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## Constitutional judgment 3-4-1-1-09

### **RULING OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT**

<b>No. of the case</b>	3-4-1-1-09
<b>Date of decision</b>	19 May 2009
<b>Composition of court</b>	Chairman Märt Rask, members Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister and Harri Salmann
<b>Court Case</b>	Review of constitutionality of § 28(1)25) of the Public Information Act
<b>Basis of proceeding</b>	The Tallinn Circuit Court judgment of 6 February 2009 in case no. 3-07-2658
<b>Hearing</b>	Written proceeding

**DECISION**                      **To dismiss the request of the Tallinn Circuit Court.**

### **FACTS AND COURSE OF PROCEEDING**

**1.** It appears from the Tallinn Circuit Court judgment that on 2 November 2007 and 25 November 2007 Oleg Gogin had made requests for information to the Loksa City Government, requesting that a list of employees of the Loksa Cultural Centre, their official titles and valid salary rates be issued to him.

**2.** On 14 November 2007 the Loksa City Mayor issued to O. Gogin a copy of the resolution of the Loksa City Council on the approval of the composition of staff of the Loksa Cultural Centre. On 22 November the Loksa City Mayor issued to the complainant the list of the Loksa Cultural Centre employees, drawn by the acting director of the Cultural Centre, whereas the list did not set out the posts of the employees. On 3 December the mayor of Loksa informed the complainant that neither the Loksa City Council nor the City Government have established a document including both the names and the official titles of the employees of the Cultural Centre. On 3 December 2007, in addition to the referred documents, O. Gogin was given an

extract of an order of the Loksa City Government on the approval of the salary of the acting director of the Cultural Centre, and he was informed that in order to receive the rest of the requested information he should address the acting director of the Cultural Centre.

On 18 December 2007 the acting director of the Loksa Cultural Centre advised O. Gogin that the requested information could not be disclosed because of § 8(3) of the Wages Act (RT I 1994, 11, 154; hereinafter “the WA”), pursuant to which an employer does not have the right to disclose information concerning the wages calculated, paid or payable to an employee or information concerning the employee’s wage conditions without the consent of the employee or basis arising from the law.

**3.** On 28 February 2008 O. Gogin submitted a request for information to the Loksa Sports Centre, requesting the disclosure of the wage rates valid in the Sports Centre. The director of the Sports Centre complied with the request for information concerning the director’s salary rate but refused to disclose the wage rates of other employees, because those employees were not the persons subject to the regulatory framework of the Public Service Act.

**4.** O. Gogin filed an action with the Tallinn Administrative Court, requesting that the court require the Loksa City Government to comply with his request for information of 25 November 2007. In addition, O. Gogin filed an action requesting that the court require the Cultural Centre to comply with his request for information of 2 November 2007, and that the Sports Centre comply with his request for information of 28 February 2008. By its rulings of 19 May 2008 and 28 March 2008 the Tallinn Administrative Court joined these actions into a joined proceeding.

**5.** By its judgment of 30 May 2008 the Tallinn Administrative Court refused to satisfy these actions. The court was of the opinion that § 28(1)25 of the Public Information Act (RT I 2000, 92, 597; hereinafter “the PIA”) required the disclosure of salary rates and guides valid in state and local government agencies, and not the salaries of concrete persons. The salary rates of the directors of the Loksa Cultural Centre and Sports Centre are disclosed on the webpage of the Loksa City. The wage conditions of other employees of the Cultural Centre and Sports Centre are determined by contracts of employment. Employment in an agency administered by a local government is not public service, and therefore, pursuant to § 8(3) of the WA, the precise wage information of the employees of the Cultural Centre is not subject to disclosure. The information requested by the complainant was disclosed pursuant to the procedure established by law and his right to receive information was not violated.

**6.** On 30 June 2008 O. Gogin filed an appeal with the Tallinn Circuit Court, applying for the annulment of the Tallinn Administrative Court judgment and for the rendering of a new judgment.

**7.** By its judgment of 6 February 2009 the Tallinn Circuit Court declared § 28(1)25 of the PIA partly unconstitutional, did not apply the unconstitutional part of the provision, and partly satisfied the appeal of O. Gogin.

## **OPINIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDING**

**8.** The Tallinn City Court argued that § 28(1)25 of the PIA established the obligation of holder of information to disclose the salary rates and guides valid in state and local government agencies, and the procedure for payment of additional remuneration and the grant of fringe benefits in such agencies. § 8(3) of the WA is not a norm restricting the disclosure of the information referred to in § 28(1)25 of the PIA. Both the Cultural Centre and the Sports Centre are agencies administered by the local government. For the purposes of the Local Government Organisation Act (RT I 1993, 37, 558) both administrative agencies and the agencies under their administration are local government agencies.

§ 28(1)25 of the PIA does not differentiate between officials and persons working under employment contracts. Therefore, the explanation of the administrative court that neither the Cultural Centre nor the Sports Centre are administrative agencies, is irrelevant.

The circuit court points out that the wording of § 61 of the draft Public Information Act submitted to the legislative proceedings in the Riigikogu provided for the amendment of § 8 of the Wages Act so that subsection (3<sup>1</sup>)4) thereof would have established, *expressis verbis*, that the restriction referred to in § 3(3) of the WA was not applicable to the employees of local government agencies. This provision was left out of the draft due to the fact that the Act Amending § 8 of the Wages Act, passed during the legislative proceeding of the draft on 9 May 2000, provided for a more general amendment of § 8(3<sup>1</sup>) of the WA. The explanatory letter to the Public Information Act reveals the will to disclose all the salaries of the public sector.

It is for the above reasons that the circuit court held that under the Public Information Act the complainant was entitled to examine the salary rates valid in the Cultural Centre and the Sports Centre.

Pursuant to § 10(1) of the WA the wage rate of an employee shall be determined by agreement of the parties upon entering into an employment contract. The statutes of the Cultural Centre or the Sports Centre do not indicate that this should be done in some other way. Thus, it can be concluded that the salary issues of employees of an agency shall be resolved by the director of the agency in the employment contract. Pursuant to § 3(1) of the PIA public information is information which is recorded and documented in any manner and on any medium and which is obtained or created upon performance of public duties provided by law or legislation issued on the basis thereof. Consequently, public information means not only administrative legislation but also information which is recorded and documented in any manner and on any medium. Thus, the requested wage rates constitute documented information which can be disclosed upon complying with requests for information.

The circuit court argued, nevertheless, that there was no ground for satisfying the action in this respect, because § 28(1)25 of the PIA was not to be applied due to the unconstitutionality thereof as far as it establishes that the wages of the employees of the agencies under the administration of local governments must be disclosed to an extent wider than that required by § 15<sup>1</sup> of the Anti-corruption Act (RT I 1999, 16, 276; hereinafter “the ACA”).

The circuit court held that the disclosure of the wage rate included in an employment contract infringes the right to the inviolability of private life. The court found the lawful objective of the infringement to be the rendering of the use of state assets more transparent and prevention of corruption. The disclosure of wage rates is a suitable measure for the achievement of the referred aim. As employment contracts, by which wage rates are agreed on, are concluded by the head of an administrative agency or by a local government agency, the disclosure allows to have control over the wage rates and to prevent the abnormal use of local government budgetary funds. Also, the necessity of disclosure of the wages of employees of the agencies under the administration of local governments arises from the right of every person, established in § 44(2) of the Constitution, to receive information from local government agencies about their activities, except information the disclosure of which is prohibited by law, and information intended exclusively for internal use.

When assessing the reasonableness of the restriction of the right to protection of private life of employees of administrative agencies the court agreed that salary costs can be effectively controlled by the disclosure of the amount of salary costs of an agency, information on the execution of the budget in this regard, and the list of offices. Therefore § 28(1)25 of the PIA excessively restricts the right of the employees of the Cultural Centre and the Sports Centre to the inviolability of private life.

**9.** O. Gogin is of the opinion that § 28(1)25) of the PIA is in conformity with the Constitution. The Tallinn Circuit Court made an error when concluding that the provision requires the disclosure of the salary rates set out in the employment contracts of employees. The provision under discussion establishes that those salary rates must be disclosed that are established in state and local government agencies by administrative legislation or regulations. This is indicated by the wording of the provision, which refers to valid salary rates.

**10.** The Loksa City Government shares the opinion of the Tallinn Circuit Court that § 28(1)25 of the PIA is

partly unconstitutional.

The disclosure of the salary information of an employee of an agency administered by a local government infringes the right of every person, established in § 26 of the Constitution, to the inviolability of family and private life. The income of a private person is his or her private business, and deserves legal protection to prevent the disclosure thereof.

Disclosure would bring about, without basis, unequal treatment of the employees of the agencies under the administration of local governments and the employees who perform the same functions on the basis of employment contracts entered into with persons in private law, as the salary information of private sector employees is not subject to disclosure without the consent of employees concerned. The salary costs of the agencies under the administration of the Loksa City Government can be controlled on the basis of the amount of salary costs and the number of posts approved by the city council.

**11.** The Constitutional Committee of the Riigikogu is of the opinion that § 28(1)25) of the PIA excessively restricts the right of the employees of the agencies under the administration of local governments to the inviolability of private life. These persons do not exercise public authority and do not hold official positions for the purposes of the Anti-corruption Act. Public interest in the wage rate of the referred persons is not justified. The public has other possibilities to examine the salary costs, which in turn allows to control the performance of public duties.

**12.** The Minister of Justice is of the opinion that § 28(1)25) of the PIA is not in conflict with § 26 of the Constitution, because the provision does not provide for the personalised disclosure of salaries.

§ 9 of the WA establishes that an employer shall establish wage rates according to the differences in work and working conditions, based on a collective agreement entered into between the employer and employees. Pursuant to § 22(1)36) of the Local Government Organisation Act the approval of the structure of rural municipality or city administrative agencies, of the composition of their staff of public servants, and salary rates and wage conditions is one of the duties of a council. As a rule, the referred salary rates make up but one part of the final salary of a person (additional remuneration and differentiation are possible). Consequently, the referred salary rates do not amount to personalised salaries. § 10(1) of the WA establishes that the wage rate of an employee shall be determined by agreement of the parties upon entering into an employment contract. Thus, the salary of a concrete person is formed in the person's employment contract. As § 28(1)25) of the PIA gives rise to the obligation to disclose the salary rates and guides valid in state and local government agencies, and the procedure for payment of additional remuneration and the grant of fringe benefits in such agencies, this does not amount to an infringement of § 26 of the Constitution, because the salary rates are not personalised.

**13.** The Chancellor of Justice is of the opinion that as a local government is obliged, under § 28(1)25) of the PIA, to disclose the salary rates of the employees of the agencies under its administration (the tariffs, not the concrete salaries of concrete employees), and this can not be done in the case under discussion, because the Loksa City Council has not established such rates, the validity of the referred norm does not affect the resolution of this administrative matter. In both cases – the validity and invalidity of § 28(1)25) of the PIA – the complainant's requests for information can not be complied with in regard to the rest of the information. Consequently, § 28(1)25) of the PIA is not a relevant norm.

Pursuant to § 2(1) of the WA wages are comprised of basic wages and additional remuneration, bonuses and additional payments paid in the cases prescribed by law. Pursuant to § 2(2) of the WA basic wages are wages calculated on the basis of an hourly, daily, weekly or monthly rate determined in an employment contract or legal instrument. Pursuant to § 9 of the WA an employer shall establish wage rates according to the differences in work and working conditions, based on a collective agreement entered into between the employer and employees. For the purposes of this provision an employer can also be a legal person in public law. Pursuant to § 10(1) of the WA the wage rate of an employee shall be determined by agreement of the parties upon entering into an employment contract. It follows from the above that first of all an employer

should establish wage rates under § 9 of the WA, and on the basis of these the concrete wage rate of a concrete employer (which, in turn, shall be the basis for the basic wages according to work load) shall be decided upon conclusion of employment contract. § 9 of the WA is applicable to local governments, who should – on the basis of this provision – establish (by legislation of general application, not just by employment contracts) the wage rates of the employees of the agencies under their administration. As far as it is known the Loksa local government has failed to do so.

The interpretation that wage rate primarily means a so called tariff is supported by § 8(3) of the WA, which provides that an employer does not have the right to disclose information concerning the wages calculated, paid or payable to an employee or information concerning the employee's wage conditions without the consent of the employee or basis arising from the law, thus differentiating the above from wage rate. While the wage rate of an employee constitutes public information, the concrete wages payable to an employee may be disclosed only with the consent of that employee.

Thus, on the basis of § 28(1)25) of the PIA the following should be disclosed: salary rates and salary guides established by local governments, as well as the procedure for payment of additional remuneration and granting of fringe benefits. The obligation to disclose extends only to such data on the basis of which general conclusions concerning the wages actually payable to employees can not be drawn, because the wages depend on several other factors related to concrete employees.

## **THE PROVISION NOT APPLIED**

**14.** § 28(1)25) of the Public Information Act (RT I 2000, 92, 597 – RT 2007, 68, 420):

“§ 28. Obligation of holder of information to disclose information

(1) A holder of information is required to disclose the following existing information relating to the duties thereof:

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25) salary rates and guides valid in state and local government agencies, and the procedure for payment of additional remuneration and the grant of fringe benefits in such agencies;”

## **OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

**15.** Pursuant to § 14(2) of the Constitutional Review Court Procedure Act (RT I 2002, 29, 174; hereinafter “the CRCPA”), in the adjudication of the matter on the basis of a court judgment or court ruling the Supreme Court may repeal a provision of legislation of general application which is relevant to the adjudication of the matter. Upon assessing relevance it is of determinative importance whether the provision which was declared unconstitutional was of decisive importance to the adjudication of the matter. A provision is of decisive importance when in the case of unconstitutionality of the provision a court should render a judgment different from that in the case of constitutionality of the provision (the Constitutional Review Chamber of the Supreme Court judgment of 2 May 2007 in case no. 3-4-1-2-07 – RT III 2007, 19, 155, paragraph 15).

To decide on the relevance of a provision in some cases it is necessary to assess whether the court who initiated concrete norm control has correctly interpreted the norm, which it declared unconstitutional, and also the norms determining the conditions and extent of the norm, which was declared unconstitutional (the Constitutional Review Chamber of the Supreme Court judgment of 25 November 2003 in case no. 3-4-1-9-03 – RT III 2003, 35, 368, paragraph 12).

**16.** In the case under discussion the Chamber is precisely of the opinion that the Tallinn Circuit Court has erroneously interpreted the provision which it declared unconstitutional and did not apply (§ 28(1)25) of the PIA).

**17.** In the administrative case which is the basis for this constitutional review case the dispute was essentially about whether an agency, which is under the administration of a local government, can comply with the obligation arising from § 28(1)25) of the PIA to disclose the salary rates of the employees employed in an agency under the administration of a local government on the basis of employment contracts, when the local government has failed to establish the salary rates of these persons by its legislation.

The Chamber agrees with the interpretation of the Tallinn Circuit Court that as § 28(1)25 of the PIA does not differentiate between administrative agencies and agencies administered by administrative agencies, the obligation to disclose is extended to those salary rates that are valid in local government administrative agencies, as well as to those salary rates that are valid in the agencies under the administration of local government administrative agencies. The Chamber also agrees with the circuit court opinion that § 28(1)25 of the PIA does not make a difference between public servants and persons employed on the basis of employment contracts. That is why the provision requires the holder of information to disclose the salary rates of public servants and persons employed on the basis of employment contracts of local government administrative agencies and the agencies administered by the latter.

**18.** In the present case the question is what is to be understood by wage rate. The term *palgamäär* [wage/salary rate] employed in § 28(1)25) of the PIA has different meanings in the Wages Act and in the Public Service Act.

Firstly, salary rate means a rate of remuneration corresponding to specific positions or offices, established by legislation of general application or employer's internal legislation. Thus, § 8<sup>1</sup>(3) of the Public Service Act (RT I 1995, 16, 228; hereinafter "the PSA") provides that a salary rate is a sum of money which corresponds to the salary grade of an official, which is established pursuant to subsection 9(3) of this Act by a regulation of the Government of the Republic or is differentiated pursuant thereto. The Government of the Republic has passed regulations of the basis of § 9(3) of the PSA setting out the lists of salary grades and corresponding salary rates of different agencies (see e.g. the Government of the Republic regulation no. 182 of 30 December 2008 "Remuneration of State Public Servants" (RT I 2009, 1, 10)). In regard to local government administrative agencies § 11(1) of the PSA establishes that the structure, staff and salary rates of public servants of local government administrative agencies shall be approved by the local government council. § 9 of the WA establishes, in regard to persons employed on the basis of employment contracts, that an employer shall establish wage rates according to the differences in work and working conditions, based on a collective agreement entered into between the employer and employees. The Government of the Republic has, on the basis of § 9 of the WA, on 30 December 2008 issued regulation no. 183 "Remuneration of Employees of State Agencies under the Administration of Governmental Authorities" (RT I 2009, 2, 11), also establishing the salary grades and corresponding monthly salary rates of employees.

Secondly, salary rate means the remuneration payable to a concrete person for the work he or she has performed within a specific period, and the remuneration, and this is determined by a directive or an order upon assuming office, or by an employment contract by agreement of the parties. The Chamber argues that this is the way salary rate is to be understood in § 24(2)3 of the PSA, which provides that the directive or order on appointment to office must contain, in addition to other data, also the title of position and salary grade, salary rate and additional remuneration. In the Wages Act the same content of the term salary rate is reflected in § 10(1) of the Act, establishing that the wage rate of an employee shall be determined by agreement of the parties upon entering into an employment contract.

**19.** The Chamber does not share the opinion of the Tallinn Circuit Court that the term salary rate, used in § 28(1)25) of the PIA, is also to be understood as the wage rate determined by agreement of the parties in an employment contract. The Chamber is of the opinion that for the purposes of the provision under discussion the salary rate subject to disclosure is only the abstract remuneration rate, not related to specific persons.

If the term *palgamäär* of this provision were to be interpreted as the remuneration determined in the employment contract of a concrete person, the provision would require the disclosure of the actual salaries of

employees without their consent. Yet, disclosure of information concerning wages infringes everyone's right to the inviolability of private life, established by § 26 of the Constitution (the Constitutional Review Chamber of the Supreme Court judgment of 24 December 2002 in case no. 3-4-1-10-02, paragraph 28).

The Supreme Court has stated that if there are many possibilities of interpretation, the constitution-conforming interpretation should be preferred to those interpretations that are not in conformity with the Constitution. Also, such interpretation should be preferred, which would guarantee the best protection to different constitutional values (the Supreme Court *en banc* judgment of 22 February 2005 in case no. 3-2-1-73-04, paragraph 36).

Consequently, in this case such interpretation of § 28(1)25) of the PIA should be preferred on the basis of which the applicable norm would not infringe the inviolability of private life of the employees of the agencies under the administration of administrative agencies. The infringement of inviolability of private life is precluded by the interpretation to the effect that the provision requires the disclosure of only abstract salary rates, not relating to concrete persons, and which have been established for the agencies under administration by the legislation of a local government. This interpretation is preferable also proceeding from § 4(3) of the PIA, which establishes that upon granting access to information, the inviolability of the private life of persons shall be ensured. The disclosure of salary information contained in employment contracts is also precluded by § 8(3) of the WA. Pursuant to this provision an employer does not have the right to disclose, *inter alia*, information concerning wage conditions without the consent of the employee or basis arising from the law. Under § 3(1) of the WA wage rates are included in wage conditions.

The Chamber argues that this interpretation, while guaranteeing broader protection to inviolability of private life, does not violate the right of the appellant in the main dispute to receive information about the activities of state agencies and local governments, established in § 44(2) of the Constitution. The objective of disclosure of salary rates is to allow for the public control of the salary costs of agencies under administration. The complainant can obtain overall information about salary costs from other information subject to disclosure, such as the budget of the agency under administration, report on the execution of the budget and the list of offices.

**20.** Consequently, pursuant to § 28(1)25) of the PIA a local government is required to disclose the salary rates of employees of agencies under its administration, established by legislation of the local government. As appears from the court judgment, which serves as the basis for this constitutional review case, the local government has not established salary rates in the described manner. Consequently, the complainant's request for information can not be complied with either in the case of constitutionality or unconstitutionality of § 28(1)25) of the PIA. The unconstitutionality of the provision does not affect the adjudication of the main dispute. Consequently, § 28(1)25) of the PIA is not a relevant provision.

**21.** For the above reasons and on the basis of § 11(2) of the CRCPPA the request of the Tallinn Circuit Court is returned without review.

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