

FOI REQUEST

1. On the 27th June 2022, Mr Andre Callus (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 Lands Authority (the “**Public Authority**”) to provide a “*copy of any/all contracts of acquisition, transfer, emphyteusis, lease, encroachment, usufruct, use, tolerance, encroachment or concession of any form relating to Comino*”.

A copy of the FOI request dated the 27th June 2022 is being marked and annexed as **Doc. IDPC 1**.

2. On the 29th July 2022, the Public Authority informed the applicant that his request was being refused on the basis of article 14(f) of the Act for the following reasons:
 - “*the resources required to identify, locate or collate the document or documents would substantially and unreasonably divert the resources of the Public Authority from its other operations, and it has not proved possible for you, with advice from the Public Authority, to redefine the request in such a manner as to make it more easily addressed by the Public Authority*”;
 - “*the resources required to examine the document or consult any person or body in relation to its possible disclosure would substantially and unreasonably divert the resources of the Public Authority from its other operations, and it has not proved*

possible for you, with advice from the Public Authority, to redefine your request in such a manner as to make it more easily addressed by the Public Authority”;

- *“the resources required to 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 you, with advice from the Public Authority, to redefine you request in such a manner as to make it more easily addressed by the Public Authority”.*

A copy of the reply provided by the Public Authority on the **29th July 2022** is being marked and annexed as **Doc. IDPC 2**.

3. On the 1st August 2022, the applicant presented a complaint seeking the reconsideration of the refusal of the Public Authority by means of the internal complaints procedure and submitted that *“Comino is a small tract of land – there cannot be many contracts pertaining to the islet and consequently finding this information would not require such great resources”.*

A copy of the complaint dated the **1st August 2022** is being marked and annexed as **Doc. IDPC 3**.

4. By means of an email dated the 13th October 2022, the applicant informed the Commissioner that he had not received a reply from the Public Authority following the exercise of his right to lodge a complaint through the Internal Complaints Procedure. Following the intervention of this Office, the Public Authority provided a reply to the applicant on the 8th November 2022. The Public Authority replied that the *“complaint is not accepted and the Authority reiterates its decision taken as per Article 14(f) of the FOI Act. Furthermore, the complaint is also not being accepted as per Art 32(1)(c)(i) of the FOI Act, which states ‘A document is an exempt document if 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”.*

A copy of the reply of the Public Authority dated the **8th November 2022** is being marked and annexed as **Doc. IDPC 4**.

FOI APPLICATION

5. On the 21st November 2022, 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 Public Authority had dealt with the requirements of the Act. The applicant contended that:
 - a. the Public Authority had provided the final reply on the 8th November 2022 after a complaint was lodged on the 1st August 2022; and
 - b. that in the final reply, the Public Authority added an entirely different reason for its refusal and referred to article 32(1)(c)(i) of the Act.

INVESTIGATION

Admissibility of the FOI Application

6. 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 the 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 an Information Notice

7. As part of the investigation procedure, by means of an information notice dated the 24th November 2022, issued in terms of article 24(1) 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 had complied with the requirements of the Act. In particular, the Commissioner requested the Public Authority to:
 - a. provide the estimated time and cost of complying with the request, specifically, taking into account, the time and, or cost spent in: (i) locating the information, or a document

which may contain the information; and, or (ii) retrieving the information, or a document which may contain the information;

- b. provide evidence that the Public Authority had advised the applicant to redefine the request in such a manner as to make it more easily addressed by the Public Authority; and
- c. clearly explain how the information is exempt in terms of article 32(1)(c)(i) of the Act and to outline the prejudice that would, or could reasonably be expected to be suffered as a result of the disclosure of the requested information.

Submissions received from the Public Authority

- 8. On the 27th January 2023, the Public Authority provided to the Commissioner the following argumentation in reply to the information notice:
 - a. that, on the 15th September 2022¹, the Public Authority refused the request on the basis of article 32(1)(c)(i) of the Act as it is impossible to entertain such request without stalling the internal workings of the Public Authority as well as divulging documents which are commercially sensitive;
 - b. that, in addition, and without prejudice to the foregoing, the decision of the Public Authority was based on article 14(f) of the Act:
 - c. that the FOI request is intended to serve as a fishing expedition vis-à-vis the information held by the Public Authority and the Public Authority would like to emphasise that it is all in favour of complying with the numerous requests that are received on a daily basis under the Act but never to allow the (ab)use of said legislation which could indirectly affect the workings of the Public Authority;
 - d. that if the Public Authority had to accede to the request, it would only be a tool in the hands of speculators to exploit said information to their advantage;

¹ Pursuant to Doc. IDPC 4, the reply to the applicant was provided on the 8th November 2022.

- e. that the Public Authority had acted within the remits of the law when deciding to refuse such request given that the public interest that is served by non-disclosure outweighs the public interest in disclosure; and
 - f. that the Public Authority is not ready to accept requests leading to a fishing expedition as this goes against the spirit of the law and surely the Act was not intended for said purposes.
9. On the 31st January 2023, the Commissioner requested the Public Authority to provide a reply to the information notice and specify the following:
- a. to indicate and explain the prejudice that third parties would suffer as a result of the disclosure of the requested documents in terms of article 32(1)(c)(i) of the Act; and
 - b. to quantify the estimated time and cost of identifying, locating or collating the requested documents, and if available, to provide evidence of the costs incurred to comply with the FOI request.
10. By means of an email dated the 9th February 2023, the Public Authority informed the Commissioner *“that in the meantime, we have come across a lease agreement entered into between the Lands Authority and the Malta Tourism Authority ... By virtue of this agreement, it is the MTA which has the vires to allocate encroachment permits to third parties and not the Lands Authority”*. Furthermore, on the 16th March 2023, the Public Authority provided to the Commissioner copies of agreements in relation to Comino that meet the terms of the FOI request.
11. Additionally, the Commissioner requested the Public Authority to indicate if the request was transferred to the other public authority in terms of article 8 of the Act. The Public Authority submitted that *“the requests were not transferred onto MTA since we came to know of these agreements once the requests were already at complaint stage”*.
12. As part of the investigation procedure of this Office, the applicant was given the opportunity to rebut the arguments of the Public Authority. On the 11th April 2023, the applicant informed the Commissioner that he would like to rely on his FOI application and to proceed with the issuance of the decision notice.

LEGAL ANALYSIS AND DECISION NOTICE

The Handling of the FOI Request

13. For the purpose of the investigation of this FOI application, the Commissioner sought to determine whether the Public Authority had handled the request pursuant to the requirements set forth in article 10 of the Act and in conformity with the Code of Practice for Public Authorities (the “Code”).
14. The Commissioner emphasises that the timeframes stipulated in the Act and the Code are necessary to provide applicants with the expected assurances that their FOI requests and complaints would be handled by the public authorities within the set timeframes. Thus, delays by the public authorities in the handling of requests and subsequent complaints hinder applicants from receiving decisions and exercising their rights in an effective manner.
15. During the course of investigating the FOI application, the Commissioner established the following facts in relation to the handling of the FOI request:

27 th June 2022	The applicant submitted the FOI request (Doc. IDPC 1)
29 th July 2022	The Public Authority replied to the FOI request (Doc. IDPC 2)
1 st August 2022	The applicant requested the Public Authority to reconsider its decision pursuant to the Internal Complaints Procedure (Doc. IDPC 3)
8 th November 2022	The Public Authority provided its final decision (Doc. IDPC 4).

16. The requirement of the Public Authority to provide a reply to the FOI request within twenty (20) working days is derived from article 10 of the Act, which states that “*the public authority to which a request is made in accordance with article 6 or is transferred in accordance with article 8 shall, as soon as reasonably practicable, and in any case not later than twenty working days after the day on which the request is received by the authority – (a) decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and (b) inform the applicant accordingly in writing*” [emphasis has been added]. It results that the Public Authority had to provide its first reply by the 26th July 2022

and thus, the reply provided on the 29th July 2022 was not in accordance with the timeframe stipulated in article 10 of the Act.

17. Additionally, section 8.0 of the Code of Practice outlines the manner how complaints are to be handled by the Public Authority. Section 8.2 of the Code of Practice provides that each public authority should establish an internal complaints procedure whereby applicants can seek review of any decision taken or complain about any delays in relation to the release of documentation. Particularly, section 8.3.a of the Code of Practice stipulates that it should not “***entail more than 10 working days, from the receipt of the complaint, to notify the applicant of the Public Authority’s decision***” [emphasis has been added].
18. Within this context, the Commissioner examined the internal complaints procedure of the Public Authority, which reads as follows: “*An applicant whose request for information is refused, or who is not satisfied with the information provided its format or the extension of the deadline for the submission of the requested information, may address a complaint to Lands Authority’s FOI Officer. The latter will forward the complaint to the Chief Executive Officer and reply will be forwarded within 10 working days from the receipt of the complaint, also informing the applicant that he or she may appeal or address complaint to the Information and Data Protection Commissioner*” [emphasis has been added].
19. In this regard, the Commissioner established that the applicant requested the Public Authority to reconsider its decision on the 1st August 2022. The Public Authority, pursuant to its own established internal complaints procedure, should have informed the applicant with its decision by no later than the 16th August 2022. This therefore led the Commissioner to conclude that the reply provided on the 18th November 2022 was not in conformity with the timeframe stipulated in the internal complaints procedure of the Public Authority.

The Transfer of the Request

20. Following the reply to the information notice, the Public Authority informed the Commissioner that some of the requested documentation which meets the terms of the request is held by another public authority. This naturally triggers the applicability of article 8 of the Act, which provides that “[w]here a request in accordance with article 6 is made to a public authority, and the document to which the request relates is not held by the authority but is believed by the person dealing with the request to be held by another public authority, the public authority to

which the request is made shall promptly, and in any case not later than ten working days after the day on which the request is received, transfer the request to the other public authority and inform the applicant accordingly”.

21. Furthermore, section 5.1 of the Code of Practice for Public Authorities guides the Public Authorities to: “[w]henever an FOI Officer receives a request relating to documents or information that may be held by another Public Authority he/she shall contact the FOI Officer of that Authority. Should it be confirmed that the document or information in question is held by that Authority, the request shall be duly transferred.”
22. Following clarifications sought by the Office in relation to the obligations of the Public Authority emanating from article 8 of the Act, the Public Authority submitted that “*the requests were not transferred onto MTA since we came to know of these agreements once the requests were already at complaint stage*” [emphasis has been added]. This effectively demonstrates that the Public Authority did not carry out the appropriate verifications and consultations at the time of the FOI request to establish that some of the documentation is not held by the Public Authority. As a result, the FOI request was not transferred within the timeframe set forth in article 8 of the Act and this led to further delays to the detriment of the applicant.

The Reasons for Refusal

23. 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.
24. This has been supported by the jurisprudence of the Court of Appeal in the judgment *Din l-Art Ħelwa vs l-Awtorita' tal-Ippjanar*², 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' 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*³ highlighted that the

² Appeal no. 7/2019, decided on the 16th May 2019.

³ Appell Inferjuri Numru 11/2020 LM, decided on the 18th November 2020.

“legiżlatur 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”.

25. Moreover, the Court of Appeal in the judgment *Allied Newspapers Limited vs Projects Malta Ltd*⁴ 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- 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-ligi 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 sogġetta li tigi żvelata sakemm ma jkunx hemm raġuni valida skont kriterji stabbiliti mil-ligi 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.””

26. 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.
27. 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 by the exemption. Accordingly, the Court of Justice of the European Union in its settled-case law in relation to the interpretation of Regulation 1049/2001⁵ states that:

⁴ Appeal no. 33/2019LM, decided on the 2nd September 2020.

⁵ 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.

“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)”⁶ [emphasis has been added].

28. Furthermore, the Information and Data Protection Appeals Tribunal in its decision ‘*Martino Caruana vs Transport Malta*’⁷ held that “[i]lli sabiex jiġi identifikat n-natura tal-preġudizzju l-Awtorita’ għandha bilfors turi li l-preġudizzju huwa reali, attwali jew ta sustanzi u turi li hemmness bejn l-isvelar u l-preġudizzju li hija qed tgħid li tirrikorrsi jekk tagħti l-informazzjoni mitluba. U li jekk ikunu sodisfatti dawn iż-żewġ rekwiżiti dwar il-preġudizzju xogħol li dan it-Tribunal huwa li jikkonsidra l-interess pubbliku”.
29. This reasoning has also been confirmed by the Court of Appeal, which provides that “[i]-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.
30. In this regard, the Commissioner proceeded to examine the replies provided to the applicant in relation to the FOI request. In the first reply dated the 29th July 2022, the applicant was informed that his request was being refused on the basis of article 14(f) of the Act. This was followed by the second reply, wherein the Public Authority invoked article 14(f) and article 32(1)(c)(i) of the Act.
31. By means of the information notice, the Commissioner requested the Public Authority to specifically provide the estimated time and cost of complying with the request and to clearly explain how the requested documentation is exempt in terms of article 32(1)(c)(i) of the Act

⁶ Case T-644/16, ClientEarth vs European Commission, Judgment of the General Court (Eighth Chamber) of the 11th July 2018, para. 22.

⁷ Appeal Number FOI/18/2021, decided on the 13th April 2023.

and to outline the prejudice that would, or could reasonably be expected to be suffered as a result of the disclosure of the requested documentation.

32. After assessing the submissions provided to this Office on the 27th January 2023 and the clarifications sought thereafter, the Commissioner established that the reasons cited by the Public Authority were not substantiated by any evidence to demonstrate how the disclosure of the requested documentation would prejudice the Public Authority and, or third parties. Thus, the Public Authority had failed to effectively demonstrate how it exercised its discretion reasonably and proportionately when it refused to accede to the FOI request made by the applicant.

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:

- a. the Public Authority did not reply to the FOI request with the timeframe set forth in article 10 of the Act;**
- b. the Public Authority did not conform with the timeframe set forth in its own internal complaints procedure, which is established in accordance with section 8.3 of the Code of Practice for Public Authorities;**
- c. the Public Authority did not transfer the FOI request in relation to documentation which is held by another public authority within the timeframe set forth in article 8 of the Act; and**
- d. the reasons of refusal provided to the applicant in terms of article 14(b) in conjunction with article 32(1)(c)(i) and article 14(f) of the Act are not justified.**

In terms of article 23(4)(a) and article 23(4)(b) of the Act, the Commissioner is hereby deciding that the Public Authority had failed to provide access to the documentation which it holds in connection with the FOI request and had failed to comply with the requirements of Part II of the Act. In this regard, the Commissioner is hereby ordering the Public Authority to:

- a. provide access to the documentation which meets the terms of the FOI request and is held by the Public Authority, after redacting any personal data contained in such documentation; and**

- b. transfer the FOI request to the respective public authority in relation to documentation which is not held by the Lands Authority.**

The Public Authority shall comply with the above orders 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.

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 deriving from Part II of the Act and the Code of Practice for Public Authorities.

Ian
DEGUARA
(Signature)

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by Ian DEGUARA
(Signature)
Date: 2023.04.19
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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, Merchants Street
Valletta.