

FOI/13/2022

Rebecca Bonello Ghio

vs

Malta Enterprise

THE FREEDOM OF INFORMATION REQUEST

1. On the 19th January 2022, Ms Rebecca Bonello Ghio (the “**applicant**”) submitted a request to the Malta Enterprise (the “**Public Authority**”) pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting an electronic copy of the following documentation:

“The Shift News reported that, in October 2014, the government secretly signed a Memorandum of Understanding (an “MoU”) with those linked to the concession of the Vitals hospital deal¹. In July 2020, the National Audit Office (the “NAO”) issued a report explaining that the deal was signed by the former Minister of Health, Konrad Mizzi, Dr Ambrish Gupta (AGMC Incorporated), represented by Dr. Ashok Rattehalli, Bluestone Special Situation 4 Ltd, represented by Mr Mark Pawley, and Portpool Investments Ltd and/or Pivot Holdings Ltd, represented by Mr Mohammad Shoaib Walajahi and Mr Chaudhry Shaukat Ali².

¹ “What we know about the ‘lost’ and newly found, hospitals MOU”, The Shift News. Retrieved from: <https://theshiftnews.com/2020/07/15/what-we-know-about-the-lost-and-newly-found-hospitals-mou/>

² “Prior agreement between Government and the Investors”, An audit of matters relating to the concessions awarded to Vitals Global Healthcare by Government Part I – A review of the tender process – Addendum, pp. 12 – 13. Retrieved from: <https://nao.gov.mt/en/recent-publications>

The Times of Malta was denied its request for the MoU, as was the Information and Data Protection Commissioner (the “IDPC”)³, while the NAO only received it following several rejections by various Ministries. Despite this, the NAO asserted that this secrecy by the government:

“casts the greatest shadow of doubt over the validity of the concession awarded by Government, for, in reality, all appears to have been pre-agreed and the procurement process undertaken was solely intended as a superficial exercise leading to an already determined outcome.”

...

I am requesting:

(a) The MoU dated 10th October 2014 signed by the former Minister of Health, Konrad Mizzi, and AGMC Incorporated, Pivot Holdings Ltd, and Bluestone Special Situation 4 Ltd.

(b) The MoU dated 23rd November 2014 signed by the former Minister of Health, Konrad Mizzi, and AGMC Incorporated, Portpool Investments Ltd, and Bluestone Special Situation 4 Ltd.

(c) Any written (including email) correspondence between Malta Enterprise and/or its representatives and the Ministry of Health and/or its representatives or the NAO and/or its representatives regarding the October MoU and November MoU being requested.

(d) Any internal correspondence or minutes of internal meetings between the representatives of Malta Enterprise regarding the October MoU and November MoU being requested.”

2. On the 17th February 2022, the Public Authority informed the applicant that her request could not be met because *“Malta Enterprise is not in a position to provide the requested information, even if such information was available, in view of the provisions of sub-articles (4) and (5) of article 21 of the Malta Enterprise Act, Cap. 463 of the Laws of Malta. Furthermore, the documents which you have requested are intrinsically related to the merits of an on-going magisterial inquiry and hence such documents constitute exempt documentation in terms of article 30(2) of the Freedom of Information.”*

³ “Court rejects Times’ request for hospitals deal documents”, The Times of Malta. Retrieved from: <https://timesofmalta.com/articles/view/court-rejects-times-request-for-hospitals-deal-documents.742512>

3. The applicant was not satisfied with the decision of the Public Authority, and on the 28th February 2022, pursuant to the Internal Complaints Procedure, the Public Authority was requested to reconsider its position. The applicant through her lawyer submitted as follows:

“The Applicant would firstly like to correct the reference made to the first document requested as follows: the reference to “the MoU dated 10th October 2014 signed by the former Minister of Health, Konrad Mizzi, and AGMC Incorporated, Pivot Holdings Ltd, and Bluestone Special Situation 4 Ltd.” should be read as “the MoU dated 10th October 2014 signed by the former Minister for the Economy, Investment and Small Business, Christian Cardona, and AGMC Incorporated, Pivot Holdings Ltd, and Bluestone Special Situation 4 Ltd.” Despite the mistake made in referring to the document, there is no question that the information requested is available and exists. The original FOI request made by the Applicant already made reference to a news article published by The Shift reporting its existence ..., and the National Audit Office (“NAO”) report published in July 2020 that made explicit and detailed reference to “the MoU dated 10 October 2014”.

The second document requested with reference to “the MoU dated 23rd November 2014 signed by the former Minister of Health, Konrad Mizzi, and AGMC Incorporated, Portpool Investments Ltd, and Bluestone Special Situation 4 Ltd.” can be ignored.

The third document requested with reference to “Any written (including email) correspondence between Malta Enterprise and/or its representatives and the Ministry of Health and/or its representatives or the NAO and/or its representatives regarding the October MoU and November MoU being requested” should be read as “Any written (including email) correspondence between Malta Enterprise and/or its representatives and the Ministry for the Economy, Investment and Small Business, and/or its representatives or the NAO and/or its representatives regarding the October MoU being requested”.

The fourth document requested with reference to “Any internal correspondence or minutes of internal meetings between the representatives of Malta Enterprise regarding the October MoU and November MoU being requested” should be read as “Any internal correspondence or minutes of internal meetings between the representatives of Malta Enterprise regarding the October MoU being requested”.

[hereinafter the “**requested documentation**”].

With respect to the Corporation’s claim that it cannot provide the requested information because it and its staff are bound by the provisions of the Professional Secrecy Act, the Applicant submits that first and foremost, none of the documents requested are professional secrets in terms of sub-article (3) of Article 2 of the Professional Secrecy Act, Cap. 377 of the Laws of Malta. Moreover, as mentioned already in the request, the National Audit Office in its report published in July 2020 condemns the secrecy perpetuated by the Government with respect to the MoU of 10 October 2014

...

In any case, Malta Enterprise misapplied the Malta Enterprise Act which it quoted in support of its refusal when it referred only to sub-articles (4) and (5) of article 21 of the Malta Enterprise Act, and ignored sub-article (6). In particular, sub-article (6)(b) makes it very clear that nothing in Article 21 hinders the Corporation or its staff from providing full access to such other persons or authorities as are entitled to receive such information under provisions of applicable law for the carrying out of their functions.

...

With respect to the Corporation’s claim that the documents requested are intrinsically related to the merits of an on-going magisterial inquiry and hence constitute exempt documentation in terms of article 30(2) of the Freedom of Information Act, the Applicant has a few submissions to make, considering the fact that article 30(2)(a) of the Act considers a document to be exempt if its disclosure under this Act would, or could reasonably be expected to “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 an inquiry conducted under the Inquiries Act”.

First, the documents are being requested from the Corporation, not from an investigating authority (the Executive Police or the Inquiring Magistrate in a magisterial inquiry), thus the Corporation, aside from having not duty to investigate whether someone should or shouldn't be charged with an offence, or power to conduct such investigations and/or institute criminal proceedings, also has no means to determine by itself whether disclosing documents to the public would or could prejudice an inquiry conducted under the Inquiries Act.

Second, even if there was a valid reason not to disclose documents that have been seized by the Judicial Authorities or Executive Police as part of an inquiry, that inquiry should not be used as an excuse for blanket interference in the right to receive information. The purpose of an exemption in the FOI Act for a document that would, by its disclosure, “prejudice an inquiry conducted under the Inquiries Act”, is to protect the effective adjudication and prosecution of offences and is not a blanket ban on the public disclosure of any document that is submitted to an investigating authority such as the Executive Police or the Inquiring Magistrate.

Third, Malta Enterprise must perform the public interest test. Where the public interest arguments in favour of disclosure outweigh the arguments in favour of an exemption, the document requested will need to be disclosed. Nothing indicates in the Corporation's refusal of the request that the public interest arguments in favour of disclosure have been considered. In this case, the disclosure of the MoU of 10 October 2014 is firmly in the public interest in light of the NAO's recommendation in his report for “further investigation by the competent authorities in terms of any possible financial mismanagement and misuse of public funds in connection with this concession awarded by Government.”

4. On the 14th March 2022, the Public Authority informed the applicant that the “*clarifications and submissions made, do not alter Malta Enterprise’s position as already declared in our previous letter*”.

FREEDOM OF INFORMATION APPLICATION

5. On the 14th March 2022, the applicant through her lawyer, applied for a decision notice pursuant to article 23(1)(a) of the Act, requesting the Information and Data Protection Commissioner (the “**Commissioner**”) to decide whether the Public Authority had dealt with the requirements of the Act. The applicant contended that the response provided by the Public Authority is unsatisfactory and reiterated the arguments provided at the stage of the internal complaint procedure.

Admissibility of the Application

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

INVESTIGATION

The Issuance of the Information Notice

7. For the purpose of the investigation procedure, by means of the information notice dated the 21st March 2022, issued in terms of article 24(1)(a) of the Act, the Public Authority was provided with a copy of the FOI application and requested to make any comments or submissions, which are deemed necessary and relevant to support its decision in relation to the refusal of the request. This information was requested for the purposes of enabling the Commissioner to exercise his functions under the Act and to determine whether the Public Authority had complied with the requirements of the Act. Additionally, the Commissioner specifically requested the Public Authority to provide further information in relation to the magisterial inquiry which is mentioned in the reply dated the 17th February 2022.

Submissions received from the Public Authority

8. By means of a letter dated the 4th May 2022, the Public Authority provided the following arguments for the Commissioner to consider in the legal analysis of this FOI application:
- a. that the Public Authority is not in a position to provide the requested information, even if such information was available, in view of the provisions of sub-articles (4) and (5) of article 21 of the Malta Enterprise Act, Cap. 463 of the Laws of Malta;
 - b. that the documents which the applicant has requested are intrinsically related to the merits of an on-going magisterial inquiry and hence such documents constitute exempt documentation in terms of article 30(2) of the Act;
 - c. that the exemption stipulated in article 21(6)(b) of the Malta Enterprise Act (Cap. 463 of the Laws of Malta) clearly does not extend and was not intended to extend to requests for information made in terms of the Act;
 - d. that the exemption is inapplicable on the basis that the said provision of law was already in place and promulgated prior to the entry into force of the Act, and hence it certainly cannot be argued that when the legislator included the said exemption, the legislator did so with the FOI in mind;
 - e. that the information requested by the applicant is certainly not required by the Commissioner for carrying out his functions, rather the functions of the Commissioner are to determine which information may be provided in terms of the enabling Act and which information is exempt;
 - f. that the Commissioner could certainly carry out his functions as established in the Act, without being provided the information requested, and thus, the interpretation of article 21(6)(b) of Cap. 463 is completely lop-sided and clearly the said exemption does not apply;
 - g. that if one would have to endorse the arguments being made by the applicant, it would render the provisions of sub-articles (4) and (5) of article 21 of Cap. 463 completely

futile since all confidentiality protected by the said two (2) provisions would be thrown out of the window given that a freedom of information request made by anyone would be invincible and the said two provisions would not apply; and

- h. that with regard to the second limb, the Public Authority reiterates that it is an established fact that the documents which are requested by the applicant are intrinsically related to the merits of an ongoing magisterial inquiry and hence such documents constitute exempt documentation in terms of article 30(2) of the Act, and consequently, for such reason, the requested information could not be provided.

Submissions received from the applicant

9. Pursuant to this Office's internal procedure, the Commissioner provided the applicant with the opportunity to rebut the arguments made by the Public Authority. In this regard, the applicant submitted the following principal arguments:
 - a. that had the legislator wanted to exclude any legislation drafted after the promulgation of Cap. 463 from being caught under this law, the legislator would have to make this explicit and in the absence thereof, there is nothing precluding the FOI Act from being covered by this provision;
 - b. that the applicant never once suggested that the information requested was for the Commissioner to carry out his functions and it baffles the applicant how the Public Authority reached this conclusion, which itself is completely lop-sided;
 - c. that the applicant is an eligible person in terms of the law who requires access to the information requested for the carrying out of her functions, who has a clear objective to campaign for public accountability and transparency, and thus, the applicant is entitled to receive the information requested in accordance with article 21(6)(b) of Cap. 463, in support of those objectives and so that she may be able to carry out her functions;
 - d. that in relation to the arguments made concerning article 30(2) of the Act, the applicant reiterates the following three points: (i) that the documents are being requested from

the Public Authority, and from an investigating authority; (ii) that even if there was a valid reason not to disclose documents that have been seized by the judicial authorities or the Executive Police as part of an inquiry, the inquiry should not be used as an excuse for blanket interference in the right to receive information; and (iii) that the Public Authority must perform the public interest test and where the public interest arguments in favour of disclosure outweigh the arguments in favour of an exemption, the document requested will need to be disclosed; and

- e. that in the current circumstances, the Public Authority is funded by public funds, and thus the memorandum of understanding and the correspondence in question relate to a matter of significant public interest.

Final Submissions received from the Public Authority

10. The Public Authority submitted the final arguments in relation to the refusal to provide the requested documentation:

- a. that in the first place, even if such information was available, in view of the provisions of sub-articles (4) and (5) of article 21 of Cap. 463, it would appear that this plea has, so far, not been given the due consideration which it deserves;
- b. that secondly, and without prejudice to the above, the Public Authority would like to clarify that all documentation which was requested by the magisterial inquiry was duly presented and that the Public Authority is not in a position to produce the documentation requested; and
- c. that the documents requested by the applicant are intrinsically related to the merits of an on-going magisterial inquiry and hence such documents constitute exempt documentation in terms of article 30(2) of the Act, and therefore, could not be produced.

11. The Commissioner noted that the Public Authority did not invoke article 14(g) of the Act as one of the reasons of the refusal, however, it repeatedly stated in the reply dated the 17th February 2022, including the submissions, that the FOI request is being refused “*even if such*

information was available". The manner how the reply and the submissions were formulated by the Public Authority seem to give the impression that the requested documentation was not held by the Public Authority at the time of the reply to the FOI request.

12. To this effect, the Commissioner requested the Public Authority to provide a sworn declaration confirming that the requested documentation has been handed over to the inquiring authorities, and thus the Public Authority does not hold any copies of the requested documentation. Notwithstanding this, by the time of the issuance of this decision notice, the Public Authority did not provide a sworn declaration and reiterated that the Commissioner "*completely ignores the first limb of the reply which had been sent from the Corporation's end to the FOI in question based on the confidentiality clauses entrenched in the Act by virtue of which the Corporation was constituted, and by which it is regulated.*" For this reason, the Commissioner proceeded to determine whether the Malta Enterprise is excluded from the applicability of the Act on the basis of the "*confidentiality clauses entrenched in the [Malta Enterprise] Act*".

LEGAL ANALYSIS AND DECISION

13. As a preliminary step of the investigation of this FOI application, the Commissioner assessed the refusal of the Public Authority, wherein by means of the reply dated the 17th February 2022, the Public Authority informed the applicant that her request could not be met because "*Malta Enterprise is not in a position to provide the requested information, even if such information was available, in view of the provisions of sub-articles (4) and (5) of article 21 of the Malta Enterprise Act, Cap. 463 of the Laws of Malta. Furthermore, the documents which you have requested are intrinsically related to the merits of an on-going magisterial inquiry and hence such documents constitute exempt documentation in terms of article 30(2) of the Freedom of Information.*".
14. For the purpose of the investigation of this FOI application and in accordance with article 23(1)(a) of the Act, the Commissioner sought to investigate, to the extent appropriate, whether the reply of the Public Authority dated the 17th February 2022 complies with the requirements of the Act. In this regard, the Commissioner analysed the reply of the Public Authority, wherein the applicant was informed that her request was being refused on two grounds that: (a) the documents requested are excluded from the scope of the Act by virtue of article 5 of the Act; and (b) the documents are exempt in terms of article 30(2) of the Act. Therefore, the Public

Authority invoked article 14(a) and article 14(b) of the Act as the reasons for the refusal of the requested documentation.

Non-Applicability of the Act

15. In the reply dated the 17th February 2022 and the submissions provided during the course of the investigation, the Public Authority reiterated that the provisions of the Act shall not apply to documents in so far as such documents contain information the disclosure of which is prohibited by article 21(4) and (5) of Cap. 463 of the Laws of Malta.
16. Within this context, the Commissioner examined article 21(4) of Cap. 463, which states that “[s]ave as may be otherwise required or permitted for the purposes of this Act, or in the course of a prosecution of an offence committed in relation to this Act, in carrying out its functions, **the Corporation and its staff shall be bound by the provisions of the Professional Secrecy Act and shall not divulge any information about any applicant or any benefits granted to any applicant without the prior written consent of such applicant or as otherwise permitted by law.**” [emphasis has been added].
17. The Commissioner noted that article 3(1) of the Professional Secrecy Act (Cap. 377 of the Laws of Malta) provides that officials and employees of the State are all persons who fall within the scope of article 257 of the Criminal Code (Cap. 9 of the Laws of Malta). It therefore follows that the employees of the public authorities are bound by the provisions of Cap. 377, and thus, the Commissioner could not accept the argument of the Public Authority that its employees are bound by the provisions of the Professional Secrecy Act as a reason to refuse to comply with the FOI request made by the applicant. Otherwise, this would lead to a situation where the Act would lose its scope and purpose, and the right to access information would become futile.
18. In addition, article 21(4) of Cap. 463 specifies that “*the Corporation ... shall not divulge any information ... without the prior consent of such applicant or as otherwise permitted by law*”. It is abundantly clear that this provision is not excluding the applicability of Cap. 496 and in fact, Cap. 463 is recognising that there could be other laws which permit the disclosure of the information held by the Public Authority.

19. The Commissioner proceeded to consider article 21(5) of Cap. 463, which provides that *“Every person having an official duty or being employed in the administration of this Act shall regard and deal with all documents and information relating to matters contemplated by or pursuant to the provisions of this Act as secret and confidential and shall make and subscribe before a Commissioner for Oaths a declaration to this effect in the form prescribed which shall be deposited with the Attorney General. Such persons shall not, unless the Prime Minister otherwise directs in writing, be required to produce to or before any court, tribunal, board, committee of enquiry or other authority, or to divulge to any such court, tribunal, board, committee of enquiry or other authority any matter or thing coming to their notice or being in their possession in the performance of their duties under this Act.”*
20. Whereas a superfluous reading of article 21(5) of Cap. 463 would appear that this provision is calling for strict secrecy and confidentiality, however, this is not a stand-alone provision, and in fact, this has to be read and interpreted in light of article 21(6) of Cap. 463. Accordingly, article 21(6)(b) of Cap. 463 stipulates that *“[n]othing in this article shall hinder the Corporation or its staff: - (b) from providing full access to such other persons or authorities as are entitled to receive such information **under provisions of applicable law** for the carrying out of their functions”*. The wording of article 21(6) of Cap. 463 makes it evidently clear that disclosure of the information is possible if permitted by an applicable law and in fact, this provision sets forth a number of instances where the Public Authority could disclose information. This is indicative that article 21(6) of Cap. 463 does not call for absolute secrecy and confidentiality, and, consequently, there is no conflict between Cap. 463 and Cap. 496 that could give rise to the applicability of the principle of *“lex specialis derogat generalis”*.
21. In addition, the Public Authority argued that *“the exemption stipulated in para: (b) of sub-article (6) of article 21 of the Malta Enterprise Act, Cap. 463 of the Laws of Malta, clearly does not extend and was not intended to requests for information made in terms of the Freedom of Information ... the said provision of law was already in place and promulgated prior to the entry into force of the Freedom of Information Act”*.
22. The Commissioner clarifies that the provisions of Cap. 463 should not exonerate the Public Authority from complying with the requirements of the Act. It is the understanding of the Commissioner, based on the legal maxim *‘ubi lex voluit lex dixit’*, that had the legislator intended to establish this prohibition, it would have clearly and specifically stated so. There is,

however, nothing in Cap.463, which prohibits the disclosure of the information requested by the applicant.

23. Additionally, the fact that Cap.463 was promulgated before Cap. 496 should certainly not be treated as a prohibition from complying with the right of access of the applicant. If the legislator intended to exclude the Malta Enterprise from the scope of the Act as it does in relation to the other public authorities, the legislator would have included the Malta Enterprise as one of the public authorities mentioned in article 5(4) of the Act. In this regard, Cap. 463 does not provide any unfettered power to the Public Authority to withhold information, particularly, when there is an overriding public interest.

24. This led the Commissioner to conclude that the applicant is an eligible person in terms of the law who requires access to the information requested for the carrying out of her functions as a public watchdog, and who has an objective to campaign for public accountability and transparency, and thus, the applicant is entitled to receive the information requested in accordance with article 21(6)(b) of Cap. 463.

Article 30(2) of the Act

25. The Public Authority argued that without prejudice to the first reason provided to the applicant, the request was being refused on the basis that the documents requested by the applicant “*are intrinsically related to the merits of an on-going magisterial inquiry and hence such documents constitute exempt documentation in terms of article 30(2) of the Freedom of Information Act.*”

26. The Commissioner emphasises that the spirit and scope of the freedom of information legislation is to establish a right to information in order to promote added transparency and accountability in public authorities. The legislation reflects the fundamental premise that all information held by public authorities is in principle public, save for those documents that specifically fall within the exemptions provided for by law.

27. This has been supported by the jurisprudence of the Court of Appeal in the judgment *Din l-Art Helwa vs l-Awtorita' tal-Ippjanar*⁴, which held that “[l]-Att dwar il-Liberta' tal-Infommazzjoni hi ligi intiża biex tipprovdi b'mod ampju iżda b'restrizzjonijiet ċari fl-istess ligi, sens ta'

⁴ Appeal no. 7/2019, decided on the 16th May 2019.

trasparenza u kontabilita fid-deċiżjonijiet, ordnijiet jew direttivi fl-amministrazzjoni pubblika li wara kollox qiegħda hemm għas-servizz tas-soċjeta.” Similarly, the Court of Appeal in the judgment *Allied Newspapers Limited vs Foundation for Medical Services*⁵ highlighted that the “*leġiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovdi ċerti garanziji għat-twettiq fil-prattika tal-libertà tal-informazzjoni bħala s-sisien tal-libertà fundamentali tal-espressjoni*”.

28. Moreover, the Court of Appeal in the judgment *Allied Newspapers Limited vs Projects Malta Ltd*⁶ made reference to the parliamentary debate in relation to the freedom of information legislation, which accentuates the spirit and scope of the legislation:

“Fi kliem l-Onor. Prim Ministru meta kien qiegħed jippilota l-Att dwar il-Libertà tal- Informazzjoni mill-Parlament: “il-prattika kienet li l-informazzjoni tibqa’ kunfidenzjali sakemm ma jkunx hemm raġuni biex isir mod ieħor. ... Bil-proposta ta’ din il-liġi qegħdin naqilbu din il-prattika kompletament ta’ taħt fuq, għax issa il-premessa li qegħdin inressqu għall-konsiderazzjoni tal-Qorti hija premessa li tgħid li l-informazzjoni issa se tkun soġġetta li tigi żvelata sakemm ma jkunx hemm raġuni valida skont kriterji stabbiliti mil-liġi għaliex m’għandhiex tkun żvelata. ... It-trasparenza hija wkoll mezz ewlieni biex tiżgura li l-korruzzjoni u l-abbuż ta’ poter ma jaqbdux għeruq u li jinkixfu u jinqerdu fejn ikunu preżenti.””

29. Whereas the objective of the Act is to confer on the applicants as wide a right of access to information, this right is nonetheless subject to certain limitations based on exemptions as set forth in Part V and Part VI of the Act. Within this context, the law provides for a number of exemptions that enable the public authorities to refuse access to information where its disclosure would or could undermine the protection of one of the interests intended to be protected by Part V and Part VI of the Act. Notwithstanding this, the Commissioner emphasises that the exemptions derogate from the principle of the widest possible access to information, and as a result, the exemptions should be interpreted and applied strictly.

30. In this regard, the refusal of a public authority to provide the requested information must be clearly substantiated by how the disclosure would effectively prejudice the interest protected

⁵ Appeal no. 11/2020 LM, decided on the 18th November 2020.

⁶ Appeal no. 33/2019LM, decided on the 2nd September 2020.

by the exemption. Accordingly, the CJEU in its settled-case law in relation to the interpretation of Regulation 1049/2001⁷ states that:

*“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 actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it relies. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (see judgment of 17 October 2013, Council v Access Info Europe, C-280/11 P, EU:C:2013:671, paragraph 31 and the case-law cited; judgment of 3 July 2014, Council v In ’t Veld, C-350/12 P, EU:C:2014:2039, paragraph 52)”*⁸ [emphasis has been added].

31. This reasoning has also been confirmed by the Court of Appeal, which provides that “[i]l-*Qorti hija tal-fehma li dan l-hekk imsejjaħ preġudizzju huwa għal kollox remot, jekk mhux ukoll ipotetiku*”. It therefore follows that the Public Authority is legally obliged to concretely demonstrate how the disclosure of the requested documentation would harm the interest which it seeks to protect through the refusal of the FOI request.
32. In this regard, article 30(2)(a) of the Act does not provide for a blanket exclusion from disclosure, but clearly states that those documents the disclosure of which “*would, or could reasonably be expected to: (a) 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 an inquiry conducted under the Inquiries Act*” are exempt.
33. The Commissioner examined the reply of the Public Authority dated the 17th February 2022 and the very limited information provided to this Office during the course of the investigation, and established that the Public Authority did not even attempt to explain how the disclosure of the requested documentation could, or would be expected to prejudice the magisterial inquiry. Despite being specifically requested to provide further information to the Commissioner, the Public Authority merely continued to reiterate its refusal in terms of article 30(2) of the Act, without substantiating its reasoning or providing a reasonable explanation to show a real

⁷ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁸ Case T-644/16, ClientEarth vs European Commission, Judgment of the General Court (Eighth Chamber) of the 11th July 2018, para. 22.

objective expectation of such damage. Thus, the Public Authority failed to effectively demonstrate how it exercised its discretion reasonably and proportionately.

34. This is naturally without prejudice to the fact that the Public Authority is not an investigating authority, and as a result, it does not have the duty or power to conduct investigations and, or prosecute. Therefore, the Public Authority has no discretion to decide by itself that the disclosure of the requested documentation would or could prejudice the magisterial inquiry.

Public Interest

35. In the present case, the Commissioner considered that the Public Authority is funded by public funds, and the Memorandum of Understanding and the correspondence in question relate to a matter of substantial public interest. This is also in view of the recent judgment delivered by the First Hall, Civil Court on the 24th February 2023, wherein the findings of the Court concretely demonstrate that there is a real and substantial public interest, which certainly merits the disclosure of the requested documentation.

36. Furthermore, the Commissioner considered the report of the Auditor General, ‘An audit of matters relating to the concession awarded to Vitals Global Healthcare by Government’⁹ with respect to the Memorandum of Understanding of the 10th October 2014, which states that:

“Despite the numerous requests made, very limited information and certainly no copy of the Agreement was provided to the NAO. As already stated, the link between this Agreement and the concession is evident and creates the utmost concern regarding the integrity of the eventual concession. Moreover, Government’s reluctance to provide the NAO with a copy of the Agreement aggravates the Office’s concerns and serves as further confirmation of its contentious relation to the concession eventually entered into by Government with the VGH. This casts the greatest shadow of doubt over the validity of the concession awarded by Government, for in reality, all appears to have been pre-agreed and the procurement process undertaken was solely intended as a superficial exercise leading to an already determined outcome.”

⁹ National Audit Office, A Report by the Auditor General, published in July 2020.

37. This led the Commissioner to conclude that the requested documentation does not only fulfill the criterion as being a matter of substantial public interest which contributes to a public debate, but furthermore demands transparency and accountability in relation to the operations of the Public Authority and the management of public funds.
38. Additionally, the Court of Appeal has repeatedly ascertained that there is an expectation of transparency when public funds are utilised. In particular, the judgment *Allied Newspapers Limited vs Projects Malta Ltd*¹⁰ states that:

“Għall-kuntrarju l-iżvelar rikjest mis-soċjetà appellanta assolutament ma jimminax l-interess pubbliku, imma kien fl-interess pubbliku li dan l-iżvelar isir u jkunu magħrufa min kienu l-membri tal-evaluation committee li aġġudika tender pubbliku ta’ miljuni kbar ta’ Euro b’rabta mal-iżvilupp, manteniment, immanigġjar u operazzjoni ta’ tliet sptarijiet pubbliċi, fl-akbar trasparenza” [emphasis has been added].

On the basis of the foregoing considerations, pursuant to article 23(3)(b) of the Act, the Commissioner assessed the reply provided by the Public Authority to the applicant on the 17th February 2022, and is hereby deciding that:

- a. the Freedom of Information Act (Cap. 496 of the Laws of Malta) applies to the documentation requested by the applicant; and**
- b. the refusal in terms of article 30(2) of the Act is not justified.**

By virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with an electronic copy of:

- a. “the MoU dated 10th October 2014 signed by the former Minister for the Economy, Investment and Small Business, Christian Cardona, and AGMC Incorporated, Pivot Holdings Ltd, and Bluestone Special Situation 4 Ltd”;**

¹⁰ Application No. 133/2018 FDP, L-Onorevoli Kap tal-Opposizzjoni l-Avukat Dottor Adrian Delia vs Onorevoli Prim Ministru ta’ Malta et.

- b. “[a]ny written (including email) correspondence between Malta Enterprise and/or its representatives and the Ministry for the Economy, Investment and Small Business, and/or its representatives or the NAO and/or its representatives regarding the October MoU being requested”; and

- c. “[a]ny internal correspondence or minutes of internal meetings between the representatives of Malta Enterprise regarding the October MoU being requested”

within twenty (20) working days from the date of receipt of this decision notice, and confirmation of the action taken shall be notified to the Commissioner immediately thereafter.



Ian Deguara
Information and Data Protection Commissioner

Decided today, the 30th March 2023

Right of Appeal

In terms of article 39(1) of the Act where a “[w]here 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