

Information and Data Protection Commissioner

CDP/FOI/16/2023

Prof Arnold Cassola

vs

Office of the Prime Minister

FOI REQUEST

1. On the 30th January 2023, Prof Arnold Cassola (the “**applicant**”) made a request pursuant to the Freedom of Information Act (the “**Act**”), Chapter 496 of the Laws of Malta, requesting the Office of the Prime Minister (the “**Public Authority**”) to provide the following information:

“On the 29th January 2023, the Prime Minister Robert Abela said in a speech that he spoke to a Magistrate who told him that even if the Magistrates gave a strict penalty, this would be overturned in the Court of Appeal.

I would like to know:

1. *The identity of the Magistrate who Prime Minister Robert Abela talked with.*
 2. *The date, place and time of the conversation which Prime Minister Robert Abela had with the Magistrate.*
 3. *The format of the conversation (face-to-face/Whatsapp/social media/email/voice recording/letter/other?)*
 4. *Identity of other sitting Magistrates and/or sitting Judges which the Prime Minister has discussed matters relating to Court in private and not in a formal setting”.*
2. On the 1st March 2023, the Public Authority informed the applicant that his request could not be met on the basis that the request does not fall within the parameters of the Act. On the same day, the applicant presented a complaint seeking the reconsideration of the refusal of the Public Authority and stated that “*you did not say why this is so, and what article of the Act it breaches.*”

It is important for the public to know how, when and why the Prime Minister is discussing issues with members of judiciary behind closed doors”. On the 16th March 2023, the Public Authority reiterated its decision.

FOI APPLICATION

3. On the 29th March 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 Public Authority has dealt with the requirements of the Act.

INVESTIGATION

FOI Application

4. After having considered that the applicant is an eligible person in terms of article 2 of the Act and the nature and background of this FOI application, together with the procedural steps involved between the applicant and the Public Authority in the request for document, the Commissioner deemed the application made by the applicant as admissible for the purpose of article 23(2) of the Act.

Submissions received from the Public Authority

5. As part of the investigation procedure, by means of an information notice dated the 30th March 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 indicate if it holds any article on which the information requested by the applicant has been recorded in whatever form to meet the terms of the FOI request.
6. On the 2nd May 2023, the Public Authority replied to the information notice and provided that *“the request does not fall within the parameters of Act Cap. 496, there can never be “any article on which information has been recorded in whatever form”.*

LEGAL ANALYSIS AND DECISION

7. For the purpose of the investigation of this complaint, the Commissioner examined the refusal of the Public Authority, including the submissions provided during the course of the investigation, wherein the Public Authority argued that the information being requested by the applicant does not fall within the parameters of the Act since it does not constitute a “document”.
8. Accordingly, the Commissioner examined the definition of a “document” as set forth in article 2 of the Act, which provides that a definition is “*any article that is held by a public authority and on which information has been recorded in whatever form, including electronic data, images, scale models and other visual representations, and audio or video recordings, regardless of whether the information can be read, seen, heard or retrieved with or without the aid of any other article or device*”.
9. The Commissioner has always applied a broad definition of the term “document” in light of the spirit and scope of the Act, which is designed to ensure the greatest possible transparency, by enabling to the widest extent possible, the exercise of the right to access documents held by the public authorities. The Court of Appeal in the judgment “*Caroline Muscat vs Malta Film Commission*”¹ confirmed this interpretation of a “document” and, to this effect, upheld the decision notice issued by the Commissioner. The Court of Appeal held that:

*“B’hekk sewwa kkunsidra wkoll it-Tribunal li l-informazzjoni msemmija kienet taqa’ taht it-tifsira mogħtija mill-artikolu 2 tal-Kap. 496 tal-kelma ‘dokument’, fejn il-Qorti tirrileva li fil-każ in kwistjoni **hija rilevanti l-ewwel parti ta’ din it-tifsira, li tipprovdi li dokument ifisser ‘kull oġġett miżmum għand awtorità pubblika u li fuqu kienet irregistrata informazzjoni fi kwalunkwe forma’.** Għalhekk huwa irrilevanti jekk l-informazzjoni tingħatax fil-forma rikjesta jew f’xi forma oħra, u dan dejjem sakemm tiġi milqugħa r-rikjesta fis-sustanza tagħha. Isegwi li l-Kummissarju kien korrett meta għaraf li l-Kummissjoni appellanta kienet fil-pussess ta’ dokumentazzjoni li kienet tissodisfa r-rikjesta tal-appellata, u b’hekk ordna li dawn kellhom jgħaddu għand l-appellata”*
[emphasis has been added].

¹ Inferior Appeal No. 72/22/LM, delivered by Judge Lawrence Mintoff on the 22nd February 2023.

10. Furthermore, the Commissioner noted the decision delivered by the Information and Data Protection Appeals Tribunal (the “**Tribunal**”), wherein the Public Authority refused a FOI request on the basis that it did not hold the documents requested by the applicant. The Tribunal referred to article 2(3) Regulation 1049/2001², which is the applicable legislation regarding public access to documentation held by the European Institutions and provided as follows:

*“this Tribunal agrees with the decision of the Commissioner for the reasons he stated therein particularly Article 2(3) of Regulation 1049/2001 which lays down the scope of the right to access to documents and stipulates that the right applies to “documents drawn up or received by it and in its possession in all areas of activity of the European Union”. **In this case it has been amply proven that the documents requested are not in the possession of the Ministry, have never been in the possession of the Ministry and the Ministry doubts their existence.**”*³ [emphasis has been added]

11. In another decision, the Tribunal made reference to the definition of a “*document*” and stated that “[l]i dan it-Tribunal jirreferi għat-tifsira ta’ dokument artikolu 2 Kap 496 li jgħid ċar u tond li jrid ikun oġġett miżmum għand awtorita pubblika”⁴ [emphasis has been added].

12. Based on the decisions of the Tribunal and the judgment of the Court of Appeal, the Commissioner noted that the most relevant aspect of the definition of a “*document*” is the first part because this would enable him to decide whether the FOI request falls within the parameters of the Act. In this regard, the Commissioner emphasises that the provisions of the Act should only apply, if at the time of the receipt of the FOI request, it could be ascertained that the Public Authority held any article on which information has been recorded in whatever form to meet the terms of the request made by the applicant.

13. In his considerations, the Commissioner assessed the FOI request, wherein the applicant requested the Public Authority to provide information in relation to a conversation which the Prime Minister Robert Abela had with a member of the judiciary. By means of the information notice issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public

² 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.

³ Appeal Number CDP/FOI/4/2021, Ahmad Aziz vs Ministry for Foreign and European Affairs and Trade, decided on the 2nd March 2023.

⁴ G/2021, Christian Peregin vs Uffiċċju tal-Prim Ministru, decided on the 13th April 2023.

Authority to specifically indicate if it holds any article on which the information requested by the applicant is recorded in whatever form to meet the terms of the FOI request. In its reply, the Public Authority reiterated that “*the request does not fall within the parameters of Act Cap. 496, there can never be “any article on which information has been recorded in whatever form”.*”

14. The Commissioner further considered the fact that the applicant did not submit any evidence at application stage to demonstrate that the requested information is indeed held by the Public Authority or rebut the replies of the Public Authority in order to show that his request falls within the parameters of the Act. In accordance with the case-law of the Court of Justice of the European Union in relation to the application of Regulation 1049/2001, an applicant should submit relevant and consistent evidence capable of rebutting the presumption of legality and veracity when a European Institution claims that it is not in possession of a document requested by the applicant. The CJEU held that a “*presumption of legality attaches to any statement of the institutions relating to the non-existence of documents requested. Consequently, a presumption of veracity attaches to such statement. That is, however, a simple presumption which the applicant may rebut in any way by relevant and consistent evidence*”⁵.

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 concluding that the Public Authority did not hold any article on which the information requested by the applicant was recorded in whatever form to meet the terms of the FOI request at the time of receipt of the FOI request.

Ian
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(Signature)
Digitally signed
by Ian DEGUARA
(Signature)
Date: 2023.05.03
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Ian Deguara
Information and Data Protection Commissioner

⁵ T-496/13, Colin Boyd McCullough vs European Centre for the Development of Vocational Training (Cedefop), 11th June 2015, para. 50.

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.