

THE FREEDOM OF INFORMATION REQUEST

1. On the 6th July 2022, Ms Erica Giusta (the “**applicant**”) submitted a request to the Arts Council Malta (the “**Public Authority**”) in terms of article 6(1) of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting information in relation to the call for a design team for Malta’s participation in ‘*London Design Biennale 2023*’, specifically “*information about the winning entry of the above-mentioned competition. Since no detailed description nor images were carried on your website, a copy of the documents submitted by the winning team would be appreciated*”.
2. On the 26th July 2022, the Public Authority issued a reply wherein it refused the applicant’s request on the basis that:

“Results were made available online at artscouncil.mt on Wednesday 22nd June 2022, and may be found [here](#). Furthermore details about the selected project were published online at artscouncil.mt on the same day 22nd June 2022 and can be found [here](#). The information published to date is not official since the selected project was required to submit an official application to the London Design Biennale by the 30th June 2022.

The selected project submitted the design concept and is awaiting the communication from the London Design Biennale. As per the London Design Biennale’s prospectus, available [here](#), the proposed Design Concept is subject to modifications which will be requested by and discussed directly with the London Design Biennale. Thus, more

details and pictures will be available at a later stage upon full and official acceptance by the London Design Biennale”.

3. The applicant was not satisfied with the Public Authority’s decision, and on the 28th July 2022, she requested the Public Authority to reconsider its position in terms of the Act, for the following reasons outlined hereunder:

“While we understand that the proposal selected by the local jury is still being discussed and finalised with the LDB team, as indicated in the timeline contained in the link that you shared, we would like to renew our request, for the reasons described below.

As participants in a public call, we expect that once the jury had completed its appraisal of the submitted proposals, then the winner of the competition is announced and published even if there are discussions to be held with the Biennale authorities, which is of course understandable. What we are interested in, which, I am sure you will agree, is legitimate, is to have visibility of the winning proposal as it was submitted in April 2022, at local open call stage, to be able to assess what our proposal was measured against, and what characteristics were prioritised by the jury. In this way, we will be in a position to review our own submission in a critical and constructive way, and understand better the vision and mission of the Arts Council.

Our interest is not the final result which will be presented at a later stage, but in the idea that was favored by the adjudicating board and in its presentation at local selection phase”.

4. On the 4th August 2022, the Public Authority replied by stating that the “[w]inning proposal have been online <https://www.artscouncilmalta.org/pages/the-council/strategy/internationalisation/malta-at-the-london-design-biennale-2023> since issue of results”.
5. The applicant was not satisfied with the decision of the Public Authority and through her legal counsel, submitted an application to the Information and Data Protection Commissioner (the “**Commissioner**”) on the 4th October 2022 pursuant to article 23(1)(a) of the Act, to investigate

the case and issue a decision notice. In this regard, the applicant outlined the same arguments submitted to the Public Authority through the Internal Complaints' Procedure, and further justified her disagreement on the basis of the following arguments:

- a. that the “*details about the selected project*” simply consists of vague, ambiguous and abstract description, but lack any visuals, designs, drawings or concrete ideas and descriptions of the project, and, it therefore does not satisfy the applicant’s request for information in terms of the Act;
- b. that the Public Authority failed to accede to her request and to inform her in writing of its decision within the time period established by law; and
- c. that the applicant “*humbly requests you to order the Arts Council Malta to grant her a copy to the full proposal submitted on or before 6 April 2022 by the winning contestant, Open Square Collective, including visual, drawings, plans, photos, models and any other documents, descriptions and details*”.

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 documentation, the Commissioner considered the application as admissible for the purpose 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 17th October 2022, issued in terms of article 24(1)(a) of the Act, the Public Authority was requested to provide information in relation to the freedom of information application for the purposes of enabling the Commissioner to exercise his functions under the Act, and to determine whether the Public Authority has compiled or is complying with the requirements of the Act. Additionally, the Commissioner requested the Public Authority to provide a copy of the requested documentation in order to be able to analyse the contents and determine whether such documentation is precluded from being disclosed by virtue of the Act.

8. On the 10th November 2022, the Public Authority provided the Commissioner with a blank copy of the online application filled by the respondents and a copy of the application submitted by Open Square Collective. Additionally, the Public Authority provided its written submissions and made the following considerations for the Commissioner to take into account during the legal analysis of this case:

a. that the information about the winning entry of the ‘*London Design Biennale 2023*’ competition was announced on the Public Authority’s website¹. The Public Authority noted that a copy of the documents submitted by the winning team have not been made publicly available; and

b. that the ‘*Selection Process*’ is explained in the guidelines and regulations².

9. On the 18th November 2022, the Commissioner provided the applicant with the opportunity to rebut the arguments made by the Public Authority. On the 18th November 2022, the applicant noted that “*the Commissioner may proceed with his deliberation, since we do not feel that the PA made any arguments that need rebutting*”.

10. On the 6th February 2023, the Commissioner requested the Public Authority to provide further clarifications to take into consideration during the legal analysis of this case, specifically to provide submissions on the reasons why the information was not made publicly available in its entirety. On the 21st February 2023, the Public Authority noted that:

“Arts Council Malta published the information on the winning proposal in line with the guidelines and regulations for the CALL FOR A DESIGN TEAM.

As stated in pages 3-4

“4) Confidentiality and the ‘Call for a Design Team’ Ownership

This ‘Call for a Design Team’ is both confidential and proprietary to Arts Council Malta and Arts Council Malta reserves the right to recall the ‘Call for a Design Team’ in its entirety or in part. The Design Teams shall not include or reference this

¹ Arts Council Malta: <https://www.artscouncilmalta.org/pages/the-council/strategy/internationalisation/malta-at-the-london-design-biennale-2023>

² Arts Council Malta: <https://www.artscouncilmalta.org/files/uploads/misc/LDB%20Call%20EN%203.pdf>

‘Call for a Design Team’ in any publicity without prior written approval from Arts Council Malta. The Design Teams accept all of the foregoing terms and conditions without exception. All responses to the ‘Call for a Design Team’ will become the property of Arts Council Malta and will not be returned.

5) Disclosure of Proposal Contents

Cost and price information provided in information proposals will be held in confidence and will not be revealed or discussed with competitors, except to the extent required by law. All other material submitted becomes the property of Arts Council Malta and may be returned only at Arts Council Malta’s discretion. Information proposals submitted to Arts Council Malta may be reviewed and evaluated by any person other than competing Design Teams at the discretion of Arts Council Malta.’’

LEGAL ANALYSIS AND CONSIDERATIONS

11. Having taking into account the spirit and scope of the Act, which is designed to ensure the greatest possible transparency and to promote accountability in public authorities, by enabling to the extent possible, the exercise of the right of access to documents held by the public authorities.
12. Having examined the request submitted by the applicant pursuant to article 6 of the Act, wherein the Public Authority was requested to provide information in relation to the call for a design team for Malta’s participation in ‘*London Design Biennale 2023*’, specifically “*information about the winning entry of the above-mentioned competition. Since no detailed description nor images were carried on your website, a copy of the documents submitted by the winning team would be appreciated*”, and the refusal of the Public Authority on the basis that the requested information is publicly available. For the purpose of this investigation, the Commissioner sought to establish whether the replies provided by the Public Authority to the applicant comply with the requirements of the Act.
13. In this regard, the Commissioner examined the replies provided to the applicant, wherein the Public Authority stated that the “[w]inning proposal have been online <https://www.artscouncilmalta.org/pages/the-council/strategy/internationalisation/malta-at->

the-london-design-biennale-2023 since issue of results”. Article 14(d) of the Act enables a Public Authority to refuse a request on the basis that “*the document requested is publicly available or will be published within three months*”. The Commissioner noted that the wording of article 14(d) of the Act is self-explanatory and the refusal may only be justified if the Public Authority demonstrates that the document is made available to the public or will be made available to the public within three (3) months.

14. As part of the investigation of this application, the Commissioner conducted an analysis to establish whether all the information requested by the applicant is made publicly available. However, it resulted that certain information, which includes, *inter alia*, drawings and budgets, is not, and, thus, not all the information requested by the applicant is in fact publicly available. It was only during the course of the investigation that the Commissioner was informed by the Public Authority that the ‘Call for a Design Team’ and the cost and price information provided in information proposals are to be held confidential. However, no exemption was cited by the Public Authority to justify its refusal in terms of the Act.
15. The Commissioner noted that article 15(1)(a) of the Act obliges the Public Authority to give the applicant the reason(s) for the refusal of the FOI request. In this regard, article 14 of the Act sets forth the number of reasons which enable the Public Authority to refuse the freedom of information request. After assessing the replies provided to the applicant, the Commissioner noted that the replies were not sufficient to enable the applicant to clearly understand the denial of the requested documentation. Accordingly, the Commissioner stresses that any decision made by the Public Authority in relation to the refusal of a document shall be accompanied by reasoned and specific justification pursuant to the provisions of the Act, particularly by citing the appropriate and specific legal exemption, if applicable, as held in Part V and Part VI of the Act.

On the basis of the foregoing considerations, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and deciding that the reason of refusal of the Public Authority in relation to the call for a design team for Malta’s participation in ‘*London Design Biennale 2023*’, specifically “*information about the winning entry of the above-mentioned competition. Since no detailed description nor images were carried on your website, a copy of the documents submitted by the winning team would be appreciated*” is not justified.

By virtue of article 12(2)(a) of the Act, is hereby instructing the Public Authority to grant the applicant with a reasonable opportunity to physically inspect the requested documentation, whilst

removing the personal data therein. The Public Authority shall engage with the applicant to find a mutually convenient date when the inspection of the document could be carried out.

The Public Authority shall comply with this order within twenty (20) working days from the date of receipt of this decision notice and provide the Commissioner with a confirmation of the action taken immediately thereafter.

Pursuant to article 23(4)(b) of the Act, the Public Authority failed to comply with the requirements of Part II, in particular, with article 15(1)(a) thereof, as it did not provide the applicant with the appropriate and suitable reasons to enable the applicant to understand the refusal of her request in terms of article 14(a) to (h). The Commissioner rebukes the Public Authority on the manner how the applicant's request was handled and emphasises on the requirements incumbent of public authorities to provide applicants with clear and correct reasons when refusing requests for information.

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(Signature) (Signature)
Date: 2023.03.20
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Ian Deguara
Information and Data Protection Commissioner

Right of Appeal

In terms of article 39(2) of the Act where a “*public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the tribunal against the notice.*”

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.