

Information and Data Protection Commissioner

CDP/FOI/7/2023

Caroline Muscat

vs

Human Rights Directorate

FOI REQUEST

1. On the 17th November 2022, Ms Caroline Muscat (the “**applicant**”) made a request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act (the “**Act**”), Chapter 496 of the Laws of Malta, requesting the Human Rights Directorate (the “**Public Authority**”) to provide an electronic copy of the following documentation:
 - *Copy of all engagement contracts signed with Michael F Camilleri until the date of reply of this FOI*
 - *Copy of all engagement contracts signed with Gabriella B. Calleja until the date of reply of this FOI*
 - *Copy of all lease contracts with regards to the premises being used by the Directorate at the A3 towers*
 - *Copy of any contract on the use of the premises by the Health Department*

2. On the 20th December 2022, the Public Authority informed the applicant that her request was being extended by twenty (20) working days in terms of article 11(1)(b) of the Act on the basis that “*the Public Authority needs to consult third parties before it can decide on your request, and more time is needed to obtain the necessary feedback*”.

3. On the 17th January 2023, the Public Authority provided the following reply in relation to the FOI request submitted by the applicant:

“Kindly find attached Mr Michael Camilleri’s engagement contract as well as Ms Gabriella Calleja’s secondment to the Human Rights Directorate (HRD). The latter document contains blackout of personal data.

The request for a copy of the lease contract with regard to the premises being used by the Directorate at the A3 Towers is not being accepted on the basis of Article 38(d) of the Freedom of Information Act.

With regard to the request for a copy of any contract on the use of the premises by the Health Department, you may wish to note that this request does not fall under HRD remit and should be addressed to the relevant authorities”.

4. On the same day, the applicant presented a complaint seeking the reconsideration of the refusal of the Public Authority by means of the internal complaints procedure in relation to the following documentation:
 - *copy of all lease contracts at A3 towers. This is financed by public funds for a public authority and through a direct order. It is clearly in the public interest as already decided, in other various instances, by IDPC*
 - *copy of arrangement/lease with Health authorities. According to the Health Ministry the premises of the new GU clinic “The Health Department was offered the use of the site by the HRID”.*

5. On the 1st February 2023, the Public Authority provided its final reply and *“reiterated that the request for a copy of the lease contract with regard to the premises being used by the Directorate at the A3 Towers is not being accepted on the basis of Article 32(c) of the Freedom of Information Act in conjunction with Article 38(d) of the same Act. With regard to the request for a copy of any contract on the use of the premises by the Health Department, kindly note that HRD offered the premises (used by the GU clinic) to the Ministry of Health at no expense. Therefore, no contract exists for the use of such premises”.*

FOI APPLICATION

6. On the 7th February 2023, the applicant 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 request for information made by the applicant to the Public Authority has been dealt with in accordance with the requirements of the Act. The applicant requested the Commissioner “*to formally investigate the public authority for its refusal to for a copy of all lease contracts with regards to the premises being used by the Directorate at the A3 Towers. We deem the refusal not to be in line with the FOI law and this is in the public interest and financed by public funds*”.

INVESTIGATION

Admissibility of the FOI Application

7. After having considered that the applicant is an eligible person in terms of article 2 of the Act and 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 an electronic copy of “*all lease contracts with regards to the premises being used by the Directorate at the A3 towers*” (the “**requested documentation**”), the Commissioner deemed the FOI application made by the applicant as admissible for the purpose of article 23(2) of the Act.

The Issuance of the Information Notice

8. As part of the investigation procedure, by means of the information notice dated the 15th February 2023, issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to provide information in relation to the FOI application for the purposes of enabling him to exercise his functions under the Act and to determine whether the Public Authority has complied with the requirements of the Act. In particular, the Commissioner requested the Public Authority to:
 - a. specify which is the legal exemption cited in terms of article 32 of the Act;
 - b. clearly explain the prejudice which would, or could reasonably be suffered as a result of the disclosure of the requested documentation in terms of the exemptions cited in the reply dated the 1st February 2023;

- c. indicate which factors were taken into consideration when carrying out the public interest test as set forth in article 35 of the Act in relation to the exemption invoked by the Public Authority pursuant to article 38(d) of the Act; and
- d. provide a true copy of the requested documentation.

Submissions received from the Public Authority

9. On the 16th March 2023, the Public Authority presented a copy of the requested documentation and submitted the following arguments for the Commissioner to consider in the legal analysis of this case:
 - a. that the Public Authority refused the request of the applicant on the basis of article 32(1)(c)(i) of the Act, which excludes the possibility of divulging confidential information of a third party on the basis of which *“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”*;
 - b. that the disclosure of the requested documentation would infringe the confidentiality clause contained in the agreement entered into between the lessor and the lessee;
 - c. that clause 17 of the requested documentation states that the *“Parties shall undertake to and shall procure its officers and employees to keep the contents of this agreement confidential during the term of the agreement”*;
 - d. that the Public Authority could expose itself to possible legal action and could be required to pay financial damages as a result of the breach of the confidentiality clause contained in the requested documentation; and
 - e. that the public interest in non-disclosure outweighs the public interest in disclosure as possible legal action against the Public Authority would render the said Public Authority liable to damages that are ultimately paid by public funds.

10. On the 17th March 2023, the Commissioner provided the applicant with the opportunity to rebut the arguments of the Public Authority in relation to the refusal of her FOI request. By means of an email dated the 3rd April 2023, the applicant informed the Commissioner that she would like to rest on her FOI application.

LEGAL ANALYSIS AND DECISION

The Handling of the FOI Request

11. As a preliminary step of the investigation, the Commissioner sought to establish, to the extent appropriate, whether the Public Authority has complied with the requirements of the Act. In this regard, the Commissioner examined the first reply provided by the Public Authority on the 17th January 2023, wherein the applicant was informed that her FOI “*is not being accepted on the basis of Article 38(d) of the Freedom of Information Act*”. Following the exercise of the right of the applicant to seek the reconsideration of the decision of the Public Authority through the internal complaints procedure, the Public Authority provided its final reply on the 1st February 2023, where it invoked another exemption in accordance with Part V of the Act. In its final reply, the Public Authority provided that “*the request for a copy of the lease contract with regard to the premises being used by the Directorate at the A3 Towers is not being accepted on the basis of Article 32(c) of the Freedom of Information Act in conjunction with Article 38(d) of the same Act*” [emphasis has been added].
12. Following the issuance of the information notice in terms of article 24(1)(a) of the Act, the Public Authority completely disregarded article 38(d) of the Act, which is the only exemption cited in its first reply, and solely relied upon article 32(1)(c)(i) of the Act to justify its refusal of the FOI request.
13. Before entering into the merits of the case, the Commissioner emphasises that the Public Authority must provide in a clear and unequivocal manner the reasoning which it followed to reach its decision to refuse the FOI request in terms of the exemptions set forth in Part V and, or Part VI of the Act. This is absolutely necessary to enable the applicant to seek the review of the decision of the Public Authority and to exercise her right to review and appeal in the most effective manner.

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

14. For the purpose of the legal analysis of this FOI application, the Commissioner proceeded to assess whether the exemption cited by the Public Authority in terms of article 32(1)(c)(i) of the Act is justified in terms of the law.
15. In the submissions received by this Office on the 16th March 2023, the Public Authority substantiated the reason for its refusal by explaining that the disclosure of the requested documentation would lead to a breach of the confidentiality clause contained in the lease agreement, and consequently, this would render the Public Authority liable to damages that would ultimately have to be paid by public funds. Therefore, according to the Public Authority, the public interest in non-disclosure outweighs the public interest in disclosure.
16. In this regard, the Commissioner examined article 32(1)(c)(i) of the Act, which provides that a *“document is an exempt document if its disclosure under this Act would disclose: - (c) 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”* [emphasis has been added].
17. 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 an undertaking would, or could reasonably be expected to, unreasonably suffer, as a result of the disclosure of the requested documentation.
18. The Commissioner remarks that this exemption is intended to protect any prejudice which third parties, other than the Public Authority, would, or could reasonably suffer. During the course of the investigation, the Commissioner was not presented with any assessment as to how the Public Authority decided to refuse the FOI request on the basis that the lessor would, or could reasonably be expected to suffer any harm as a result of the disclosure of the requested

documentation. In fact, the Public Authority strictly limited its submissions to the prejudice that it could suffer as the Human Rights Directorate, by arguing that the disclosure of the requested documentation could expose it “*to possible legal action and could be required to pay financial damages as a result of the breach of the confidentiality clause*”.

19. Without prejudice to the foregoing, the scenario which the Public Authority intended or envisaged to protect from disclosure seems to refer to article 31(2) of the Act. Notwithstanding this, the exemption contemplated in article 31(2) of the Act is not a blanket exclusion from disclosure of the requested documentation and thus, the Public Authority needed to effectively demonstrate how and why the “*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*”.

20. Within this context, the Commissioner examined the decision ‘*Public Broadcasting Services Limited vs Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data*’¹, wherein the Information and Data Protection Appeals Tribunal (the “**Tribunal**”) decided that a contract containing a confidentiality clause is not considered to be exempt according to article 31(2) of the Act. In fact, the Tribunal remarked that “*jekk fil-kuntratt tagħhom ma saritx tali klawnsola li l-kuntratt huwa sugġett għal dan il-Kap [496] u għal Kap 440 dwar l-Att dwar il-Protezzjoni u l-Privatezza tad-Data dik hija problema tal-PBS u mhux tal-Kummissarju jew ta’ dan il-Tribunal*”.

21. Additionally, the Commissioner considered the decision ‘*Allied Newspapers Limited vs Foundation for Medical Services*’², where the Tribunal reiterated that “*l-confidentiality clauses ħafna drabi magħrufa bħala gaggin clauses veru li jorbtu lil partijiet iżda vera wkoll li huma sugġetti għal Att dwar il-Libertà tal-Informazzjoni u din tista’; tingħata jew bil-kunsens tal-parti, jew bil-liġi jew meta hemm dak li jissejjaħ overriding public interest*”. The Tribunal further remarked that “*kieku verament kien il-każ cioe li kull kuntratt ta’ kunfidenzjalita jirbaħ fuq l-interess pubbliku kieku din il-liġi tirrendi ruħha ineffettiva u ma hi tajba għal xejn*”.

22. The Court of Appeal in the judgment ‘*Allied Newspapers Limited vs Foundation for Medical Services*’³ confirmed that:

¹ Appeal decided on the the 12th July 2017.

² Appeal decided on the 30th January 2020.

³ Appeal No. 11/2020 LM, decided on the 18th November 2020.

“Il-Qorti tqis li huwa assolutament illoġiku u kontrasens li l-ewwel il-leġiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovdi ċerti garanziji għat-twertiq fil-prattika tal-libertà tal-informazzjoni bħala s-sisien tal-libertà fundamentali tal-espressjoni, u mbagħad entitajiet pubbliċi bħall-appellanta jippruvaw jizgiċċaw mill-effetti tal-imsemmija leġiżlazzjoni meta jidhlu f’kuntratti bi klawnsoli ta’ kunfidenzjalità, li jiġu interpretati mill-imsemmija entitajiet pubbliċi b’tali mod li jispiċċaw ma jikkonformawx mal-obbligi legali taħt l-imsemmija leġiżlazzjoni. Il-fondazzjoni appellanta tippretendi li b’sempliċi klawnsola ta’ kunfidenzjalità f’kuntratt, tqiegħed lilha nnifisha ’l fuq mil-liġi u teżenta lilha nnifisha mill-obbligi legali tagħha taħt il-Kap. 496. Biex tagħmel dan l-appellanta tinterpreta l-artikolu 31(2) tal-Kap. 496 b’mod li ma jirrispekkjax il-kelma u l-ispirtu tal-istess liġi.”

23. Furthermore, the Court of Appeal provided that “[b]l-ebda mod il-kuntratt ta’ impjieg ta’ Neville Gafà u Carmen Ciantar mal-fondazzjoni appellanta, **entità pubblika ffinanzjata minn fondi pubbliċi**, ma jistgħu jitqiesu li huma dokumenti eżentati taħt l-artikolu 31(2) tal-Kap. 496, ’il għaliex huwa **fl-interess pubbliku li tiġi żvelata l-informazzjoni mitluba**, biex jitharsu wkoll **il-prinċipji tat-trasparenza u tal-kontabilità f’kuntest ta’ kuntratti ta’ impjieg li ma sarux wara sejha pubblika, u allura ma kinux magħrufa l-kundizzjonijiet applikabbli għall-impjieg ta’ dawn iż-żewġ individwi**”⁴ [emphasis has been added].
24. In his considerations, the Commissioner assessed section 7.0⁵ of the Code of Practice for Public Authorities⁶ issued in terms of article 41 of the Act, which guides the public authorities as to the practice which would be desirable for them to follow in connection with the discharge of their functions. Section 7.1 of the Code states that the “*Heads of Public Authorities shall consider their obligations in terms of the Act when entering into contracts with private companies. Contractors shall be made aware that contracts, or extracts thereof, may be disclosed under the Act unless these fall within the scope of the Act’s exemptions or any other law regulating disclosure*”.
25. In this regard, the Commissioner emphasises that the Public Authority is subject to the provisions of the Act and therefore, it is explicitly bound by the obligation of mandatory disclosure of the documentation that it holds, save for the exemptions provided by law which may justify non-disclosure in certain specific instances. In fact, it is in the Commissioner’s

⁴ Ibid. 3

⁵ Inclusion of Disclosure of Information clauses in Contracts entered into by Public Authorities.

⁶ <https://justice.gov.mt/en/foi/Documents/Downloads/Code%20of%20Practice%20EN%20MT%20Nru584.pdf>

judicious view that public authorities in general should adopt a horizontal standard practice to inform, *a priori*, the other party to a contract that such contract is subject to the provisions of the national law governing access to documents.

26. The Commissioner concluded that despite the fact that the Public Authority did not cite the appropriate legal exemption in terms of the Act, the reasoning which led the Public Authority to refuse the FOI request is not in accordance with the law and the settled case-law. A blanket confidentiality clause in a contract would certainly not exonerate the Public Authority from complying with its obligations emanating from the Act. Thus, the Commissioner is discarding the arguments raised by the Public Authority in its submissions.

Article 38(d) of the Act

27. In the replies provided to the applicant on the 17th January 2023 and the 1st February 2023, the Public Authority cited article 38(d) of the Act as the reason for the refusal of the FOI request. In the information notice dated the 15th February 2023, the Commissioner specifically requested the Public Authority to indicate which factors were taken into consideration when carrying out the public interest test as set forth in article 35 of the Act in relation to the exemption invoked pursuant to article 38(d) of the Act. However, the Public Authority failed to provide any information or attempt to explain how the disclosure of the requested documentation would, or could reasonably be expected to have a substantial adverse effect on the conduct of negotiations by or on behalf of the Government or another public authority.

28. Given that the Public Authority completely disregarded article 38(d) of the Act in its submissions, the Commissioner did not have any information which would enable him to determine if the exemption cited in the replies of the Public Authority applies.

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 refusal of the Public Authority to provide a “[c]opy of all lease contracts with regards to the premises being used by the Directorate at the A3 towers” 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 the requested documentation in its entirety after redacting the following personal data:

- **identity card numbers;**
- **dates of birth;**
- **names of parents;**
- **place of birth and residence;**
- **registered address and contact number of the lessor;**
- **signatures; and**
- **any photographs which could lead to the identification of data subjects.**

The redacted documentation shall be sent to the applicant 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 Digitally signed
DEGUARA by Ian DEGUARA
(Signature) (Signature)
 Date: 2023.04.11
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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 “[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.