

**Information and Data Protection Commissioner**

**CDP/FOI/20/2022**

**Rebecca Bonello Ghio**

**vs**

**Ministry for the Economy,  
European Funds and Lands**

**THE REQUEST**

1. On the 20<sup>th</sup> January 2022, Ms Rebecca Bonello Ghio (the “**applicant**”) submitted a request to the Ministry for the Economy, European Funds and Lands<sup>1</sup> in terms of article 6 of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting the following information:

*“(a) Any internal or external reports and/or spreadsheets with the list of beneficiaries of the first round of the voucher scheme including the amounts reimbursed to each beneficiaries.*

*“(b) Electronic copies of the VAT receipts submitted by the beneficiaries of the scheme that correspond to those vouchers reimbursed to them, received from the start of the first round of the voucher scheme until its extended deadline, 31st October 2020.*

*“(c) Any internal or external reports and/or spreadsheet outputs with the number of vouchers claimed from the start of the first round of the voucher scheme until its extended deadline on 31st October 2020.*

*“(d) Electronic copies of the VAT receipts submitted by the beneficiaries of the first round of the voucher scheme that correspond to those vouchers reimbursed to them,*

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<sup>1</sup> During the course of the investigation, the Public Authority changed its name from ‘Ministry for Economy and Industry’ to ‘Ministry for the Economy, European Funds and Lands’.

*received following the extended deadline on 31st October 2020.*

*(e) Any internal or external reports and/or spreadsheet outputs with the number of vouchers claimed following the extended deadline of the first round of the voucher scheme, 31st October 2020.*

*(f) Any internal or external reports and/or spreadsheet outputs from the so ware which held data on both generated and redeemed vouchers that show the payments made to the beneficiaries of the first round of the voucher scheme from the start of the scheme until its extended deadline, on 31st October 2020.*

*(g) Any internal or external reports and/or spreadsheet outputs from the so ware which held data on both generated and redeemed vouchers that show the re-executed payments made to the beneficiaries of the first round of the voucher scheme, following the deadline of the scheme on 31st October 2020.*

*(h) Any internal or external reports and/or spreadsheet outputs with the number of vouchers inputted manually into the so ware which held data on both generated and redeemed vouchers during the first round of the voucher scheme.*

*(i) Any internal or external reports and/or spreadsheet outputs with the number of vouchers inputted automatically, via the QR code, into the so ware which held data on both generated and redeemed vouchers during the first round of the voucher scheme.*

*(j) Any internal or external reports and/or any other written correspondence, including minutes of meetings and/or email correspondence, on the two approaches MIMCOL used to “claw back the funds” from beneficiaries due to the discrepancy recorded by the NAO of €66,606 which was paid to merchants but not recorded as redeemed”.*

2. On the 14<sup>th</sup> February 2022, the Public Authority informed the applicant that her request was extended by twenty (20) working days pursuant to article 11(1)(a) of the Act, on the basis that *“the request is for a large number of documents or necessitates a search through a large number of documents, and meeting the original time limit would unreasonably interfere with the operations of the public authority”*.

3. On the 21<sup>st</sup> March 2022, the Public Authority issued a reply wherein it refused the applicant's request on the basis that:

*“A request for access to documents in terms of article 2 refers to an official document held by a public authority. The Act, in no way or manner, mentions the obligation to compile information in the way referred to in the request.*

*Documents referred to in the request are considered exempt in terms of Article 38 (a) and (b) and (c)”.*

4. The applicant was not satisfied with the Public Authority's decision and on the 25<sup>th</sup> March 2022, pursuant to the Internal Complaints' Procedure, she requested the Public Authority to reconsider its position in terms of the Act, for the following reasons, which are being outlined hereunder:

- a. that the extension was requested by the Public Authority on the basis that it had to gather documents, and thus, it is not clear why this delay was necessary, given that the disclosure was then rejected on a point of principle that did not require documents to be gathered,
- b. that *“the request was made in the interest of transparency and accountability, since the NAO reported that it intended to rely on MIMCOL's reconciliations on the voucher scheme; however, these were not comprehensive enough for audit purposes”*;
- c. that the Public Authority may rely on article 38 of the Act, as a reason to exempt documents from being disclosed, only if article 35 of the Act has been satisfied, and the document contains matters *“in relation to which the public interest that is served by non-disclosure outweighs the public interest in disclosure”*. The Public Authority must consider the balance of public interest in the circumstances of the request. In this case, the applicant noted that the lack of a full picture following the National Audit Office's (“NAO”) audit means that there is a public interest in releasing documentation to provide more information regarding Malta Investment Management Company Limited's (“MIMCOL”) reconciliations of the voucher scheme;

- d. that by referring to article 38 of the Act, the Public Authority is citing an audit that has already been published<sup>2</sup>;
  - e. that the information that has been placed in the public domain, for instance published audit reports, are not covered by the exemption since this information could not possibly prejudice the “*effectiveness of the procedures or methods*” of an audit that has already been completed, whether unsatisfactorily or not;
  - f. that article 38 of the Act is a prejudice-based exemption, meaning that the Public Authority has to show that the prejudice or substantial adverse effect specified in the exemption either would or could be expected to occur;
  - g. that the Public Authority must show that the prejudice it is envisaging affects the particular interest protected by the exemption, that is, the effectiveness of the procedures or methods of an audit and the ability of the public authority to achieve the objectives of that audit, and therefore, the Public Authority must show that the disclosure must at least be capable of harming the interest in some way, and that the damage is real, actual, or of substance;
  - h. that “*[f]inally, prejudice to the proper and efficient conduct of the operations of a public authority refers to a substantial adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose. Given that the first round of the Covid-19 voucher scheme has been concluded and the Government of Malta has moved onto subsequent rounds, it is not plausible to assume that this exemption applies to the original request*”; and
  - i. that the Public Authority must show what substantial adverse effect it considers the disclosure would have on its operations which are different to the other provisions cited in its rejection. It must show that the harm is real and would or would be likely to cause substantial damage to the Public Authority.
5. On the 12<sup>th</sup> April 2022, the Public Authority reconfirmed its position and provided further clarifications to the applicant, particularly:

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<sup>2</sup> NAO, ‘Report by the Auditor General on the Public Accounts 2020’ (pages 122 to 128), available at: <https://nao.gov.mt/en/recent-publications>

- a. that the Public Authority is obliged to process the request anyway, prior to moving to any decision on the request, and an extension may be applied as indicated in article 11 of the Act;
  - b. that in accordance with article 6(2) of the Act: “(2) *No applicant shall be required to justify or give any reasons for a request under this Act, and any beliefs of public authorities as to what are the applicant’s reasons for seeking access shall not affect that request*”;
  - c. that the Public Authority contends that pending the reconciliation process, disclosing the information would not be in favour of public interest;
  - d. that publicly available documents are exempt through article 14(d) of the Act, and the request was not interpreted to refer to documents that are already public; and
  - e. that “[t]he FOIA obliges public authorities to issue a decision. If this is a refusal, it is obliged to make reference to article 14 of the Act and any other exceptions included in the Act”.
6. The applicant was not satisfied with the decision of the Public Authority and submitted a complaint to the Information and Data Protection Commissioner (the “**Commissioner**”) on the 18<sup>th</sup> April 2022 pursuant to article 23(1)(a) of the Act, to investigate the case and issue a decision notice. In this regard, the applicant outlined the same arguments submitted to the Public Authority through the Internal Complaints’ Procedure, and further justified her disagreement on the following arguments:
- a. that with reference to article 38(c) of the Act, in its second reply, the Public Authority stated that “*pending the reconciliation process, disclosing the information would not be in favour of public interest*”. The applicant noted that the Commissioner in his decision ‘*Matthew Caruana Galizia vs the Ministry for Energy, Enterprise, and Sustainability*’ [Ref. No. FOI/86/2021] outlined that article 38 of the Act: “*shall only apply once the Public Authority demonstrates that the disclosure of the requested documents would or could be reasonably expected to cause harm to the protected interest [and that this harm must be] sufficiently specific and concrete*”; and

- b. that “[t]he public authority has not sufficiently demonstrated that the prejudice or substantial adverse effect specified in the exemption either would or could be expected to occur. It must show that the prejudice it is envisaging affects the particular interest protected by the exemption, i.e. the effectiveness of the procedures or methods of an audit and the ability of the public authority to achieve the objectives of that audit. The public authority must show that disclosure must at least be capable of harming the interest in a sufficiently specific and concrete manner. Given that the first round of the Covid-19 voucher scheme has been concluded and the Government of Malta has moved onto subsequent rounds, it is not plausible to assume that this exemption applies to the Original Request”.

## **INVESTIGATION**

### **Admissibility of the application**

7. 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 information, 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**

8. As part of the investigation procedure, by means of an information notice dated the 25<sup>th</sup> April 2022, which was issued pursuant to article 24(1)(a) of the Act, the Public Authority was requested to provide information in relation to the freedom of information application for the purposes of enabling him to exercise his functions under the Act and to determine whether the Public Authority has complied or is complying with the requirements of the Act.
9. On the 3<sup>rd</sup> June 2022, the Public Authority provided its written submissions and reiterated the legal exemptions cited to the applicant for not acceding to her request. Furthermore, the Public Authority submitted the following considerations for the Commissioner to take into account during the legal analysis of this case:
  - a. that MIMCOL does not have readily available reports, in the manner and format as requested by the applicant, and thus, the Public Authority explained that the reports

requested need to be complied *ad hoc*, to be able to answer the specific demands made by the applicant which would require the limited resources of MIMCOL to devote time and effort to compile in the manner so requested;

- b. that by way of example and to further illustrate the matter, the Public Authority explained that MIMCOL has data on transactions effected, however the data is not aggregated by beneficiary, and therefore, the Public Authority would need to run queries on the business intelligence system so that it would be able to generate *ad hoc* reports to answer the applicant's queries;
- c. that *“in so far as the specific queries (b) and (d) are concerned, namely queries relating to VAT receipts, one is to also note that apart from having to run queries, there is also a technical limitation that needs to be addressed and technical input that is required from the systems provider, obviously at a cost to the organisation, so that MIMCOL can generate the ad hoc report requested. Indeed, one notes that receipts for all transactions have been stored in Microsoft Azure object storage service with extended encryption provided by the software. Using the admin tool one can, by querying the system on a specific transaction, review the VAT receipt and download this in a standard image format. However to provide the detail in the manner requested by the applicant, one will need to ask the system providers to develop a specific script to perform a global export of all VAT receipt images. This script must iterate through all transactions, decrypt the corresponding image, add it to a ZIP file and compress the large ZIP file so generated to allow for its download. One is to also keep in mind that the file will be of several gigabytes of information as we are talking about all the transactions in the campaign. System providers indicated that they would need 7 days to develop and test the script before its eventual execution on the production system. There will then be need to run the script and test it for completeness. This will obviously also mean additional expenses will have to be incurred to generate the data in the manner and format requested by the applicant”*;
- d. that the limited human resources at MIMCOL's disposal would need to be stopped to attend to the applicant's demand, and therefore, on the basis of article 14(f) of the Act, the decision to refuse the applicant's request should be deemed justified;

- e. that in addition to the above and in further support of the decision to refuse the applicant's request, the Public Authority noted that the information requested may give rise to breach of data protection claims against MIMCOL.
- f. that one of the strengths behind the success of the voucher campaign was the confidentiality afforded to the beneficiaries, and such confidentiality would be breached if a reply in the manner being requested is given and might also prejudice other initiatives, based on the same format, that Government may opt to roll out;
- g. that if the Public Authority had to provide the information being requested, it would be sharing sensitive commercial information the nature of which could be easily identifiable by the merchant and, or businesses, and consequently, the Public Authority cited article 5(3)(a) of the Act as a basis for such information to be withheld;
- h. that the Public Authority also took into consideration the requirements of section 6 of the Code of Practice for Public Authorities (the “**Code**”), for Public Authorities in relation to the Act stating that:

*"Whenever a request is made for a document that is held by the Public Authority of the FOI office receiving the request, but relates to third parties (omissis), the FOI Officer shall inform the third parties in question on possible disclosure of the document. The consultation shall be limited to the third parties' views as to whether the document in question falls within the scope of the exemptions foreseen by the Act or not, or any restriction on disclosure foreseen by any other law. The public Authority, which has sole responsibility for the request made by the applicant, is not bound to abide by the recommendations of the third parties concerned if it considers that, in accordance with the applicable legislation, the applicant is entitled to access to the document in question. The Public Authority shall communicate to the third parties concerned its final decision whether to disclose or otherwise, preferably giving reasons why it has opted for a specific decision, particularly when this is contrary to any opinions or recommendation forthcoming from such third parties."*



The Public Authority further noted that “[f]rom an operational perspective, this means that MIMCOL would need to send out circa 4k letters by registered mail to the voucher scheme beneficiaries, await the replies and then take a decision once such replies and their possible implications and risks are analysed. Again, the resources required to run this process are significant and hugely prohibitive and disruptive from an operational nature”;

- i. that one of the main issues raised in the NAO report, is that of double payments and the Public Authority explained to the NAO, the technical nature of the issue which gave rise to double payments, and now MIMCOL is in the process of recovering such funds. The Public Authority explained that this is quite a lengthy process and merchants have been returning funds. Notwithstanding this, there may still be the need to refer non-compliant merchants to the relevant authorities, for further investigation; and
- j. that this also applies to the request being made for disclosure of receipts, an exercise undertaken as part of the evaluation of the system, which identified possible non-compliance with the fiscal legislation by merchants. Such matters are being evaluated and referred to the Commissioner for Revenue, to determine whether there are grounds for further investigations and audit. Therefore, the Public Authority noted that disclosing such information may prove to be detrimental to such efforts and on such basis, it deems non-disclosure as necessary.

10. On the 3<sup>rd</sup> June 2022, the Commissioner provided the applicant with the opportunity to rebut the arguments made by the Public Authority. Consequently, by means of an email dated the 14<sup>th</sup> June 2022, the applicant disagreed with the Public Authority’s reply for the subsequent reasons:

Information unavailable in the format requested

- a. that MIMCOL explained the technical details of making the documents available in the format requested, saying that this would take a significant amount of time and resources. The applicant would be satisfied with the information being provided in any format which would allow her to read it and the information was requested in a particular format because she worked on the assumption, that it was readily available in that format;

- b. that with reference to the end of its response, MIMCOL mentioned that the information the applicant requested, has already been submitted to the NAO “*albeit in a different format*”, and thus, it would be reasonable for MIMCOL to provide the information to her in the same format that it was provided to the NAO;

Too much time, resources, and money

- c. that MIMCOL stated that it does not have the human resources to compile the information in the requested format. The exemption cited is article 14(f) of the Act, which ends with, “...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” [emphasis added by the applicant]. In this regard, the applicant noted that she was not provided with advice, from the Public Authority, that would have allowed her to redefine her request with a change in the requested format;

Potential data breach and resources required to follow Regulation requirements

- d. that in its response, MIMCOL stated that disclosing the information might lead to a data breach, specifically because the beneficiaries were promised confidentiality when they participated in the scheme. It stated that the information requested relates to sensitive commercial information, which is exempt under article 5(3) of the Act. MIMCOL cites section 6.1 of the Code to explain the work that it would need to perform to follow regulations on dealing with information belonging to third parties;
- e. that the applicant did not specifically request legally protected personal data. The object of her request is information on the companies and traders that benefited from the scheme, VAT receipts, the number of vouchers claimed per company or trader, and the payments made to the beneficiaries, as well as written reports or other correspondence. Moreover, the applicant explained that where phone numbers, email addresses or other personal data, occur in the requested documentation, the Public Authority is empowered by article 13 of the Act to redact that information, allowing it to disclose the requested documents;
- f. that MIMCOL also cited the exemptions in articles 32(1)(b) and 32(1)(c) of the Act when it stated that the information requested is sensitive commercial information. The

applicant remarked that these articles have to be read in conjunction with article 32(4) of the Act, which requires MIMCOL to show that the disclosure of the information requested would be contrary to the public interest by reasons of articles 32(4)(a) or 32(4)(b). This means that MIMCOL would have to demonstrate that disclosing the documents would substantially harm a person’s lawful business or professional affairs, or would prejudice the future supply of information to the government or a particular public authority;

- g. that in citing the obligation under section 6.1 of the Code, MIMCOL explained that informing the third-party beneficiaries of the scheme would be a highly burdensome task. However, the applicant noted that it omits section 6.2 of the Code from consideration in its reply, which clearly states that, when third parties are represented by an association, “*consultations may be held with the association*” instead of with many individuals;

Disclosure could potentially prejudice investigations

- h. that the applicant’s original request is not limited to information in documents that themselves contain evidence of double payments. She requested information in documents that will help her, and the public, understand how the implementation of the first round of the Covid-19 voucher scheme was carried out, given that the NAO stated that its attempt to reconcile the vouchers issued with those redeemed was ‘futile’<sup>3</sup>;
- i. that the exemption in article 38 of the Act “*would not come into play if MIMCOL provides, for example, the totals per merchant or documentation that allows me to calculate the €66,606 discrepancy that the NAO reported (with deletions so that I cannot infer whether there have been any double payments)*”;

Information held by a commercial entity

- j. that “*MIMCOL possibly cites sub-article 5(1)(e) FOI Act in error, as they refer to content in sub-article 5(1)(f). The latter sub-article refers to “commercial partnerships”, which MIMCOL is not since it is entirely owned by the Government of*

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<sup>3</sup> Ministry for the Economy, Investment and Small Businesses, ‘*Annual Audit Report Public Accounts 2020, National Audit Office*’ (page 124), available at: <https://nao.gov.mt/en/recent-publications>

*Malta. Thus, neither is the voucher scheme a commercial partnership between MIMCOL and the beneficiaries of the scheme, which included: hotels, accommodation, restaurants, bars, diving schools, retail, and services (such as hair and beauty salons, retail shops, sports clubs, museums, and band clubs)’<sup>4</sup>;*

Documents held by NAO

- k. that MIMCOL also referred to the exemption in Article 5(4)(e). However, in its report the NAO clearly states that it *“had to conclude the audit”*<sup>5</sup>. Therefore, the information being requested is not currently held by the NAO or, if it is, that is only for archival policy reasons and not to support an ongoing audit;

Additional comments

- l. that MIMCOL has not stated the reason why it has not been able to accept the request in the original freedom of information request for: *“[a]ny internal or external reports and/or any other written correspondence, including minutes of meetings and/or email correspondence, on the two approaches MIMCOL used to “claw back the funds”<sup>6</sup> from beneficiaries due to the discrepancy recorded by the NAO of €66,606 which was paid to merchants but not recorded as redeemed”*.
11. In line with the investigation procedure of this Office, on the 22<sup>nd</sup> June 2022, the Commissioner provided the Public Authority with the opportunity to rebut the arguments made by the applicant. Additionally, the Commissioner requested the Public Authority to provide the following documentation and, or clarifications in order to take into consideration during the legal analysis of this case:
- a. a sample documentation of the reports and VAT receipts, requested by the applicant;  
and

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<sup>4</sup> Ibid, page 122

<sup>5</sup> Ibid, page 124

<sup>6</sup> Ibid, page 127

- b. to quantify the estimated time and cost of manually compiling the requested reports and the VAT receipts, in order to be able to answer the specific information demanded by the applicant.

12. In this regard, on the 11<sup>th</sup> July 2022, the Public Authority provided a sample of the VAT receipts, as well as a report in the available format. Additionally, the Public Authority rebutted the arguments made by the applicant and submitted the following principal arguments:

- a. that *“the storage format of the VAT receipt is such that it is an individual image. Each VAT receipt may correspond to one or more vouchers, depending on the transactions. The process required to extract all images as explained in our first reply will ensure that all such images are extracted and collated together. Being an image, however, means that one will have to go through each and every image to identify the respective VAT number and at the end group all the VAT receipts per beneficiary. Once that is carried out one will then have to go through each beneficiary and allocate every VAT receipt to the respective transactions making up the number of vouchers attributable to each receipt. Indeed considering the number of vouchers redeemed per beneficiary (ref report with vouchers transacted and redeemed) this will prove to be quite a daunting and laborious task.”*;
- b. that the time required by software providers to extract the VAT images is of fourteen (14) days at a cost of seven thousand euro (€7,000). The Public Authority noted that it is difficult to estimate exactly the time required to go through the process of collating VAT receipts per beneficiary, identify the respective transactions and vouchers per transaction and then, build this data for all the respective vouchers each merchant has transacted;
- c. that providing the information in the requested format, entails an extensive use of time, resources and money that will also detract from the operations of the company;
- d. that *“[i]t is strongly believed that providing beneficiaries details and the revenues accrued to each beneficiary from the voucher scheme is sensitive, commercial information that one should not divulge. Other than VAT numbers there is no other info to redact and would render any documents provided to the applicant irrelevant. Indeed articles 32(4)(a) and 32(4)(b) are indeed relevant. One may not exclude that, also in the light of the difficulties being experienced internationally and locally, government*

*may consider launching another scheme. If the basis of confidentiality is eroded as a result of the information being requested then it may indeed be inferred that this may potentially harm Government's ability to manage the economy. Similarly disclosing performance of beneficiaries when participating in the voucher scheme may potentially provide competitive intelligence to competitors within the same sector of operation and thus harming the ordinary course of business”;*

- e. that there are ongoing processes to recoup such funds which could also result in further investigations by the relevant authorities with respect to non-cooperative merchants; and
- f. that MIMCOL is set up under the Companies Act, irrespective of the shareholding and is expected to observe its provisions like any other commercial entity.

13. Following the receipt of the Public Authority’s submissions, a meeting was held with the Public Authority on the 29<sup>th</sup> July 2022, to further discuss the request made by the applicant. During the meeting, the Commissioner had the opportunity to discuss the submissions, and the Public Authority provided further explanations regarding the content thereof and, explained in more detail the reasons for refusal. Specifically, the Public Authority confirmed that it does not have “[a]ny internal or external reports and/or any other written correspondence, including minutes of meetings and/or email correspondence, on the two approaches MIMCOL used to “claw back the funds” from beneficiaries due to the discrepancy recorded by the NAO of €66,606 which was paid to merchants but not recorded as redeemed”.

14. Following the meeting, the Public Authority was requested to provide further information and clarifications, in relation to the request made by the applicant. In this regard, the Commissioner sent several reminders to the Public Authority about the request for submissions, more specifically, on the 22<sup>nd</sup> August 2022 and 14<sup>th</sup> September 2022. On the 21<sup>st</sup> October 2022, the Commissioner once again requested the provide its submissions, particularly:

- a. to provide submissions, in support of its decision to refuse access to the requested documentation on the basis of article 38(a), article 38(b) and article 38(c) of the Act;
- b. to provide evidence that the cost of the service provider to extract the VAT images amounts to seven thousand euro (€7,000);

- c. to confirm, or otherwise, whether the transactions, receipts and vouchers contain any personal data of the beneficiaries; and
  - d. to clarify whether the double payments' investigation is still ongoing or concluded, and to specify who is or was conducting this investigation.
15. By means of an email dated the 7<sup>th</sup> November 2022, the Public Authority provided documentary evidence entitled 'Mimcol Voucher Azure Object Storage export module (Proposal Code #204)' dated the 1<sup>st</sup> July 2022, delineating the module quote. It incorporated an explanation regarding the development of an export module for object storage files corresponding to receipt images for the full MIMCOL Vouchers Scheme round one transactions, and outlined the scope of the proposal including the required activities to achieve such task. Furthermore, the Public Authority submitted the following considerations for the Commissioner to consider in the legal analysis of this case:
- a. that the Public Authority noted that articles 38(a) and 38(b) of the Act relate to the ongoing exercise of identifying and evaluating possible merchants' non-compliance with fiscal legislation, following referrals to the Commissioner for Revenue, who retains discretion whether there are grounds for further investigations and audit. Therefore, disclosing such information may prove to be detrimental to such efforts and, on such basis, the Public Authority deems non-disclosure as essential. As regards to article 38(c) of the Act, the Public Authority contended that the disclosure of the requested documentation would have a substantial adverse effect on the proper and efficient conduct of its operations. The Public Authority further noted that *"[a]mongst the issues flagged in this context, the public authority has already mentioned that the requested disclosure would place in the public domain sensitive commercial information relating to identifiable traders. Such scenario would have deleterious effect on the credibility of the scheme, and would jeopardise participation of traders in future schemes, thereby debilitating the authority's ability to implement essential economic intervention of a similar nature. Additionally, the public authority has already advised that it would be duty-bound in terms of the Code of Practice for Public Authorities in relation to the Freedom of Information Act, to notify merchants to the effect that identifiable commercial information would be disclosed. Such notification would need to be done through approximately 4,000 registered letters, and would involve considerable resources both in terms of cost, and commitment of human*

*resources for the verification of notifications and addressing follow-up feedback. Such actions would clearly put a strain on its conduct of operations”;*

- b. that the VAT receipts may contain personal data of merchants, as well as personal details such as home addresses;
- c. that the investigation on the double payments is still ongoing and MIMCOL is recovering the double payments paid to merchants; and
- d. that the NAO had full access to the system.

## **LEGAL ANALYSIS AND CONSIDERATIONS**

16. For the purposes of this legal analysis, the Commissioner assessed the request submitted by the applicant in two-fold:

a. Requests A to I:

(a) Any internal or external reports and/or spreadsheets with the list of beneficiaries of the first round of the voucher scheme including the amounts reimbursed to each beneficiaries.

(b) Electronic copies of the VAT receipts submitted by the beneficiaries of the scheme that correspond to those vouchers reimbursed to them, received from the start of the first round of the voucher scheme until its extended deadline, 31st October 2020.

(c) Any internal or external reports and/or spreadsheet outputs with the number of vouchers claimed from the start of the first round of the voucher scheme until its extended deadline on 31st October 2020.

(d) Electronic copies of the VAT receipts submitted by the beneficiaries of the first round of the voucher scheme that correspond to those vouchers reimbursed to them, received following the extended deadline on 31st October 2020.



(e) Any internal or external reports and/or spreadsheet outputs with the number of vouchers claimed following the extended deadline of the first round of the voucher scheme, 31st October 2020.

(f) Any internal or external reports and/or spreadsheet outputs from the so ware which held data on both generated and redeemed vouchers that show the payments made to the beneficiaries of the first round of the voucher scheme from the start of the scheme until its extended deadline, on 31st October 2020.

(g) Any internal or external reports and/or spreadsheet outputs from the so ware which held data on both generated and redeemed vouchers that show the re-executed payments made to the beneficiaries of the first round of the voucher scheme, following the deadline of the scheme on 31st October 2020.

(h) Any internal or external reports and/or spreadsheet outputs with the number of vouchers inputted manually into the so ware which held data on both generated and redeemed vouchers during the first round of the voucher scheme.

(i) Any internal or external reports and/or spreadsheet outputs with the number of vouchers inputted automatically, via the QR code, into the so ware which held data on both generated and redeemed vouchers during the first round of the voucher scheme.

b. Request J:

(j) Any internal or external reports and/or any other written correspondence, including minutes of meetings and/or email correspondence, on the two approaches MIMCOL used to “claw back the funds” from beneficiaries due to the discrepancy recorded by the NAO of €66,606 which was paid to merchants but not recorded as redeemed.

General Considerations

17. The Commissioner acknowledges 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.

18. 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>7</sup>, which held that “[l]-Att dwar il-Liberta' tal-Infommazzjoni hi liġi intiża biex tipprovi b'mod ampju iżda b'restrizzjonijiet ċari fl-istess liġi, sens ta' trasparenza u kontabilita fid-deċiżjonijiet, ordnijiet jew direttivi fl-amministrazzjoni pubblika li wara kollux qiegħda hemm għas-servizz tas-soċjeta.” Similarly, the Court of Appeal in the judgment *Allied Newspapers Limited vs Foundation for Medical Services*<sup>8</sup> highlighted that the “legiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovi ċerti garanziji għat-twettiq fil-prattika tal-libertà tal-infommazzjoni bħala s-sisien tal-libertà fundamentali tal-espressjoni”.

19. Moreover, the Court of Appeal in the judgment *Allied Newspapers Limited vs Projects Malta Ltd*<sup>9</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 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 tghid li l-infommazzjoni issa se tkun soġġetta 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.””

## Requests A to I

20. For the purpose of the investigation, the Commissioner considered the freedom of information application, the submissions received by both the Public Authority and the applicant, as well as the meeting held with the Public Authority on 29<sup>th</sup> July 2022.

<sup>7</sup> Appeal No. 7/2019, decided on the 16th May 2019.

<sup>8</sup> Appell Inferjuri Numru 11/2020 LM, decided on the 18<sup>th</sup> November 2020.

<sup>9</sup> Appell Inferjuri Numru 33/2019LM, decided on the 2<sup>nd</sup> September 2020.

21. In its reply to the request submitted by the applicant, the Commissioner took into consideration the Public Authority's submissions wherein it argued that the limited human resources available at MIMCOL's disposal would need to be halted to attend to the applicant's request. For this reason, the Commissioner proceeded to examine article 14(f)(i) of the Act, which stipulates that the request may be refused if the resources required to identify, locate or collate the documents *“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 to make it more easily addressed by the authority”*.
22. Article 14(f)(i) 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.
23. After examining the request submitted by the applicant, the Commissioner noted that MIMCOL does not have the reports, in the manner and format requested by the applicant, and therefore the request would require MIMCOL to develop a specific script to perform a global export of all the VAT receipt images. In this regard, the Commissioner requested the Public Authority to provide an accurate estimate of the time and the cost incurred to manually compile the requested reports and the VAT receipts, that would be required to process the applicant's request. The Commissioner analysed the reply provided by the Public Authority on the 11<sup>th</sup> July 2022, where it quantified the time required by software providers to extract the VAT images, is of fourteen (14) days at a cost of seven thousand euro (€7,000). Moreover, the Commissioner examined the documentary evidence entitled *‘Mimcol Voucher Azure Object Storage export module (Proposal Code #204)’* dated the 1<sup>st</sup> July 2022, which was provided by the Public Authority on the 7<sup>th</sup> November 2022.
24. In this connection, the Commissioner examined section 13.2 of the Code, 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.”*

25. In his analysis, the Commissioner considered the UK case-law in relation to a voluminous freedom of information 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.

26. When it is concretely proven that the resources required to comply with a request would substantially and unreasonably divert the resources of the public authority, article 14(f)(i) of the Act obliges the Public Authority to request the applicant *“to redefine request in such a manner as to make it more easily addressed by the authority”*. In this regard, the Commissioner noted that the Public Authority does not have the requested documentation in the format requested by the applicant. The information that is readily available does not reflect the freedom of information request submitted by the applicant and therefore, the readily available information that the Public Authority is in possession of, does not meet the terms of the request of the applicant.

#### Requests J

27. Having examined the request submitted by the applicant pursuant to article 6 of the Act, whereby the Public Authority was requested to provide a copy of *“[a]ny internal or external reports and/or any other written correspondence, including minutes of meetings and/or email correspondence, on the two approaches MIMCOL used to “claw back the funds” from*

*beneficiaries due to the discrepancy recorded by the NAO of €66,606 which was paid to merchants but not recorded as redeemed”.*

28. Having taken into account that during the course of the investigation, the Commissioner established that the Public Authority does not have the documentation requested by the applicant. For this purpose, the Commissioner examined article 14(g) of the Act, which states that **“the document requested is not held by the public authority and the person dealing with the request has no grounds for believing that the document is held by, or connected more closely with the functions of, another public authority;”** [emphasis has been added].

## DECISION NOTICE

### Requests A to I

**On the basis of the foregoing considerations, the Commissioner hereby decides that the decision taken by the Public Authority to refuse, the applicant’s Requests A to I for an electronic copy of the documentation, is justified on the basis that it was concretely proven that the resources required to identify, locate, collate and make a copy of the documentation would substantially and unreasonably divert the resources of the Public Authority from its other operations, pursuant to article 14(f)(i) of the Act.**

### Requests J

**The Commissioner examined the request submitted by the applicant, whereby she specifically requested a copy of “[a]ny internal or external reports and/or any other written correspondence, including minutes of meetings and/or email correspondence, on the two approaches MIMCOL used to “claw back the funds” from beneficiaries due to the discrepancy recorded by the NAO of €66,606 which was paid to merchants but not recorded as redeemed”. The Commissioner analysed the submissions provided by the Public Authority and the meeting held with the Public Authority’s representatives on the 29<sup>th</sup> July 2022, and established that the Public Authority does not hold the requested documentation.**

**The Commissioner hereby decides that when the Public Authority refused to provide access to the requested document, the applicant was not informed on which specific legal ground the Public Authority is relying in order to refuse access pursuant to the Act.**

**In this regard, the Commissioner emphasises, and draws the attention of the Public Authority, that decisions taken by the public authorities refusing requests for access to information, shall be accompanied by reasoned and specific justification(s) in order to enable applicants to clearly understand such decisions. The purpose of this obligation derives from article 15(1)(a) of the Act, which provides that: “[w]here a request made in accordance with this Act is refused, the public authority shall - (a) subject to article 34, give the applicant the reasons for the refusal”.**

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**Ian Deguara  
Information and Data Protection Commissioner**

### **Right of Appeal**

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

An appeal to the Information and Data Protection Appeals Tribunal shall be made in writing and addressed to:

The Secretary  
Information and Data Protection Appeals Tribunal  
158, Merchant Street  
Valletta.