

**Information and Data Protection Commissioner**

**CDP/FOI/36/2022**

**Christoph Schwaiger**

**VS**

**Superintendence of Cultural Heritage**

**THE REQUEST**

1. On the 14<sup>th</sup> June 2022, Mr Christoph Schwaiger (the “**applicant**”) submitted a request to the Superintendence of Cultural Heritage (the “**Public Authority**”) pursuant to article 3 of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting “[a] list of heritage artefacts located in Qala, Gozo. The list should include but must not necessarily be limited to: a name/description of each artefact and its current address”.
2. On the 14<sup>th</sup> July 2022, the Public Authority refused the request on the basis of article 14(g) of the Act, which states that “*the document requested is not held by the Public Authority and the undersigned has no grounds for believing that the document is held by, or connected more closely with the functions of, another public authority*”.
3. The applicant was not satisfied with the Public Authority’s decision, and on the 15<sup>th</sup> July 2022, pursuant to the Internal Complaints’ Procedure, he requested the Public Authority to reconsider its position in terms of the Act, by contending that:

*“The Superintendence performs a number of functions deemed vital to the discovery, analysis, upkeep, and documentation of matters of cultural importance to the Republic of Malta including but not limited to being responsible for all scientific investigation regarding cultural assets such as the conduction of field work and archaeological excavation, both terrestrial and underwater, and for the*

*full record keeping and management of documentation resulting from such interventions. The Superintendence also has the role of evaluating art objects, objects of cultural value and collections of such items”.*

4. On the 23<sup>rd</sup> August 2022, the Public Authority remarked that “[t]he information requested does not refer to an official document in terms of Article 2 of the Act, therefore the right of access in terms of Article 3 does not apply”. The applicant was not satisfied with the Public Authority’s decision and on the 24<sup>th</sup> August 2022, the applicant applied to the Commissioner for a decision pursuant to article 23(1)(a) of the Act, and justified his disagreement by replicating the same arguments provided to the Public Authority on the 15<sup>th</sup> July 2022.

## **INVESTIGATION**

### **Admissibility of the complaint**

5. After having considered the nature and background of this complaint, together with the procedural steps involved between the applicant and the Public Authority in the request for information, the Commissioner considers the complaint made by the applicant as admissible for the purposes of article 23(2) of the Act.

### **Submissions received from the Public Authority**

6. As part of the investigation procedure, by means of an information notice dated the 29<sup>th</sup> August 2022, the Public Authority was requested by the Commissioner to provide submissions or comments, which are over and above those already expressed to the applicant, in support of its decision to refuse to provide access to the requested information.
7. On the 31<sup>st</sup> October 2022, the Public Authority outlined that “[t]he issue at hand is not that the Superintendence is withholding information from Mr Schwaiger, but rather that the Superintendence is not in possession of the information being requested”. Therefore, following the receipt of the Public Authority’s email, the Commissioner requested the Public Authority to provide by means of a sworn declaration that it does not have the documentation requested by the applicant.

8. By means of an email dated 2<sup>nd</sup> December 2022, the Public Authority provided the requested affidavit signed by Mr Kurt Farrugia, together with its written submissions. Furthermore, the Public Authority submitted the following considerations for the Commissioner to take into account during the legal analysis of this case:

i. that it is the Public Authority's duty to maintain a National Inventory which is to be composed of:

*“(1) In establishing the national inventory of cultural property, the Superintendence shall consider cultural property and underwater cultural heritage belonging to:*

*(a) the State or State institutions;*

*(b) the Catholic Church and other religious denominations;*

*(c) foundations and non-governmental organisations as established in accordance to law;*

*(d) physical and juridical persons. In the case of privately owned movable cultural property, when such cultural property has been made accessible to the public and when such persons have given their consent for such purposes; and*

*(e) any other cultural property and underwater cultural heritage as defined in this Act”;*

ii. that the National Inventory is available publicly<sup>1</sup>, and currently it includes only immovable cultural heritage items. The Public Authority noted that it is in the process of compiling an inventory of moveable cultural heritage items which is currently composed of artefacts found in its repository and this list is not yet publicly available;

iii. that the Public Authority has a list of sites and features discovered during archaeological investigations and this list is currently intended for internal use only, and the intention is to make it available in the near future; and

iv. that the Superintendent of Cultural Heritage, Mr Kurt Farrugia, declared that none of this data can be considered as “[a] list of heritage artefacts located in Qala, Gozo’. The Public

---

<sup>1</sup> Superintendence of Cultural Heritage, *National Inventory*, available at: <https://culture.gov.mt/en/culturalheritage/Pages/National%20inventory.aspx>

Authority further noted that “[i]n that the only list relating to artefacts is a work in progress list which related solely to artefacts included in the Superintendent’s repository and I declare that there are no other lists beyond those described”.

9. On the 5<sup>th</sup> December 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 19<sup>th</sup> December 2022, the applicant rebutted the arguments made by the Public Authority and submitted the following principal arguments:

- i. that the Public Authority, in its submissions stated that it is “*responsible for all scientific investigation regarding cultural assets such as the conduction of field work and archaeological excavation, both terrestrial and underwater, and for the full record keeping and management of documentation resulting from such interventions. The Superintendence also has the role of evaluating art objects, objects of cultural value and collections of such items*” [emphasis added by the applicant];
- ii. if the Public Authority “*at any point deals with, is notified, or in some manner interacts with a heritage artefact in a locality of this great Republic, one would reasonably expect documentation and records about this to be found. Furthermore, keeping such documentation and records out of the public’s view means denying the people of this great Republic knowledge about their heritage, ancestry, culture, and identity*”;
- iii. that as per the Public Authority’s submissions, “[t]he Superintendence is in the process of compiling an inventory of movable cultural heritage items which is currently composed of artefacts found in its repository and this list is not yet publicly available. Finally, the Superintendence also has a list of sites and features discovered during archeological investigations. This list is currently intended for internal use only, but the intention is to make it available in the near future”. The applicant noted that somehow, the Public Authority then “*confirms that none of this data can be considered as ‘A list of heritage artefacts located in Qala, Gozo’.*” But then further on, the same Public Authority confirms that there is in fact a list of artefacts. In fact, “[i]n that the only list relating to artefacts is a work in progress list which relates solely to artefacts included in the Superintendent’s repository”;

- iv. that the applicant instead of requesting the entire list in its possession, in order to reduce the work burden for the Public Authority, he restricted the disclosure to one locality. The applicant argued that it would not be the first time the Public Authority acted in favour of evasiveness and lack of transparency with the public;
- v. that in May 2022, Times of Malta declared that the Heritage Superintendent was being evasive about an artefact in a minister's home<sup>2</sup>. The Public Authority is on record as previously having stated that: “[t]he authorities went to Refalo's house and found the artefact there. The competent authorities inspected the property to identify the artefact. The artefact has been identified and the proprietor is collaborating in full”<sup>3</sup>;
- vi. that the applicant noted that the Act does not appear to envision an exemption for disclosure based on a document's status as being one which is an evolving one, that is a list of heritage artefacts will understandably grow every time such an artefact is found;
- vii. that the public interest reasons for disclosure outweigh the reasons for non-disclosure. The public has a right to know what is happening with its heritage artefacts. The applicant noted that in February 2022, ‘The Shift’ reported<sup>4</sup> that:

*“A protected early 19th century stone marker is adorning the courtyard of one of Agricultural Minister Anton Refalo’s properties in Qala, Gozo, photos uploaded to social media by his son show.*

*The old stone marker, with the initials VR (Victoria Regina), is considered by law to be part of Malta’s protected national heritage. It is clearly restored and placed on a pedestal in the minister’s courtyard, just a few metres away from the pool.*

...

*Appropriating items of cultural and historical value is a criminal offence, punishable with a fine of up to €116,000 or a maximum of six years imprisonment.*

....

---

<sup>2</sup> Times of Malta (13<sup>th</sup> May 2022), ‘Heritage Superintendent evasive about artefact in minister’s home’, available at: <https://timesofmalta.com/articles/view/Heritage-Superintendent-evasive-about-artefact-in-minister-s-home.954622>

<sup>3</sup> Ibid

<sup>4</sup> The Shift News (17<sup>th</sup> February 2022), ‘Minister has protected national heritage at home, refuses to explain’, available at: <https://theshiftnews.com/2022/02/17/minister-has-protected-national-heritage-at-home-refuses-to-explain/>

*He was also asked to state how he had acquired it and whether he had **reported its discovery to the Superintendence of Cultural Heritage, as he is obliged to do by law.***

....

*Contacted by The Shift and shown the pictures, national heritage experts confirmed that **the VR marker forms part of the country's national heritage** and retaining it in private property is a crime.*

....

*The Cultural Heritage Act is very clear on infringements of the law related to the discovery of items of national heritage. "Any person who receives or retains any cultural property knowing that it has been illegally removed in Malta or illegally exported from any other country" would be **committing a crime and should face justice**, the law states.*

*Upon the discovery of such a crime, the police and the **Superintendent of Cultural Heritage are obliged to file a report** and take the necessary criminal action against the alleged offender." [emphasis added by the applicant];*

- viii. that "[t]he media reports make for a depressing read, one which shows a lack of transparency from both the minister in question and the SCH. A case of a minister/parliamentarian possibly being found guilty of a crime that can lead up to six years imprisonment is certainly in the public interest. If the SCH is in possession of documentation that this is the case, the applicant appeals to the SCH to do the right thing and help the good law abiding people of these great islands"; and
- ix. that "in light of the Public Authority's duties to keep records of heritage artefacts in Qala, in light of the SCH's investigations in Qala concerning heritage artefacts, and in light of the significant public interest in disclosing the requested documentation which may also help Police investigations, the applicant reiterates that the documentation requested should be released in the original format in which it was requested".

10. On the 16<sup>th</sup> February 2023, the Commissioner requested the Public Authority to confirm, or otherwise, that the information available on the 'SCH GIS Interface'<sup>5</sup> includes all the cultural heritage discoveries and the national inventory known to the Public Authority to date, and to confirm, or otherwise, whether the Public Authority has any internal lists for any moveable or

---

<sup>5</sup> Superintendence of Cultural Heritage Malta, 'SCH GIS Interface', available at: <https://schmalta.maps.arcgis.com/apps/webappviewer/index.html?id=6b8748bb3eb243b2bb186194cf3a5a74>

immoveable cultural heritage items, which also includes artefacts. On the 28<sup>th</sup> February 2023, the Public Authority “*confirmed that the information available on the ‘SCH GIS Interface’ includes all the cultural heritage discoveries and the national inventory known to the Public Authority to date*”. Additionally, the Public Authority provided a copy of the internal inventory for movable heritage being drawn up in relation to items found in the Public Authority’s repository.

## LEGAL ANALYSIS AND DECISION

11. Having examined the request submitted by the applicant pursuant to article 3 of the Act, whereby the Ministry for Foreign and European Affairs was requested to provide “[a] list of heritage artefacts located in Qala, Gozo. The list should include but must not necessarily be limited to: a name/description of each artefact and its current address”.
12. Having taken into account the decision taken by the Public Authority in relation to the refusal to provide a copy of the requested information on the basis that “*the document requested is not held by the Public Authority and the undersigned has no grounds for believing that the document is held by, or connected more closely with the functions of, another public authority*”.
13. Having assessed the declaration submitted to the Commissioner during the course of the investigation, whereby the Superintendent of Cultural Heritage, Mr Kurt Farrugia, declared that none of the data available can be considered as “[a] list of heritage artefacts located in Qala, Gozo’. The Public Authority further noted that “[i]n that the only list relating to artefacts is a work in progress list which related solely to artefacts included in the Superintendent’s repository and I declare that there are no other lists beyond those described”.
14. For this purpose, the Commissioner examines the reason provided by the Public Authority for refusing to comply with the applicant’s request pursuant to 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].
15. The Commissioner analysed the reply provided by the Public Authority on the 28<sup>th</sup> February 2023, and ascertained that all the cultural heritage discoveries and the national inventory known to the Public Authority, are available and enlisted on the ‘SCH GIS Interface’. Furthermore, the

Commissioner scrutinised the copy of the internal inventory for movable heritage found in the Public Authority's repository, and concluded that the locality questioned by the applicant, is not part of such list. In this regard, the Public Authority explained that “[l]ocalities with nil entries have not been included”.

**On the basis of the foregoing, in terms of article 23(3)(b) of the Act, the Commissioner hereby decides that insofar as the facts that he could reasonably establish in terms of his powers under the Act, and particularly following the submissions made by the Public Authority, more specifically, that it does not hold the requested document, the cited exemption to refuse the applicant's request for information in terms of article 14(g) of the Act, is justified.**

Ian  
DEGUARA  
(Signature)

Digitally signed  
by Ian DEGUARA  
(Signature)  
Date: 2023.03.07  
10:46:06 +01'00'

**Ian Deguara**  
**Information and Data Protection Commissioner**



## **Right of Appeal**

In terms of Article 39(1) of the Act “*where 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 Tribunal shall be made in writing and addressed to:

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