TRIBUNAL TAL-APPELLI DWAR L-INFORMAZZJONI U L-PROTEZZJONI TAD-DATA

Appeal Number 36/2016:

Allied Newspapers Limited

Vs

Commissioner for the Information and Data Protection

Decision: 16th February 2016

Chairman: Dr Anna Mallia LL.D., LL.M. (Lond), Dip.Tax
Members : Mr Charles Cassar M.B.A.(Exec.), Dip.Lab.Stud., Cert.Mediator (UK)
Mr David Bezzina HNDip C.S., BSc IT (Hons)

The Tribunal

Having seen that the request made by the appellant on 29 September 2015 to Enemalta plc was refused by Enemalta on 14th December 2015 on the grounds stated therein.

Having seen the request made by Leonard Callus on behalf of the appellant to the Commissioner for the Information and Data Protection dated 15 December 2015 for an investigation and review by the Information and Data Protection Commissioner in accordance with article 23 of the freedom of Information Act of the decision of Enemalta of 14th December 2015.

Having seen the decision by the Commissioner dated 16th July 2016 wherein such request was refused on the grounds stated therein.

Having seen the appeal by the appellant regarding the decision of the Commissioner dated 16th July 2016 wherein the seven requests made by the appellant were all rejected;

Having seen the reply submitted by the Commissioner to the appeal made by the appellant;

Having seen the minute in the 24 November 2016 wherein the parties declared that they are closing their case and the case was deferred for judgement.

Preliminary

1.The Tribunal notes that although the appellant makes ample reference to the decisions of the European Court of Human Rights he does not give any details about the source and when he does he does not give the details about the judgements quoted.

2.Freedom of Information and Data Protection

It is true that the twin principles of freedom of information and of data protection are expressly recognised with the provisions of the TFEU - (article 15(1) formerly Article 255EC) and Article 16 TFEU (formerly Article 286 EC).

Article 42 of the EU Charter of fundamental Rights provides regarding the right of access to documents by any citizen of the EU. There is however no express provision in the European Convention on Human Rights guaranteeing a right of access to individual or general information held by public authorities as distinct from the right guaranteed under both article 10 ECHR and Article CFA – freely to express and to receive and impart information and ideas one already has, without interference by public authority and regardless of frontiers. See Loisea v France – admissibility decision (2003) ECHR 46809/99 (Second Section 18 November 2003): *'It is difficult to derive from the ECHR a general right of access to administrative data and documents...'*

As a derogation from the general principle of public access to documents held by the EU, these exceptions must be interpreted narrowly and applied strictly. See Case C-506-08 P *Sweden v Commission* 21 July (2011) ECR I-nyr at paras 75-6:

"para 76. Thus if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying."

Under reference to Article 4(1) (a) where disclosure would undermine the protection of the public interest as regards, public security, defence and military matters, international relations and /or the financial, monetory or economic policy of the EU or of a Member State. (see *Joined Cases T-3/00 & T-337/04 Pitsiorlas v Council* (2007) ECR II-4779.

And under reference to Article 4(2) unless there is an overriding public interest in disclosure, the EU institutions are also required to refuse access to a document where its disclosure would undermine the protection of commercial interest of a natural or legal person including intellectual property and court proceedings and legal advice and the purpose of inspections, investigations and audits.

In *Joined Cases T-355/04 & T-446-04 Co-Frutta* the General Court noted at para 133 in relation to this exception:

'The aim behind the application for access to the documents (in this case) is that of verifying the existence of fraudulent practices on the part of the applicant's competitors. The applicant thus pursues, amongst other objective, the protection of its commercial interests. However, it is not possible to categorise the applicant's commercial interests as being an "overriding public interest" which prevails over the protection of the commercial interests of traditional operations, the objective underlying the refusal of access to a part of the documents requested. In addition, the pursuit of the public interest in identifying cases of fraud in order to ensure the smooth operation of the banana market is not a matter for the operators but for the competent Community and national public authorities where appropriate following an application made by an operator. '

The EU legislature enacted in 2001 the freedom of information measure in Regulation (EC) 1049/2001 and Regulation (EC) 45/2001 on data protection. The first regulation seeks to guarantee the "widest possible access to document" and the data protection legislation pulls in the opposite direction seeking to ensure the proper protection the privacy of individuals whose personal data is processed by EU and member states institutions or bodies. In Joined Cases C-39/05 P & C-52/05 *P Sweden and Turco v Council* (2008) ECR I-4723 para 49; and Case C-139/07 *P Commission v Technische Glaswerke Ilmenau* 29 June (2010) ECR 1-nyr.para 53, it was held that if a body subject to the provisions of the regulation (EC) no 1049/2001 decides to refuse access to a requested document it must in principle explain how disclosure of that document could specifically and effectively undermine the interest protested by the Article 4 exceptions.

3.Enemalta plc as a public authority

Now the Tribunal shall examine whether Enemalta plc is a public authority.
Enemalta plc the government holds 66.6% as is admitted by Enemalta plc in this appeal.
Article 5(1) (f) of Chapter 496 of the Laws of Malta (the Freedom of Information Act) states that this Act shall not apply to documents that are held by a commercial partnership in which the Government or another public authority has a controlling interest, in so far as the documents in question relate to the commercial activities for the commercial partnership.

The request made by appellant does not fall under the European Directive 2003/4/EC on Public Access to Environmental Information which request "public authorities to provide environmental information on request. This directive defines 'public authority' in Article 2(2)(c) as a natural legal person under the control of a body or persons falling within the categories of government body or one performing public administrative functions. If in the case of *Smartscource v the Information Commissioner* (2010) UKUT 415 (AAC) water utilities were held not to be public authorities and consequently had no obligation to provide information to the public pursuant to the Environmental Information Regulations 2004 which implement the Directive into English and Welsh Law, in Fish Legal and Emily Shirley v ICO and Southern Water, United utilities An Yorkshire Water Case C 279/12, the Court ruled that in order to determine whether a body is covered by article 2(2) (b) – "it should be examined whether they have "special powers beyond those which result from the normal rules applicable in relations persons governed by private law.' And considered that bodies which fell under this article as hybrid organisations with both functions of public authority and separate commercial functions that not all of their environmental information fell within their activities of public administration. However a body under the control of a public authority under (b) or (c) would not be required to provide environmental information which did not relate to the provision of its administrative service or functions. Where a water company, for instance is thought to be under the control of, say Ofwat, only that environmental information relating to its public function would need to be provided.

A public entity creates a body to run a public service and chooses to incorporate it under private law such as in the case of Enemalta plc.

In *Portgas* case, the issue brought before the European Court of Justice was whether a Member State which has not transposed a Direction could invoke said Directive against a public service concession-holder before a national court. Under ECJ case law, a Directive cannot impose a duty on a private individual. It therefore cannot be invoked in legal proceedings against a private individual before a national court (6), particularly where the State has omitted to transpose the same.

However, by virtue of the Foster judgment of 12 July 1990 (7), a network concession holder may in some cases can be considered as a "public authority" rather than a private entity. In that decision, the Court took the view that *"a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any*

event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon" (para 20 and 22).

In the *Portgás* decision, the Court adopted the same criteria. However, owing to a lack of information in the file, the Court did not rule on the question as to whether *Portgás* could, in this case, be considered as a "public authority" within the meaning of the case law in Foster; instead, it left that assessment to the national court.

The European Court of Justice's decision in *Fish Legal judgement* above quoted, the Court of Justice again used the definition of "public authority" established in *Foster*, only this time in an altogether different context. It was a matter in the second case of interpreting Directive 2003/4 of 28 January 2003 (9) on public access to environmental information which implemented the Aarhus Convention in European Union law. Pursuant to Article 3 (1) of said Directive, *"Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest"*

Article 2 (2) of the same Directive defines the notion of "public authority" as follows:

"[...] a) government or other public administration, including public advisory bodies, at national, regional or local level;
(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).
Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

In this context, the Court of Justice was asked to rule on the question of whether commercial companies responsible in the United Kingdom for water supply and sanitation services, in the framework for the privatisation of the sector in 1989, were likely to constitute public authorities within the meaning of the Directive and, if so, on the scope of their duty to issue the environmental information in their possession. Proceeding with a systematic reading of the Directive, the Court took the view that a distinction ought to be made between, on the one hand, public authorities in the organic sense i.e. those enumerated under subparagraph a), namely *"government or other public administration, including public advisory bodies, at national, regional or local level";* and, on the other hand, public authorities in the operational sense, i.e. any public or private entity performing a public administrative function. It was at this stage that the Court broke new ground in terms of definitions, by taking the view that this means "entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this

purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

This definition is reminiscent of that given in the Foster decision. The Court did not, however, mention it at this point in its reasoning to justify its definition of "public authority". Conversely, Advocate General Cruz Villalon explicitly used Foster in his conclusions in order to formulate the same definition as the Court. It will be noted, however, that the "control by a public authority" condition, which can be found in Foster, was not taken up in the definition of "public authorities" put forward by the Court. This is another consequence of the systematic approach, as that this condition features at point c) of Art. 2 (2), i.e. the third category of public authorities within the meaning of the Directive. Point c) was also the subject of other preliminary questions that the Court handled together, precisely with a view to determining which criteria would serve to establish whether an entity finds itself "under the control" of a public authority within the meaning of either point a) or point b). It was only at this stage of its reasoning that the Court finally explicitly mentioned the judgment in Foster, and this because the national court wished to know whether the notion of "supervision" within the meaning of the Directive was to be interpreted in the same way as in the Foster case law. However, having drawn inspiration from that decision in order to identify the criteria for "service of public interest" and "special powers", the Court then moved away from it.

Admittedly, according to the Court, "[w]here a situation of control is found when applying the criteria adopted in Foster and Others, paragraph 20, that may be considered to constitute an indication that the control condition in Article 2(2)(c) of Directive 2003/4 is satisfied, since in both of those contexts the concept of control is designed to cover manifestations of the concept of 'State' in the broad sense best suited to achieving the objectives of the legislation concerned" (para. 64). Nevertheless, it specified immediately afterwards that "[t]he precise meaning of the concept of control in Article 2(2)(c) of Directive 2003/4 must, however, be sought by taking account also of that directive's own objectives".

The Court then proceeded with an interpretation of "public authority" based on the notion of public powers: *"in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State"* (para. 67). It went on:

"Those factors lead to the adoption of an interpretation of 'control', within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity's action in that field" (para. 68).

Finally, there remained one last important question as to the scope of the right of access to information held, in the scenario where an entity cannot only qualify as a public authority for part of its activities. In such cases, does the public have a right of access to all information

held by that entity, or only that information held in the context of the supply of public services? On this point, the Court made a distinction between public authorities within the meaning of, on the one hand, Art. 2 (2) b) and, on the other, Art. 2 (2) c).

According to the Court, "Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as the water companies concerned, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services" (para. 83 and operative part).

Enemalta plc therefore falls under the definition of 'public authority' under EU law and Enemalta plc is a commercial partnership in which the Government or another public authority has a controlling interest. (art 5(1)(f) part thereof.

4.Public Procurement

Another point at issue on the requests made by the appellant is the issue of public procurement as certain requests relate to tenders published and in compliance with EU public procurement regulations.

Two standard clauses in each tender relate to Data Protection and Freedom of Information (vide General Rules Governing Tenders vl.14 published by Department of Contracts Malta, 04th January 2016). Such clauses state as follows:

Any personal data submitted in the framework of the procurement procedure and /or subsequently included in the contract shall be processed pursuant to the Data Protection Act (2001). It shall be processed solely for the purposes of the performance, management and follow-up of the procurement procedure and/or subsequent contract by the Contracting Authoirty/contracting Authority without prejudice to possible transmission to the bodies charged with a monitoring of inspection task in conformity with National and/or Community Law.

The provisions of this contract are without prejudice of the Contracting Authority in terms of the Freedom of Information Act (Cap. 496 of the Laws of Malta). The Contracting Authority, prior to disclosure of any information to a third party in relations to any provisions of this contract which have not yet been made public, shall consult the contractor in accordance with the provisions of the said Act, pertinent subsidiary legislation and the Code of Practice issued pursuant to the Act. Such consultation shall in no way prejudice the obligations of the Contracting Authority in terms of the Act.

5.Exemptions to tender information and contracts

The Freedom of Information Act sets out a number of exemptions to the right of access to information held by public authorities. The exemptions most likely to apply to tender information and contracts are listed below:

- The information is a trade secret;
- Disclosure would prejudice the commercial interest of any person or organisation; the information that will be disclosed by external bodies to Enemalta plc and the nature of the information or the circumstances of its disclosure, or other circumstances, justify the acceptance by Enemalta plc of an obligation of confidence in relation to that information;
- The information is personal data and is protected un the Data Protection Act.(Cap.440)

6. What constitutes 'Trade Secret'

Factors to be taken into account in deciding whether information amounts to a trade secret include: the extent to which the information is known outside of the plaintiff's business; the extent to it is known by employees and other involved in his business; the extent of measures taken by him to guard the secrecy of the information; the value of the information to him and to his contemporaries; the amount of effort or money expended by him in developing the information; the ease of difficulty with which the information could be properly acquired or duplicated by others. (*vide* Ansell Rubber C Pty Ltd v Allied Rubber Industries Pty Ltd 91967) V.R. 373.

There remains the issue as to whether the documents requested by the appellant are subject to public procurement EU regulations and if not, whether they 'relate to the commercial activities of the commercial partnership' and the extent to which the Freedom of Information Act applies in relation to the requests made by the appellant.

7.Information published by Enemalta plc

The Tribunal notes that the following information was made available by Enemalta plc namely:

Background information on the Project;
Information on the call for Expressions of Interest;
The list of entities that were shortlisted to participate in the RFP stage together with the membership/shareholding of such entities;
The final shortlist of consortia qualified to bid for the Project;
The list of entities that submitted a bid for the Project;
The results of the first stage of evaluation of the bids submitted in response to the RFP;
Selection of the preferred bidder;
The notice award of the Project to the ElectroGa Malta Consortium;
approval of the development permit for the Project.

8. The Tribunal notes that the Commissioner based his objection on all requests made by the appellant on articles 5(1)(f), 31(1) (2) and 32(1)(a)(b) and 32(4) of the Act.

Request 1

Adjudication report on the responses to the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement.

The Commissioner in his reply referred to the reply by Enemalta plc that the Adjudication Report includes technical solutions which are the proprietary of the parties proposing them and information relating to the persons submitting the responses. It also contends that the Adjudication Report contains details that if disclosed contains details that would severely prejudice the private undertaking as it contains commercial sensitive information.

As a fact, the Tribunal finds that this report is extraneous to the operation of the commercial partnership and falls under public procurement rules subject to the instances where there is no obligation to disclose.

The rights of access to information provided by the Freedom of Information (FOI) Act are subject to a range of exemptions which are those grounds which the Commissioner quoted for justifying his refusal namely article 5(1)(f), 31(1) (a)(b) and 32(4) of the Act.

The EU Public Procurement Directives – Directive 93/36 (1993) O.J.L199; Directive 93/37(1993) O.J.L199; Directive 93/98 (19930 o.j. 1199; and Directive 92/50 (1992) O.J. L209. The Directives contain two possible sources of obligations not to disclose public procurement information. The first is the provision relating to the withholding of sensitive information which is to be found in the measures regarding both debriefing and the publication of contract award notices. Here the Directives give the contracting authority the discretion to withhold such information.

The other possible source of a community obligation not to disclose is to be found in the confidentiality provisions of the Directives. Art 15.3 Directive 93/36; art 18.2. Directive 93/7, art 28.6 Directiv 93/8 and Art 23.2 Directiv 92/50 each contain a provision allowing Member States to authorise the submissions of tenders by means other than in writing so long as it is "possible to ensure ..that the confidentiality of tenders is maintained pending their evaluation." In addition, Directive 93/36 (but not the other Directives) requires contracting authorities to "respectfully the confidential nature of any information furnished by the suppliers " (art 15.2).

Re article 31(1)(2) of the FOI Act, and in the light of art 15.2. of Directive 93/36 this provision prevent disclosure under the Act of pre-award materials relating to contracts for supply such as tenders provided it could be shown that they were confidential in nature.

Article 2 of the Freedom of Information Act, Cap.496 , defines a 'document' as any article that is held by a public authority and on which information has been recorded in whatever form and defines an 'exempt document' as a document which is not subject to disclosure under this Act in accordance with Parts V and VI.

Part VI applies in various situations.

The Tribunal finds that since the adjudicating report includes information provided by non-successful tenderers which information remains commercially sensitive and details of prices may be and may remain trade secrets, qualifies as an 'exempt document' under the Freedom of Information Act, and this request is therefore being rejected.

Request 2

The full agreement between Enemalta and Shanghai Electric Power that will see the Chinese invest in Enemalta and purchase the BSWC plant and enter into joint ventures with Enemalta (December 2014).

The Commissioner endorsed Enemalta plc's contention that this document contains information of a commercial value on forecasts and the planned activities of the parties that would diminish if the information was disclosed and also trade secrets thus exempted in terms of article 32 of the Act. The document is also exempt by virtue of article 5(1)(f) and article 31(2) thereof, due to the reasons already explained in the preceding points.
Forecasts and the planned activities of the parties need the consent of all parties to the agreement to be published as per art. 31 of the FOI Act.

The Tribunal recognises that there are valid reasons for withholding some information and the Freedom of Information Act lays down situations in which information is considered exempt but a public authority cannot contract out of its responsibilities under the Act and unless information is covered by an exemption it must be released if requested.

Any of the exemptions mentions in the Act could apply to information concerning the relationship between a public authority and a contractor. Section 5(1)(f) relates to documents held by the public authority which has a controlling interest and documents which relate to the commercial activities of the commercial partnership; Section 31(2) explains that a document is an exempt document if its disclosure under this Act would found an action by a person (other than a public authority) for breach of confidence.

This means that only information that is in fact confidential in nature or which could prejudice a commercial interest if released can be withheld under these provisions.

The commercial interest exemption as provided in Section 5(1)(f) of the Act is not subject in Malta, as in the UK, to a public interest test.
As to the other reason for the objection by the Commissioner, that is, art 31(2), the Tribunal finds that once the private person entered into a contract with a public authority.

The third reason for the objection is Section 32 of the Act which exempts this document from disclosure on account of its trade secrets.
The Tribunal notes that none of the parties submitted any information as to whether this contract was subject to the tendering procedure and has to rely solely on the Freedom of Information Act.

The document requested by the appellant falls under the definition of 'exempt document' since if disclosed would disclose trade secrets and the Tribunal decides to dismiss this request of the appellant.

Request 3

The interlocking agreement between Enemalta, Electrogas and Shanghai Electric Power mentioned by the Minister Konrad Mizzi in November 2014.

The Commissioner submitted in his reply that the Public Authority in this case Enemalta plc replied that it is refusing to publish this agreement on grounds of article 5(1)(f) - as the Government has a controlling interest, and Article 31(2) as these documents contain information which is the proprietary of the interested parties and of a confidential nature hence its disclosure 'would found an action by a person for breach of confidence and consequently ElectroGas and the other interested parties would claim an unlawful disclosure and possible damages and Article 32 of the Freedom of Information Act as its disclosure would disclose the Enemalta's and third parties trade secrets and be contrary to the public interest as it would result in undue detriment to Enemalta, the Government and ElectroGas. Enemalta also contends that the 'interlocking agreement' contains a reference to principles on technical matters agreed with the various parties and embedded in the various contracts between parties which are subject of the requests made by the applicant in other requests considered above, particularly requests 2 & 4 and thus the same reasons for refusal shall apply.

Moreover, the Commissioner was informed that the Government of Malta had "published a document containing the salient points of the transaction with SEP entitled 'Energy Sector Cooperation and Investment Agreement." And that the Interlocking Agreement is merely a reference to the provisions contained in the agreements with ElectroGas Malta and Shanghai Electric Power and thus such disclosure would disclose the Adjudication Reports and the agreements with the Shanghai Electric Power.

The appellant in his appeal relied only on the notion of public interest and decisions of the European Court of Human Rights, but the Tribunal is bound to rely on the provisions of the FOI act, Data Protection and public procurement regulations.

The Tribunal rejects therefore this request on the basis of Art 5(1) (f) and Art 32 of the FOI Act as it find this agreement to fall under the definition of 'exempt document'.

Request 4

A copy of all agreements signed between the Government of Malta and/or Enemalta with ElectroGas Malta.

The submissions made by Enemalta states that following receiving the full technical and financial proposals, the Public authority proceeded to evaluate the bids and declared

ElectroGas Malta Consortium as the preferred bidder. Such proposal award was not contested and Enemalta proceeded to sign a number of agreements relating to the project.

Public Procurement regulations besides the Freedom of Information Act comes into play in this case. The Act lays down exceptions to the freedom of information concerning the relationship between a public authority and a contractor. Public Procurement Rules also make it mandatory to include in the tender document a provision regarding data protection and freedom of information as described above, namely that:

Two standard clauses in each tender relate to Data Protection and Freedom of Information (vide *General Rules Governing Tenders vl.14 published by Department of Contracts Malta*, 04th January 2016). Such clauses state as follows:

Any personal data submitted in the framework of the procurement procedure and /or subsequently included in the contract shall be processed pursuant to the Data Protection Act (2001). It shall be processed solely for the purposes of the performance, management and follow-up of the procurement procedure and/or subsequent contract by the Contracting Authority/contracting Authority without prejudice to possible transmission to the bodies charged with a monitoring of inspection task in conformity with National and/or Community Law.

The provisions of this contract are without prejudice of the Contracting Authority in terms of the Freedom of Information Act (Cap. 496 of the Laws of Malta). The Contracting Authority, prior to disclosure of any information to a third party in relations to any provisions of this contract which have not yet been made public, shall consult the contractor in accordance with the provisions of the said Act, pertinent subsidiary legislation and the Code of Practice issued pursuant to the Act. Such consultation shall in no way prejudice the obligations of the Contracting Authority in terms of the Act.

Exemptions to tender information and contracts.

The Freedom of Information Act sets out a number of exemptions to the right of access to information held by public authorities. The exemptions most likely to apply to tender information and contracts are listed below:

- The information is a trade secret;
- Disclosure would prejudice the commercial interest of any person or organisation; the information that will be disclosed by external bodies to Enemalta plc and the nature of the information or the circumstances of its disclosure, or other circumstances, justify the acceptance by Enemalta plc of an obligation of confidence in relation to that information;
- The information is personal data and is protected un the Data Protection Act.(Cap.440)

Only information that is in fact confidential in nature or which could prejudice a commercial interest if released can be withheld under these provisions. However, it is an established fact that once a tender is awarded information from the successful tenderer loses confidentiality in respect of price and type of quantity of goods supplied subject to exceptions; that other

confidential information provided by the successful tenderer might well retain its confidentiality; that unsuccessful tender information retains its confidential.

The Tribunal notes also that Information Tribunal of the UK has confirmed that information contained in a contract between a public authority and a third party represents the conclusion of negotiations between the two parties and as such is jointly created rather than being obtained by the public authority from the contractor and is not confidential information. Nevertheless, depending on the circumstances of the case there can be elements of a contract or agreement for example technical information set out in a schedule as well as records of pre-contractual negotiations which the public authority has obtained from the third party and so may qualify as confidential information (*vide Derry City Council v Information Commissioner* (EA/2006/0014; 11 December 2006).

The Tribunal therefore decides that these agreements are to be made public except for the provisions that are considered to be exempt according to law. The Tribunal does not have at its disposal a copy of all agreements signed between the Government of Malta and/or Enemalta with ElectroGas Malta and cannot therefore rule as to which provisions can be considered as exempt and which are not and which can amount to breach of confidence.

The Tribunal notes that it cannot apply article 49(4) of the Data Protection Act (Cap 440) since the Freedom of Information Act stipulates in article 39(5) that the Tribunal shall remain subject to article 49(3) and Article 50(2)(3)(4) of the Data Protection Act and does not include article 49(4) of the same Act.

The Tribunal therefore decides to annul the decision of the Commissioner limited only to this request and limited also to publication of the agreements in question without commercially sensitive data such as trade secrets, and without documents which if disclosed would found an action by a person for breach of confidence.

Request 5

The adjudication report on the responses to the RFP from the shortlisted bidders after the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement.

For the reasons quoted in Request 1 above and particularly for the consent that is needed from all the shortlisted bidders, such request cannot be upheld.

Request 6

The Request for Proposals (RFP) and any addenda and/or clarifications distributed to the shortlisted bidders after the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long terms gas supply and power purchase agreement.

For the reasons mentioned in Request 1 and particularly for the consent that is needed from all the shortlisted bidders, such request cannot be upheld.

Request 7

Call for expression of interest (EoIC) issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement (April 2013).

This has already been acceded to and the web site quoted by Enemalta plc to appellant from where the appellant can find a copy of this call.

Dr Anna Mallia
Chair person

Mr Charles Cassar
Membru

Mr David Bezzina
Membru

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Members : Mr Charles Cassar M.B.A.(Exec.), Dip.Lab.Stud., Cert.Mediator (UK)
Mr David Bezzina HNDip C.S., BSc IT (Hons)

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2.Freedom of Information and Data Protection

It is true that the twin principles of freedom of information and of data protection are expressly recognised with the provisions of the TFEU - (article 15(1) formerly Article 255EC) and Article 16 TFEU (formerly Article 286 EC).

Article 42 of the EU Charter of fundamental Rights provides regarding the right of access to documents by any citizen of the EU. There is however no express provision in the European Convention on Human Rights guaranteeing a right of access to individual or general information held by public authorities as distinct from the right guaranteed under both article 10 ECHR and Article CFA – freely to express and to receive and impart information and ideas one already has, without interference by public authority and regardless of frontiers. See Loisea v France – admissibility decision (2003) ECHR 46809/99 (Second Section 18 November 2003): *'It is difficult to derive from the ECHR a general right of access to administrative data and documents...'*

As a derogation from the general principle of public access to documents held by the EU, these exceptions must be interpreted narrowly and applied strictly. See Case C-506-08 P *Sweden v Commission* 21 July (2011) ECR I-nyr at paras 75-6:

"para 76. Thus if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying."

Under reference to Article 4(1) (a) where disclosure would undermine the protection of the public interest as regards, public security, defence and military matters, international relations and /or the financial, monetory or economic policy of the EU or of a Member State. (see *Joined Cases T-3/00 & T-337/04 Pitsiorlas v Council* (2007) ECR II-4779.

And under reference to Article 4(2) unless there is an overriding public interest in disclosure, the EU institutions are also required to refuse access to a document where its disclosure would undermine the protection of commercial interest of a natural or legal person including intellectual property and court proceedings and legal advice and the purpose of inspections, investigations and audits.

In *Joined Cases T-355/04 & T-446-04 Co-Frutta* the General Court noted at para 133 in relation to this exception:

'The aim behind the application for access to the documents (in this case) is that of verifying the existence of fraudulent practices on the part of the applicant's competitors. The applicant thus pursues, amongst other objective, the protection of its commercial interests. However, it is not possible to categorise the applicant's commercial interests as being an "overriding public interest" which prevails over the protection of the commercial interests of traditional operations, the objective underlying the refusal of access to a part of the documents requested. In addition, the pursuit of the public interest in identifying cases of fraud in order to ensure the smooth operation of the banana market is not a matter for the operators but for the competent Community and national public authorities where appropriate following an application made by an operator. '

The EU legislature enacted in 2001 the freedom of information measure in Regulation (EC) 1049/2001 and Regulation (EC) 45/2001 on data protection. The first regulation seeks to guarantee the "widest possible access to document" and the data protection legislation pulls in the opposite direction seeking to ensure the proper protection the privacy of individuals whose personal data is processed by EU and member states institutions or bodies. In Joined Cases C-39/05 P & C-52/05 *P Sweden and Turco v Council* (2008) ECR I-4723 para 49; and Case C-139/07 *P Commission v Technische Glaswerke Ilmenau* 29 June (2010) ECR 1-nyr.para 53, it was held that if a body subject to the provisions of the regulation (EC) no 1049/2001 decides to refuse access to a requested document it must in principle explain how disclosure of that document could specifically and effectively undermine the interest protested by the Article 4 exceptions.

3.Enemalta plc as a public authority

Now the Tribunal shall examine whether Enemalta plc is a public authority.
Enemalta plc the government holds 66.6% as is admitted by Enemalta plc in this appeal.
Article 5(1) (f) of Chapter 496 of the Laws of Malta (the Freedom of Information Act) states that this Act shall not apply to documents that are held by a commercial partnership in which the Government or another public authority has a controlling interest, in so far as the documents in question relate to the commercial activities for the commercial partnership.

The request made by appellant does not fall under the European Directive 2003/4/EC on Public Access to Environmental Information which request "public authorities to provide environmental information on request. This directive defines 'public authority' in Article 2(2)(c) as a natural legal person under the control of a body or persons falling within the categories of government body or one performing public administrative functions. If in the case of *Smartscource v the Information Commissioner* (2010) UKUT 415 (AAC) water utilities were held not to be public authorities and consequently had no obligation to provide information to the public pursuant to the Environmental Information Regulations 2004 which implement the Directive into English and Welsh Law, in Fish Legal and Emily Shirley v ICO and Southern Water, United utilities An Yorkshire Water Case C 279/12, the Court ruled that in order to determine whether a body is covered by article 2(2) (b) – "it should be examined whether they have "special powers beyond those which result from the normal rules applicable in relations persons governed by private law.' And considered that bodies which fell under this article as hybrid organisations with both functions of public authority and separate commercial functions that not all of their environmental information fell within their activities of public administration. However a body under the control of a public authority under (b) or (c) would not be required to provide environmental information which did not relate to the provision of its administrative service or functions. Where a water company, for instance is thought to be under the control of, say Ofwat, only that environmental information relating to its public function would need to be provided.

A public entity creates a body to run a public service and chooses to incorporate it under private law such as in the case of Enemalta plc.

In *Portgas* case, the issue brought before the European Court of Justice was whether a Member State which has not transposed a Direction could invoke said Directive against a public service concession-holder before a national court. Under ECJ case law, a Directive cannot impose a duty on a private individual. It therefore cannot be invoked in legal proceedings against a private individual before a national court (6), particularly where the State has omitted to transpose the same.

However, by virtue of the Foster judgment of 12 July 1990 (7), a network concession holder may in some cases can be considered as a "public authority" rather than a private entity. In that decision, the Court took the view that *"a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any*

event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon" (para 20 and 22).

In the *Portgás* decision, the Court adopted the same criteria. However, owing to a lack of information in the file, the Court did not rule on the question as to whether *Portgás* could, in this case, be considered as a "public authority" within the meaning of the case law in Foster; instead, it left that assessment to the national court.

The European Court of Justice's decision in *Fish Legal judgement* above quoted, the Court of Justice again used the definition of "public authority" established in *Foster*, only this time in an altogether different context. It was a matter in the second case of interpreting Directive 2003/4 of 28 January 2003 (9) on public access to environmental information which implemented the Aarhus Convention in European Union law. Pursuant to Article 3 (1) of said Directive, *"Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest"*

Article 2 (2) of the same Directive defines the notion of "public authority" as follows:

"[...] a) government or other public administration, including public advisory bodies, at national, regional or local level;
(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).
Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

In this context, the Court of Justice was asked to rule on the question of whether commercial companies responsible in the United Kingdom for water supply and sanitation services, in the framework for the privatisation of the sector in 1989, were likely to constitute public authorities within the meaning of the Directive and, if so, on the scope of their duty to issue the environmental information in their possession. Proceeding with a systematic reading of the Directive, the Court took the view that a distinction ought to be made between, on the one hand, public authorities in the organic sense i.e. those enumerated under subparagraph a), namely *"government or other public administration, including public advisory bodies, at national, regional or local level";* and, on the other hand, public authorities in the operational sense, i.e. any public or private entity performing a public administrative function. It was at this stage that the Court broke new ground in terms of definitions, by taking the view that this means "entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this

purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

This definition is reminiscent of that given in the Foster decision. The Court did not, however, mention it at this point in its reasoning to justify its definition of "public authority". Conversely, Advocate General Cruz Villalon explicitly used Foster in his conclusions in order to formulate the same definition as the Court. It will be noted, however, that the "control by a public authority" condition, which can be found in Foster, was not taken up in the definition of "public authorities" put forward by the Court. This is another consequence of the systematic approach, as that this condition features at point c) of Art. 2 (2), i.e. the third category of public authorities within the meaning of the Directive. Point c) was also the subject of other preliminary questions that the Court handled together, precisely with a view to determining which criteria would serve to establish whether an entity finds itself "under the control" of a public authority within the meaning of either point a) or point b). It was only at this stage of its reasoning that the Court finally explicitly mentioned the judgment in Foster, and this because the national court wished to know whether the notion of "supervision" within the meaning of the Directive was to be interpreted in the same way as in the Foster case law. However, having drawn inspiration from that decision in order to identify the criteria for "service of public interest" and "special powers", the Court then moved away from it.

Admittedly, according to the Court, "[w]here a situation of control is found when applying the criteria adopted in Foster and Others, paragraph 20, that may be considered to constitute an indication that the control condition in Article 2(2)(c) of Directive 2003/4 is satisfied, since in both of those contexts the concept of control is designed to cover manifestations of the concept of 'State' in the broad sense best suited to achieving the objectives of the legislation concerned" (para. 64). Nevertheless, it specified immediately afterwards that "[t]he precise meaning of the concept of control in Article 2(2)(c) of Directive 2003/4 must, however, be sought by taking account also of that directive's own objectives".

The Court then proceeded with an interpretation of "public authority" based on the notion of public powers: *"in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State"* (para. 67). It went on:

"Those factors lead to the adoption of an interpretation of 'control', within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity's action in that field" (para. 68).

Finally, there remained one last important question as to the scope of the right of access to information held, in the scenario where an entity cannot only qualify as a public authority for part of its activities. In such cases, does the public have a right of access to all information

held by that entity, or only that information held in the context of the supply of public services? On this point, the Court made a distinction between public authorities within the meaning of, on the one hand, Art. 2 (2) b) and, on the other, Art. 2 (2) c).

According to the Court, "Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as the water companies concerned, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services" (para. 83 and operative part).

Enemalta plc therefore falls under the definition of 'public authority' under EU law and Enemalta plc is a commercial partnership in which the Government or another public authority has a controlling interest. (art 5(1)(f) part thereof.

4.Public Procurement

Another point at issue on the requests made by the appellant is the issue of public procurement as certain requests relate to tenders published and in compliance with EU public procurement regulations.

Two standard clauses in each tender relate to Data Protection and Freedom of Information (vide General Rules Governing Tenders vl.14 published by Department of Contracts Malta, 04th January 2016). Such clauses state as follows:

Any personal data submitted in the framework of the procurement procedure and /or subsequently included in the contract shall be processed pursuant to the Data Protection Act (2001). It shall be processed solely for the purposes of the performance, management and follow-up of the procurement procedure and/or subsequent contract by the Contracting Authoirty/contracting Authority without prejudice to possible transmission to the bodies charged with a monitoring of inspection task in conformity with National and/or Community Law.

The provisions of this contract are without prejudice of the Contracting Authority in terms of the Freedom of Information Act (Cap. 496 of the Laws of Malta). The Contracting Authority, prior to disclosure of any information to a third party in relations to any provisions of this contract which have not yet been made public, shall consult the contractor in accordance with the provisions of the said Act, pertinent subsidiary legislation and the Code of Practice issued pursuant to the Act. Such consultation shall in no way prejudice the obligations of the Contracting Authority in terms of the Act.

5.Exemptions to tender information and contracts

The Freedom of Information Act sets out a number of exemptions to the right of access to information held by public authorities. The exemptions most likely to apply to tender information and contracts are listed below:

- The information is a trade secret;
- Disclosure would prejudice the commercial interest of any person or organisation; the information that will be disclosed by external bodies to Enemalta plc and the nature of the information or the circumstances of its disclosure, or other circumstances, justify the acceptance by Enemalta plc of an obligation of confidence in relation to that information;
- The information is personal data and is protected un the Data Protection Act.(Cap.440)

6. What constitutes 'Trade Secret'

Factors to be taken into account in deciding whether information amounts to a trade secret include: the extent to which the information is known outside of the plaintiff's business; the extent to it is known by employees and other involved in his business; the extent of measures taken by him to guard the secrecy of the information; the value of the information to him and to his contemporaries; the amount of effort or money expended by him in developing the information; the ease of difficulty with which the information could be properly acquired or duplicated by others. (*vide* Ansell Rubber C Pty Ltd v Allied Rubber Industries Pty Ltd 91967) V.R. 373.

There remains the issue as to whether the documents requested by the appellant are subject to public procurement EU regulations and if not, whether they 'relate to the commercial activities of the commercial partnership' and the extent to which the Freedom of Information Act applies in relation to the requests made by the appellant.

7.Information published by Enemalta plc

The Tribunal notes that the following information was made available by Enemalta plc namely:

Background information on the Project;
Information on the call for Expressions of Interest;
The list of entities that were shortlisted to participate in the RFP stage together with the membership/shareholding of such entities;
The final shortlist of consortia qualified to bid for the Project;
The list of entities that submitted a bid for the Project;
The results of the first stage of evaluation of the bids submitted in response to the RFP;
Selection of the preferred bidder;
The notice award of the Project to the ElectroGa Malta Consortium;
approval of the development permit for the Project.

8. The Tribunal notes that the Commissioner based his objection on all requests made by the appellant on articles 5(1)(f), 31(1) (2) and 32(1)(a)(b) and 32(4) of the Act.

Request 1

Adjudication report on the responses to the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement.

The Commissioner in his reply referred to the reply by Enemalta plc that the Adjudication Report includes technical solutions which are the proprietary of the parties proposing them and information relating to the persons submitting the responses. It also contends that the Adjudication Report contains details that if disclosed contains details that would severely prejudice the private undertaking as it contains commercial sensitive information.

As a fact, the Tribunal finds that this report is extraneous to the operation of the commercial partnership and falls under public procurement rules subject to the instances where there is no obligation to disclose.

The rights of access to information provided by the Freedom of Information (FOI) Act are subject to a range of exemptions which are those grounds which the Commissioner quoted for justifying his refusal namely article 5(1)(f), 31(1) (a)(b) and 32(4) of the Act.

The EU Public Procurement Directives – Directive 93/36 (1993) O.J.L199; Directive 93/37(1993) O.J.L199; Directive 93/98 (19930 o.j. 1199; and Directive 92/50 (1992) O.J. L209. The Directives contain two possible sources of obligations not to disclose public procurement information. The first is the provision relating to the withholding of sensitive information which is to be found in the measures regarding both debriefing and the publication of contract award notices. Here the Directives give the contracting authority the discretion to withhold such information.

The other possible source of a community obligation not to disclose is to be found in the confidentiality provisions of the Directives. Art 15.3 Directive 93/36; art 18.2. Directive 93/7, art 28.6 Directiv 93/8 and Art 23.2 Directiv 92/50 each contain a provision allowing Member States to authorise the submissions of tenders by means other than in writing so long as it is "possible to ensure ..that the confidentiality of tenders is maintained pending their evaluation." In addition, Directive 93/36 (but not the other Directives) requires contracting authorities to "respectfully the confidential nature of any information furnished by the suppliers " (art 15.2).

Re article 31(1)(2) of the FOI Act, and in the light of art 15.2. of Directive 93/36 this provision prevent disclosure under the Act of pre-award materials relating to contracts for supply such as tenders provided it could be shown that they were confidential in nature.

Article 2 of the Freedom of Information Act, Cap.496 , defines a 'document' as any article that is held by a public authority and on which information has been recorded in whatever form and defines an 'exempt document' as a document which is not subject to disclosure under this Act in accordance with Parts V and VI.

Part VI applies in various situations.

The Tribunal finds that since the adjudicating report includes information provided by non-successful tenderers which information remains commercially sensitive and details of prices may be and may remain trade secrets, qualifies as an 'exempt document' under the Freedom of Information Act, and this request is therefore being rejected.

Request 2

The full agreement between Enemalta and Shanghai Electric Power that will see the Chinese invest in Enemalta and purchase the BSWC plant and enter into joint ventures with Enemalta (December 2014).

The Commissioner endorsed Enemalta plc's contention that this document contains information of a commercial value on forecasts and the planned activities of the parties that would diminish if the information was disclosed and also trade secrets thus exempted in terms of article 32 of the Act. The document is also exempt by virtue of article 5(1)(f) and article 31(2) thereof, due to the reasons already explained in the preceding points.
Forecasts and the planned activities of the parties need the consent of all parties to the agreement to be published as per art. 31 of the FOI Act.

The Tribunal recognises that there are valid reasons for withholding some information and the Freedom of Information Act lays down situations in which information is considered exempt but a public authority cannot contract out of its responsibilities under the Act and unless information is covered by an exemption it must be released if requested.

Any of the exemptions mentions in the Act could apply to information concerning the relationship between a public authority and a contractor. Section 5(1)(f) relates to documents held by the public authority which has a controlling interest and documents which relate to the commercial activities of the commercial partnership; Section 31(2) explains that a document is an exempt document if its disclosure under this Act would found an action by a person (other than a public authority) for breach of confidence.

This means that only information that is in fact confidential in nature or which could prejudice a commercial interest if released can be withheld under these provisions.

The commercial interest exemption as provided in Section 5(1)(f) of the Act is not subject in Malta, as in the UK, to a public interest test.
As to the other reason for the objection by the Commissioner, that is, art 31(2), the Tribunal finds that once the private person entered into a contract with a public authority.

The third reason for the objection is Section 32 of the Act which exempts this document from disclosure on account of its trade secrets.
The Tribunal notes that none of the parties submitted any information as to whether this contract was subject to the tendering procedure and has to rely solely on the Freedom of Information Act.

The document requested by the appellant falls under the definition of 'exempt document' since if disclosed would disclose trade secrets and the Tribunal decides to dismiss this request of the appellant.

Request 3

The interlocking agreement between Enemalta, Electrogas and Shanghai Electric Power mentioned by the Minister Konrad Mizzi in November 2014.

The Commissioner submitted in his reply that the Public Authority in this case Enemalta plc replied that it is refusing to publish this agreement on grounds of article 5(1)(f) - as the Government has a controlling interest, and Article 31(2) as these documents contain information which is the proprietary of the interested parties and of a confidential nature hence its disclosure 'would found an action by a person for breach of confidence and consequently ElectroGas and the other interested parties would claim an unlawful disclosure and possible damages and Article 32 of the Freedom of Information Act as its disclosure would disclose the Enemalta's and third parties trade secrets and be contrary to the public interest as it would result in undue detriment to Enemalta, the Government and ElectroGas. Enemalta also contends that the 'interlocking agreement' contains a reference to principles on technical matters agreed with the various parties and embedded in the various contracts between parties which are subject of the requests made by the applicant in other requests considered above, particularly requests 2 & 4 and thus the same reasons for refusal shall apply.

Moreover, the Commissioner was informed that the Government of Malta had "published a document containing the salient points of the transaction with SEP entitled 'Energy Sector Cooperation and Investment Agreement." And that the Interlocking Agreement is merely a reference to the provisions contained in the agreements with ElectroGas Malta and Shanghai Electric Power and thus such disclosure would disclose the Adjudication Reports and the agreements with the Shanghai Electric Power.

The appellant in his appeal relied only on the notion of public interest and decisions of the European Court of Human Rights, but the Tribunal is bound to rely on the provisions of the FOI act, Data Protection and public procurement regulations.

The Tribunal rejects therefore this request on the basis of Art 5(1) (f) and Art 32 of the FOI Act as it find this agreement to fall under the definition of 'exempt document'.

Request 4

A copy of all agreements signed between the Government of Malta and/or Enemalta with ElectroGas Malta.

The submissions made by Enemalta states that following receiving the full technical and financial proposals, the Public authority proceeded to evaluate the bids and declared

ElectroGas Malta Consortium as the preferred bidder. Such proposal award was not contested and Enemalta proceeded to sign a number of agreements relating to the project.

Public Procurement regulations besides the Freedom of Information Act comes into play in this case. The Act lays down exceptions to the freedom of information concerning the relationship between a public authority and a contractor. Public Procurement Rules also make it mandatory to include in the tender document a provision regarding data protection and freedom of information as described above, namely that:

Two standard clauses in each tender relate to Data Protection and Freedom of Information (vide *General Rules Governing Tenders vl.14 published by Department of Contracts Malta*, 04th January 2016). Such clauses state as follows:

Any personal data submitted in the framework of the procurement procedure and /or subsequently included in the contract shall be processed pursuant to the Data Protection Act (2001). It shall be processed solely for the purposes of the performance, management and follow-up of the procurement procedure and/or subsequent contract by the Contracting Authority/contracting Authority without prejudice to possible transmission to the bodies charged with a monitoring of inspection task in conformity with National and/or Community Law.

The provisions of this contract are without prejudice of the Contracting Authority in terms of the Freedom of Information Act (Cap. 496 of the Laws of Malta). The Contracting Authority, prior to disclosure of any information to a third party in relations to any provisions of this contract which have not yet been made public, shall consult the contractor in accordance with the provisions of the said Act, pertinent subsidiary legislation and the Code of Practice issued pursuant to the Act. Such consultation shall in no way prejudice the obligations of the Contracting Authority in terms of the Act.

Exemptions to tender information and contracts.

The Freedom of Information Act sets out a number of exemptions to the right of access to information held by public authorities. The exemptions most likely to apply to tender information and contracts are listed below:

- The information is a trade secret;
- Disclosure would prejudice the commercial interest of any person or organisation; the information that will be disclosed by external bodies to Enemalta plc and the nature of the information or the circumstances of its disclosure, or other circumstances, justify the acceptance by Enemalta plc of an obligation of confidence in relation to that information;
- The information is personal data and is protected un the Data Protection Act.(Cap.440)

Only information that is in fact confidential in nature or which could prejudice a commercial interest if released can be withheld under these provisions. However, it is an established fact that once a tender is awarded information from the successful tenderer loses confidentiality in respect of price and type of quantity of goods supplied subject to exceptions; that other

confidential information provided by the successful tenderer might well retain its confidentiality; that unsuccessful tender information retains its confidential.

The Tribunal notes also that Information Tribunal of the UK has confirmed that information contained in a contract between a public authority and a third party represents the conclusion of negotiations between the two parties and as such is jointly created rather than being obtained by the public authority from the contractor and is not confidential information. Nevertheless, depending on the circumstances of the case there can be elements of a contract or agreement for example technical information set out in a schedule as well as records of pre-contractual negotiations which the public authority has obtained from the third party and so may qualify as confidential information (*vide Derry City Council v Information Commissioner* (EA/2006/0014; 11 December 2006).

The Tribunal therefore decides that these agreements are to be made public except for the provisions that are considered to be exempt according to law. The Tribunal does not have at its disposal a copy of all agreements signed between the Government of Malta and/or Enemalta with ElectroGas Malta and cannot therefore rule as to which provisions can be considered as exempt and which are not and which can amount to breach of confidence.

The Tribunal notes that it cannot apply article 49(4) of the Data Protection Act (Cap 440) since the Freedom of Information Act stipulates in article 39(5) that the Tribunal shall remain subject to article 49(3) and Article 50(2)(3)(4) of the Data Protection Act and does not include article 49(4) of the same Act.

The Tribunal therefore decides to annul the decision of the Commissioner limited only to this request and limited also to publication of the agreements in question without commercially sensitive data such as trade secrets, and without documents which if disclosed would found an action by a person for breach of confidence.

Request 5

The adjudication report on the responses to the RFP from the shortlisted bidders after the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement.

For the reasons quoted in Request 1 above and particularly for the consent that is needed from all the shortlisted bidders, such request cannot be upheld.

Request 6

The Request for Proposals (RFP) and any addenda and/or clarifications distributed to the shortlisted bidders after the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long terms gas supply and power purchase agreement.

For the reasons mentioned in Request 1 and particularly for the consent that is needed from all the shortlisted bidders, such request cannot be upheld.

Request 7

Call for expression of interest (EoIC) issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement (April 2013).

This has already been acceded to and the web site quoted by Enemalta plc to appellant from where the appellant can find a copy of this call.

Dr Anna Mallia
Chair person

Mr Charles Cassar
Membru

Mr David Bezzina
Membru

TRIBUNAL TAL-APPELLI DWAR L-INFORMAZZJONI U L-PROTEZZJONI TAD-DATA

Appeal Number 36/2016:

Allied Newspapers Limited

Vs

Commissioner for the Information and Data Protection

Decision: 16th February 2016

Chairman: Dr Anna Mallia LL.D., LL.M. (Lond), Dip.Tax
Members : Mr Charles Cassar M.B.A.(Exec.), Dip.Lab.Stud., Cert.Mediator (UK)
Mr David Bezzina HNDip C.S., BSc IT (Hons)

The Tribunal

Having seen that the request made by the appellant on 29 September 2015 to Enemalta plc was refused by Enemalta on 14th December 2015 on the grounds stated therein.

Having seen the request made by Leonard Callus on behalf of the appellant to the Commissioner for the Information and Data Protection dated 15 December 2015 for an investigation and review by the Information and Data Protection Commissioner in accordance with article 23 of the freedom of Information Act of the decision of Enemalta of 14th December 2015.

Having seen the decision by the Commissioner dated 16th July 2016 wherein such request was refused on the grounds stated therein.

Having seen the appeal by the appellant regarding the decision of the Commissioner dated 16th July 2016 wherein the seven requests made by the appellant were all rejected;

Having seen the reply submitted by the Commissioner to the appeal made by the appellant;

Having seen the minute in the 24 November 2016 wherein the parties declared that they are closing their case and the case was deferred for judgement.

Preliminary

1.The Tribunal notes that although the appellant makes ample reference to the decisions of the European Court of Human Rights he does not give any details about the source and when he does he does not give the details about the judgements quoted.

2.Freedom of Information and Data Protection

It is true that the twin principles of freedom of information and of data protection are expressly recognised with the provisions of the TFEU - (article 15(1) formerly Article 255EC) and Article 16 TFEU (formerly Article 286 EC).

Article 42 of the EU Charter of fundamental Rights provides regarding the right of access to documents by any citizen of the EU. There is however no express provision in the European Convention on Human Rights guaranteeing a right of access to individual or general information held by public authorities as distinct from the right guaranteed under both article 10 ECHR and Article CFA – freely to express and to receive and impart information and ideas one already has, without interference by public authority and regardless of frontiers. See Loisea v France – admissibility decision (2003) ECHR 46809/99 (Second Section 18 November 2003): *'It is difficult to derive from the ECHR a general right of access to administrative data and documents...'*

As a derogation from the general principle of public access to documents held by the EU, these exceptions must be interpreted narrowly and applied strictly. See Case C-506-08 P *Sweden v Commission* 21 July (2011) ECR I-nyr at paras 75-6:

"para 76. Thus if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying."

Under reference to Article 4(1) (a) where disclosure would undermine the protection of the public interest as regards, public security, defence and military matters, international relations and /or the financial, monetory or economic policy of the EU or of a Member State. (see *Joined Cases T-3/00 & T-337/04 Pitsiorlas v Council* (2007) ECR II-4779.

And under reference to Article 4(2) unless there is an overriding public interest in disclosure, the EU institutions are also required to refuse access to a document where its disclosure would undermine the protection of commercial interest of a natural or legal person including intellectual property and court proceedings and legal advice and the purpose of inspections, investigations and audits.

In *Joined Cases T-355/04 & T-446-04 Co-Frutta* the General Court noted at para 133 in relation to this exception:

'The aim behind the application for access to the documents (in this case) is that of verifying the existence of fraudulent practices on the part of the applicant's competitors. The applicant thus pursues, amongst other objective, the protection of its commercial interests. However, it is not possible to categorise the applicant's commercial interests as being an "overriding public interest" which prevails over the protection of the commercial interests of traditional operations, the objective underlying the refusal of access to a part of the documents requested. In addition, the pursuit of the public interest in identifying cases of fraud in order to ensure the smooth operation of the banana market is not a matter for the operators but for the competent Community and national public authorities where appropriate following an application made by an operator. '

The EU legislature enacted in 2001 the freedom of information measure in Regulation (EC) 1049/2001 and Regulation (EC) 45/2001 on data protection. The first regulation seeks to guarantee the "widest possible access to document" and the data protection legislation pulls in the opposite direction seeking to ensure the proper protection the privacy of individuals whose personal data is processed by EU and member states institutions or bodies. In Joined Cases C-39/05 P & C-52/05 *P Sweden and Turco v Council* (2008) ECR I-4723 para 49; and Case C-139/07 *P Commission v Technische Glaswerke Ilmenau* 29 June (2010) ECR 1-nyr.para 53, it was held that if a body subject to the provisions of the regulation (EC) no 1049/2001 decides to refuse access to a requested document it must in principle explain how disclosure of that document could specifically and effectively undermine the interest protested by the Article 4 exceptions.

3.Enemalta plc as a public authority

Now the Tribunal shall examine whether Enemalta plc is a public authority.
Enemalta plc the government holds 66.6% as is admitted by Enemalta plc in this appeal.
Article 5(1) (f) of Chapter 496 of the Laws of Malta (the Freedom of Information Act) states that this Act shall not apply to documents that are held by a commercial partnership in which the Government or another public authority has a controlling interest, in so far as the documents in question relate to the commercial activities for the commercial partnership.

The request made by appellant does not fall under the European Directive 2003/4/EC on Public Access to Environmental Information which request "public authorities to provide environmental information on request. This directive defines 'public authority' in Article 2(2)(c) as a natural legal person under the control of a body or persons falling within the categories of government body or one performing public administrative functions. If in the case of *Smartscource v the Information Commissioner* (2010) UKUT 415 (AAC) water utilities were held not to be public authorities and consequently had no obligation to provide information to the public pursuant to the Environmental Information Regulations 2004 which implement the Directive into English and Welsh Law, in Fish Legal and Emily Shirley v ICO and Southern Water, United utilities An Yorkshire Water Case C 279/12, the Court ruled that in order to determine whether a body is covered by article 2(2) (b) – "it should be examined whether they have "special powers beyond those which result from the normal rules applicable in relations persons governed by private law.' And considered that bodies which fell under this article as hybrid organisations with both functions of public authority and separate commercial functions that not all of their environmental information fell within their activities of public administration. However a body under the control of a public authority under (b) or (c) would not be required to provide environmental information which did not relate to the provision of its administrative service or functions. Where a water company, for instance is thought to be under the control of, say Ofwat, only that environmental information relating to its public function would need to be provided.

A public entity creates a body to run a public service and chooses to incorporate it under private law such as in the case of Enemalta plc.

In *Portgas* case, the issue brought before the European Court of Justice was whether a Member State which has not transposed a Direction could invoke said Directive against a public service concession-holder before a national court. Under ECJ case law, a Directive cannot impose a duty on a private individual. It therefore cannot be invoked in legal proceedings against a private individual before a national court (6), particularly where the State has omitted to transpose the same.

However, by virtue of the Foster judgment of 12 July 1990 (7), a network concession holder may in some cases can be considered as a "public authority" rather than a private entity. In that decision, the Court took the view that *"a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any*

event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon" (para 20 and 22).

In the *Portgás* decision, the Court adopted the same criteria. However, owing to a lack of information in the file, the Court did not rule on the question as to whether *Portgás* could, in this case, be considered as a "public authority" within the meaning of the case law in Foster; instead, it left that assessment to the national court.

The European Court of Justice's decision in *Fish Legal judgement* above quoted, the Court of Justice again used the definition of "public authority" established in *Foster*, only this time in an altogether different context. It was a matter in the second case of interpreting Directive 2003/4 of 28 January 2003 (9) on public access to environmental information which implemented the Aarhus Convention in European Union law. Pursuant to Article 3 (1) of said Directive, *"Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest"*

Article 2 (2) of the same Directive defines the notion of "public authority" as follows:

"[...] a) government or other public administration, including public advisory bodies, at national, regional or local level;
(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).
Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

In this context, the Court of Justice was asked to rule on the question of whether commercial companies responsible in the United Kingdom for water supply and sanitation services, in the framework for the privatisation of the sector in 1989, were likely to constitute public authorities within the meaning of the Directive and, if so, on the scope of their duty to issue the environmental information in their possession. Proceeding with a systematic reading of the Directive, the Court took the view that a distinction ought to be made between, on the one hand, public authorities in the organic sense i.e. those enumerated under subparagraph a), namely *"government or other public administration, including public advisory bodies, at national, regional or local level";* and, on the other hand, public authorities in the operational sense, i.e. any public or private entity performing a public administrative function. It was at this stage that the Court broke new ground in terms of definitions, by taking the view that this means "entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this

purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

This definition is reminiscent of that given in the Foster decision. The Court did not, however, mention it at this point in its reasoning to justify its definition of "public authority". Conversely, Advocate General Cruz Villalon explicitly used Foster in his conclusions in order to formulate the same definition as the Court. It will be noted, however, that the "control by a public authority" condition, which can be found in Foster, was not taken up in the definition of "public authorities" put forward by the Court. This is another consequence of the systematic approach, as that this condition features at point c) of Art. 2 (2), i.e. the third category of public authorities within the meaning of the Directive. Point c) was also the subject of other preliminary questions that the Court handled together, precisely with a view to determining which criteria would serve to establish whether an entity finds itself "under the control" of a public authority within the meaning of either point a) or point b). It was only at this stage of its reasoning that the Court finally explicitly mentioned the judgment in Foster, and this because the national court wished to know whether the notion of "supervision" within the meaning of the Directive was to be interpreted in the same way as in the Foster case law. However, having drawn inspiration from that decision in order to identify the criteria for "service of public interest" and "special powers", the Court then moved away from it.

Admittedly, according to the Court, "[w]here a situation of control is found when applying the criteria adopted in Foster and Others, paragraph 20, that may be considered to constitute an indication that the control condition in Article 2(2)(c) of Directive 2003/4 is satisfied, since in both of those contexts the concept of control is designed to cover manifestations of the concept of 'State' in the broad sense best suited to achieving the objectives of the legislation concerned" (para. 64). Nevertheless, it specified immediately afterwards that "[t]he precise meaning of the concept of control in Article 2(2)(c) of Directive 2003/4 must, however, be sought by taking account also of that directive's own objectives".

The Court then proceeded with an interpretation of "public authority" based on the notion of public powers: *"in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State"* (para. 67). It went on:

"Those factors lead to the adoption of an interpretation of 'control', within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity's action in that field" (para. 68).

Finally, there remained one last important question as to the scope of the right of access to information held, in the scenario where an entity cannot only qualify as a public authority for part of its activities. In such cases, does the public have a right of access to all information

held by that entity, or only that information held in the context of the supply of public services? On this point, the Court made a distinction between public authorities within the meaning of, on the one hand, Art. 2 (2) b) and, on the other, Art. 2 (2) c).

According to the Court, "Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as the water companies concerned, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services" (para. 83 and operative part).

Enemalta plc therefore falls under the definition of 'public authority' under EU law and Enemalta plc is a commercial partnership in which the Government or another public authority has a controlling interest. (art 5(1)(f) part thereof.

4.Public Procurement

Another point at issue on the requests made by the appellant is the issue of public procurement as certain requests relate to tenders published and in compliance with EU public procurement regulations.

Two standard clauses in each tender relate to Data Protection and Freedom of Information (vide General Rules Governing Tenders vl.14 published by Department of Contracts Malta, 04th January 2016). Such clauses state as follows:

Any personal data submitted in the framework of the procurement procedure and /or subsequently included in the contract shall be processed pursuant to the Data Protection Act (2001). It shall be processed solely for the purposes of the performance, management and follow-up of the procurement procedure and/or subsequent contract by the Contracting Authoirty/contracting Authority without prejudice to possible transmission to the bodies charged with a monitoring of inspection task in conformity with National and/or Community Law.

The provisions of this contract are without prejudice of the Contracting Authority in terms of the Freedom of Information Act (Cap. 496 of the Laws of Malta). The Contracting Authority, prior to disclosure of any information to a third party in relations to any provisions of this contract which have not yet been made public, shall consult the contractor in accordance with the provisions of the said Act, pertinent subsidiary legislation and the Code of Practice issued pursuant to the Act. Such consultation shall in no way prejudice the obligations of the Contracting Authority in terms of the Act.

5.Exemptions to tender information and contracts

The Freedom of Information Act sets out a number of exemptions to the right of access to information held by public authorities. The exemptions most likely to apply to tender information and contracts are listed below:

- The information is a trade secret;
- Disclosure would prejudice the commercial interest of any person or organisation; the information that will be disclosed by external bodies to Enemalta plc and the nature of the information or the circumstances of its disclosure, or other circumstances, justify the acceptance by Enemalta plc of an obligation of confidence in relation to that information;
- The information is personal data and is protected un the Data Protection Act.(Cap.440)

6. What constitutes 'Trade Secret'

Factors to be taken into account in deciding whether information amounts to a trade secret include: the extent to which the information is known outside of the plaintiff's business; the extent to it is known by employees and other involved in his business; the extent of measures taken by him to guard the secrecy of the information; the value of the information to him and to his contemporaries; the amount of effort or money expended by him in developing the information; the ease of difficulty with which the information could be properly acquired or duplicated by others. (*vide* Ansell Rubber C Pty Ltd v Allied Rubber Industries Pty Ltd 91967) V.R. 373.

There remains the issue as to whether the documents requested by the appellant are subject to public procurement EU regulations and if not, whether they 'relate to the commercial activities of the commercial partnership' and the extent to which the Freedom of Information Act applies in relation to the requests made by the appellant.

7.Information published by Enemalta plc

The Tribunal notes that the following information was made available by Enemalta plc namely:

Background information on the Project;
Information on the call for Expressions of Interest;
The list of entities that were shortlisted to participate in the RFP stage together with the membership/shareholding of such entities;
The final shortlist of consortia qualified to bid for the Project;
The list of entities that submitted a bid for the Project;
The results of the first stage of evaluation of the bids submitted in response to the RFP;
Selection of the preferred bidder;
The notice award of the Project to the ElectroGa Malta Consortium;
approval of the development permit for the Project.

8. The Tribunal notes that the Commissioner based his objection on all requests made by the appellant on articles 5(1)(f), 31(1) (2) and 32(1)(a)(b) and 32(4) of the Act.

Request 1

Adjudication report on the responses to the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement.

The Commissioner in his reply referred to the reply by Enemalta plc that the Adjudication Report includes technical solutions which are the proprietary of the parties proposing them and information relating to the persons submitting the responses. It also contends that the Adjudication Report contains details that if disclosed contains details that would severely prejudice the private undertaking as it contains commercial sensitive information.

As a fact, the Tribunal finds that this report is extraneous to the operation of the commercial partnership and falls under public procurement rules subject to the instances where there is no obligation to disclose.

The rights of access to information provided by the Freedom of Information (FOI) Act are subject to a range of exemptions which are those grounds which the Commissioner quoted for justifying his refusal namely article 5(1)(f), 31(1) (a)(b) and 32(4) of the Act.

The EU Public Procurement Directives – Directive 93/36 (1993) O.J.L199; Directive 93/37(1993) O.J.L199; Directive 93/98 (19930 o.j. 1199; and Directive 92/50 (1992) O.J. L209. The Directives contain two possible sources of obligations not to disclose public procurement information. The first is the provision relating to the withholding of sensitive information which is to be found in the measures regarding both debriefing and the publication of contract award notices. Here the Directives give the contracting authority the discretion to withhold such information.

The other possible source of a community obligation not to disclose is to be found in the confidentiality provisions of the Directives. Art 15.3 Directive 93/36; art 18.2. Directive 93/7, art 28.6 Directiv 93/8 and Art 23.2 Directiv 92/50 each contain a provision allowing Member States to authorise the submissions of tenders by means other than in writing so long as it is "possible to ensure ..that the confidentiality of tenders is maintained pending their evaluation." In addition, Directive 93/36 (but not the other Directives) requires contracting authorities to "respectfully the confidential nature of any information furnished by the suppliers " (art 15.2).

Re article 31(1)(2) of the FOI Act, and in the light of art 15.2. of Directive 93/36 this provision prevent disclosure under the Act of pre-award materials relating to contracts for supply such as tenders provided it could be shown that they were confidential in nature.

Article 2 of the Freedom of Information Act, Cap.496 , defines a 'document' as any article that is held by a public authority and on which information has been recorded in whatever form and defines an 'exempt document' as a document which is not subject to disclosure under this Act in accordance with Parts V and VI.

Part VI applies in various situations.

The Tribunal finds that since the adjudicating report includes information provided by non-successful tenderers which information remains commercially sensitive and details of prices may be and may remain trade secrets, qualifies as an 'exempt document' under the Freedom of Information Act, and this request is therefore being rejected.

Request 2

The full agreement between Enemalta and Shanghai Electric Power that will see the Chinese invest in Enemalta and purchase the BSWC plant and enter into joint ventures with Enemalta (December 2014).

The Commissioner endorsed Enemalta plc's contention that this document contains information of a commercial value on forecasts and the planned activities of the parties that would diminish if the information was disclosed and also trade secrets thus exempted in terms of article 32 of the Act. The document is also exempt by virtue of article 5(1)(f) and article 31(2) thereof, due to the reasons already explained in the preceding points.
Forecasts and the planned activities of the parties need the consent of all parties to the agreement to be published as per art. 31 of the FOI Act.

The Tribunal recognises that there are valid reasons for withholding some information and the Freedom of Information Act lays down situations in which information is considered exempt but a public authority cannot contract out of its responsibilities under the Act and unless information is covered by an exemption it must be released if requested.

Any of the exemptions mentions in the Act could apply to information concerning the relationship between a public authority and a contractor. Section 5(1)(f) relates to documents held by the public authority which has a controlling interest and documents which relate to the commercial activities of the commercial partnership; Section 31(2) explains that a document is an exempt document if its disclosure under this Act would found an action by a person (other than a public authority) for breach of confidence.

This means that only information that is in fact confidential in nature or which could prejudice a commercial interest if released can be withheld under these provisions.

The commercial interest exemption as provided in Section 5(1)(f) of the Act is not subject in Malta, as in the UK, to a public interest test.
As to the other reason for the objection by the Commissioner, that is, art 31(2), the Tribunal finds that once the private person entered into a contract with a public authority.

The third reason for the objection is Section 32 of the Act which exempts this document from disclosure on account of its trade secrets.
The Tribunal notes that none of the parties submitted any information as to whether this contract was subject to the tendering procedure and has to rely solely on the Freedom of Information Act.

The document requested by the appellant falls under the definition of 'exempt document' since if disclosed would disclose trade secrets and the Tribunal decides to dismiss this request of the appellant.

Request 3

The interlocking agreement between Enemalta, Electrogas and Shanghai Electric Power mentioned by the Minister Konrad Mizzi in November 2014.

The Commissioner submitted in his reply that the Public Authority in this case Enemalta plc replied that it is refusing to publish this agreement on grounds of article 5(1)(f) - as the Government has a controlling interest, and Article 31(2) as these documents contain information which is the proprietary of the interested parties and of a confidential nature hence its disclosure 'would found an action by a person for breach of confidence and consequently ElectroGas and the other interested parties would claim an unlawful disclosure and possible damages and Article 32 of the Freedom of Information Act as its disclosure would disclose the Enemalta's and third parties trade secrets and be contrary to the public interest as it would result in undue detriment to Enemalta, the Government and ElectroGas. Enemalta also contends that the 'interlocking agreement' contains a reference to principles on technical matters agreed with the various parties and embedded in the various contracts between parties which are subject of the requests made by the applicant in other requests considered above, particularly requests 2 & 4 and thus the same reasons for refusal shall apply.

Moreover, the Commissioner was informed that the Government of Malta had "published a document containing the salient points of the transaction with SEP entitled 'Energy Sector Cooperation and Investment Agreement." And that the Interlocking Agreement is merely a reference to the provisions contained in the agreements with ElectroGas Malta and Shanghai Electric Power and thus such disclosure would disclose the Adjudication Reports and the agreements with the Shanghai Electric Power.

The appellant in his appeal relied only on the notion of public interest and decisions of the European Court of Human Rights, but the Tribunal is bound to rely on the provisions of the FOI act, Data Protection and public procurement regulations.

The Tribunal rejects therefore this request on the basis of Art 5(1) (f) and Art 32 of the FOI Act as it find this agreement to fall under the definition of 'exempt document'.

Request 4

A copy of all agreements signed between the Government of Malta and/or Enemalta with ElectroGas Malta.

The submissions made by Enemalta states that following receiving the full technical and financial proposals, the Public authority proceeded to evaluate the bids and declared

ElectroGas Malta Consortium as the preferred bidder. Such proposal award was not contested and Enemalta proceeded to sign a number of agreements relating to the project.

Public Procurement regulations besides the Freedom of Information Act comes into play in this case. The Act lays down exceptions to the freedom of information concerning the relationship between a public authority and a contractor. Public Procurement Rules also make it mandatory to include in the tender document a provision regarding data protection and freedom of information as described above, namely that:

Two standard clauses in each tender relate to Data Protection and Freedom of Information (vide *General Rules Governing Tenders vl.14 published by Department of Contracts Malta*, 04th January 2016). Such clauses state as follows:

Any personal data submitted in the framework of the procurement procedure and /or subsequently included in the contract shall be processed pursuant to the Data Protection Act (2001). It shall be processed solely for the purposes of the performance, management and follow-up of the procurement procedure and/or subsequent contract by the Contracting Authority/contracting Authority without prejudice to possible transmission to the bodies charged with a monitoring of inspection task in conformity with National and/or Community Law.

The provisions of this contract are without prejudice of the Contracting Authority in terms of the Freedom of Information Act (Cap. 496 of the Laws of Malta). The Contracting Authority, prior to disclosure of any information to a third party in relations to any provisions of this contract which have not yet been made public, shall consult the contractor in accordance with the provisions of the said Act, pertinent subsidiary legislation and the Code of Practice issued pursuant to the Act. Such consultation shall in no way prejudice the obligations of the Contracting Authority in terms of the Act.

Exemptions to tender information and contracts.

The Freedom of Information Act sets out a number of exemptions to the right of access to information held by public authorities. The exemptions most likely to apply to tender information and contracts are listed below:

- The information is a trade secret;
- Disclosure would prejudice the commercial interest of any person or organisation; the information that will be disclosed by external bodies to Enemalta plc and the nature of the information or the circumstances of its disclosure, or other circumstances, justify the acceptance by Enemalta plc of an obligation of confidence in relation to that information;
- The information is personal data and is protected un the Data Protection Act.(Cap.440)

Only information that is in fact confidential in nature or which could prejudice a commercial interest if released can be withheld under these provisions. However, it is an established fact that once a tender is awarded information from the successful tenderer loses confidentiality in respect of price and type of quantity of goods supplied subject to exceptions; that other

confidential information provided by the successful tenderer might well retain its confidentiality; that unsuccessful tender information retains its confidential.

The Tribunal notes also that Information Tribunal of the UK has confirmed that information contained in a contract between a public authority and a third party represents the conclusion of negotiations between the two parties and as such is jointly created rather than being obtained by the public authority from the contractor and is not confidential information. Nevertheless, depending on the circumstances of the case there can be elements of a contract or agreement for example technical information set out in a schedule as well as records of pre-contractual negotiations which the public authority has obtained from the third party and so may qualify as confidential information (*vide Derry City Council v Information Commissioner* (EA/2006/0014; 11 December 2006).

The Tribunal therefore decides that these agreements are to be made public except for the provisions that are considered to be exempt according to law. The Tribunal does not have at its disposal a copy of all agreements signed between the Government of Malta and/or Enemalta with ElectroGas Malta and cannot therefore rule as to which provisions can be considered as exempt and which are not and which can amount to breach of confidence.

The Tribunal notes that it cannot apply article 49(4) of the Data Protection Act (Cap 440) since the Freedom of Information Act stipulates in article 39(5) that the Tribunal shall remain subject to article 49(3) and Article 50(2)(3)(4) of the Data Protection Act and does not include article 49(4) of the same Act.

The Tribunal therefore decides to annul the decision of the Commissioner limited only to this request and limited also to publication of the agreements in question without commercially sensitive data such as trade secrets, and without documents which if disclosed would found an action by a person for breach of confidence.

Request 5

The adjudication report on the responses to the RFP from the shortlisted bidders after the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement.

For the reasons quoted in Request 1 above and particularly for the consent that is needed from all the shortlisted bidders, such request cannot be upheld.

Request 6

The Request for Proposals (RFP) and any addenda and/or clarifications distributed to the shortlisted bidders after the EoIC issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long terms gas supply and power purchase agreement.

For the reasons mentioned in Request 1 and particularly for the consent that is needed from all the shortlisted bidders, such request cannot be upheld.

Request 7

Call for expression of interest (EoIC) issued for prospective candidates to register their interest and submit outline proposals for the supply of natural gas and electricity to Enemalta under long term gas supply and power purchase agreement (April 2013).

This has already been acceded to and the web site quoted by Enemalta plc to appellant from where the appellant can find a copy of this call.

Dr Anna Mallia
Chair person

Mr Charles Cassar
Membru

Mr David Bezzina
Membru