

Information and Data Protection Commissioner

CDP/FOI/37/2022

Christoph Schwaiger

vs

Infrastructure Malta

THE REQUEST

1. On the 12th July 2022, Mr Christoph Schwaiger (the “**applicant**”) submitted a request to Infrastructure Malta (the “**Public Authority**”) in terms of the requirements set forth in article 6 of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting a *“copy of the marine studies conducted by Khatib & Alami as per Direct Order "Marine Studies within the port of Marsaxlokk" valued at €79,000.00 awarded by Infrastructure Malta during the period between 1st January, 2021 and 30th June, 2021, published in terms of Article 151 of the Public Procurement Regulations 2016”*.
2. On the 10th August 2022, the Public Authority informed the applicant that *“[s]pecifically in terms of article 32.(1) (b) A document is an exempt document if its disclosure under this Act would disclose: any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed”*. The applicant was not satisfied with the Public Authority’s decision and, on the 17th August 2022, pursuant to the Internal Complaints’ Procedure, he requested the Public Authority to reconsider its decision, by contending that *“[t]he release of marine studies paid for by the tax-payer will not diminish any commercial values perceived by Infrastructure Malta. For this reason, you are kindly requested to overturn your initial decision and grant me access to the documentation requested in full and in the format originally requested”*.
3. On the 18th August 2022, the Public Authority reconfirmed its position and remarked that *“[t]his report cannot be submitted due to fact that it has commercial/operational value and can be used by third parties”*. The applicant was not satisfied with the Public Authority’s decision and on the same day, he submitted an application to the Information and Data Protection Commissioner

(the “Commissioner”) in terms of article 23(1)(a) of the Act. The applicant justified his disagreement on the basis of the following arguments:

- a. that the spirit of the legislation is designed to ensure transparency and be promotive of accountability of public authorities, which includes the Public Authority in question;
- b. that “*IM, whose CEO at the time when the document being requested was commissioned is currently the target of Malta Police Force investigations and proceedings, is acting contrary to this spirit of the laws of the Republic of Malta*”;
- c. that the Public Authority has not satisfactorily demonstrated how releasing the requested documentation would disclose “*information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed*”; and
- d. that instead of choosing to redact these alleged economically sensitive aspects of the marine studies, the Public Authority opted for a blanket ban on the whole documentation.

INVESTIGATION

Admissibility of the application

4. 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 documentation, the Commissioner considered the application as admissible for the purpose of article 23(2) of the Act.

Submissions received from the Public Authority and the Applicant

5. As part of the investigation procedure, by means of an information notice dated the 24th August 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. Additionally, the Commissioner requested the Public Authority to provide a copy of the requested documents

in order to be able to analyse the contents and determine whether such documents are precluded from being disclosed by virtue of the Act.

6. On the 26th August 2022, the Public Authority provided its written submissions and reiterated the legal exemptions cited to the applicant for not acceding to his request. Furthermore, the Public Authority submitted the following arguments for the Commissioner to take into account during the legal analysis of this case:
 - a. that the Agency of the Public Authority is empowered by virtue of article 5 of Agency for Infrastructure Malta Act, Chapter 588 of the Laws of Malta, to “*implement national plans for road and maritime infrastructure*”, including but not limited to, planning, designing, constructing, re-constructing such maritime infrastructure as the case may be;
 - b. that the study in question was required in order to provide mitigation measures to protect the Marsaxlokk port and to prevent or minimise the erosion of the Natura 2000 coastal wetland;
 - c. that ‘Khatib & Alami’ was selected following a call for quotations from technical experts in this highly specialised field requiring skill, knowledge, ability and tools to carry out a study of the sort;
 - d. that the offers received for the carrying out of the study were evaluated by the Agency’s technical staff and ‘Khatib & Alami’ was chosen as the cheapest bidder from the offers received and deemed compliant;
 - e. that as based on the circumstances that existed at the time that the request has been made, the Public Authority considered that the disclosure of the requested documentation may be detrimental to any negotiations or procurement undertaken by the Government, and that the results of the study will be used by the Government in procuring works related to marine infrastructure;
 - f. that there is a public interest in protecting the commercial interests of individual companies and ensuring they can fairly compete;
 - g. that, furthermore, the Public Authority considered that there is a public interest in ensuring that public authorities are not disadvantaged by their freedom of information

obligations during commercial negotiations with the private sector; and

h. that the documents are of a highly technical nature and require technical guidance in its proper interpretation.

7. On the 30th August 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 5th September 2022, the applicant rebutted the arguments made by the Public Authority and submitted the following principal arguments:

a. that “[t]aking into consideration the deliberations of *Bord ta’ Inkjesta- Daphne Caruana Galizia*, where:

i. *“Il-Bord diġà fl-osservazzjonijiet generali li għamel aċċenna għall-fatt illi fil-każ tal-ġurnalisti, l-aċċess għall-informazzjoni li kienet ta’ interess pubbliku u li allura jiffacilita l-investigazzjoni u r-riċerka tal-verità, hu mezz ewlieni kif l-iStat iwettaq l-obbligu pożittiv tiegħu li jipproteġihom jekk il-hajja tagħhom tkun f’riskju. Dan mhux biss għaliex meta tiġi mogħtija l-informazzjoni xierqa u fiż-żmien utli l-iStat ikun qiegħed juri li jivvalorizza x-xogħol ta’ ġurnalista u jelimina ħafna mill-konfrontazzjoni li tinħoloq mis-suspett u d-dubju, imma wkoll tagħti sinjal pożittiv li l-ġurnalisti kien jistħoqqilhom kull protezzjoni u kien pront biex jiddefendihom kontra kull tentattiv ta’ aggressjoni.”*

ii. *“Il-Qorti Ewropea irrikonoxxiet illi n-nozzjoni tal-helsien li wiehed jirċievi informazzjoni tinkludi d-dritt għall-aċċess għall-informazzjoni. Dan ipoġġi fuq l-awtoritajiet pubbliċi l-obbligu, li hu n-naħa l-oħra tal-midalja, illi l-iStat jipprovdi dik l-informazzjoni li hija fl-interess pubbliku. **L-ghoti ta’ din linformazzjoni speċjalment lill-ġurnalisti hu element kruċjali biex tiġi assicurata t-trasparenza u l-kontabilità tal-amminsitrazzjoni pubblika, speċjalment f’materji li huma ta’ interess pubbliku generali**” (See: *Bord ta’ Inkjesta- Daphne Caruana Galizia*, p. 337-338).*

iii. *It is therefore rather sad that even in the case of “Marine Studies”, IM is choosing to restrict, obstruct, and fight against this spirit of transparency advocated for by the Public Inquiry Board despite knowing what perils such sad actions bring about” [emphasis added by the applicant].*

- b. that the Public Authority confirmed that “[t]he study in question was required in order to provide mitigation measures to protect the Marsaxlokk port and to prevent or minimise the erosion of the Natura 2000 coastal wetland”;
 - c. that the applicant further noted that the marine sector is not a classified economic sector by NACE, which is the statistical classification of economic activities in the European Community, adhered to also by Malta¹, and, therefore, any argument that the requested documentation pertaining to marine studies should not be disclosed for economic and, or financial reasons is deemed null and void;
 - d. that the Public Authority stated that “[t]he results of the study will be used by the Government in procuring works related to the maritime infrastructure”, and in this regard, the applicant rebutted that when such procurement happens, for instance by a tender, the details and the specifications of the works to be carried out are publicly listed, and therefore, since such specifications would in any case be made public, it is hard to understand how the disclosure of these specifications would be so harmful if disclosed now, rather than later; and
 - e. that exhibiting the documents in public would actually serve the public interests even more, by allowing more companies to have access to this document in order for them to give their best service possible to the Republic of Malta.
8. In line with the investigation procedure of this Office, on the 6th September 2022, the Commissioner provided the Public Authority with the opportunity to rebut the arguments made by the applicant. In this regard, on the 12th September 2022, the Public Authority remained firm in its position as highlighted in its submissions on the 26th August 2022.

LEGAL ANALYSIS AND CONSIDERATIONS

9. The Act aims to establish a right to information in order to promote transparency and accountability in public authorities, and therefore, article 3 of the Act provides that every eligible person shall have the right to access documents held by public authorities in accordance with and subject to the provisions of the Act.

¹ See: *NACE Rev. 2 Statistical classification of economic activities in the European Community, 2008. ISBN 978-92-79-04741-1*

10. Transparency is an absolute prerequisite of good governance in a democratic society, and it empowers citizens to closely scrutinise the conduct of public authorities and hold them accountable. It is also the basis for the exercise of the right of the freedom of expression and information, as clearly highlighted by the judgment, *'Allied Newspapers Limited vs Foundation for Medical Services'*², which held that “*il-leġiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovd i ċerti garanzji għat-twettiq fil-prattika tal-libertà tal-informazzjoni **bħala s-sisien tal-libertà fundamentali tal-espressjoni***” [emphasis has been added].
11. The Court of Appeal in the judgment *'Din l-Art Helwa vs l-Awtorita' tal-Ippjanar*³ held that “[l]-Att dwar il-Liberta' tal-*Informazzjoni hi ligi intiza biex ttipprovd i b'mod ampju izda b'restrizzjonijiet cari fl-istess ligi, **sens ta' trasparenza u kontabilita fid-decizjonijiet, ordnijiet jew direttivi fl-amministrazzjoni pubblika li wara kollox qeghda hemm ghas-servizz tas-socjeta***” [emphasis has been added].
12. The Public Authority cited article 32(1)(b) of the Act as the reason for not disclosing the requested document to the applicant. Article 32(1)(b) of the Act provides that a document is deemed exempt if its disclosure would reveal “*any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed*”. The reasoning behind this provision is that information which may not rise to the level of a trade secret, may also be deemed to be confidential on the basis of commercial value of the information.
13. The Commissioner considered that article 32(1)(b) of the Act shall only apply after the Public Authority demonstrates that the disclosure of the document would, or could reasonably be expected to cause harm to the protected interest. In this regard, the Commissioner is of the view that such harm shall be sufficiently specific and concrete, and not merely speculative or remote. This is also in accordance with the settled case-law of the Court of Justice of the European Union concerning the interpretation of Regulation 1049/2001, wherein the Court stated that “*if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how access to that **document could specifically and actually undermine the interest protected by the exemption** – among those laid down in Article 4 of Regulation 1049/2001 – upon which it is relying. Moreover, **the risk of that undermining must be reasonably foreseeable and not purely hypothetical***”⁴ [emphasis has been added].

² Appeal No. 11/2020, *Allied Newspapers Limited vs Foundation for Medical Services*, dated 18th November 2020.

³ Appeal No. 7/2019, *Din l-Art Helwa vs l-Awtorita' tal-Ippjanar*, decided on the 16th May 2019.

⁴ Case C-506/08 P, *Kingdom of Sweden v European Commission and MyTravel Group plc*, judgment of the Court (First Chamber) of 21st July 2011

14. The Public Authority explained that the requested report would disclose which may be detrimental to any negotiations or procurement undertaken by the Government. Therefore, such disclosure would not only have a detrimental effect on the infrastructural works which may ensue, but also distort competition in the market.

On the basis of the foregoing considerations, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving the Public Authority with a decision notice and concluding that the refusal to provide the applicant with a “*copy of the marine studies conducted by Khatib & Alami as per Direct Order "Marine Studies within the port of Marsaxlokk" valued at €79,000.00 awarded by Infrastructure Malta during the period between 1st January, 2021 and 30th June, 2021, published in terms of Article 151 of the Public Procurement Regulations 2016*” in terms of article 32(1)(b) of the Act, is not justified.

The Commissioner took into consideration the nature of the document involved in this case and, pursuant to article 12(2)(a) of the Act, is hereby instructing the Public Authority to grant the applicant with a reasonable opportunity to inspect the requested document. The Public Authority shall engage with the applicant to find a mutually convenient date when the inspection of the document could be carried out.

The Public Authority shall comply with these instructions within twenty (20) working days from the date of receipt of this decision notice and provide the Commissioner with a confirmation of the action taken immediately thereafter.

Ian
DEGUARA
(Signature)

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by Ian DEGUARA
(Signature)
Date: 2023.03.06
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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.