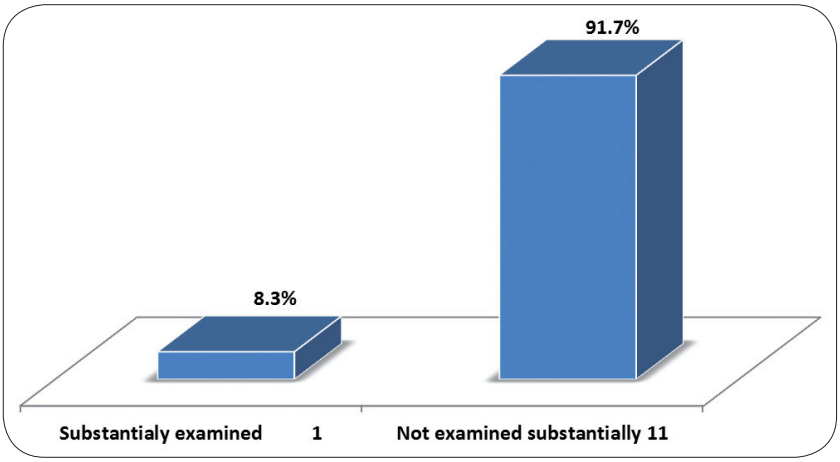


[4] In 2010 no complaint has been filed in Tbilisi Appellate Court.

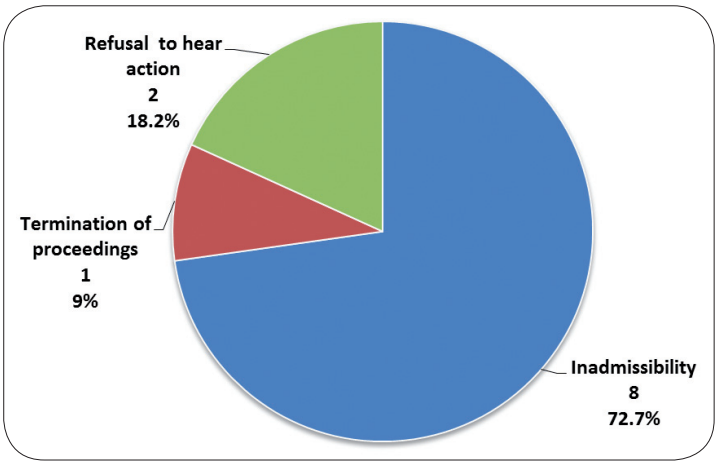
[5] In 2008, no complaint was filed in Kutaisi Appellate Court.

2.4. Court of cassation

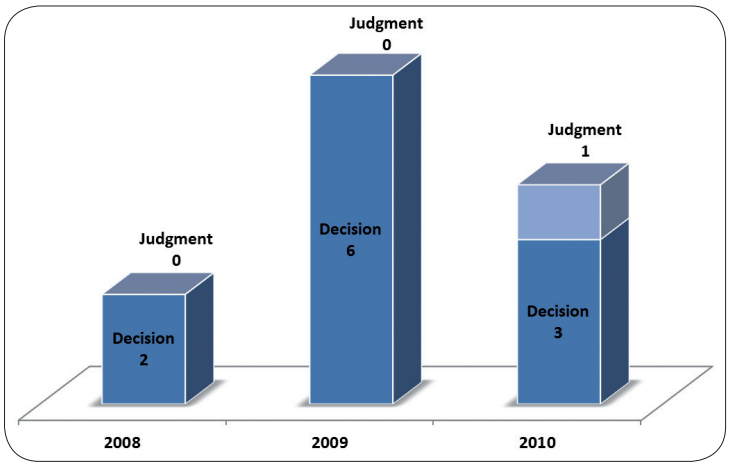
The Supreme Court filed 12 complaints of cassation. All complaints were intiated by a private person, an administrative body did not file any complaont of cassation. The courtyreviewed only one case in its substance and did not uplhold the claim.



The court of cassation dismissed 2 cases without litigation (due to nonpayment of state levy and due to a gap), terminated proceedings in a case (termination upon a citizen's application), and declared 8 cases inadmissible.



The court of cassation rendered 2 decisions in 2008, 6 – in 2009, and 1 judgment and 3 decisions in 2010.



I. FREEDOM OF INFORMATION IN GEORGIA (CASE LAW OF THE CONSTITUTIONAL COURT)

1. Introduction

Rules on freedom of information are spread out in a few norms of the Georgian Constitution. According to the paragraph 1 of Article 24 of the Georgian Constitution, "Everyone has the right to freely receive and impart information, [...]". Article 41 of the Constitution reads as follows: "Every citizen of Georgia shall have the right to become acquainted, in accordance with a procedure prescribed by law, with the information about him/her stored in state institutions as well as official documents existing there unless they contain state, professional or commercial secret"(1st Paragraph). Paragraph 5 of Article 37 provides that: "A person shall have the right to receive a complete, objective and timely information as to a state of his/her working and living environment."

Case law of Georgian Constitutional Court relating to freedom of information (this research discusses all cases relating to freedom of information heard by the Constitutional Court since its establishment)is not very broad (three judgments have been rendered with regard to Article 24, two judgments with regard to Article 41 and no judgment at all has been taken with regard to Article 37). Nevertheless, these judgments are the main source for exploring and establishing the standards of the Constitutional Court case law for protection of freedom of information.

2. Importance of freedom of information

Discussing the importance of freedom of information in a general context may be redundant, but within a new democracy, while old Soviet totalitarian institutional memory is still fresh, in the absence of a culture of open interaction of the government with its people and absence of proactive information policy within public governance, defining the value of freedom of information cannot be considered as anachronism.

Freedom of information is a powerful tool in the hands of a state willing to build trust in its electorate, it is also a powerful tool for a society for exercising control over fairness, legitimacy and effectiveness of its government. For these very reasons, the Constitution of Georgia recognizes freedom of information as its integral part and as one of the building blocks of democracy.

,,[…] In a democratic state the Constitution [...] aims at insuring free exchange of information [...] in a democratic society[...]."[6] Hence, by making the freedom of information a right protected by the Constitution and making its protection a constitutional category, the Constitutional Court awarded a very high status to the freedom of information. The Constitutional Court subsequently linked a few times freedom of information to the goal of democracy, for instance in a case of "Maia Natadze and Others V the Parliament of Georgia " the Constitutional Court said that the freedom of information is linked to the goal of democracy,[…] because a democratic society

[6] The Judgment N2/2-389 dated 26 October 2007 of a Second Chamber of the Georgian Constitutional Court: A Citizen Maia Antadze and Others V the Parliament of Georgia and the President of Georgia, II, Section 16.

cannot exist and the Constitutional legal order cannot survive in the absence of free access to information[...]."[7]

In the same case the Constitutional Court one more time stressed the importance of freedom of information and provided an exhaustive list of benefits that freedom of information brings to the society when it is fully realized: ,,The Constitution of Georgia awards a special importance to the freedom of information and pays a lot of attention to it[...]; freedom of thoughts and free exchange of views and ideas of life importance peculiar to a free society cannot exist without freedom of information. In order to formulate thoughts, views and ideas, once needs to obtain information, and free flow of information insures the delivery of the thoughts, views and ideas to the addressee. Apart from social importance, freedom of information bears a great importance for personal and intellectual development of individuals".[8]

Obviously, the Constitutional Court accords a great importance to freedom of information due to its constitutional legal weight. The Court provides that the freedom of information is a manifestation of democracy of the state, and this is manifested by constant open flow of information, open access to information and with a full public participation in this process.

3. Protected area

As mentioned above, different aspects of freedom of information are regulated by three different norms of the Georgian Constitution. Each of these norms regulate a specific area, so that none of them overlap or interfere with each other.

3.1. Interrelation of Constitutional norms

3.1.1. Receipt and sharing of information through private sources (Article 24 of the Georgian Constitution).

Before getting to the main point of the discussion, we must define what is a "source of information". It is an information defined by the place of its storage or its origin, in particular, it is an information stored in non state sources and the information created not by the state, but by a private party. As an example, it can be information obtained and possessed by information agencies or information obtained by non commercial research institutions, etc.

Article 24 protects specifically this type of information ("stored in private sources"). On one hand, the Georgian Constitution provides a relatively lower standard for protection of this type of information compared to the information stored in public institutions, but it does not mean that the first is least important. On the other hand, the information protected by this Article serves a very important function as it provides a limit for the state, relating to the content as well as the procedure, for release of the information.

[7] Same: The Judgment N2/2-389 dated 26 October 2007.

[8] The judgment of the Second Chamber of the Constitutional Court of Georgia N2/3/406,408 dated 30 October 2008: The Ombudsmen of Georgia and the Georgian Young Lawyers' Association V the Parliament of Georgia, II, Section 10.

The first case relating to freedom of information that the Constitutional Court processed was a case of "the Georgian Young Lawyers' Association and the citizen Rusudan Tabatadze V the Parliament of Georgia."[9] Although in this case the Constitutional Court did not draw a firm line between Article 24 and Article 41, it did not examine these two articles in the same context either.

In this case the Constitutional Court only said that realization of the right protected by Article 24, in general, depends on active actions of an entitled individual, and the state in this case is only required not to impede the receipt of information by the entitled individual, not to impede the person's freedom of expression, and not to censor mass media.[10]

In a later case "Citizen of Georgia Maia Natadze and others V the Parliament of Georgia and the President of Georgia" the court more clearly defined the importance of Article 24 for protection of freedom of information. "Article 24, Paragraph 1 of the Constitution of Georgia protects freedom of information, its free flow and release, and free access to information through widely available sources, through careers of the information, that are useful for accessing and disseminating the information. [...] This is a norm that prohibits installing an "information filter" in a society and in human mind, peculiar to non democratic regimes."[11] By this determination the Constitutional Court specified that this norm protects ways of access to information stored in private sources and release of this information.

Based on the above, the Constitutional Court defines that Article 24 provided protection to the right of a person to access information from private sources, and to share and disseminate the information by lawful means available to him/her. In this case the state is required not to impede the person to enjoy his/her right by creating any gross disproportional barriers. In other words, the state is prohibited from regulating the information market, except for in cases and by means defined by the Constitution.

3.1.2. Access to information in public institutions (Article 41 of the Georgian Constitution).

Article 24 and Article 41 of the Georgian Constitution are different in terms of the status of a place where information is stored. In other words, when establishing the areas of regulation for each of these articles attention should be paid to a space where the information is stored – in public institutions or in private space.

The Constitutional Court determined constitutional limits of Article 41 in its case "The Public Defender of Georgia and the Georgian Young Lawyers' Association V the Parliament of Georgia", where it said that "Unlike Article 24 of the Georgian Constitution, Article 41 of the Georgian Constitution does not regulate obtaining information from publically and widely available sources. Article 41 of the Georgian Constitution focuses

[9] The Judgment of the Second Chamber of the Georgian Constitutional Court N 2/3/364 dated 14 July 2006, Georgian Young Lawyers' Association and the Citizen Rusudan Tabatadze V the Parliament of Georgia.

[10] Same, The Judgment N 2/3/364 dated 14 July 2006.

[11] The Judgment of the Constitutional Court of Georgia N 2/2-389 dated 28 October 2007: II.14; also: see the Judgment N2/3/406,408 dated 30 October 2008: II. Section 11.

on information stored in state institutions and official records."[12] The Constitutional Court also said that the legal framework for access of this sort of information is of course different from a legal framework for access to information available from publically available sources."[13] It means that bases for their constitutional-legal regulation and for their limitations are different, and we elaborate on this below.

Finally we can conclude that Article 41 regulates access to information stored in state public institutions, unlike Article 24, thus these two different types of information protected by these two articles are subject to different legal regimes.

3.1.3. Right of access to information about the environment (Article 37 of the Georgian Constitution)

Article 37, Paragraph 5 of the Georgian Constitution protects a person's right to receive information about the environment. This article can be used equally effectively as a means of receiving information from public as well as private persons. This article requests the state or issue an information about the environment possessed by it and take positive actions in cases when a public institution refuses a person the information about the environment possessed by this public institution.

3.2. Scope of regulation

3.2.1. Freedom of information as a part of a freedom of expression (Article 24 of the Georgian Constitution)

Article 24 has a broad scope of protection. We are not going to discuss its every aspect in this research, but we will only discuss its part that relates to freedom of information. However, in order to see the degree of importance the Constitutional Court of Georgia attaches to the freedom of information with regard to this particular article, we have to define it at least in general terms, as well as classify it.

Based on the case law, Article 24 contains 3 rights, and these are as follows:

- The Right of each person to freely access information/ideas and disseminate them;
- The right of each person to have an opinion;
- The right of media to be free of censorship[14].

We are interested in the right of free access to information and the freedom to disseminate it, as protected by this article[15].

The right guaranteed and protected by Article 24 can be limited only in cases provided in Paragraph 4 of the same Article[16]. But a question of "how justified it is for the state to interfere in free expression of an opinion in each specific case", remains to be an-

[12] Same: The Judgment N2/3/406,408 dated 30 October 2008, II. Section 11.

[13] Same: The Judgment N2/3/406,408 dated 30 October 2008, II. Section 11.

[14] Compare: The Judgment N2/3/364 dated 14 July 2006.

[15] Compare: The Judgment of the Constitutional Court of Georgia N2/2/359 dated 6 June 2006, Georgian Young Lawyers' Association V the Parliament of Georgia, Section 1.

[16] Compare: The Judgment N2/3/364 dated 14 July 2006; also compare: The Judgment N2/2/359 of 6 June 2006, Section 4.

swered.[17] It means that in order to determine whether limitation by the state of the right guaranteed by this Article complies with the Constitutional standard or not, we should apply, on one hand, the test of proportionality, and on the other hand the social context within which the state undertakes the above mentioned limitation.

As we see, Article 24 of the Georgian Constitution provides quite wide protection to the freedom of information and at the same time establishes specific basis for its limitation.

3.2.2. The right of a person to access information stored in public institutions (Article 41 of the Georgian Constitution).

Article 41 of the Georgian Constitution protects access to information in official (i.e. public or state) sources. According to its provision, access to information is divided into two groups based on subjects involved in obtaining the information and the sort of information sought for. These two groups are as follows:

1. The right of a person to have access to information about himself/herself stored in public institutions;
2. The right of a person to have access to official documents in custody of public/governmental institutions.

Information that can be requested from the governmental institutions is divided into a few subgroups. This division is based on the approach of the Constitutional Court of Georgia.[18] This subgroups mainly differ by the degree of access to information within each one.

1. Information relating to the person requesting the information.

This information, according to Paragraph 1 of Article 41 of the Georgian Constitution, must be given to a person in a way established by law without impediment.

2. Official documents that are not related to the person requesting them.

This type of information implies the information in a custody of public institutions. The present standard applies when a person is requesting from governmental institutions the information that is not specifically relating to the requesting person. A person can receive this type of information in a way and manner established by law. The Constitution does not provide for a specific rule and leaves it to the discretion of law, however, Article 41 establishes a standard that should guide the legislator when developing and offering such rule to its citizens.

3. Information containing state, commercial or professional secret

This is the information with the least degree of access and neither individuals nor legal entities have access to it. However, Paragraph 1 of Article 41 does not consider such information as secret by default. The question of to what degree does any given information represent state, commercial and thus, professional secret, must be answered through initial assessment. In order to classify the information as secret, a certain

[17] Same: The Judgment N2/3/364 dated 14 July 2006;

[18] Same: The Judgment N2/3/406,408 dated 30 October 2008; II. Section 12.

procedure must be followed, which are defined by Georgian Law on State Secret and by the General Administrative Code of Georgia.

The content of the professional secret must also be defined. The text of the Georgian Constitution as well as the General Administrative Code of Georgia separate this information from other types of information. The main question that arises in this context is the following: Is the professional secret a significantly separate type of information, or is it not similar by its content to the other types of information discussed above? This question should probably have a straightforward answer. Specifically, it cannot be a significantly different type of information, but in this case, the substantial issue is, that the professional information is of a parasite nature, since what is a personal information, must be at the same time either state, commercial, or personal information. The professional information is one of these types of information, but only after it has become known to a particular person during execution by that person's of his/her professional duties.

3.2.3. Data stored in official records relating to private issues

This information is a secret by default and the Georgian Constitution defines the procedure and basis for awarding it a degree of secret. The degree of secret can be removed with a consent of a person to whom this information related to. Other cases of access to this information must be established by law and must be for safeguarding the necessary state security or public safety order, as well of health, and the rights and freedoms of others.

As we see, the above mentioned groups of information and the frameworks of their constitutional legal protection are different. It should be determined to which group does the information containing tax secret belong to. We should determine this by looking at general characteristics of this information.

As above discussion demonstrates, Article 41 of the Georgian Constitution has a quite wide scope of protection, since it insures not only the access to information in public institutions' possession, but it also classifies the information and applies different standards of protection to each of them. Article 41 of the Georgian Constitution separates the information that relates to the person requesting the information; the official documents that are not related to the person requesting the information; the information that contains state, commercial or professional secret and the data registered in official records that relate to private issues.

3.2.4. The positive and the negative obligation of the state (Article 41 of the Georgian Constitution).

In order to fully enjoy each freedom it is important that the state adheres to its positive as well as negative obligations, in order to insure that the usage of their rights and freedoms by its citizens does not have a fragmented nature and does not negate the main purpose of each freedom. The Constitutional Court of Georgia said the following in one of its cases:

,, Article 41 considers [...] the official information in possession of state institutions as an open information and grants each individual as well as legal entity with access to

this information, access to information stored in state institutions is an important condition for a person's informational self determination and for person's free development. [...]The Georgian Constitution guarantees the freedom of information [...] and imposes on the state not only the negative obligation not to impede the person's access to information, but also imposes a positive obligation – to release the information in its possession. The Constitution of Georgia restricts this right only in cases when the requested information contains state, professional or commercial secret."[19] However, in this case, similar to cases envisaged by Article 24, "it is practically at the Court's discretion to assess and decide the degree to which the right of access to information requires the state to release any given information ."[20]

Finally, we can conclude that the Georgian Constitutional Court unequivocally declared in the above case that the freedom of information has both, the positive as well the negative aspect of its protection, and the state is obliged to live up to its constitutional obligation. Naturally, there is no state without obligations, rights always require responsive actions from the state for protection these rights.

3.2.5. Two paragraphs of Article 41 and scope of protection

As we mentioned above, the scope of protection of Article 41 includes only the information stored in official sources. "[...] Article 41, Paragraph 1 focuses on a subject, interested in receiving the information from official sources. This paragraph protects the right of the person to get the information from official records. At the same time, the basis for restriction of this right is also established. Therefore, Article 41, Paragraph 1 of the Georgian Constitution relates to the freedom of information. It can be said that this provision protects a specific case of the freedom of information – the right to receive the information from official sources."[21]

Nevertheless, it does not automatically mean that the interests provided in different parts of this Article are identical. The Constitutional Court of Georgia first discussed this issue in the case of the Public Defender of Georgia and the Georgian Young Lawyers' Association.

"Unlike Paragraph 1 of Article 41 of the Georgian Constitution, the main subject of Paragraph 2 of the same Article is a person, whose private information is stored in official sources. Accordingly, the category protected by this paragraph is a private person, and the protection of privacy and protection of private data. This provision protects the person's substantial right to request from the state protection of information relating to the person's health, financial issues or relating to other private areas, stored in official records of state institutions. This right has its corresponding obligation of the state to ban access to the above mentioned information, except for in cases prescribed by the Georgian Constitution itself."[22] This right is of course not absolute and it can be limited in case of exercising a proportionality test.

[19] Same: The Judgment N2/3/364 dated 14 July 2006;

[20] Same: The Judgment N2/3/364 dated 14 July 2006;

[21] The Judgment of the Second Chamber of the Georgian Constitutional Court N 2/3/406,408 dated 30 October 2008, Georgian Young Lawyers' Association and the Public Defender of Georgia of Georgia V the Parliament of Georgia, II. Section 13.

[22] Same: The Judgment N2/3/406,408: II, Section 14.

3.2.5.1. Subjects (Paragraph 2 of Article 41 of the Georgian Constitution)

In every case it is important to define the subjects of each right, i.e. who enjoys the right on one hand, and, on the other hand, who has an obligation to protect the specific standards established by a specific provision. Since we have already discussed the second issue, we now discuss the persons who enjoy the rights. The Constitutional Court of Georgia defined the scope of protection under Article 41 of the Georgian Constitution with regard to its subjects and provided, that: "[...] Paragraph 2 of Article 41 of the Georgian Constitution equally applies to individuals as well as legal entities with regard to protection of information relating to financial and material details. Official sources register information that relate to individuals as well as to legal entities actions and financial situation and a reasonable expectation exists that this information will not be accessible for third parties."[23]

The Constitutional Court also declared that the right applies to private individuals as well as to legal entities. "[...] Although this provision uses the term "individual (i.e. a human being)", according to Article 45 of the Georgian Constitution, this term implies, by its nature and content, not only physical persons, i.e. individuals, but also legal entities."[24] The Constitutional Court went on and specified and indicated that the legal entity cannot be a subject of each aspect of Paragraph 2 of Article 41, for instance, "health is a benefit that only a living individual can enjoy (A Judgment N2/3/441-II,5). Therefore, Paragraph 2 of Article 41 of the Georgian Constitution does not apply to legal entities with respect to the information relating to health stored in official sources."[25]

Based on a brief elaboration above, we can conclude that the subjects of the above discussed provision are both individuals as well as legal entities, though, in certain cases we should differentiate more specifically, in particular, the information about health cannot relate to legal entities.

3.2.5.2. Freedom of information and right to privacy

In general, it occurs often in the field of rights that different rights collide, i.e. collision of rights occur. Certain rights, due to their nature, are more likely to cause such conflicts. In this respect, taking into account the context of this research, it is important to determine the interrelation between the freedom of information and the right to privacy.

The Constitutional Court of Georgia discussed these two rights and interrelation between the two of them in its case "The The Public Defender of Georgia and Georgian Young Lawyers' Association V the Parliament of Georgia".

Article 41, Paragraph 2 of the Georgian Constitution provides a list of elements of private life. These are information that relate to a person's:

1. Health;

[23] Same: The Judgment N2/3/406,408: II, Section 20.

[24] Same: The Judgment N2/3/406,408: II, Section 18.

[25] Same: The Judgment N2/3/406,408: II, Section 18.

2. Finances;

3. Other private issues.

This list is not obviously exhaustive. In this case of the Public Defender of Georgia and the Georgian Young Lawyers' Association the Constitutional Court had to discuss and define issues relating to finances. The Court said that "it does not imply the information that only relates to money or to monetary affairs and gives us a full or partial picture about the person's financial state. Financial information also implies the data, that directly or indirectly reflect the material state of the person's private details, material basis for his existence or his activities. Protection of this information must be based on an appropriate Constitutional interests, since the personal issues include, apart from non material aspects, material aspects as well".[26] The Court compared the standard for protection of personal information on material issues to that of the personal information on non material issues and indicated that "In this area protection of secrecy of information is no less important and often even more important for a person to whom the information relates to."[27]

When discussing the nature of right to privacy the Constitutional Court mentioned that "the person's interest not to allow the disclosure of information relating to personal issues and to control the flow of such information is one of the most important aspects of the right to privacy".[28] The Constitutional Court also drew a parallel to another Article of the Constitution and said that "Paragraph 2 of Article 41 is connected to Article 20 of the Georgian Constitution, that protects the right to privacy, since it provides the details that belong to the person's private life."[29] The Constitutional Court also discussed the differences and conflicts between these two articles: "In this case it is presumed that the person does not want to disclose the information relating to his/her private life. The state is required to protect the person's privacy until such time when the person him/herself expresses his/her opposite will and approves the disclosure of such information". In this case the main value protected by the Constitution is the person's privacy. This is significantly different from Paragraph 1 of Article 41, establishes a norm for making the information secret upon the person's expression of approval and it serves a different purpose."[30]

The Constitutional Court also established the standard for making the information secret, in particular, it provided: in order to make the information, relating to a specific person, secret, "[...] the information must allow the identification of a tax payer [...]."[31] However, the Court decided that if such identification is possible, the degree of disclosure of this information no longer matters. "the area to which the information relates to is of main importance and not the degree to which the specific data discloses the information about the person.[...]Article 41, Paragraph 2 protects the right of the person not to have information about this person stored in official sources accessible to third parties. Making this information secret, irrespective of results and

[26] Same: The Judgment N2/3/406,408: II, Section 19.

[27] Same: The Judgment N2/3/406,408: II, Section 19.

[28] Same: The Judgment N2/3/406,408: II, Section 15.

[29] Same: The Judgment N2/3/406,408: II, Section 15.

[30] Same: The Judgment N2/3/406,408: II, Section 15.

[31] Same: The Judgment N2/3/406,408: II, Section 26.

damage caused by its disclosure, represents by itself a violation of the Constitutional right of a person and does not call for a deep analysis of ensuing results. [...] disclosure of this information is by itself a damage to a tax payer – the violation of the taxpayer's Constitutional right."[32]

The Constitutional Court, quite interestingly, pointed to the right of the person to have access to an information regarding private details of another person. "The Georgian Constitution does not recognize a right of a person to obtain information from official sources about other person's health, financial state or other private issues. If we admit that the private information can be accessible for protection of Paragraph 2 of Article 41, we will face a paradox – each person would be able to receive private information about other persons [...]. This logically will make Paragraph 2 of Article 41 meaningless, that puts a tabu on the information due of its private nature [...]. Hence, it is wrong to interpret the words "for protection of others' rights and freedoms" in Paragraph 2 of Article 41"so that they imply the protection of the right to access information in official sources. A right of a person cannot be limited by an nonexistent right of the other person. In cases recognized by Paragraph 2 of Article 41 of the Georgian Constitution access to private information bears a secondary meaning in support of protection of other Constitutional rights and freedoms."[33]

Paragraph 2 of Article 41 provides basis for restriction of the right protected by it. Therefore, disclosure of private information is allowed, if "the information registered in official records relating to a person's health, finances, or other private details, should not be accessible to anyone without a consent of the person him/herself, except for where otherwise prescribed by law, for protection of state security, public safety, health, and the rights and freedoms of others."

The Court also elaborated on an interesting topic such as the right to privacy of public officers and companies with state shares. The Constitutional Court decided that "[...]a public officer, equal to any other non public person, has a right to privacy and a right of protection from unauthorised disclosure of his/her private data [...]."[34]

The Court also elaborated on personal details of companies with state shares in it and concluded that "state ownership of or state participation in a company does not remove the legal entity from the scope of Paragraph 2 of Article 41. It is at the legislator's discretion to grant access and determine, in compliance with this Constitutional norm, the degree of access to information relating to finances and other private details of such companies."[35] In the Judgment of the Constitutional Court this note is unclear and here is why: It is understood that guarantees provided by Section 2 of the Georgian Constitution apply to a legal entity where a state has a share, but it is not clear, whether the same standard should apply to legal entities that are 100% state owned. The difference in terms of guarantees for rights is simple. Although in the first case the state participates in management of the company, it is also at least a minor shareholder, a private person, who possesses the right, but since it is impossible to segregate public and private elements of management in legal entities of such management structure, one faces a choice – either completely remove these entities from the scope

[32] Same: The Judgment N2/3/406,408: II, Section 24.

[33] Same: The Judgment N2/3/406,408: II, Section 21.

[34] Same: The Judgment N2/3/406,408: II, Section 41.

[35] Same: The Judgment N2/3/406,408: II, Section 43.

of Section 2 of the Georgian Constitution, or fully apply Section 2 to these entities. In such a case a presumption for the benefit of the human rights should be applied, that provides that in such conflicting situations, the decision should be taken for the benefit of human rights. It is a completely different case when the state owns 100% of the company' shares. In this case the legal entity represents a part of the state and it has no private interests. Therefore, Section 2 protection of the Georgian Constitution should not apply to such legal entities.

As demonstrated by above analysis of the Constitutional Court's case law, right to privacy and the freedom of information are competing rights. It has to be decided on a case by case basis which one takes precedent on the other. This should be done though a proportionality test, that shows in each specific case, what represents the higher value – the protection of a specific person's private information or the public interest to receive this information. In other words, it must be determined which party is more likely to suffer a damage – the public, that can not satisfy its request for information, or the specific person, whom the information relates to.

3.2.5.3. Commercial and state secret

The Constitution recognizes different types of secret information. Apart from private secret, the Georgian Constitution recognizes commercial and state secret. The Constitutional Court discussed both very briefly in its case the Georgian Young Lawyers' Association and the Public Defender of Georgia, providing important definition.

The Constitutional Court of Georgia defined some aspects of the state secret:

- Commercial secret

In this case, the main objective is protection of commercial interests. The person to which the information relates to personally decides on the commercial value of the information in order to intiate classification of this information as secret. It is very much possible that the information classified as a commercial secret does not allow the identification of the person, but its disclosure can still cause a damage to a competitiveness of the person.[36]

- State secret

In this case the state in the face of its institutions initiates the classification of an information as a state secret. The information is classified as a state secret in order to insure protection of crucial state interests in areas of state security, foreign intelligence, rule of law, public order, economy and other strategically important areas. State secret category serves exactly this purpose and not protection of data relating to private information.[37]

In short, the Constitutional Court determined the subjects who classify the information as secret. In case of a commercial secret it is the person himself possessing the secret, while in case of the state secret it is the state. It is remarkable that in both cases the information is classified as secret when its open disclosure is likely to cause a damage. In the first case the damage may be caused to the competitiveness of an entity

[36] Same: The Judgment N2/3/406,408: II, Section 16.

[37] Same: The Judgment N2/3/406,408: II, Section 17.

and in the second case the damage may be caused to state's legitimate interests. At the same time, in case of personal data, the likelihood of a possible damage is not necessary for classifying a private information about a person as a secret.

4. Conclusion

To summarize the above it can be concluded that the Georgian Constitution provides high standards of freedom of information, and its regulating standards are spread among Articles 24, 41 and 37 of the Georgian Constitution. The Constitutional Court of Georgia provided interpretations of the meaning of these articles in its jurisprudence.

We are interested in Article 41 of the Georgian Constitution, since this article provides for protection of access to information stored in public institutions. The scope of protection of Article 41 includes:

- Information about the person requesting the information;
- Official documents, that do not relate to the person requesting the information;
- Information, that contains state, commercial or rpofessional secret;
- Data registered in official records that contain private details.

The Georgian Constitution recognizes three types of confidential information: private, commercial and state secret.

As the Constitutional Courts case law demonstrates, in case of competition between freedom of information and any other right, the judgment on which right prevails in each particular case must be made on a case by case basis by means of conducting a proportionality test.

Although the jurisprudence of the Georgian Constitutional Court is limited, it still provides certain standards by means of which the appropriate provisions of the Constitution can be interpreted. Based on the analysis, The Georgian Constitutional Court sets a higher standard for protection of the freedom of information compared to the general courts, and its case law is scientifically better argued compared to the jurisprudence of general courts.

II. FREEDOM OF INFORMATION IN GEORGIA (JURISPRUDENCE OF GENERAL COURTS OF GEORGIA)[38]

Issues relating to freedom of information are regulated, apart from the Georgian Constitution, by Chapter 3 of the Georgian General Administrative Code, by Georgian Law on State Secret, the Georgian Tax Code, and other legislative and normative acts. Practical implementation of these laws and regulations is greatly defined by jurisprudence of general courts of Georgia. The court is an institution where any person can apply to for protection of their legitimate interests and request the state not to impede realization of their rights.

In this part of this research we discuss and analyze the jurisprudence of general courts of Georgia for the last two years (for the period between first of January 2008 and first of September 2010) with regard to the freedom of information.

1. Freedom of Information versus right to privacy

Without freedom of information a free discussion cannot exist, in a free society freedom of information insures supply of free discussion with appropriate arguments. "The Georgian Constitution [...] imposes on a state not only the negative obligation not to impede the person's right to receive information, but also requires it to take positive actions to release the information possessed by it.[39] Public information is open and accessible by everyone, unless the opposite is established.[40] The right to privacy is one of the major guarantees of personal safety. The right to privacy is a major tool for a person for acting against the total control of the state. When defining the personal data the court referred to the Georgian law on Freedom of Speech and Freedom of Expression, according [...] to which, the information contains personal secret if its secrecy is protected by law, as well as all information and circumstances, with respect to which a person has a reasonable expectation of protection of private life."[41]

As we already mentioned above, the freedom of information and the right to privacy can be considered as competing rights. It is also supported by the expressive nature of the freedom of information, its constant aspiration to openness and often clashes with the privacy area. In each particular case it can be decided based on specific circumstances which right takes prevails.

Georgian general courts have often faced the above challenges. Disputes on these issues are so frequent that we can track the tendency of developing controversial jurisprudence on this subject.

Two controversial approaches have been developed with regard to secrecy of personal data. According to the first approach, the secrecy of personal data is presumed, i.e.

[38] We should mention from the beginning that sources referred to in footnotes for certain cases are incomplete. This is caused by concealing of certain private information by the general courts to insure data protection. However, in some cases the information concealed has nothing to do with private secret. The Georgian Young Lawyers' Association is engaged in court proceedings over such cases.

[39] The judgment of Tbilisi City Court #3/2909-09 dated 28 December 2009 on a case of Ana Shalamberidze V National Agency of Public Registry

[40] The Administrative Chamber of Tbilisi City Court (2).

[41] The judgment of Tbilisi City Court #3/2909-09 dated 28 December 2009;

personal data is confidential and closed, not subject to disclosure, unless the applicant for the information submits a consent of the subject person of the personal data on data disclosure. According to the second approach, personal data is open, unless the data subject person requests its closure for third parties. The Administrative Chamber of Tbilisi Appellate Court in its Judgment #3b/819-08 of 22 September 2008 referred to the judgment of the first instance concerning the second approach (but the appellate court, due to the fact that the plaintiffs withdrew their law suit, was not able to elaborate on appropriateness of the judgment of the first instance). [...] The court believes that in order to receive personal data requested by the plaintiffs a written consent is not necessary and access to it should be granted; [...] the law awards a priority to a subject of personal data to determine which personal data is a personal secret in his/her mind. As a result, upon a respective judgment of an appropriate institution where the data is stored, the personal data, that is classified as a personal secret based on the person's request, goes under a different legal framework, i.e. it is no longer subject to disclosure and access to it is denied. But in the above mentioned case, since the information requested by the plaintiffs was not categorized as a secret, it should not be subject to limitations.[42] However, this case is one of the exceptions. Since the court, as a rule, consents with the first approach, this very approach was adopted by the Georgian Supreme Court in a case with the Georgian Young Lawyers' Association: "The cassation chamber does not agree with the cassation's opinion that with regard to the Act of Pardoning the requirement of Paragraph 2 of Article 37 of the Georgian General Administrative Code can be applied only to those cases if the person has recognized the information, based on Article 27 prima of the same Code, upon his personal declaration, as a personal secret. [...] "According to the Georgian Law on Freedom of Speech and Freedom of Expression, the specific criteria for categorizing the information as personal secret is the requirement of law for its protection, and also the information should contain a personal value, with respect to which the person shall have a reasonable expectation of protection of privacy. Information relating to finances, health, family affairs and assets carry a personal value the country's supreme law, the Constitution of Georgia, requires protection of its secrecy. Therefore, personal secret is the information of a private nature, that is automatically categorized as secret, as well as public information, that is categorized as secret upon a person's judgment. According to Article 27(e) of the Georgian General Administrative Code, personal data is a public information that allows identification of a person. Article 27 prima of the same Code establishes a person's right, except as otherwise provided by law, to decide personally the issue of categorizing the personal data as secret. Collecting personal data by state agencies is only an execution by the agencies of their rights and law strictly defines the scope of the data for each agency. Hence, a part of the personal data about citizens stored in public agencies that are absolutely protected by law belong to the category of personal secret and they can be disclosed only in cases strictly defined by law. The analysis of constitutional provisions in relation with appropriate regulations of the General Administrative Code demonstrates that with regard to protection of person's private data stored in public institutions these norms have a high degree of definition, that generates a legitimate expectation in a person that the his/her personal data stored in public institutions that is automatically categorized as personal secret will be protected against disclosure unless the person personally con-

[42] The Judgment of the Administrative Chamber of Tbilisi Appelate Court #3b/819-08 dated 22 September 2008;

sents or in other cases directly prescribed by law.[43] The court concluded the same in another case, in particular, "According to Paragraph 2 of Article 37 a personal data of a person is confidential and its disclosure is allowed only in cases when an interested person submits a certified consent by notary or a consent certified by an appropriate administrative agency."[44]

As we saw above, there are two different conflicting approaches towards the information containing personal data. The first is that the personal data is confidential and not accessible, until the person requesting the information provides a consent of the person who the personal data belongs to, to disclose the information. The second approach is that the personal data is open until the person to whom the personal relates to, requests it to be confidential and not accessible for third parties. Finally, based on the judgment of the Georgian Supreme Court, the first approach prevails.

1.1. The list of public officials, data on their remuneration, bonuses and business trips

During last few years issue of access to information relating to public officers' remuneration, bonuses and business travels has become very central in the jurisprudence of Georgian courts. During these years the Georgian Young Lawyers' Association has been actively applying to courts trying to access information relating to above listed issues through the court. In this respect the case of Ana Shalamberidze V Legal Entity of Public Law Ilia Chavchavadze University is very important. The case was heard by Tbilisi City Court and it determined in the first place, that "public officials working in state institutions are subject to a general rule of protection of personal data, because these persons do not represent persons defined by a Georgian Law on Conflict of Interest and Corruption in public institutions."[45]

With regard to the main issue of the dispute, the court segregated 1) the list of public officials and 2) their remuneration, bonuses and business travel expenditures.

Same: The Judgment of Tbilisi City Court #3/2909-09 dated 8 December 2009.

1. "The court declared that the request of the plaintiff for the list of public officers is well found and should be satisfied. This information is not an information relating to the person's health, finances and other private issues (the court did not consider these data within the scope of protection of right to privacy).[46]
2. Regarding remuneration, bonuses and business travel expenditures, the Court concluded that these information represents the information about the person's finances, and therefore has a private nature."[47]

[43] The Judgment of the Georgian Supreme Court 's Administrative Chamber #bs-1278-1240(k-08) dated 5 July 2010 on a case: Georgian Young Lawyers' Association V the President of Georgia.

[44] The Judgment of Tbilisi City Court #3/2907-09 dated 8 December 2009 on case: Ana Shalamberidze V Legal Entity of Public Law Ilia Chavchavadze University; see also the same: The judgment of Tbilisi City Court #3/2909-09 dated 28 December 2009.

[45] Same: The Judgment of Tbilisi City Court #3/2907-09 dated 8 December 2009.

[46] Same: The Judgment of Tbilisi City Court #3/2909-09 dated 8 December 2009.

[47] Same: The Judgment of Tbilisi City Court #3/2909-09 dated 8 December 2009.

One more interesting case discussed by Tbilisi City Court is a case of "Ana Shalamberidze V National Agency of Public Registry".

The court first specified the list of subjects of personal data and declared that "information about an administrative body does not represent a private secret [...]".[48]

The court then went on to discuss issues relating to salaries of specific public officials, bonuses, awards and business travel expenditures of each public official and declared that all the above "[...] are personal data about finances of public officials registered in official records of employer public agencies and the administrative bodies are not allowed to disclose this information without a consent of the persons to whom the data relates ."[49]

When discussing the burden of proof, the court established that the person requesting the information has to prove that the request bears a public interest that prevails to an interest of protection of a person's personal data: "the issue of protection of personal data is connected to the right of privacy protected by the Georgian Constitution, as it protects the individual's private, also a human right – to insure a person's free development without a control and supervision of another person. [...] at the moment of requesting the information there was no urgent public need prescribed by law that could serve as a basis for disclosure of this information. At the same time the Plaintiff cannot prove why and how does his/her interest to access the information about an employee's finances prevail the interest of this employee not to have his personal data disclosed without his/her consent. [The Plaintiff] received the information (statistical data) about a total amount of work compensation and business travel expenditures spent from the budget of the public registry, that does not allow the identification of a specific person. Therefore, the legitimate objective of the Plaintiff has been satisfied by the fact of receipt of the above information."[50]

If we summarize the court judgments relating to the above issue, we will reach the following conclusion: List of public officers is an open public information, but the information regarding their salaries, bonuses, awards and expenditures for business travel, is, according to the jurisprudence, a personal secret and thus is a closed public information, and in order to have access to it, it is necessary to provide either a consent of the subject of the information, or it is necessary to demonstrate a public interest that prevails the person's interest to keep his/her personal information secret.

1.2. Document of Act of Pardon as a personal information[51]

There is an overlap between a few issues of right of privacy and the freedom of information. The disputes heard in general courts of Georgia relate to some of those issues, including access to the document of act of pardon.

The court in a case of "the Georgian Young Lawyers' Association V The Administration of The President of Georgia", discussed the following issue: whether the documents of

[48] Same: The Judgment of Tbilisi City Court #3/2909-09 dated 8 December 2009.

[49] Same: The Judgment of Tbilisi City Court #3/2909-09 dated 8 December 2009.

[50] Same: The Judgment of Tbilisi City Court #3/2909-09 dated 8 December 2009.

[51] The same approach is applied in relation to an amnesty – the Judgment of Administrative Chamber of Tbilisi City Court.

act of pardon represent the information protected because of its personal data and decided that it is such type of information.

"Non disclosure of the information is also based on a personal character of the data to be included in this act that are related to private details of the pardoned person's life [...]. The judgment about pardon is based on a proposal of a pardoning commission to pardon a convicted person, that is made though taking into account an opinion of justice and law enforcement bodies and other circumstances. This circumstances also include the motivation of using the pardoning act, that can be an information about person's health, family or any other private information. Hence, the pardoned person has a legitimate expectation that the information reflected in the pardoning act will be protected and not disclosed to third parties, and that the pardoned person will not be required to request protection of this information through filing a personal request requiring categorizing the information as a secret. We should keep in mind that the act of pardoning implies the fact that the person has been convicted, and this fact belongs to a category of specific, sensitive personal data. The personal data that belongs to the category of especially sensitive personal data is segregated by a special legal framework from usual personal data. Processing and disclosure of personal data of this category requires a consent of the person. In this case, it is presumed that the person does not want to disclose this information and the administrative body is required to protect the person's privacy until such time when and if the person him/herself expresses his will to have the information disclosed [...]".[52]

In this case the court took an approach similar to the previous case and qualified documents on pardon as a closed public information not to be disclosed.

1.3. Materials of registration of a legal entity as a private information

The court also qualified as a public information of closed type all copies of documents that served as a precondition and a legal basis for registration of all private commercial and non commercial legal entities of any organizational legal structure registered in a court, "since this information (documents) contains a personal information of founders of these legal entities".[53]

II

1.4. Reports of 10 December

According to Article 49, a public agency, on 10 December of every Year is required to submit a report to the President of Georgia and the Parliament of Georgia. The Court qualified the information in these reports as a public information of closed type. The court argued that this is because "the reports to be submitted contain information about public data base and about collection, storage, and disclosure of personal data by public agencies."[54]

[52] Same: The Judgment of the Supreme Court of Georgia #bs-1278-1240(k)-08 dated 5 July 2010.

[53] The Judgment of the Administrative Chamber of Tbilisi Appeals Court # 3b/1254-07 dated 7 October 2008.

[54] Same: The Judgment # 3b/1254-07 dated 7 October 2008.

1.5. Home address

The court determined that "the person's home address is a type of information that allows the identification of the person and therefore it represents a personal data ."[55]

1.6. The number of persons escaped from residential institutions

The court qualified the number and dates of persons escaped from residential institutions as information containing personal details.

At the court hearing the defendant argued that publicizing these data would "publicize the private secret information of a specific individual and this would allow for identification of this individual, since the personal secret is a kind of information that contains personal data of a specific individual, and in case of escaping from an institution, even if the person is identified afterwards, cannot be qualified as personal data."[56]

The Appellate court stated in the same case that "According to Article 28 of the General Administrative Court, public information is open, except for when the information [...] contains personal secret; It is exactly due to restrictions set by the above mentioned legal provisions that the disclosure of public information was rejected, because in this case the agency would have violated the rights of the person whose indentify would have been revealed through disclosing the public information."[57] However, the court did not specify how would the disclosure of public information by the public agency could have violated the person's right to privacy, where neither the first names, nor the last names, and other means of personal identification would not have been revealed.

As we saw in the above analysis, in the last four cases the court additionally defined the personal data, and included the materials of state registration of legal entities in there, as well as so called Tenth December reports due to the President of Georgia and to the Parliament of Georgia, the home addresses, and the number of people escaped from residential institutions as well the dates of escape.

1.7. The title of the case

From the point of view of access to information request of jurisprudence materials is very problematic in Georgia. However, the Telavi City Court heard a similar case and concluded that the information regarding dates and types of cases when a person was acquitted is an open information.[58]

II

[55] The Judgment of the Administrative Chamber of Tbilisi Appeals Court # 3b/719-07 dated 1 May 2008.

[56] The Judgment of the Administrative Chamber of Kutaisi Appeals Court # 3/b/355-09 dated 29 July 2009.

[57] The same: the Judgment # 3/b/355-09 dated 29 July 2009.

[58] The Judgment of Telavi City Court dated 11 May 2010: Non Governmental Organization Center for Human Rights Kakheti Branch Coordinator Gela Mtivlishvili V Telavi District Court Officer in Charge of disclosure of Public Information.

1.8. Scientific research

According to Article 45 of the General Administrative Code "personal data may be accessible for conducting scientific research but only in a shape and form that excludes the possibility for person's identification". Obviously, a person requesting the information in this form should not face any obstacles in accessing the information since there is no interest to serve as a basis for qualifying this type of information as a secret. However, the court declared that when a person is requesting the information based on the General Administrative Code, he/she must specify the scientific research he/she is conducting for which he/she is requesting the information.[59] This creates an unjustifiable obstacle for materialization of freedom of information.

2. Objective basis for rejection of disclosure of information

Another important topic within the context of freedom of information is the basis for rejection of disclosure of information that are predetermined by objective reality. Public agencies take this approach in a number of cases when the information requested causes administrative expenditures, whether it is financial or human recourses. In the following chapter we analyze each of these cases.

2.1. Creating the information

Freedom of information becomes more critical when it concerns the creation of information by a public institution. In such a case, a citizen is typically requesting an information in a form and shape in which the information does not exist. The main questions that arises in this case is whether a public institution is obliged to give the information to a requesting person in a form requested, or should the public institution release the information in a form it possesses in a given moment.

We can initially discuss a relatively simple issue that concerns a translation of a document. The court's position is clear with respect of the translation of a document, the judgment says: "any information stored in a public institution is a public information. [...] According to Article 38, a public institution should provide access to copies of the public information. In case of request for the information, the public institution is in no circumstances required to create a new document, or translate it etc. The request only relates to search and locating various documents, classification and systematization [...]. "[60] It is also interesting that according to the court judgment, a public institution is required to search, locate, systematize and classify the information, although the spirit of the same judgment is arguable when the court talks about creating a new document. In this case the main argument is that if the public institution is required to create information and in a given moment it does not have this information, a need for creation of the information may arise. The Georgian Supreme Court has an interesting position on this issue.

In one of its judgments the Georgian Supreme Court decided the following: "[...] information about natural disaster of 2006 in Georgia and about an amount of damage caused by it is not in any form a protected, received, processed, created or sent

[59] The Judgment of Administrative Chamber of Tbilisi Appeals Court #3b-2792-06 dated 7 October 2008.

[60] The Judgment of Tbilisi City Court dated 16 July 2009.

information that might have been sent by an analytical group to the Administration of the President of Georgia. The author of a cassation appeal is not able to refer to any legal norm that would require an analytical group within the Administration of the President of Georgia to process the information or to deliver it in a written form. The cassation chamber stresses that in exercising operative connections with supervisor, subordinate and other institutions, a governance institution of any level can, within its own competency, and based on specifics of each particular case, use a way of exchange of information without material documents: verbal definitions, and indication. A public information is an official document (including, but not limited to, a drawing, a market, a plan, a chart, a photo, electronic information, video and audio recording) i.e. the information either stored in a public institution or information received, processed created or sent by a public institution or its public official in connection with executing public duty. Hence, a public information must have a material nature and must be stored in a public institution, and at the same time, a specific public institution should be required to obtain and create the information in such a shape. Therefore, the Administration of the President of Georgia is required, apart from other obligations, to provide informational analytical services to the President of Georgia and is not required by any legal rule to process the information in a written form and store it, and has no ability to disclose the information in a form of a public information".[61] By a logic enforced by the Supreme Court of Georgia, if the plaintiff can prove that a specific public institution has a general obligation to possess the discussed information, in such a case, even if the information does not exist, this specific public institution is required to create the information and release it to the requesting person.

There is one more approach which does not withstand criticism. The issue concerns the publicity and access to an information stored in a registry of public information[62], and the court laid out its approach as follows:

"The Court focuses on Article 35 of the General Administrative Code that requires the public institution to record the information possessed by it in a public registry. The plaintiff was not able to prove the necessity for recording in a public registry of the information required by him/her or for reflecting of it in any other form. Based on the above mention definition of public information, the court, while discussing the issue, will look at the fact that the information [...] requested by the plaintiff does not exist. Therefore, the information does not represent an official document possessed by the defendant available for making a copy and be delivered to a requesting person."[63] By this approach, the interested person can request only the information either recorded in a public registry and not the information stored in a public institution in general, which does not comply with requirements of the Georgian Constitution and makes the openness of a public institutional questionable giving the public institution a great discretion, and imposes a burden of proof with regard to publicity of information not recorded in a public registry on a plaintiff.

We should discuss one more case in this respect, where the court decided that "the request for disclosure of public information must be satisfied only in such cases when it is proven that the requested information is possessed by a public institution, and

[61] The Same: The Judgment of the Supreme Court of Georgia #bs-1278-1240(k-08) dated 5 July 2010.

[62] More specifically on a public registry see a sub-chapter: the Registry of Public Information

[63] The Judgment of Tbilisi City Court (34); On the same issue see the judgment of Tbilisi City Court (30).

the institution has either received the information, processed, created or it has been delivered, or it is related to execution of duties of a public official. [...] The mere fact that the appropriate officials have an obligation to process certain documents does not mean that these officials have only these obligations [...]".[64]

It is very interesting that according to the court judgment, a public institution is required to search, locate, systematize, classify and more over, to create the information, but this is not an unanimous practice. In one case the court determined that:

"Based on the definition of a public information the court will take into account a fact that the information requested by the plaintiff [...from a public institution...] is not possessed by this institution, and therefore the requested information does not represent an official document which are normally stored in an administrative institution and are available for making copies and distribution to interested persons. [...] The court determines that according to the General Administrative Code of Georgia it is the public information that is subject to disclosure, and the public information never has a form of a document. Therefore, the court declares it is without a ground to request [... an administrative body...] to deliver information which it does not possess".[65]

Article 36 of the Georgian General Administrative Code establishes an term of a person responsible for insuring access to public information.

Every public body must have a person on such a position. Such a person is in charge of release of public information. This person makes independent judgment whether to disclose the public information or not. According to the General Administrative Code of Georgia public information is an official document (inter alia, a drawing, a plan, a chart, a photo, electronic information, video and audio recordings) i.e. the information stored in a public institution, or an information received, processed, created or delivered by a public institution or a public official due to execution of such official's official duties. Accordingly, one of the responsibilities of a public institution's official in charge of disclosure of public information is to process the public information and deliver it to a requesting person.

We admit that a public institution may not always have a public information in a form ready to release. In such cases it is often difficult to find a public information that the public institution can disclose. Also, if we base our analysis on a definition of the public information provided by Georgian legislation, it becomes obvious that public information implies processing of information.

Moreover, according to Article 40 of the General Administrative Code of Georgia, a public institution uses up to 10 days for disclosing the information while the information is processed by another public institution. Therefore we conclude that one of the responsibilities of a public institution is to obtain, collect, and process public information from another public institution, and then disclose it.

At the same time, according to Article 35 of the General Administrative Code of Georgia, public information must be recorded in a registry of public information within two days from its receipt, creation, processing or issuance. Therefore, Georgian legislation requires a public institution to process public information and different interpretation does not comply with requirements of Georgian legislation. Hence, public institutions,

[64] The Judgment of Administrative Chamber of Tbilisi Appeals Court #3b/892-07 dated 30 October 2008.

[65] The Judgment of Tbilisi City Court dated 2009, Municipality of Vake-Saburtalo district as a Defendant.

and in particular a public official in each public institution in charge of disclosure of public information is required to review citizens' requests for public information, and take appropriate action, i.e. collect, search, process and deliver public information requested by citizens, since Georgian legislation imposes such duty.

With regard to a statement that a given public institution does not possess public information in such a form ready to deliver, it is against the law. Moreover, as we mentioned above, The General Administrative Code of Georgia does not recognize such a base for rejection of access to public information.[66]

2.2. Disclosure of information of a big volume

One more reason why public institutions may refuse to disclose public information is the volume of such information. Below we discuss a case in which a public institution refused a request for public information on this ground. The court decided in this case that the volume of information may not be a ground for rejection of disclosure of such information.

"The request to access and review the information in its original and to allow each plaintiff to review the information was rejected based on the argument that the information is of a high volume, and that producing copies of this information would disrupt the educational process, thus only one person was granted access to the required information. [...] The court considers that refusing access to public information based on a possibility of disruption of educational process is against the law. [...] Such ground cannot serve as a reason for refusal of access to public information. [...] The court considers it inappropriate to deny any of the plaintiffs individually or together with others access to public information. If each one individually wants to have copies of evidence, each are entitled to receive copies of evidence individually wihtout having to pay individual fee. [...] If a risk of possible damage exists, the administrative body must provide an opportunity to access the requested information under supervision or must provide duly certified copies of the requested information."[67]

In the same case the court once again referred to an important issues by determining that:

"[...] The defendant does not have the right to select a form for receipt of required information. Law grants a plaintiff with such right and the plaintiff is entitled to exercise this right and define the form of the required information. [...] The court determines that although the plaintiff is entitled to determine the form of the information, the plaintiff is not entitled to request a receipt of the information in a form in which it does not exist. [...] The plaintiff has a right of choice only in such cases when the requested information is available in different sorts that allows release of information in different forms."[68]

The court considers that "the defendant is required to deliver the information in a form in which the defendant possesses the information. If the form of the information and the method of its storage does not comply to the requirements of the law, this is

[66] Article 28 of the General Administrative Code of Georgia.

[67] The Judgment of Administrative Chamber of Batumi City Court #3-349/09 dated 4 December 2009.

[68] The Judgment of Administrative Chamber of Batumi City Court #3-349/09 dated 4 December 2009.

not a problem related to a request of public information and is not decided along with these issues. Public information implies its processing and release according to charts [...]."[69]

This judgment is important because it elaborated the standard established by the General Administrative Code of Georgia and interpreted it in three sections:

(1) The receiver of the information and not the administrative body takes a judgment regarding a form of the requested public information;

(2) when more than one person are requesting the same information, allowing access to the information to only one of the requesting persons is against the standard of freedom of information, and all requesting persons should be granted access to the requested information;

(3) a public institution is required to process the information and deliver it to requested persons according to the requirements of law. If the public institution has no previous experience of processing and releasing information, it does not free them for an obligation to process the information.

2.3. When information is stored in another institution

Rule of Law standard requires that a relationship between the state and its citizens must be open and transparent, and it also should be flexible. The expansion of modern states in different areas of civil life is gradually growing. It is demonstrated by its coverage of various private institutions of state regulation. In these circumstances the citizens face difficulties in their efforts to receive a full and complete information and to actively obtain information about functions of public institutions and data stored in these institutions. Therefore, the state is required to assist its citizens to find their ways in labyrinths of public institutions.

It is a separate issue when citizens are requesting information from a specific public institution which does not possess the requested information. In such a case we consider two approaches: first – when the institution is required to forward the request to an appropriate institution. According to Article 80, Paragraph one of the General Administrative Code of Georgia, "if a requested information is within a competency of a administrative institution other than the one that received the request, the administrative institution that received the request is required to forward the request to a competent administrative institution within five days." This is exactly how court clarified above mentioned question in its judgment "[...] the judgment on information requested by an application belonged to a competency of a different administrative body, and therefore according to Articles 12 and 80 of the General Administrative Code Georgia, forwarding a request for information to an appropriate public institution cannot be considered as a denial to disclosure of the information."[70]

It is another issue whether a public institution is obliged to forward a person's request for information to an appropriate addressee. In theory this question should not be a subject to discussion since the above mentioned provision implicitly provides for such obligation, however, court jurisprudence has paid a little attention to this issue.

[69] The Judgment of the Administrative Chamber of Batumi City Court #3-349/09 dated 4 December 2009.

[70] The Judgment of the Administrative Chamber of Tbilisi Appeals Court #3b/2108-07 dated 4 March 2008.

"The cassation chamber does not share the view of the cassation claim that Georgian state, as a signatory party to the Convention on Access to Information, Public Participation in Judgment-making and Access to Justice in Environmental Matters, has an obligation to insure every person's right to receive full and timely information about the state of the environment, which imposes an obligation on the state to possess and regularly renew such information. Since the Georgian state has designated, based on the principle of distribution of power, the Ministry of Environment and Natural Resources, and not the Administration of the President, as a competent government body for environmental issues, this ministry should obtain, process and possess information about the environment. At the same time, the plaintiff is requesting from an administrative body not an obligation to create the information, but an assignment to issue already existing already created information, while the defendant, the Administration of the President, does not possess such information, but the administrative body is required to release information possessed by it. If an administrative institution is not able to issue the requested information in the form it is requested, it should be issued in a form that it exists in the public institution. Non existence of information is a legitimate ground for rejecting its issuance."[71]

The court judgments demonstrate that the standard applied is in line with the second approach. It means that an administrative institution relies only on its data when obtaining information, and it does not take responsibility to take pro active measures in order to assist a specific person and use all means available to it, which implies forwarding a request for information to an appropriate institution.

2.4. Archiving

Can a process of archiving in progress in a public institution be a legitimate ground for denial an access to information? Gori district court decided on this matter that works of archive can be a legitimate ground for rejection of release of information.[72]

2.5. Expiration of time for storage of information

It is a known fact that public institutions do not keep information for an indefinite time. Different time limits apply to different types of information. In case of dispute "a court can not request a public institution to issue an information that a given public institution does not possess and which information this institution is not required to keep [...]"[73]

2.6. Documents of strict recording

Sometimes public institutions try to limit a definition of public information excluding from it a certain data. We had a similar case when a public institution did not consider

[71] The same: The Judgment of the Administrative Chamber of the Supreme Court of Georgia #bs-1278-1240 (k-08) dated 5 July 2010.

[72] The judgment of Gori District Court #3-112 dated 5 June 2008; It is also interesting that Gori District Court terminated the case on the grounds of absence of a subject matter

[73] The Judgment of Tbilisi City Court (33).

a registry as a document of strict recording and declared that the freedom of information rules required the public institution only to issue documents of strict recording. The court rejected such approach:

"[arguments, that] a registration journal of a legal department does not represent a document of strict recording and the data recorded in there is not a public information and rejection has no legal ground."[74]

3. Public bodies not required to release public information according to the General Administrative Code of Georgia

Here we discuss an important issue of a scope of application of Chapter 3 of the General Administrative Code of Georgia.

Article 3 Section 2 the General Administrative Code provides a list of state bodies, which do not fall under the scope of application of the General Administrative Code. These public institutions are as follows: The parliament of Georgia; The Supreme Representative Bodies of Aphkhazeti Autonomous Republic and Adjara Autonomous Republic; The Consultative Body of the President of Georgia; The Public Defender of Georgia; The Justice Bodies of Georgia; The Supreme Counsel of Justice of Georgia.

In this respect the provision provided in Section 4 of the same Article is also relevant, as it states that the General Administrative Code does not apply to those actions of bodies of executive power that relate to: prosecution of a person for a criminal offence and administration of criminal proceedings; activities for criminal investigation; measures for execution of court judgments entered into force; measures related to implementation of acts prescribed by a Georgian Law on Administration of Execution of Justice Judgments; actions related to judgment making with regard to military issues and military discipline, unless it relates to rights and freedoms of a person granted by the Constitution of Georgia; actions relating to appointment and dismissal of officials by the President of Georgia at positions laid out in the Georgian Constitution, as well as actions relating to execution of rights and competencies granted by Article 73, Section 1, Subsections "a", "d", "e", "g", "h", "n", as well as Subsections 2, 4 and 5; actions related to implementation of international treaties and agreements and foreign policy measure.

In this context it is important to be clear whether the above listed activities are not covered by the General Administrative Code of Georgia in general, or whether Chapter 3 is an exception and it equally applies to all.

According to a judgment of the Constitutional Court of Georgia "[...] Chapter 3 of the General Administrative Code of Georgia by all means applies to these bodies unless freedom of information is limited by provisions of this Chapter. [...] It is important to clarify that the information listed in this provision does not belong to a category of a state, professional or commercial secret, disclosure of which is restricted by Article 41 of the Georgian Constitution."[75]

[74] The Judgment of the Administrative Chamber of Tbilisi Appeals Court # 3b/166-08 dated 19 November 2008.

[75] The Judgment of a Second Chamber of The Georgian Constitutional Court N2/3/364 dated 14 July 2006, The Georgian Young Lawyers Association and the citizen Rusudan Tabatadze V the Parliament of Georgia.

"The cassation chamber defines that Article 3 of the Georgian General Administrative Code establishes a scope of application on this Code on state institutions. Certain parts of this Article specify the list of those administrative bodies and their activities, to which the provisions of this Code either do not apply or apply with limitations.

If we make a counter analysis of the above mentioned definition of Article 41 of the Georgian Constitution and Article 3 of the Georgian General Administrative Code we can clarify how direct is application of limitations set by various parts of Article 3 to certain administrative bodies or to information created during executing of functions of these administrative bodies.

According to Article 3.2. of the Georgian General Administrative Code, the Code applies to administrative bodies listed in it only within the boundaries of Article 3, while Article 3.3 sets additional limitations to the application Article 3 and limits it to only freedom of information created within the course of implementing administrative duties.

According to Paragraph "e" of the same Article, this Code applies to activities of executive bodies that are relating to appointment and dismissal of officials by the President of Georgia at positions laid out in the Georgian Constitution, as well as actions relating to execution of rights and competencies granted by Article 73, Section 1, Subsections "a", "d", "e", "g", "h", "n", as well as Subsections 2, 4 and 5. In a given case the requested information is created by the President of Georgia during execution of rights and competencies granted by Paragraph "n" of Article 73 of the Georgian Constitution. Administrative legislation recognizes a functional definition of an administrative body and considers the following as such: any person or body within the process of executing executive competencies granted by law, despite a branch of a power this person organizationally belongs to.

In order to clarify why does Paragraph 4 of Article 3 of the General Administrative Code of Georgia remove this specific competency of the President of Georgia from the scope of application of the General Administrative Code, we need to understand the functionalities of this competency and also understand whether the law considers the President of Georgia as a body executing administrative duties. [...] when pardoning convicted. The President does not execute governance functions, and does not administer, and based on this the President does not fall within the scope of application of the General Administrative Code of Georgia. [...] Act of pardoning of convicted and detained persons represents a Constitutional-legal activity of the President and adopting such acts is within a special competency of the President, which the President executes within a wide discretion."[76]

The court took the same approach in a case where the plaintiff was requesting the materials of a criminal proceeding. The court said that the General Administrative Code of Georgia does not apply to justice institutions. The court based this argument on a comparative analysis of part 1 and part 2 of Article 3 of the Georgian General Administrative Code. The court said that Article 3.2 of the General Administrative Code can be divided into a few statements:

- The General Administrative Code of Georgia applies to all state institutions;

[76] The Judgment of the Administrative Chamber of Supreme Court of Georgia # bs-1278-1240(k-08) dated 5 July 2010, The Georgian Young Lawyers' Association Versus The Administration of the President of Georgia.

- The General Administrative Code does not apply to above listed institutions;
- Only the chapter of the General Administrative Code that relates to freedom of information applies to above mentions institutions;
- The Chapter on freedom of information applies to activities of the state institutions that are related to execution of administrative duties.

"The Chamber thinks that proceedings in a court belong to the category of law enforcement and not administration. This definition is supported by Article 3.4 of the General Administrative Code of Georgia according to which the General Administrative Code does not apply to a case of criminal prosecution of a person and affairs relating to criminal proceedings. We believe that a publicity of the process and disclosure of public information are based on same ground, but are still different categories. It is supported by the fact that affairs relating to these two categories are regulated by different provisions of law. [...] these categories are different with respect to their content as well, in particular, publicity of the process is a right granted to a person to have free access without any obstacles to a court proceeding (unless as otherwise provided by law), while freedom of information is a right of a person to have free access to information possessed by a public institution. Although based on a principal of publicity a person attending an open court proceeding receives full information about a specific criminal proceeding, a court still is not required to issue documents containing such information[as provided in General Administrative Code]. The word issuance used in Article 40 and 41 of the General Administrative Code are different content wise, while by using a term "issue" a legislators imposes and obligation to take active steps on a person requesting an information, meanwhile an administrative body has a more passive role and is only required to facilitate the receipt of the requested information by a person.

In this respect we should mention that an administrative institution is required to process the information and issue a requested information in a systematized form not only when it receives request for information. Law provides an exhaustive list of cases when an administrative institution is required to process and systematize the public information possessed within, and it is an additional duty to undertake such process for the purpose of disclosing the requested information."[77]

A comparative analysis of precedents shows that the general courts of Georgia apply a low standard of freedom of information and limit the application of the Chapter 3 of the General Administrative Code, not applying standards for freedom of information to an entire spectrum of activities of certain public institutions. This is groundless and is based on a superficial, rather wrong reading of laws, that leads to a violation of rights.

4. Compensation of damages

Disproportional limitation of a right is always connected to a moral suffering of a person whose right has been limited. Limitation of a right causes a feeling of insecurity, and helplessness and injustice. Due to this, on one hand, and for rebuilding a damaged loyalty towards the state, on the other hand, various mechanisms of restoration of rights apply, on them being a moral compensation.

[77] The Judgment of the Administrative Chamber #3b/178-08 dated 19 October 2008.

According the Article 47 of the General Administrative Code of Georgia, in case of violation of rights provided in Chapter 3 of the General Administrative Code person may request compensation of immaterial damages.[78] In this respect Kutaisi Appeals court heard a very interesting case. The court of instance satisfied the plaintiff's claim and requested the defendant to compensate the damages. The court said: "Freedom of information supports and deepens the society's trust to public institutions and this right implies a freedom of a person to access freely and obtain any information only within limitations required by law. In order to insure a right of free access to information a legislator recognized and provided a right of public to exercise public control on work of public administrative institutions and violation of this right equals to a violation of human rights."[79]The court excluded the application of a Civil Code in a case on issue of compensation of immaterial damages: "when discussing an issue of compensation of non material damages with regard to freedom of information, provisions of Article 18 and Article 413 of the Georgian Civil Code do not apply, because based on Article 47 of the General Administrative Code when denied access to public information, a person is entitled to request compensation of material as well non material damages. The court thinks that since violation of the right causes a moral discomfort, a legislator defined by a special provision a compensation of moral discomfort as a counter measure against violation of the right. [...] A main purpose of compensation of moral damages is not a full restitution of a violated right, but we should take into account an attitude of a specific person towards violation of his/her right, and at the same time the compensation must have a preventive meaning – to avoid violation of rights."[80] The court determined 100 GEL as an amount of compensation of damages.

The defendant appealed the above judgment in appeals court, that fully reversed the approach and the judgment of the court of the first instance and said that: "Interpretation of Article 47 of the General Administrative Code of Georgian compensation of damages as a means of penalizing legal tool when a public institution denies to disclose an information to a person is not admissible, because such an approach is not in line with constitutional principles, i.e. this provision can not be interpreted in a way to conclude that a rejection of disclosure of information automatically imposes on a public institution to compensate material and non material damages of certain amount.

[...] When a request to annul or change a judgment on rejection of disclosure of public information is satisfied a request for compensation of damages is also subject to adjudication and the norm should not be awarded automatically. Therefore it is logical and legally inappropriate to discuss compensation of material and non material damages

II

[78] **Article 47. The nullification or amendment of a judgment. Claim for damages**
1. A person may file a claim in a court demanding the nullification or amendment of the Judgment of a public agency or public servant, and claim material or non-material damages for:
(a) Denying access to public information, partly or completely closing the session of a Corporate public agency, or designating public information to be classified,
(b) the creation and processing of incorrect public information,
(c) the illegal collection, processing, storage and dissemination of personal data, or illegal furnishing of personal data to another person or public agency, or
(d) the infraction of other requirements of this Code by a public agency or public servant.
2. The burden of proof shall rest with the public agency or public servant that acts as a defendant in a court.

[79] The Judgments of the Administrative Chamber of Kutaisi Appeals Court #3/b-355-09 dated 29 July 2009.

[80] The Judgment of the Administrative Chamber of Kutaisi Appeals Court #3/b-355-09 dated 29 July 2009.

separately from civil legal categories [...]. Since the formula – that violation of this right automatically class for compensation of material and non material damages, is a legal nonsense."[81]

The court developed a certain test for determining non material damages. It referred to Article 18 of the Civil Code and said that: "monetary compensation for non material damages can be claimed only in cases strictly defined by law and in a way of reasonable and fair compensation [...]. It is disputable what sort of information was requested and what sort of physical and moral suffering was caused. [...] "moral discomfort" cannot be equal to moral suffering neither with respect to "moral-psychological suffering", nor in relation with general criteria of evaluation of this kind. "[82]

In another judgment a court considered inadmissible a dispute initiated based on Article 24 of Administrative Procedural Code: "According to a provision a law suit must be admitted, if any action of an administrative institution or lack of action of the same institution causes a direct or individual damage to legitimate rights or interests of the plaintiff. The court did not consider violation of freedom of information and rejections of its disclosure a direct damage."[83]

Taking into account the case of law Georgian general courts, two approaches are applied: according to a first approach, since a violation of a right by itself causes a moral discomfort, it automatically means that the rights of a person must be restituted though compensation of moral damages. According to the second approach, a court thinks that the compensation should not be automatically awarded and for compensation a plaintiff must pass a certain test. It is disturbing that the Appeals Court is the author of the second approach, because it is very likely that all other courts under its jurisdiction also exercise the same approach. This approach puts a standard of Article 42, Paragraph 9 of the Georgian Constitution under doubt, which provides that everyone is entitled to receive a compensation for damages caused by the state.

5. Other issues

5.1. Burden of proof

II

According to a principle of rule of law, a burden of proof rests with a party initiating the restriction of a right, and the other party only has to prove that the right has been restricted and so called protected space has been opened. IN general, in a dispute about a violation of a right a state always has a burden of proof, and the General Administrative Code regalements it in a legislation. According to Article 47 of the General Administrative Code, "a person may file a claim in a court demanding the nullification or amendment of the Judgment of a public agency or public servant, [...] The burden of proof shall rest with the public agency or public servant that acts as defendant in a court." However the court often does not automatically share requirements of the general Administrative Code and distributes the burden of proof in different manner in different stages of proceedings.

[81] The Judgment of the Administrative Chamber of Kutaisi Appeals Court #3/b-355-09 dated 29 July 2009.

[82] The Judgment of the Administrative Chamber of Kutaisi Appeals Court #3/b-355-09 dated 29 July 2009.

[83] The same: The Judgment of the Administrative Chamber of Tbilisi Appeals Court #3b/564-08 dated 29 April 2008.

The court does not use the General Administrative Code as a material legal act for determining procedural standards. It relies on provisions of Civil Procedural Code and Administrative Procedural Code, and analyzing them the court says: "[...] the court thinks that imposing a burden of proof only on a public agency and releasing a plaintiff from responsibility to argue the claim is wrong, because the plaintiff always has a duty to argue the claim him/herself and neither civil nor administrative law recognizes a possibility to impose this obligation on a defendant.

In civil as well as in administrative proceedings the parties enjoy equal procedural rights and opportunities. In particular, each party must prove the evidence on which they base their requests and submissions. Therefore each party must submit facts supporting their claims and if the facts become disputable, a submitting party must prove their validity. "[84]

The Georgian Young Lawyers' Association expressed a suspicion in case discussions in Tbilisi City Court that the materials of the case insufficiently proved that the discussed decrees were the acts of pardoning. The court said that [...] the decrees of the President of Georgia #73 and #280 of 2006 are the acts adopted by the President of Georgia within execution of rights provided by Article 73, Paragraph "n" of the Georgian Constitution. [...] Accordingly, there was no grounded suspicion or any other evidence that disputed decrees were administrative-legal acts of a different content. Although the plaintiff challenged the legitimacy of rejection on disclosure of information, the plaintiff had the duty to prove his suspicion with appropriate evidence. Therefore, the materials of the case did not create any ground for the court to take an initiative and research the circumstances and collect evidence."[85] However, the court has not requested the disputed documents as evidence at any level of hearing, in order to negate the plaintiff's suspicion with regard to the relevance of the documents. IT is also interesting that the court allowed a presumption that an information submitted by a public agency is true, unless the opposite is proved.

In above mentioned cases the general courts distribute a burden of proof equally and impose its certain portions to private and legal entities. Such blanket prohibition instead of distributing a burden of proof through a special test in each particular case, increases the likelihood that the court's approach is not in line with the standard of rule of law.

5.2. Commercial Secret

The period discussed in this research was not marked with active case law regarding commercial secret. In this direction the general courts heard only two cases, both in Tbilisi City Court. In the first case the court considered information about company shares a commercial secret,[86] and the second case relates to publicity of Memorandum of Understanding between the Georgian Government and "Inter Rao ESS".

[84] The Judgment of the Administrative Chamber of Tbilisi City Court # 3/313-09 dated 9 November 2009, the Georgian Young Lawyers' Association V the Administration of the Georgian President.

[85] The same: The judgment of the Administrative Chamber of the Supreme Court of Georgia #bs-1278-1240 (k-08) dated 5 July 2010.

[86] The Administrative Chamber of Tbilisi City Court (29).

In the case of the Georgian Young lawyers' Association and others[87] the court defined a commercial secret and said that "Article 27(2) of the General Administrative Code of Georgia[88] provides a complete list criteria for recognizing information as a commercial secret, and the applicable procedure. [...] it should also be mentioned that a commercial secret is s secret of private legal entities and other entrepreneurs and represents their ownership. This information in circumstances prescribed by law may end up in public agencies. Public agencies are required not to disclose such kind of public information to third parties. The only way to access a commercial secret is though a consent of a person who owns the information, and the consent must be certified by a notary or bay an administrative body before submission to a court [...]."[89]

According to Article 27(2), paragraph 2, "information about an administrative agency is not a commercial secret". The court did not apply this article in its discussion a Memorandum of Understanding between the Government of Georgia and open corporation and said that "the Ministry of Energy of Georgia was required to consider a Memorandum a commercial secret, since the grounds for recognizing an information as a commercial secret are present [...], in particular, the memorandum has the characteristics necessary for a commercial secret and an interested party had requested its recognition as a commercial secret.

Energy and Electricity sector in general is an area regulated by the state, and its significant part is regulated. Law clearly defines competencies of a national regulatory

[87] The judgment of the Administrative Chamber of Tbilisi City Court #3/13/13/-09 dated 9 November 2009, on Daily Newspaper Rezonansi LLC, The Acting Chairman of the Georgian Conservative Party Zviad Dzidziguri, the Georgian Young Lawyers' Association V the Ministry of Energy and the Government of Georgia.

[88] **Article 272. Commercial secret** (2.03.2001 N772)
1. Commercial secret means any information concerning the plan, formula, process, or means that constitute a commercial value, or any other information that is used to produce, prepare, or reproduce goods, or provide service, and/or which represents an innovation or a significant technical accomplishment, or any other information, disclosure of which could reasonably be expected to cause competitive harm to a person.
2. No information concerning an administrative agency shall be considered commercial secret.
3. When submitting particular information, a person shall indicate whether it constitutes commercial secret. A public agency shall within 10 days categorize the information specified in Paragraph 1 of this Article as commercial secret, unless the applicable law requires the information to be open. If after submission of the information by the person the public agency does not consider it commercial secret, the agency shall make the information open and immediately inform the concerned person thereof. The information shall become open in 15 days after the judgment is made, unless the person who submitted the information appeals the agency's judgment in a higher administrative agency or court before expiration of that term. In this case the person shall immediately inform the agency about the appeal.
4. Any person may appeal the judgment to consider information as a commercial secret in a higher administrative agency or court. (28.12.2007 N5671).
5. A public agency shall enter into public register the records regarding any request for commercial information submitted by a third person or another public agency, including the date of request and name/title and address of the requester.

[89] The judgment of the Administrative Chamber of Tbilisi City Court #3/13/13/-09 dated 9 November 2009, on Daily Newspaper Rezonansi LLC, The Acting Chairman of the Georgian Conservative Party Zviad Dzidziguri, the Georgian Young Lawyers' Association V the Ministry of Energy and the Government of Georgia.

commission of energy and water supply with respect of regulating energy tariffs and it does not include regulations of tariffs for electricity and other big electric stations tariffs that are regulated today. At the same time, export, import and production of electricity by small electric power stations is not subject to licensing. All the above leads to a conclusion that there is a competition in the area of electric energy and therefore, there is a risk of damage to competitiveness of these enterprises."[90]

Within a free market society commercial secret allows an entrepreneur to ensure effective business operations and maintenance of their competition. In this respect it is similar to a personal secret, as the latter is at a human operation in an outside world according to a person's own wishes. Both types of closed public information insure a safe personal information practice for each person. That is why often courts discuss these two rights in the same context.

With respect to a procedure for awarding a label of a commercial secret a court offered the following mechanism: "in order to protect a secret information, it is necessary to award the information with a label of state, commercial or personal secret. A label of secrecy is a necessary requisite of a secret information. [...] With regard to a commercial and a personal secret, a universal legal provision regulating a process of awarding a secrecy label to them does not exist. This does not deprive public agencies a right to regulate issues of awarding a label of secrecy to commercial and personal secret according to appropriate normative acts, following a procedure provided by law, as well as develop special stamps for commercial and personal secret. A public agency must take a special judgment in order to label information as commercial or personal secret. Information label is awarded and taken away by an official with appropriate competencies. The Label must indicate the type of the information [...] and the term for secrecy. The term starts from the day of taking an appropriate judgment. The term of secrecy may be extended. [...] A head official of a public agency is required to insure registration of a secret information and to execute control on its protection. It calls for development of a regulation on admission of public officials (employees) to secret information."[91]

The court has established two clear standards with respect to commercial secret. According to the first standard, commercial secret criteria apply even when the state is at the other side of the dispute and it is not an automatic ground for making the information public. In this case also, similar to cases of obtaining other closed information, a proportionality test must be used. The second, not less important, is the procedure, that the court established for confidentiality of a commercial secret. This issue is very important as so far no such procedure existed.

[90] The judgment of the Administrative Chamber of Tbilisi City Court #3/13/13/-09 dated 9 November 2009, on Daily Newspaper Rezonansi LLC, The Acting Chairman of the Georgian Conservative Party Zviad Dzidziguri, the Georgian Young Lawyers' Association V the Ministry of Energy and the Government of Georgia.

[91] The judgment of the Administrative Chamber of Tbilisi City Court #3/13/13/-09 dated 9 November 2009, on Daily Newspaper Rezonansi LLC, The Acting Chairman of the Georgian Conservative Party Zviad Dzidziguri, the Georgian Young Lawyers' Association V the Ministry of Energy and the Government of Georgia.

5.3. State secret

According to Article 28 of the General Administrative Code of Georgia (which is similar to Article 41 of the Constitution of Georgia), public information is open, except for otherwise required by law, and when information is a state, commercial or personal secret according to established rules. Therefore, an information is public unless it is recognized as a state secret according to a rule provided by law. According to the above mentioned laws, it is not sufficient for the information to have a secret content, it is necessary to follow the procedure set by law. According to Article 27(2) of the General Administrative Code of Georgia a Georgian Law on State Secret defines a rule for recognizing an information as a state secret. According to Article 1 of this law "information that contains data of state secret relating to areas of defense, economy, foreign relations, intelligence, state security and rules, disclosure or loss of which can cause a damage to a sovereignty of Georgia or other parties of international treaties and agreements, or to their constitutional order, political and economic interests, which is recognized as state secret by international treaties or agreements and is subject to state protection."

Accordingly, in order to categorize information as state secret, three conditions must be met, in particular:

1. Information must contain state secret data relating to areas of protection of defense, foreign affairs, economy, state security, rule of law;
2. Disclosure or loss of information must cause damage to sovereignty, constitutional order or other state interests;
3. Information must be recognized as state secret according to a procedure.

In order to recognize information as a state secret, it is necessary that the information contains state secret data relating to areas of protection of defense, foreign affairs, economy, state security, rule of law. In this context a principle of legitimacy set by the same law becomes very important . An administrative agency, when making such a judgment, is required to evaluate whether it falls within the boundaries set by law. In specific terms it means that the agency must evaluate whether a requested information belongs to a list of information provided by law which may be classified as state secret. An administrative agency should also always prove the ground for making information a state secret, because only the belonging of the information to above listed areas does not automatically satisfy the requirements. While the information must belong to one of the above areas, it must be secretive by its substance.

According to the General Administrative Code and "law on State Secret" classifying information as state secret is connected to exercising rules established by law. Accordingly, along with above listed material preconditions, it is necessary to strictly follow the rules required by law. "Georgian law on State Secret" sets appropriate rules and procedures. In particular, Article 9, Paragraph 1 of the Law requires that "to prove the necessity of classification of information as state secret, taking into account an importance of the data, is a duty of a state agency, and also the company, organization or an institution, who developed or received the data for review or storage."

Following the existing practice, in case of request for certain types of information administrative agencies consider this information a state secret, although they do not indicate the data for secret labels: in particular, the details of a public official classifying the information as state secret, the term of the secrecy, and a degree of secrecy con-

tained in the information. Therefore, it is not known whether an administrative agency followed the procedure of law for classifying the information as secret, or whether the given information recognized as state secret at all.

Unfortunately, courts do not explore above mentioned details and often in case there is no evidence on whether the information is recognized as a state secret or not. Besides, when a legal procedure is not followed, a plaintiff faces problems to request removal of a secret label from an information in the future request form an agency to cancel the classification of information as state secret). Therefore, this practice is problematic not only because the response of a public agency is against the law, but also because it deprives the third parties an ability to request from a public agency to remove a secret label from the information.

5.4. Request of information from a legal entity of private law within state financing

According to Article 27 of the General Administrative Code, a public agency, inter alia, is a legal entity of private law within such financing. In a case of the Georgian Young Lawyers' Association a subject of disclosure of information was disputed. When an interested person wants to receive information about a legal entity of private law within state financing, it is interesting who should issue this information: a state agency that paid for financing or a legal entity of private law.

"The court determines that Article 37 of the General Administrative Code grants everyone a right to request public information. In particular, it grants everyone a right to request public information irrespective of physician shape and condition of storage and select the form of receipt of the requested public information, if it exists in different forms, also, have access to the information in its original shape. According to this imperative norm, the Georgian Young Lawyers' Association ha s full right to request a public agency to issue public information within the boundaries of law, even if, as the defendant indicates, it can obtain necessary information from executive bodies. At the same time, the court indicates that the legislator does not restrict the person interested in receiving the information and does not require this person to apply to a first source of the information directly. [...] i.e. a subject required to issue a requested public information is every institution that possesses the public information, and that, on its part, insures access to public information and transparency."[92]

5.5. Public Registry of information

According to Article 35 of the General Administrative Code of Georgia, "a public agency is required to record public information possessed by it in a registry of public registry. A reference to a public information must be recorded in a public registry within 2 days of receipt, creation, processing or issuance of the information, with e reference to an individual or legal entity, public official or a public agency, that either delivered the information or to which the information was sent to." The rule set by this provision is unfortunately often ignored and the majority of public agencies do not maintain a public registry of information.

[92] The Georgian Young Lawyers' Association V X

Nowadays the court practice is developing a tendency that the appeals court recognizes lack of recording of public information in a public registry as one of types of restriction of access to information. i.e. if a public agency does not have an information in a public registry of information, courts do to satisfy claims on request for information. In particular, by a judgment of an appeals court dated 11 May 2010,[93]a request of a plaintiff for public information was not satisfied. "The Appeals court is of the view that not all information stored in public agencies is a public information and public information is only the information that, according to Article 35 of the general Administrative Code of Georgia, is registered in a public registry of public information by a public agency according to a due process." An appeals court reached the same judgment in another case[94], where a disclosure of public information was requested and a defendant public agency did not have a public information recorded in a public information registry.

We think, that Georgian legislation[95] recognizes three cases of restriction of freedom of information, when information is, based on law provisions, state, commercial or personal secret. Therefore, restriction of freedom of information is possible only in these cases prescribed by law, and the grounds for restriction of freedom of information defined by the court are illegal, since, as we already mentioned, Georgian legislation does not recognize such grounds for restriction.

We should keep in mind that the role of court is important in exercising the right of freedom of information, since the court also supervises the legitimacy and compliance with law of judgments made by public agencies. We mention one more time that an argument of the appeals court for restriction of freedom of information is against the law. A public information may make an omission and not record public information in a public information registry, and a party suffering damages will be in this case a claimant since the court will not satisfy the request only trusting the competency of the public agency. Besides, such judgments make courts' role in administrative proceedings to supervise compliance with law of judgments made by administrative agencies, meaningless, and it significantly damages the process of development of democracy and to freedom of information. Unfortunately, if the court practice keeps developing this direction and disputes on freedom of information will always be decided for the benefit of defendant public agency , it will result into a significant abuse of power by public agencies being able to decide based on their subjective will rather than on requirements of law, whether or not to make information public. By making such judgments courts liberated themselves from a duty of control that implies supervision of compliance of court judgments with law. That is why we recommend that provisions on freedom of information must be correctly interpreted and a burden of proof set by law must be fairly distributed.

II

5.6. The principle of court economy and its importance for freedom of information

According to Administrative Procedural Court, a court must complete proceedings within 2 months from filing a claim. According to the same Code, is the case is espe-

[93] Judgment of Tbilisi Appeals Court # 3b/685-10 dated 11 may 2010: Nino Miqiashvili V Law Enforcement Execution Agency.

[94] The Judgment of Tbilisi Appeals Court # 3b-1697-07 dated 12 February 2008.

[95] See Article 28 of the General Administrative Code of Georgia

cially complicated, based on a the court judgment the term for these cases can be extended up to 5 months.

Taking into account the fact that information is a "perishable product", in proceedings of claims on freedom of information completion of proceedings within the time prescribed by law is very important. There is a risk that after a certain period of time the plaintiff might lose interest towards the requested information. Sadly, no case discussed by us was completed within a term required by law. Moreover, the courts have not taken any decisions on extension of term of proceedings. Vice versa, the court delayed proceedings by combining claims, while, according to Article 182 of Georgian Civil Procedural Code one of the objectives of combining claims is a court economy.

The next important issue that gets on the way of court economy is a formal nature of an initial court hearing. According to Article 205 of Georgian Civil Procedural Code, the court is entitled to appoint an initial hearing session, that should facilitate a timely and correct judgment of the case. If the court, after examining submitted materials decides that the parties may settle the case or the plaintiff withdraw a claim, or a defendant agree with the claim, and also if the judge thinks that it is within the interests of the case, the court can appoint an initial hearing session. It is necessary that an appointment of the initial hearing has a certain result for timely and fair judgment of the case, which has not happened in the cases discussed in this research. Sadly, appointed initial hearings demonstrated that courts do not take initial hearings seriously.

5.7. Defining state levy in case of combined claims

One of the criteria of admissibility of a claim is payment of state levy. That is why courts attach a big importance to its definition and procedure for its payment.

Disputes on freedom of information are handled according to administrative proceedings. These disputes belong to non material disputes by their nature, that is why according to Article 39(h), the amount of the state levy is 100 GEL for cases in court of first instance, 150 GEL in appeals court, and 300 GEL in cassation court. In civil proceedings Article 40 of the Civil Procedural Code is applied in determining the state levy, that defines the value of subject of a claim. According to Section 2 of this Article, if one claim contains more than one request, these requests must be combined and after that the value of the claim. In administrative proceedings on claims on freedom of information the value of requests is not defined. According to Article 40 of the Civil Procedural Code, a value of a claim is defined based on a value of a request. In administrative proceedings claims relating to freedom of information have no monetary value (the request is to have access to a public information), therefore Article 40 of the Civil procedural Code cannot be used in these proceedings. As a result, in case of combined claims, one of the claimants must pay 100 GEL and not each of them, since a value of the claims cannot be added as there is no value.

However, issue of state levy on our claims requesting public information filed in courts have been decided in different ways when claim requests were combined. A judge Nino Oniani in a case with plaintiff Ana Shalamberidze who requested to assign the Georgian Ministry of Justice, the Georgian Ministry of Foreign Affairs, the Georgian Ministry of Economic Development and the Georgian Cabinet of Ministers, decided that 100 GEL paid to the state budget was sufficient to admit the claim.

A judge Dimitri Gvritishvili made a different judgment, when he decided on a claim of Tamar Gurchiani against the legal entity of public law, a Municipal Development Fund of Georgia, and illegal entity of public law, the national Bank of Georgia, that the claim combined two different disputes. Based on this argument the judge imposed a state levy in the amount of 200 GEL instead of 100 GEL, although the judge did not specify the provision of law based on which he made such judgment. The law allows to pay 100 GEL for a suit in combined claims in administrative proceedings. However, unfortunately, judges give different interpretations to above mentioned provisions. Here we should also mention that nowadays it is quite difficult for citizens and nongovernmental organizations to pay a state levy even in the amount of 100 GEL.

5.8. Violation of terms for disclosure of public information.

According to Article 41 f the general Administrative Code of Georgia, "a claimant shall be immediately informed of a public agencies' denial of access to public information. When refusing disclosure of public information a public agency is required to explain to a requesting person in writing the person's rights and obligations and the procedure for appeal, and also indicate a public agency or a subdivision that was consulted for taking a judgment on denial of access to public information." How much can a denial made in violation of this rule can serve as a ground for request of information by means of court proceeding, is determined in a court judgment, which says that "although the defendant administrative agency did not notify the party accordance to Article 41 of the general Administrative Code about existence of a public information, this cannot be considered as a violation of law that would have triggered the judgment of a different sort. Therefore this motive cannot be a ground for satisfaction of the claim."[96]

As we see, a mere violation of term of disclosure of public information cannot become a sufficient ground for establishing a violation of a right. But this rule applies in cases when a person has really received information and delayed receipt of the information has not cause any material damage to the person. It would be interesting to see what would the court have decided if delayed issuance of public information would have deprived the information of relevance and thus value, and caused damages to the person's ;legitimate interests.

II

6. Conclusion

We summarize the standards established by general courts as follows:

The court gave a definition of personal data and included in there the following: registration details of a legal entity; so called December 1o reports to be submitted to the parliament of Georgia and the President of Georgia based on Article 49 of the General Administrative Code of Georgia; home addresses; acts of pardoning of convicted by the President of Georgia, and the lists of person escaped from residential institutions and dates of their escape. Based on the court definition, lists of officials (employees) of public agencies is an open information, but information about their salaries, bonuses and business travel expenditures, according to the court practice, is a personal secret and thus is a closed public information.

[96] The Judgment of Tbilisi City Court of 2010; Mayor of Tbilisi as a defendant, Section 6.2p.

Commercial secret: requirements for commercial secret apply even when the other party of an agreement is the state and it is not an automatic ground for making the information public. In this case also, in order to obtain the information, like with any other type of closed public information, a proportionality test must be exercised. However, for classifying the information as a commercial secret the court determined a specific procedure.

In order to classify information as a state secret, the information must be, in terms of its content, of a category of state secret, and must be protected by rules prescribed by law. Unfortunately, courts have not explored the above details and often in court cases there are no evidence to clearly determine whether the information is recognized as a state secret or not.

Another outstanding issue is a "creation" of information by a public agency. The court practice demonstrates that in collecting information public agencies rely only on their own data and do not take responsibility for taking proactive measures to assist specific persons and use every tool available to it, which implies forwarding the request for information to an appropriate agency.

According to a definition of the Supreme Court of Georgia, if a plaintiff proves that a specific public agency has a general duty to possess a requested information, in this case, even if the information does not exist, the specific agency is required to create such information and issue it to the requesting person. But, if the plaintiff cannot prove the above, the claim will not be satisfied.

With regard to the volume of information, according to the approach of general courts, the volume of information cannot become a ground for denial of access to this information.

One of the important challenges is delayed terms of disclosure of public information. The practice of general courts shows that mere violation of terms of disclosure of public information (unless it cause a material damage) cannot become a ground for establishing the violation of the right of freedom of information.

According to the practice, a court should not automatically award compensation when standards of freedom of information are violated, in order to receive compensation, a plaintiff must pass a certain intense test of "moral suffering". This requirement casts doubt on the issue of state's automatic responsibility in case of human rights' violations.

In disputes on freedom of information the general courts distribute the burden of proof equally among a plaintiff and a defendant (in disputes on freedom of information a public agency is always a defendant). Such a blanket judgment of the issue instead of distribution of the burden of proof by means of application of a special test in each individual case increases the likelihood that the court's approach does not comply with the standard of rule of law.

Finally, it is important to mention that the Constitutional Court and the general courts deliver different interpretations of the issue of application of Chapter 3 of the general Administrative Code to certain constitutional bodies and on their certain competencies. General courts of Georgia use a standard for freedom of information that contradicts the Georgian Constitution, and by doing so they restrict the scope of application of Chapter 3 of the General Administrative Coe of Georgia and apply the requirements

of freedom of information not to all parts of the relationship, but only to those that derive from exercising of administrative duties by the public agencies. This leads to a violation of the rights based on irresponsible and wrong interpretation of the law.

The role of general courts in introducing and implementing freedom of information and transparent governance, is in general, extremely important, since it is the courts that insure social validity of laws. As this research showed, often the judgments of general courts, unlike the Constitutional Court, are positive, although there are judgments that contain forward-looking statements. There is no t a less number of judgments which, to say the least, contain many disputable statements. We remain hopeful, that in the future the general courts will take more judgments for the benefit of human rights.

III. COURT CASES OF THE GEORGIAN YOUNG LAWYERS' ASSOCIATION THAT HAVE THE IMPORTANCE OF PRECEDENCE

1. Georgian Young Lawyers' Association (the GYLA) V the Ministry of Foreign Affairs of Georgia

On 3 September 2009 the GYLA submitted an application to the Ministry of Foreign Affairs of Georgia and requested information on allocation of finds to the Ministry of Foreign Affairs based on a Decree of the Georgian Government # 7. In particular, by their decree the Georgian Government allocated 400,000 (four hundred thousand) USD in GEL from a reserve fund of the Georgian Government to satisfy the requirements of an agreement to be signed between the Georgian Government and Orion Strategy LLC. The Georgian Young Lawyers' Association requested by 3 September application full and detailed information with regard to the decree, and also relevant supporting documents.

With respect to this case the events developed as follows:

3 September 2009:

The GYLA requests the public information.

The Ministry of the foreign Affairs does not react on our request.

19 October 2009:

The Georgian Young Lawyers' Association submitted an admnistrative complaint to the Ministry of Foreign Affairs.

26 November 2009(after 1 month and 7 days after submitting the complaint):

A ministry official in charge of issuance o public information delivered to us a part of requested information.

27 November 2009:

The deputy Minister of Foreign Affairs terminated proceedings with regard to the complain of the Georgian Young Lawyers' Association on the ground that the Georgian Young Lawyers' Association already received the requested information and thus the subject of dispute disappeared.[97]

29 December 2009:

The GYLA applied to court requesting access to full information.

15 January 2010 (after 4 months and 15 days from submitting a request):

An official of the Ministry of Foreign Affairs responsible for issuance of public information issues additional part of the information request by the Georgian Young lawyers' Association by 3 September request.

[97] Individual administrative-legal act N 232 of the Deputy Minister of Foreign Affairs, Levan Davituliani, "On termination of Proceedings over a complaint of the Georgian Young Lawyers' Association dated 27 November 2009.

18 January 2010:

The Ministry of Foreign Affairs submitted to the court a counter claim and also a motion to stop proceedings based on Article 272 of the Civil Procedural Code of Georgia due to non existence of the cause of dispute.

The chronology of events clearly demonstrates that the Ministry of Foreign Affairs took active actions only when if faced an administrative complaint and an administrative law suit. Submission of an application with a request of the information was ignored, even though we submitted the complaint at the last day of its deadline.

The Georgian Young Lawyers' Association is of the opinion that the Ministry of Foreign Affairs' motion to terminate the proceedings should not have been satisfied for the following reasons:

1. After termination of proceedings over the complaint the Ministry official in charge of issuance of the public information had no possibility to renew the proceeding and deliver the part of the information after 1 month and 15 days from the day of taking a judgment over the administrative complaint. By taking a final judgment over the administrative complaint by the Deputy Minister of Foreign Affairs of Georgia, both the proceeding over the complaint as well as the proceeding over the original request were terminated in the Ministry. While the Georgian Young lawyers' Association had not submitted a new request for information, therefore, a ground for either renewal, initiation or continuation of the administrative proceedings did not exist.
2. It is remarkable that the procedural legislation does not recognize a provision similar to Section 1 of Article 189 of the General Administrative Code, when an administrative agency can issue an act and exercise an action even after submission of a complaint, which proves that the Ministry of Foreign Affairs of Georgia was not entitled to do so after the submission of the law suit. The Ministry of Foreign Affairs of Georgia, on its part, as the administrative body, is subject to a crucial principle of public law – "everything that is not allowed by law, is prohibited". Article 5.1 of the General Administrative Code reflect this well, based on which, "an administrative body is not entitled to take any action against the requirements of law". It is clear that the action of the Ministry of Foreign Affairs cannot base its action on any provision of law, and therefore this action is against the law.
3. Moreover, according to Article 189.2 of the Civil Procedural Code of Georgia "after admission of the law suit and commencement of court proceedings a disputes between the parties cannot be handled by any other court or body. At the same time, the parties maintain the right to sell or otherwise release a subject of the dispute, or withdraw their claims." We think, that the "body" referred to in this provision implies also a body responsible for issuance of the act. Undertaking of an action and issuance of the part of the information after a law suit has been filed into the court is nothing less than a taking a repeated judgment by the administrative body on the subject of the dispute;
4. After accepting the case for hearing, the Ministry of Foreign Affairs of Georgia could have undertaken an action only within the mechanism of recognition of the law suit according to the rules provided by procedural code. In this case,

the administrative organ could use the above mentioned mechanism without obstacles, since in a given case admission of the law suit would not have been illegal and would not have cause any to public interests, quite the opposite;

5. The Ministry of Foreign Affairs of Georgia had really no legal possibility to issue the information after termination of proceedings over the complaint, but undertaking an action by the Ministry was already a factual result, which we could not have ignored. Therefore, we were of the opinion, that, taking into account the existing reality, the court must have used Article 32 , Section 3 of the Code and should have requested the defendant to undertake an action, since this was the request of the plaintiff the Georgian Young Lawyers' Association and our legitimate interest was obvious;

The procedural legislation of Georgia does not regulate cases when a defendant undertakes an action requested by the claim before the court judgment, but instead, it regulates the case when an individual administrative-legal act becomes void before the court judgment is made, which was also requested by the claim. Therefore, we have a precondition prescribed by Article 7, Section 2 of the Civil Procedural Code of Georgia:

"If there is no civil procedural provision, that regulates the affair created during court proceedings, the court uses the provision of law that regulates similar affairs (analogy of law)..."

We should consider Article 32 Section 3 as a provision regulating the similar situation, that relates to a court judgment on a law suit on declaring an administrative-legal act void or null and we use it though the analogy:

"In case of an administrative-legal act being declared as void before taking a judgment a court can, if the party has legitimate interests, upon the request of the party, declare void this individual administrative legal act."

Based on a judgment of a court of first instance, proceedings on GYLA's law suit terminated due to absence of subject of dispute. In a descriptive part of the judgment it is indicated that "for the plaintiff it is equally important to receive the information as well as receipt of the information according to a process established by law. "

It is within legitimate interests of the Georgian Young Lawyers' Association to insure, in full compliance with its bylaws (Article 2.1 (a) of the bylaws: [Objectives of the Association] are to raise the legal consensus of the society and establish the supremacy of law), satisfaction its requests. In the present case the Georgian Young Lawyers' Association, has legitimate interests as a party to the case. Therefore, the court's interpretation of the provisions of law is wrong, when the court says the following: "The court also considers that the plaintiff's appeal to use Article 32.3. of the Administrative Procedural Code of Georgia by the analogy of law, since this provision relates to a court's judgment on a claim for voidance or cancellation of an administrative- legal act, while the legislator does not recognize the same action for the claim requesting a specific action and thus there is no ground to use the analogy of law in this particular case."

The Ministry of Foreign Affairs of Georgia was entitle to issue an information only through accepting the claim, but their motion for termination of the case should not have been satisfied by law.

In its decision on termination of the proceedings the court interpreted Article 272.a.1 of the Civil Procedural Code of Georgia as follows: "termination of proceedings is allowed only in cases when the court has admitted the claim. Therefore, the legislator considered it appropriate to terminate the proceedings, after having admitted the claim, to terminate the proceedings due to non existence of the subject of the dispute, which is, in the court's view, an imperative norm of law and it cannot be interpreted in any other way. Therefore, the plaintiff's reference to Article 184.2 of the same Code, in this particular case, is inappropriate and the court cannot share it. The court also thinks that the plaintiff's appeal to use Article 32.3 of Administrative Procedural Code though the analogy of law is groundless, because this provision relates to a court's judgment on a claim for voidance or cancellation of an administrative- legal act, while the legislator does not recognize the same action for the claim requesting a specific action and thus there is no ground to use the analogy of law in this particular case."

Tbilisi Appeals Court rejected the Georgian Young Lawyers' Association's complaint by its decision. The Appeals Court agreed with the findings and conclusions of the court of first instance . The judgment of the Appeals Court is final and is not subject to further appeal.

It should be mentioned that this precedent and such a judgment of the issue will impact the degree of freedom of information in Georgia and developments related to it, so below we discuss this judgment with respect of its likely results:

1. Raising state levy and costs of disclosure of information

Georgian procedural legislation sets quote a high state levy for receiving free public information by means of court proceedings. When the claim is satisfied, the plaintiff is released from the duty and it is transferred to a defendant. But the courts have enforced a practice that when a public agency satisfies the plaintiff's request, the duty of pay the state levy stays with the plaintiff, which is a total legal nonsense.

2. "Freezing effect"

Implementing and supporting the above practice by Georgian courts may, to us the wording of the European Court of Human Rights, have a "freezing effect" on consumers of freedom of information and hesitate in the future to apply to courts with claims regarding freedom information. If until recently the likelihood of satisfaction of law suits was high, today it becomes totally impossible and out of control to make such assessment.

The other side of the issue, which, inter alia, relates to politics of a public agency for disclosure of public information: "a freezing effect" may also be caused by a court practice according to which public agencies issue public information only after a requesting party files a law suit in a court. As a result, citizens are forced to waste time and pay the state levy to receive public information which they are entitled to receive on time and for free. For instance, in a case "The Georgian Young Lawyers' Association v Probation Department of Georgia"[98], the GYLA submitted a request for public information on 19 November 2009. The defendant public agency refused to issue the

[98] The Georgian Young Lawyers' Association v Probation Department of Georgia, case # 3/1423-2010.

requested public information and referred to Article 3, Section 4(c) of the General Administrative Code of Georgia, and said that based on this provision, the requested information was a type of information that was out of the scope of application of the General Administrative Code of Georgia[99]. However, despite such arguments, the Probation Department did provide the requested public information to the Georgian Young Lawyers' Association within the course of the court proceedings[100].

We faced a similar problem in a case "The Georgian Young Lawyers' Association v Probation Department of Georgia"[101]. In this case the GYLA submitted a request for public information on 5 June 2008 and requested public information. But the defendant agency did not provide the requested information and also ignored GYLA's administrative complaint. As a result, on 29 September 2008 the Georgian Young Lawyers' Association filed a law suit against the Probation department of Georgia and requested disclosure the public information requested in the original request. Similar to the previously discussed case above, the Probation Department declared during the court proceedings by their letter of 23 April 2009[102], that it was ready to satisfy the request of the Georgian Young Lawyers' Association and disclose the requested information. The GYLA withdrew its claim at an initial court hearing session on 22) October 2010, since it had been two years from the day of requesting the information the Georgian Young Lawyers' Association had already lost interest towards this information.

For exercising the freedom of information it is crucial to receive information timely within the terms set by law. According to Article 40 of the General Administrative Code of Georgia, a public agency is required to disclose and issue the requested information immediately, and only in special circumstances, the public agency can use 10 days for issuance requested information.[103]

3. Legality of delay of disclosure of information by courts

In this circumstances a term for disclosure of public information set by the General Administrative Code of Georgia that the information must be provided "immediately, or within 10 days", becomes nonsense. In a case discussed above the Georgian Ministry of Foreign Affairs replied to our request of 3 September 2009 (!) on 15 January 2010, i.e. after 4 months and 12 days after receiving our request for information. Thanks to the court of first instance and the court of appeals, the Georgian Ministry of Foreign

[99] A letter from a public official of the Probation Department of Georgia in charge of disclosure of public information dated 30 December 2009.

[100] The letter from the Probation Department dated 30 September 2010.

[101] The Georgian Young Lawyers' Association v Probation Department of Georgia, case # 3/2259-08.

[102] The letter from the Probation Department dated 23 Aoril 2009.

[103] **Article 40. Release of public information** *(2.03.2001 N772)*
1. A public agency shall release public information immediately, or not later than ten days if responding to a request for public information requires:
(a) acquisition of information from its subdivision that operates in another area, or from another public agency, or processing of such information,
(b) acquisition and processing of separate and large documents that are not interrelated, or
(c) consultation with its subdivision that operates in another area, or with another public agency.
2. If release of public information requires the period of 10 days, the public agency shall immediately inform the applicant thereof upon his request

Affairs got away with a fundamental breach of law without being subject to any penalizing or preventive measures, and the plaintiff, instead of satisfaction of its legitimate claim, had to carry the burden of payment of state levy, and waste time, which lacks any reasoning.

4. Diminishing role of courts

Such support of the court to an illegitimate strategy of the Ministry of Foreign Affairs of Georgia makes a court a place where administrative proceedings will be carried out upon the discretion of administrative bodies, as opposed to based on the requirements of law, which diminishes the role of courts.

5. Encouraging the strategy of delay

By legitimating such practices of public bodies encourages the public agencies to delay without limits the provision of public information, and provide information to a plaintiff after the law suit is filed, and terminate court proceedings in this manner.

2. Burjanadze case

On 20 January 2010 the Georgian Young Lawyers' Association applied to the Tbilisi City Court and requested the following public information:

1) Based on Article 13 of "The Georgian Organic Law on General Courts " (Article 12 of the organic law previously in force), in how many cases did the Tbilisi City Court conduct photo and video recording in 2007, 2008, 2009;
2) In how many cases did the court disseminate the photo and video recordings;

The chief of staff of Tbilisi City Court informed us by a letter that for provision of the requested information the court has to systematize and search cases , that requires a lot of time and therefore, it is impossible to mobiles the work force of the court at this moment for this task. The Georgian Young Lawyers' Association's administrative complaint was overruled, so we filed a law suit.

Tbilisi City court did not satisfy the GYLA's law suit. The court said the following: "since the disputed information does not exist in its required form, in order to adopt a lawful and well grounded judgment on this case, it is crucial to make a legal assessment – whether the defendant was required, according to Article 40 of the General Administrative Code of Georgia, to search for the required information , process it, and provide it to the plaintiff within 10 days ." However, for answering this question the court of first instance did not refer to Article 40, Section 1(a) and Section 1(b) of the General Administrative Code of Georgia, which provide for obligation price information and the maximum term for such processing is 10 days.

Instead, the court wrongly defined that "General Administrative Code of Georgia, as it is also demonstrated by its title, is a legal act of a general nature for administrative bodies and its provisions apply along the provisions of special legal acts regulating activities of appropriate administrative bodies; therefore, if a specific relationship is regulated by a special provision of law, this provision must be used on the first place ."

Such determination of the court goes beyond any limits of law, because the special norms should be used only in the basis of collision of norms, when norms are conflicting. In the given case there is no collision between the provisions of Chapter 3 of the General Administrative Code of Georgia and the provisions of the Georgian Organic Law on General Courts. Moreover, even in case of such collision, Chapter 3 of General Administrative Code of Georgia should prevail, because its provisions are specific norms with respect to the freedom of information.

,, It should be mentioned that neither the discussed provision [Article 13 of the Georgian Organic Law on General Courts], nor any other legal act requires the courts to process the information according to years and to keep the information ready in this form with respect tp the facts of how many times has the court conducted photo and video recording in order to provide the information to the interested persons", – said the judge Dimitri Gvritishvili. Such definition is substantially against the purpose and ideas of the General Administrative Code of Georgia.

The General Administrative Code of Georgia introduces and supports a principle of transparent governance. According to its Article 28, "public information is open, except as otherwise required by law, and except for information belonging to state, commercial and personal secret, as required by law." " Maximum openings of information represents a crucial principle of freedom of speech, and based on this principle, all information possessed by a public agency, is open, unless exceptions apply."

The court based its judgment on two circumstances: 1) "The information does not exist in its ready form"; 2) "The defendant is not required by law to process the required information."

According to Article 1, Section 3 of the Georgian Organic Law on General Courts, "this law defines an overall system and organization of Georgian general courts, as well as legal status of judges, the procedure for their selection, appointment (election) and dismissal, and the guarantees for social and legal protection of judges." It is clear that this law does not regulate issues of provision of public information by the courts. According to Article 3.2(d) of the General Administrative Code of Georgia, only Chapter 3 applies to bodies of justice, i.e. Georgian courts, which once against proves that the court did not apply the law which it should have applied in order to decide on a dispute.

"Article 13 of the Georgian Organic Law on General Courts is important in this case because it confirms the Georgian Young Lawyers' Association's request for information from an administrative body. Tbilisi City court has in its records information on how many times had the court conducted photo and video recording in years 2007, 2008 and 2009, and in how many cases these photo and vide materials have been released. This information can be disclosed to the Georgian Young Lawyers' Association is possible upon processing the data possessed by the court, for which Article 40, Section of the general Administrative Code of Georgia sets a term of 10 days.

The defendant Tbilisi appeals court argues that the request for information requires collection of information that requires a lot of time. According to Article 28 of the General Administrative Code of Georgia such a respond cannot be a lawful ground for rejection of disclosure of information. The court of first instance should have duly assessed the arguments submitted by the defendant, which it did not do.

The General Administrative Code of Georgia does not recognize a right of an admin-

istrative body to reject release of information if there is a need to collect and systematize an information of a significant volume. In these circumstances 10 days deadline applies, instead of a duty to release the information immediately. In a letter in response to our request for information the defendant referred to, as a legal basis for rejection on release of the requested information, circumstances that According to Article 40.1.(b) of the General Administrative Code of Georgia is recognized as a legal basis for releasing the information within 10 days and not a basis for rejection of release of the information. "A public agency is required to release an information.. no later than 10 days, if the release of the public information requires: collection and processing of inter related documents of a significant volume."

As a result, we think that the release of the public information required by the Georgian Young Lawyers' Association should have happened in a maximum term established by law.

In response to the request of the GYLA, Tbilisi City court instructed that: "the court exercises its duties based current legislation. Therefore, the staff of court is assigned to undertake duties of the court granted to it by law. Taking into account the above, collecting this type of cases and mobilization of major personnel of the court for this purpose is not possible at this stage due to high volume of court cases." The court cannot escape the duty imposed on it by provisions of law on freedom of information by arguing that its primary function is to exercise the justice. On the contrary, we emphasize the fact that the defendant in this dispute is the Tbilisi City Court, that itself hears disputes in city of Tbilisi on freedom of information, that, at the end, significantly raises the number of cases. Based on the role and a position of the defendant, it is of double importance that the court serves as example in transparency of information for other state and public agencies. Following its position this ill logic, any public agency would be able to escape the duty of release of public information when it is possible, as each of them are busy with their own important responsibilities. We think that the court of first instance should have carefully assessed the facts and legal details of the case, and based on this should have exercised the judicial supervision over an illegal act issued by the defendant, should have decaled it void, and should have requested the Tbilisi City Court of release the information requested by the Georgian Young Lawyers' Association.

Instead of the above, the judge Dimitri Gvritishvili the claims of the Georgian Young Lawyers' Association. According to Principle 8 of freedom of expression, "laws that contradict to a principle of maximum transparency, must be amended or annulled. Others laws must be interpreted according to provisions of normative acts on freedom of information so that the principles of freedom of information are met. Other legislation that relates to information possessed by the society, must comply with principles of freedom of information listed in law. With respect to restrictions and limitations, the legal framework of exceptions provided by legislation on freedom of information, must be complete and should not be interpreted by means of other laws." It is clear that the court of first instance did not apply the law, which it should have applied, and interpreted the provisions of law wrongly, jeopardizing the provisions of law on freedom of information, and decided on the case in violation of provisions of law.

The Georgian Young Lawyers' Association further appeals the judgment of the court of first instance. The appeal is submitted on 18 November 2010.

3. Georgian Young Lawyers' Association V the Administration of the President of Georgia

On 5 June 2009 the Georgian Young Lawyers' Association requested from the Administration of the President of Georgia the Presidential Decrees of year 2008 on allocations of funds form a reserve fund.

Our request for information, as well our administrative complaint of 16 July 2009 were ignored, after which on 16 September 2009 we filed a law suit.

On 17 February 2010 the GYLA again submitted a request to the Administration of the President of Georgia and this time requested Presidential Decrees of year 2009 on allocations of funds form a reserve fund. The request, as well as our administrative complaint filed on 16 March 2010 were ignored, that prompted us to file a law suit on 29 April 2010.

Tbilisi City Court's administrative chamber issued decision on 4 October 2010 and by this decision it combined the two cases. By its decision of 22 October 2010 the court partially terminated the proceeding with respect to the request to take steps against the Administration of the President of Georgia, based on inadmissibility of the law suit. The court said that the law suit was filed in violation of a deadline requested by law.

According to Tbilisi City Court, the law suits of the Georgian Young Lawyers' Association have exhausted their statute of limitation as they have missed the terms of filing. In particular, the court argued that Article 183 of the General Administrative Code of Georgia determines e term of one month for applying to court with a request to release information. The court went on saying that Article 183, Section 1 of the General Administrative Code of Georgia sets the term for reviewing an administrative complaint, but the above provision has a general character. According to the court, the term for reviewing complaints relating to cases of freedom of speech is 10 days according to Article 40 of the General Administrative Code of Georgia, which is a special norm. Therefore, based on the courts argument, in proceedings of reviewing administrative complaints, a term of 10 days apply, instead of the term of one month, and after expiring this term a plaintiff should apply to court with a claim to protect the plaintiff's right within one month. WE should mentioned that in similar cases (the Georgian Young Lawyers' Association v the Supreme Counsel of Justice, a decision of 13 October 2010), the judge Dimitri Gvritishvili determines that the term for reviewing an administrative complaint is 15 days according to Article 100, Section 2, of the General Administrative Code of Georgia.

The Georgian Young Lawyers' Association thinks that the court did not apply the law it should have applied. In particular, the Georgian Young Layers' Association filed a law suit based on Article 24 of the Administrative Procedural Code and requested to require the Administration of the President of Georgia to take action, in particular, to release the public information requested by the application of the Georgian Young Lawyers' Association. It should be noted that the Georgian legislation does not determine a term for filing a law suit based on Article 24 of the Administrative Procedural Code. In determining the admissibility of a law suit filed under this Article only the fact of damages caused to legitimate interests of the plaintiff is verified. In this case the legitimate interests imply rights and freedoms granted to the plaintiff by Georgian laws. The judge of Tbilisi City Court Dimitri Gvritishvili rightly mentions that Article 24 of the Administrative Procedural Code of Georgia "does not set the term for appeal".

However, the judge considers it is a defect of law, rather than a legislator's intent. This interpretation is wrong, and therefore, the Georgian Young Lawyers' Association was not required to follow any term to file a law suit requesting action.

At the same time, the court indicated in its decision that in reviewing an administrative complaint and deciding on it, a term of 10 days applies. However, the Georgian Young Lawyers' Association used the term 1 month and filed a law suit in a court at the end of this 1 month. Therefore, the court decided that the GYLA's law suit had expired its statute of limitation.

With respect to review of an administrative complaint, the General Administrative Code of Georgia sets specific chapter 13. Therefore. Administrative bodies should apply provisions of this chapter when deciding on admissibility, review and judgment making on administrative complaints, and these provisions are special norms by their character. More specifically, according to Article 183 of the General Administrative Code of Georgia, an administrative body is required to review and administrative complains and take an appropriate judgment within one month period. In a given case, the Administration of the President of Georgia did not review the complaints submitted by the Georgian Young Lawyers' Association, for which it had one month as determined by law.

At the same time, a judge can only interpret and define the provisions of law. A judge does not make a law, a judge only assesses the law. Article 183 of the General Administrative Coe of Georgia unequivocally determines that "unless a law or a subordinate normative act determines otherwise, an entitled administrative body is required to review an administrative complaint and render appropriate judgment within the term of one month."For some reason unknown to us this instruction was not clear for the judge Gvritishvili. According to his definition, the above mentioned provision "has a general character and requires applying a special provision that sets the special term. And such a provision, according to the court, is set by Article 40 of the General Administrative Code of Georgia – not later than 10 days." Such a judgment would have been inacceptable for a country with rich culture of law of precedent.

Therefore, we believe that based on Article 183 of the General Administrative Code of Georgia, 1 month is the term for reviewing of administrative complaints and provisions of the chapter on freedom of information regulating release of information upon request appl. Our arguments are supported by a judgment of the Supreme Court of Georgia. In particular, In a verdict of cassation court of 25 May 2009, case Nbs-42-42(k-k-09), the court said that the term for review of administrative complaints is one month as determined by Article 183 of the General Administrative Code of Georgia. Also, according to Article 183, Section 4 of the General Administrative Code of Georgia, an administrative body may extend the term by no more than one month. Based on the judgment of the cassation court itself, a maximum term for review of administrative complaints is separately determined in chapter 13 of the General Administrative Code of Georgia, which determines procedure for administrative proceedings for review of administrative complaints.

The law does not determine the maximum term for filing law suits based on Article 24 of the Administrative Procedural Code of Georgia requesting undertaking an action. Therefore, the decision of the city court on termination of proceedings on this ground is against the law.

We also attach a great importance to the fact that one of the law suits of the Georgian Young Lawyers' Association against the Administration of the president of Georgia is admissible even within the wrong judgment of the court. However, for some reason the court ignored these circumstances.

#	Request	Claim	Law suit
1	5.06.2009	16.07.2009	16.09.2009
2	17.02.2010	16.03.2010	29.04.2010

1) The judge Gvritishvili did not investigate the dates of submission to the competent body of the request and of the administrative complaint referred to in the second law suit of the Georgian Young Lawyers' Association.

2) In a telephone communication the Administration of the President of Georgia instructed the Georgian Young Lawyers' Association that they received our complaint on 17 March. This means that the last day of the 10 days term referred to by the judge was not the 26 March, as he indicated, but 29 March, the Monday. Therefore, the law suit filed on 29 April is within ints statute of limitations.

The Georgian Young Lawyers' Association has been working on issues on freedom of information for a long time. On one hand, we could have considered this judgment of the court as a progress, as it determines a very short term for review of administrative complaints on issues of freedom of information, which reduces the time for court proceedings. However, we cannot accept this judgment as legitimate, however beneficial for future work of the Georgian Yong Lawyers' Association, as the supremacy of law and implementation of this principle in our daily lives is one of our strategic objectives as set by our charter. At the same time, as we realize that the laws are made not just for lawyers, but they are made for people, we think, that encouraging such illegal judgments may endanger the rights of ordinary citizens. The ordinary citizens will never be able to read the law the way the judge Gvritishvili interpreted it, which goes beyond limits of law.

The administrative chamber of appeals court is hearing our private claim which we filed on 8 November 2010.