

**Information and Data Protection Commissioner**

**CDP/FOI/29/2022**

**Caroline Muscat**

**vs**

**Lands Authority**

**THE FREEDOM OF INFORMATION REQUEST**

1. On the 23<sup>rd</sup> of November 2021, Ms Caroline Muscat (the “**applicant**”) submitted a request to the Lands Authority (the “**Public Authority**”) in terms of the requirements set forth in article 6 of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting an electronic “*copy of ALL framework contracts for the Execution of Structural and Other Repair works in the Government Properties in different localities Malta and Gozo signed between 2013 and the date of reply to this FOI*” and “*List of ALL payments made according to these contracts and copies pf [sic]all invoices paid*”.
2. On the 24<sup>th</sup> of December 2021, the Public Authority informed the applicant that “*this request is being extended for a further period since discussions are still ongoing*”. On the 13<sup>th</sup> of June 2022, the Public Authority informed the applicant that the request is not being accepted as “*per Art 14(b) of the FOI Act i.e by virtue of Part V or Part VI, there is good reason for withholding the documents requested; as well as Article 35(2) of the FOIA in that the documents and information requested are being withheld in accordance with provisions of this Part as they contain matter in relation to which the public interest that is served by non-disclosure outweighs the public interest in disclosure*”.
3. The applicant was not satisfied with the Public Authority’s decision and on the 14<sup>th</sup> June 2022, pursuant to the Internal Complaints’ Procedure, requested the Public Authority to reconsider its position in terms of the Act, by contending that “*the information sought is in the public interest. Also, please be advised that the time limit for a reply to a re-consideration is 10 working days*”.

4. On the 27<sup>th</sup> June 2022, the Public Authority reconfirmed its position and remarked that *“the resources required to (i) identify, locate or collate a document or documents; (ii) examine a document or consult any person or body in relation to its possible disclosure; or (iii) make a copy, or an edited copy, of a document would substantially and unreasonably divert the resources of the public authority from its other operations”*<sup>1</sup>.
  
5. The applicant was not satisfied with the Public Authority’s decision and, on the 30<sup>th</sup> of June 2022, in terms of article 23 of the Act, submitted a complaint to the Information and Data Protection Commissioner (the **“Commissioner”**) to investigate the case and issue a decision notice in terms of his powers at law. The applicant justified her disagreement on the grounds that *“the Lands Authority is obliged to be transparent and accountable in a democratic society and the information requested is paid by taxpayers and is of public interest. No excuse should be used to hide the payments made by taxpayers to various contractors”*.

## **INVESTIGATION**

### **Admissibility of the FOI 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 documentation, 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 4<sup>th</sup> of August 2022, which was issued pursuant to article 24 of the Act, the Public Authority was requested by the Commissioner to provide information in relation to the freedom of information application for the purposes of enabling him to exercise his functions under the Act and determine whether the Public Authority has complied, or is complying, with the requirements of the Act. Additionally, the Commissioner requested the Public Authority to provide a copy of the requested documents to enable him to analyse the contents and make his deliberations in the process of deciding on this application.

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<sup>1</sup> Article 14 (f) of the Act.

8. On the 25<sup>th</sup> of August 2022, the Public Authority provided its written submissions and reiterated the legal exemptions cited to the applicant for not acceding to her request<sup>2</sup>. Furthermore, the Public Authority submitted that all the framework contracts signed over the past nine years, as well as all payments and copies of invoices thereof, were nearly impossible to entertain as the information is exempted by virtue of article 32(1)(c) of the Act. The Public Authority added that it might have been granted advantageous prices in these types of framework agreements when compared to how various companies charge third parties and, consequently divulging the prices might be counter-productive for future framework agreements that the Authority might enter into. The Public Authority concluded that the request is intended to serve as a fishing expedition vis-à-vis the information held by the Public Authority.
  
9. On the 26<sup>th</sup> of August 2022, the Commissioner provided the applicant with the opportunity to rebut the arguments made by the Public Authority. By means of an email dated the 29<sup>th</sup> of August 2022, the applicant submitted the following principal arguments:
  - i. that the framework contracts were paid through public taxes and concern a public authority. It is the norm, not the exception, that this information should be made publicly available;
  - ii. that the framework contracts requested are very specific and concern the "*execution of structural and other repair works in Gov Properties*";
  - iii. that there aren't hundreds of these framework contracts, to the contrary, the applicant is informed that there are very few. This means that the "impossibility" being cited by the Public Authority does not hold any water; and
  - iv. that the Public Authority has a modern IT system which can easily find the regular payments made to certain companies in the framework contracts in the shortest of time.
  
10. In line with the internal investigation procedure, on the 30<sup>th</sup> of August 2022, the Commissioner provided the Public Authority with the opportunity to make its final submissions on the rebuttal arguments made by the applicant. By means of a communication dated the 15<sup>th</sup> of September 2022, the Public Authority reiterated its position, namely that the applicant's request was not accepted on the basis of article 14(b), (f) and articles 32(1)(c) and 35(2) of the Act.

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<sup>2</sup> Article 14 (b) and (f) and article 35(2) of the Act.

11. On the 18<sup>th</sup> of October 2022, a meeting was held with the Public Authority, during which, the Commissioner physically inspected the agreements. These consisted of two (2) sets of documents, entitled Contract Ref No: CT2154/2021/5 and MTIP/LA/003/2018 (the “**Framework Agreements**”). The Commissioner requested the Public Authority to provide him with a copy of the Framework Agreements, together with a copy of the actual invoices and the respective payments issued in relation to such agreements.

## LEGAL ANALYSIS AND CONSIDERATIONS

### General Considerations

12. The Commissioner acknowledges that the spirit and scope of the freedom of information legislation is to establish a right to information 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.
13. This has been supported by the jurisprudence of the Court of Appeal in the judgment *Din l-Art Ħelwa vs l-Awtorita' tal-Ippjanar*<sup>3</sup>, which held that “[l]-Att dwar il-Liberta' tal-Infommazzjoni hi ligi intiża biex tipprovi b'mod ampju iżda b'restrizzjonijiet ċari fl-istess ligi, sens ta' trasparenza u kontabilita fid-deċizzjonijiet, ordnijiet jew direttivi fl-amministrazzjoni pubblika li wara kollox qiegħda hemm għas-servizz tas-socjeta.” Similarly, the Court of Appeal in the judgment *Allied Newspapers Limited vs Foundation for Medical Services*<sup>4</sup> highlighted that the “legiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovi ċerti garanziji għat-tweqqif fil-prattika tal-libertà tal-infommazzjoni bhala s-sisien tal-libertà fundamentali tal-espressjoni”.
14. Moreover, the Court of Appeal in the judgment *Allied Newspapers Limited vs Projects Malta Ltd*<sup>5</sup> made reference to the parliamentary debates in relation to the freedom of information legislation, which accentuate the spirit and scope of the legislation:

*“Fi kliem l-Onor. Prim Ministru meta kien qiegħed jippilota l-Att dwar il-Libertà tal-Infommazzjoni mill-Parlament: “il-prattika kienet li l-infommazzjoni tibqa’ kunfidenzjali*

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<sup>3</sup> Appeal Number 7/2019, decided on the 16th May 2019.

<sup>4</sup> Appeal Number 11/2020 LM, decided on the 18<sup>th</sup> November 2020.

<sup>5</sup> Appeal Number 33/2019LM, decided on the 2<sup>nd</sup> September 2020.

*sakemm ma jkunx hemm raġuni biex isir mod iehor. ... 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 tghid li l-informazzjoni issa se tkun sogġetta li tiġi 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."*

#### Article 14(f) of the Act

15. In its reply to the request submitted by the applicant, the Public Authority refused this request based on article 14(f) of the Act. For this purpose, the Commissioner examined such article, which provides that requests may be refused if *“the resources required to – (i) identify, locate or collate a document or documents; (ii) examine a document or consult any person or body in relation to its possible disclosure; or (iii) make a copy, or an edited copy, of a document, would substantially and unreasonably divert the resources of the public authority from its other operations, and it has not proved possible for the applicant, with advice from the public authority, to redefine his request in such a manner as to make it more easily addressed by the authority the disclosure of a document”*.
16. Article 14(f) of the Act is intended to prevent the improper diversion of the Public Authority's resources from its other operations. This provision aims to strike a balance between the objective of the Act and the need to ensure that the applicant's request does not cause substantial and unreasonable disruption to the operations of the Public Authority due to the voluminous nature of the request. The word *“substantially”* is to be interpreted as meaning that the diversion of resources shall be more than merely nominal, and the word *“unreasonably”* shall refer to the balancing exercise of the estimated impact on the Public Authority for processing the request against the objective of the Act.
17. After examining the request submitted by the applicant, the Commissioner noted that the request is limited to contracts for the execution of structural and other repair works in the Government properties in Malta and Gozo and restricted to a specific timeframe.
18. In this regard, the Commissioner examined section 13.2 of the Code of Practice for Public Authorities, published in accordance with article 41 of the Act, which provides guidance in relation to situations where article 14(f) of the Act may apply:

*“Public Authorities may consider a request to entail a substantial and unreasonable diversion from other operation of its total cost to the Public Authority reaches or exceed €100.00, calculated with reference to the following rates:*

- i) €5.00 per man-hour of processing;*
- ii) The rates applicable to additional fees in Schedule 2 and 3 of the Fees charged by the Public Authorities for Access to Documents Regulations.”*

19. In his analysis, the Commissioner considered the UK case-law in relation to a voluminous FOI request and the Upper Tribunal Case of *Craven vs The Information Commissioner and the Department of Energy and Climate Change* held that *“it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as “manifestly unreasonable”, purely on the basis that the cost of compliance would be too great”*. In determining whether the cost or burden of responding with a request is ‘too great’, public authorities must analyse the proportionality of the burden or costs involved and determine if they are clearly or obviously unreasonable.
20. After taking into account these considerations, the Commissioner concludes that, in the present case, the exemption invoked by the Public Authority to refuse the applicant’s request would certainly not substantially and unreasonably divert its resources from its other operations, in particular, relating to the required effort to locate and make a copy of the Framework Agreements and the invoices. Consequently, the exemption cited by the Public Authority pursuant to article 14(f) is not justified.

#### Article 32(1)(c)(i) of the Act

21. The Public Authority cited article 32(1)(c)(i) of the Act as the reason to justify the refusal of the documents requested by the applicant. For this purpose, the Commissioner examined article 32(1)(c)(i) of the Act, which prohibits the disclosure of a document if *“information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information: (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs”*.

22. The first step in the application of article 32(1)(c)(i) of the Act requires the proper characterisation of the relevant information to ascertain whether the requested documentation concerns the “*business or professional affairs*” of a person or the “*business, commercial or financial affairs of an organisation or undertaking*”. Therefore, this exemption intends to protect the harm that a person or an organisation or undertaking would or could reasonably be expected to, unreasonably suffer, because of the disclosure of the requested documentation.
23. The Commissioner remarks that this exemption is intended to protect any prejudice which third parties, other than the Public Authority, might suffer because of the disclosure of the requested documentation. In his analysis, the Commissioner noted that the Public Authority failed to specify who are these third parties that might suffer any prejudice. In fact, the Public Authority limited its analysis to the prejudice which it could, or would reasonably suffer, as a result of the disclosure.
24. Furthermore, the Commissioner notes that the Public Authority did not attempt to explain how the disclosure of the requested documents would or could reasonably be expected to prejudice the affairs of the third party. The Commissioner stresses that it is not sufficient for the Public Authority to merely argue that the request is being refused because it would, or could reasonably be expected to cause harm. The onus rests with the Public Authority invoking the exemption to identify the harm and concretely demonstrate a causal relationship between the disclosure and the prejudice that is envisaged as a result of the disclosure. In the present case, the Commissioner did not have sufficient information to enable him to understand the harm that could possibly materialise because of the disclosure or who may be prejudiced and how. Consequently, the exemption cited by the Public Authority pursuant to article 32(1)(c)(i) is not justified.

#### Article 38(d) of the Act

25. In its submissions, the Public Authority explained that it might have been granted advantageous prices, when compared to how various companies charge third parties, and the disclosure of the requested documentation “*might be counter-productive if not working adversely for future framework agreements that the Authority might be entered into*”.
26. For this reason, the Commissioner considered Article 38(d) of the Act, which provides that a document is an exempt document if its disclosure would or could reasonably be expected to have a substantial adverse effect on the conduct of negotiations by the public authority.

27. According to settled case-law, “*the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation 1049/2001<sup>6</sup>, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation*”<sup>7</sup>. In this context, the Court of Justice of the European Union has acknowledged that the institutions enjoy “*a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest*”<sup>8</sup>.
28. In the judgement *Sophie in 't Veld vs European Commission*<sup>9</sup>, it was held that “*it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations’ and ‘have a negative effect on the negotiating position of the European Union’ as well as ‘reveal, indirectly, those of other parties to the negotiations*”. Moreover, “*the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union*” [emphasis has been added].

**On the basis of the foregoing, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and determining that the decision taken by the Public Authority to refuse the applicant’s request for “*a copy of ALL framework contracts for the Execution of Structural and Other Repair works in the Government Properties in different localities Malta and Gozo signed between 2013 and the date of reply to this FOI*” and the “*List of ALL payments made according to these contracts and copies pf [sic] all invoices paid*” is only justified on the basis of article 38(d) of**

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<sup>6</sup> Article 4(1)(a) of 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: “*The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: — public security, — defence and military matters, — international relations, — the financial, monetary or economic policy of the Community or a Member State;*”.

<sup>7</sup> Case C-266/05 P, *Sison vs Council*, decided on the 1<sup>st</sup> February 2007

<sup>8</sup> Case C-350/12 P, *Council vs in 't Veld*, decided on the 3<sup>rd</sup> July 2014

<sup>9</sup> Case T-301/10, *Sophie in 't Veld v the Commission*, decided on the 19<sup>th</sup> March 2013



**the Act insofar as Section 5, entitled “Financial Offer (Following Arithmetical Corrections)/Breakdown)” of Contract Ref No: MTIP/LA/003/2018, and certain information contained in the invoices.**

The Commissioner concludes that, whereas a breakdown of the fees and the rate per hour could reasonably have a substantial adverse effect on the future negotiations that may be conducted by the Public Authority, it is indeed in the public interest for the Public Authority to disclose the total amount spent in terms of the Framework Agreements. The Commissioner highlights that the disclosure of information related to public expenditure leads to increased accountability and transparency in the management of public funds.

The Commissioner further concludes that, in principle, the information contained in the section entitled “Technical Offer” of Contract Ref No: CT2154/2021/5, and sections 4 and 6 entitled “Contractors Technical Offer (Including Any Clarifications Made During Adjudication) and “Tenderer’s Declarations in Tender Response Format” of Contract Ref No: MTIP/LA/003/2018 respectively, are not covered by any of the exemptions cited by the Public Authority<sup>10</sup>.

Moreover, after carefully examining the Framework Agreements provided by the Public Authority, together with the invoices, the Commissioner established that the above-mentioned sections contain personal data within the meaning of article 4(1) of Regulation (EU) 2016/679 which ought to be protected to safeguard the fundamental data protection rights and freedoms of the individuals concerned.

**Consequently, by virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with a copy of the Framework Agreements and invoices issued, only after redacting the following information:**

- a. the curriculum vitae relating to the Key Experts, and any attachments thereto containing personal data under the section entitled “Technical Offer” of Contract Ref No: CT2154/2021/5;**

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<sup>10</sup> The other sections of the Framework Agreements are publicly available and accessible at: <https://www.etenders.gov.mt/epps/quickSearchAction.do> Tenders (gov.mt), accessed on 30<sup>th</sup> March 2023.

- b. the fourth (4<sup>th</sup>)<sup>11</sup> and fifth (5<sup>th</sup>)<sup>12</sup> columns of the Bill of Quantities under Section 5 “Financial Offer (Following Arithmetical Corrections)/Breakdown)” relating to Contract Ref No:MTIP/LA/003/2018;
- c. the “Quantity” and “Price/Unit Price” columns of the invoices relating to Contract Ref No:MTIP/LA/003/2018;
- d. the “Rate” column of Quote No. 21\_001; and
- e. all the signatures and any identity document numbers contained in both Framework Agreements and invoices.

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

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<sup>11</sup> “Indicative Quantity (for 24 months)”

<sup>12</sup> “Rate including Taxes, other Duties & Discounts but Exclusive of VAT”

**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, Merchants Street  
Valletta.