

**Information and Data Protection Commissioner**

**CDP/FOI/30/2022**

**Caroline Muscat**

**vs**

**Ministry for Justice (MFJ)**

**THE REQUEST**

1. On the 1<sup>st</sup> May 2022, Ms Caroline Muscat (the “**applicant**”) submitted a request to the Ministry for Justice (MFJ) (the “**Public Authority**”) pursuant to article 3 of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting an electronic copy of the “*lists of court experts compiled by the Department of Justice according to public calls since 2016*”.
2. On the 30<sup>th</sup> May 2022, the Public Authority informed the applicant that her request could not be met as the requested document is “*exempt through Article 5 (3) (a) of the Act which states that a document is an exempt document if it contains personal data subject to the Data Protection Act*”.
3. The applicant was not satisfied with the Public Authority’s decision and on the 30<sup>th</sup> May 2022, pursuant to the Internal Complaints’ Procedure, requested the Public Authority to reconsider its position in terms of the Act, by contending that “*[t]he document requested is in the public interest, pertains an open court system and forms part of a new system adopted by the same Ministry through a public call for experts. Also, the Ministry’s interpretation of data protection laws in this context is wrong*”.
4. On the 15<sup>th</sup> June 2022, the Public Authority reconfirmed its position and remarked that “*the document is exempt through Article (5) (3) (a) because the list serves as an expression of various experts (natural persons) in their fields of expertise in their personal capacity, and by virtue of Part V of the Act i.e Art 30 (2) (a) because: the disclosure of such document could prejudice the fair trial of a person or the impartial adjudication of a particular case by any court, tribunal, disciplinary board, arbitration panel or similar body, or prejudice any inquiry under the Inquiries Act*”.

5. The applicant was not satisfied with the Public Authority's decision and on the 4<sup>th</sup> July 2022, submitted a complaint to the Information and Data Protection Commissioner (the "**Commissioner**") pursuant to article 23(1)(a) of the Act to investigate the case and issue a decision notice in terms of his powers at law. The applicant remarked that "*[i]n 2016, the Justice Ministry had announced this initiative for more transparency and accountability. Now the same Ministry is turning around the whole issue and for some reason people are being denied on knowing who the court experts are. These experts are paid by taxpayers and people have a right to know even to ensure transparency of the judicial system itself*".

## **INVESTIGATION**

### **Admissibility of the application**

6. After having considered the nature and background of this application, together with the procedural steps involved between the applicant and the Public Authority in the request for the document, the Commissioner considered the application made by the applicant as admissible for the purposes of article 23(2) of the Act.

### **Submissions received from the Public Authority and the Applicant**

7. As part of the investigation procedure, by means of an information notice dated the 20<sup>th</sup> July 2022, which was issued pursuant to article 24(1)(a) of the Act, the Public Authority was requested by the Commissioner to make submissions in relation to the decision taken to refuse access to the requested documentation on the basis of article 5(3)(a) and article 30(2)(a) of the Act. Additionally, the Commissioner requested the Public Authority to provide a copy of the requested document or to set up a mutually convenient date, for the Commissioner to physically inspect the document, to analyse the contents and to determine whether such document is precluded from being disclosed by virtue of the Act.
8. On the 30<sup>th</sup> August 2022, the Public Authority provided its written submissions and reiterated the legal exemptions cited to the applicant for not acceding to his request. Furthermore, the Public Authority submitted the following considerations for the Commissioner to take into account during the legal analysis of this case:
  - a. that the list pertains to an ongoing public call, more specifically an expression of interest, that may be accessed from <https://justice.gov.mt/en/doj/Pages/Reform-Exercise.aspx>.

The Public Authority explained that through this process, individuals who have expertise in various fields may express their interest by submitting their details and documents, to be considered for the role of court experts;

- b. that the Department of Justice receives these submissions, verifies them and maintains the list, and thus, the individuals confirmed on the list are potential court experts and they form part of a pool of individuals that may be considered by members of the judiciary, and who may eventually appoint them in that role;
  - c. that in this respect, article 5(3)(a) of the Act was cited by the Public Authority because these individuals are natural persons, who may have never been called to act in that role;
  - d. that it is also pertinent to note that members of the judiciary are empowered by law to engage experts at their discretion, irrespective of any list of possible experts provided to them; and
  - e. that in these cases, having this list made publicly available could also adversely affect the administration of justice, and therefore the Public Authority made reference to article 30(2)(a) of the Act.
9. On the 5<sup>th</sup> September 2022, the Commissioner provided the applicant with the opportunity to rebut the arguments made by the Public Authority. Consequently, by means of an email dated the 7<sup>th</sup> September 2022, the applicant rebutted the arguments made by the Public Authority and submitted the following principal arguments:
- a. that the list of experts to be possibly nominated by the court should be transparent and members of the judiciary (who are public servants), are not excluded from any rules of transparency and accountability;
  - b. that the Public Authority had no qualms before in publishing these lists, as it has already done following a freedom of information request by *'The Times of Malta'*, some years ago;
  - c. that the judicial process in our democracy is an open and transparent one, and the applicant cannot understand how the publication of this list of experts, paid by public funds for a public service, may *'adversely affect the administration of justice'*;

- d. that the Public Authority had publicly stated that the scope of these lists was for the judicial process to become more transparent and were to be made publicly available on the Public Authority’s portal. The applicant remarked that for some reason this has not happened since 2016; and
  - e. that “[a]s justice has to be seen to be done, experts and those members of the judiciary who hire them, should be known. This is in the interest of justice and of good governance. The fact that the Chamber of Advocates is on the record describing the nomination of experts as “a racket” increases the need for more transparency and accountability”.
10. In line with the Commissioner’s complaint-handling procedure, on the 14<sup>th</sup> September 2022, the Commissioner provided the Public Authority with the opportunity to rebut the arguments made by the applicant. In this regard, on the 3<sup>rd</sup> October 2022, the Public Authority submitted its reply and highlighted the following salient arguments:
- a. that the list does not refer to court experts, but individuals who might be considered for that role, and therefore until such time, these individuals are considered as private persons. The Public Authority further noted that since the appointment of experts remains at the discretion of the judiciary, stating whether or not these individuals will be appointed is not a matter to be stated publicly. This also applies to disclosing the fact that certain areas of expertise are covered by a handful of individuals, should they be appointed as court experts, prior public knowledge of this might adversely affect the administration of justice; and
  - b. that there was no such request referred to the Public Authority by the ‘*The Times of Malta*’.
11. On the 24<sup>th</sup> October 2022, the Commissioner requested the Public Authority to provide a copy of the list of individuals that are considered to serve as court experts. Additionally, the Public Authority was requested to clarify whether it keeps a record of those individuals chosen to serve as court experts, or whether this information could be obtained from payment records. By means of an email dated 5<sup>th</sup> January 2023, the Public Authority provided a copy of the list of individuals that are interested to serve as court experts. The Public Authority further noted that “*the Public Authority in this instance is the Justice Department. The Department is not involved in the choice of court experts or their remuneration, therefore there are no such payment records held*”.

## DECISION NOTICE

On the basis of the foregoing considerations, the Commissioner examined the request submitted by the applicant, whereby she specifically requested a copy of the “*lists of court experts compiled by the Department of Justice according to public calls since 2016*”. The Commissioner analysed the documentation, provided by the Public Authority on the 5<sup>th</sup> January 2023, and established that the list which is held by the Public Authority is not the list of court experts, as requested by the applicant, but rather the list of individuals who have shown interest to serve as court experts. These persons will only be considered as court experts after being engaged by the members of the judiciary. Consequently, the Commissioner concludes that, prior to this engagement process, the individuals’ personal data contained in the list held by the Public Authority, should not be made publicly available but should be afforded with the necessary protection to guarantee their data protection rights and fundamental freedoms.

Notwithstanding this, the Commissioner decides that the reason of the refusal cited by the Public Authority, in its replies dated the 30<sup>th</sup> May 2022 and the 15<sup>th</sup> June 2022, is inapplicable on the basis that, during the course of the investigation, it was established that the document requested by the applicant is not held by the Public Authority.

The Commissioner draws the attention of the Public Authority on the manner how the request was handled and emphasises that public authorities are required to provide applicants with clear and correct reasons or grounds when refusing requests for information.

Ian  
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**Ian Deguara**  
**Information and Data Protection Commissioner**

## **Right of Appeal**

In terms of article 39(1) of the Act where a “*decision notice has been served, the applicant or the public authority may appeal to the Tribunal against the notice within twenty working days.*”

An appeal to the Information and Data Protection Appeals Tribunal shall be made in writing and addressed to:

The Secretary  
Information and Data Protection Appeals Tribunal  
158, Merchant Street  
Valletta.