

Information and Data Protection Commissioner

CDP/FOI/50/2022

Roberta Spiteri

vs

Enemalta p.l.c.

FOI REQUEST

1. On the 10th June 2022, Ms Roberta Spiteri (the **“applicant”**) made a request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act (the **“Act”**), Chapter 496 of the Laws of Malta, requesting Enemalta p.l.c. (the **“Public Authority”**) to provide an electronic copy of the following documentation:

“On 31 May, 2022, the Times of Malta reported that an unnamed legal firm had been commissioned by Enemalta to conduct a review of the several aspects of the transaction that led to the Mozura Windfarm investment. A summary of the review has been provided in pages 5-6 of Enemalta’s Annual Report and Consolidated Financial Statements of 31 December 2019 that was received by the Registry of Companies on 6 April 2022. As part of my work for The Daphne Caruana Galizia Foundation in support of its objective to campaign for public accountability, I am requesting:

1. *A copy of the full report of the review of the Mozura Transaction conducted by the unnamed legal firm commissioned by Enemalta; and*
2. *A copy of the terms of reference of this review.”*

2. On the 13th July 2022, the Public Authority informed the applicant that her request could not be met because by virtue of Part V or Part VI, there is good reason for withholding the information requested. The Public Authority stated that the *“request relates to a report compiled by legal professionals commissioned by Enemalta plc. In their report disclosure is not being permitted given that the document in question is an exempt document pursuant to Art.31 of Cap. 496”*. In its reply, the Public Authority cited excerpts from its Annual Report for 2019 and 2020.
3. On the 20th July 2022, the applicant presented a complaint seeking the reconsideration of the refusal of the Public Authority and submitted:
 - a. that a report which is compiled by legal professionals is not automatically bound by legal professional privilege and according to the Information Tribunal in the English case of *‘Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry’* (EA/2005/0023, 4 April 2006), the concept of legal professional privilege relates to two types of privilege, litigation privilege and advice privilege;
 - b. that, according to the ICO, *“litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility”* and, thus, the applicant argued that the requested documentation was not made for the purpose of litigation since no litigation is in progress or contemplated, and there is no real prospect or likelihood of litigation in preparation for which the documentation would need to have been produced;
 - c. that with respect to advice privilege, the ICO states that this *“applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice”* within a legal context, such as for example, legal rights, liabilities, obligations or remedies;
 - d. that, in relation to the present case, according to the summary published by the Public Authority in its Annual Report for 2019, the Report was commissioned *“to look into several aspects of the transaction that led to the [Mozura Windfarm] investment”* as per the terms of reference of this review which *“included an assessment of: the*

Company's adoption of internal investment processes; whether there are awareness of the price originally paid by the Vendor when acquiring the investment and the Company's business rationale behind the eventual significantly higher contract price; whether management was aware of the ultimate beneficiary owner of the Vendor and any potential conflicts; and if any of the current board of directors of the Company who had a decision making role at the time of the execution of the transaction were directly involved in any wrong doing that could possibly effect the standing or position of the Company today";

- e. that, according to the applicant, there is nothing in the terms of reference as presented in the summary of the 2019 Annual Report or the summary of the 2020 Annual Report, which indicates that the requested report was commissioned for the purpose of seeking or giving legal advice in a legal context;
 - f. that the requested documentation is not subject to legal professional privilege and this documentation is not of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege, and therefore, the documentation is not exempt in terms of article 31(1) of the Act; and
 - g. that the requested documentation does not contain material obtained in confidence, and there is absolutely no reason to believe that the disclosure of such documentation would found an action by a person (other than a public authority) for breach of confidence, and therefore, the requested documentation is not exempt in terms of article 31(2) of the Act.
4. On the 8th August 2022, the Public Authority reiterated its reply and submitted:
- a. that the request relates to a report compiled by legal professionals commissioned by the Public Authority and, thus, the requested documentation is being refused in terms of article 31 of the Act;
 - b. that the complaint of the applicant is based on the decisions of the English authorities and on the case-law of English Courts, and in this respect, the Public Authority argued that the interpretation of legal privilege in the context of English law on freedom of information is more restricted than article 31 of the Act;

- c. that, within this context, the English courts draw stark distinctions between classes of documents compiled by legal advisors and conversely, in terms of Maltese law and particularly the Professional Secrecy Act (Cap. 377), “*the persons who, by reason of their calling, profession or office, fall within the scope of article 257 of the Criminal Code include the following: ... advocates ...*”; and
- d. that the Maltese Courts will not ordinarily order the production of documents compiled by advocates for their clients, irrespective of the scope of the document, and thus, the English law is irrelevant to the current scenario.

FOI APPLICATION

5. On the 28th September 2022, the applicant applied for a decision notice pursuant to article 23(1)(a) of the Act, requesting the Information and Data Protection Commissioner (the “**Commissioner**”) to decide whether the Public Authority had dealt with the requirements of the Act.

Admissibility of the FOI Application

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

INVESTIGATION

7. As part of the investigation procedure, by means of an information notice dated the 3rd October 2022 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 had complied with the requirements of the Act. In particular, the Commissioner requested the Public Authority to make available a copy of the requested documentation in order to determine whether the exemption cited by the Public Authority in terms of article 31 of the Act is indeed applicable to the present case.

8. By means of an email dated the 4th November 2022, the Public Authority informed the Commissioner that the requested documentation could be inspected by his office at its premises. In this regard, on the 17th November 2022, the Commissioner carried out an onsite inspection to examine the contents of the requested documentation and to determine whether such documentation is indeed exempt in terms of the Act. During such meeting, the possibility of a mediation attempt was explored, however, such possibility was eventually abandoned as it did not prove to be viable due to certain conditions.
9. The Commissioner has requested, on a number of occasions, the Public Authority to provide its submissions in relation to the information notice issued on the 3rd October 2022. Notwithstanding this, the Public Authority failed to provide any submissions or information to substantiate its legal reasoning that led to the refusal of the FOI request. Thus, the Commissioner based the legal analysis of the present case on the replies provided to the applicant and the onsite inspection held at the premises of the Public Authority on the 17th November 2022.

LEGAL ANALYSIS AND DECISION NOTICE

10. For the purpose of this legal analysis, the Commissioner sought to determine whether the contents of the requested documentation contain any information which is deemed to be exempt in terms of article 31 of the Act, specifically, if there is any information which is covered by legal privilege, professional secrecy and confidentiality.

The Replies Provided by the Public Authority to the Applicant

11. In the first reply provided by the Public Authority on the 13th July 2022, the applicant was informed that his “*request relates to a report compiled by legal professionals commissioned by Enemalta plc. In their report disclosure is not being permitted given that the document in question is an exempt document pursuant to Art. 31 of Cap. 496*” [emphasis has been added]. The reply seems to suggest that the Public Authority assumes legal privilege because the report was prepared by a law firm and for this reason, it contains legal advice. Within this context, the Commissioner emphasises that a document prepared by a legal professional does not automatically render the document exempt from disclosure. It is not the legal profession of the person preparing the report which would classify the document as exempt, but it is the actual

content of the document which would lead to the non-disclosure of the document in terms of the Act.

12. Preliminary, the Commissioner noted that the replies of the Public Authority refer to article 31 of the Act without indicating the sub-article upon which it is relying to refuse to provide access to the requested documentation. Article 31 of the Act contains three (3) sub-articles and thus, the Public Authority should have stated the reason(s) of the refusal by invoking the appropriate legal exemption to enable the applicant to understand the refusal of the FOI request in terms of article 15(1)(a) of the Act and to subsequently exercise any rights and remedies which are provided by law in the most effective manner.
13. Article 31 of the Act provides for an exemption in relation to documents subject to legal professional privilege or containing material obtained in confidence. In this regard, the provision sets forth three (3) different circumstances where a document could be considered as exempt in terms of the Act:
 - a. that the document is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege;
 - b. that the disclosure of the document would give rise to an action by a person (other than a public authority) for breach of confidence; and
 - c. that the document is an internal working document prepared by a member, officer or employee of the Government or any other public authority in the course of its duties.

For the purpose of this legal analysis, article 31(3) of the Act could be excluded because it is clear that the requested information is not an internal working document prepared by a member, officer or employee of the Government or any other public authority.

Article 31 of the Act

14. Article 31 of the Act does not provide an absolute exemption from disclosure for legal advice in general or for documents which fall under the legal professional privilege as seems to be suggested by the replies provided by the Public Authority. In this regard, article 31(1) of the

Act deems the information to be exempt if it first falls within the legal professional privilege and then only if that information would not be allowed to be produced in legal proceedings.

15. Before delving into the merits of the case, the Commissioner clarifies that legal privilege, professional secrecy and confidentiality is a right belonging to the person seeking the legal advice. Thus, the obligation not to disclose legal advice belongs to the lawyer providing the advice and not to the client. This was indeed confirmed by the judgment ‘*Av Kris Borg noe vs HSBC Bank Malta plc*’¹, which was recently delivered by the Court of Appeal:

*“Din il-Qorti ma taqbel xejn mal-interpretazzjoni mogħtija mill-attur appellat dwar l-Artikolu 588 tal-Kap. 12, meta jgħid li għalkemm dan il-provvediment tal-liġi jsemmi żewġ persuni, essenzjalment l-avukat huwa parti integrali mill-klijent, u li dan il-provvediment qiegħed hemm sabiex jipproteġi lill-avukat, mentri l-klijent mhux privileġġjat. Relevanti f’dan il-kuntest, hija s-silta ċitata mill-Ewwel Qorti b’rabta mas-sentenza ta’ din il-Qorti, tal-31 ta’ Jannar, 2019, **fil-kawża fl-ismijiet Robert Hornyold Strickland v. Allied Newspapers Limited et minn fejn jirriżulta ċar li l-privileġġ huwa tal-klijent u mhux tal-avukat, inkwantu r-rabta tas-sigriet professjonali tista’ tinhall biss mill-klijent (ara b’mod partikolari paragrafu 18 sa 21 tal-istess sentenza u r-riċerka estensiva hemm magħmula). Din il-Qorti thaddan bis-sħiħ il-prinċipji enunċjati f’dik is-sentenza**” [emphasis has been added].*

16. The judgment ‘*Robert Hornyold Strickland vs Allied Newspapers Limited u The Strickland Foundation*’² further provides that:

*“Taħt is-sistema proċedurali ċivili Anglo-Sassonu (li minnu jidher li nstiltu r-regoli tal-Kodiċi tagħna dwar il-mod kif jitmexxa l-proċediment quddiem qorti f’kawża) huwa miżmum li **“The privilege is in all cases the privilege of the client and not of the solicitor or legal adviser and may be waived by the client but not by solicitor or legal adviser”** [emphasis has been added].*

¹ Application Number: 469/16/2 MH, decided on the 29th March 2023, paragraph 12.

² Application Number 1136/15 SM, decided on the 31st January 2019, paragraph 21.

17. The Court of Appeal proceeded to clarify the distinction between legal advice privilege and litigation privilege:

“[m]aż-żmien, fl-Ingilterra bdiet issir distinzjoni bejn dak li huwa Legal Advice Privilege u Litigation Privilege ... li fil-verita’ hija rifless fl-Artikolu 350 tal-Kap. 9 hawn qabel citat:

- **Legal Advice Privilege** jittratta kull komunikazzjoni li tghaddi bejn l-avukat Prattikanti u l-klijent, bl-iskop li jinghata parir legali ...

Mentri – Litigation Privilege huwa maħsub li joffri protezzjoni għal kull forma ta’ komunikazzjoni bejn avukat u klijent, kif ukoll terza persuna, bl-iskop waħdieni jew prinċipali (bl-Ingliż tintuża l-kelma dominant) li titratta t-tmexxija ta’ kawża eżistenti l-Qorti (inkluż proċeduri ta’ arbitraġġ) jew għat-tnejjija ta’ proċeduri li jkunu ser jinbdeu fi żmien qasir, inkluż id-difiża tal-każ u kull sforz sabiex jiġu evitati l-proċeduri gudiżzarji jew bl-iskop li sseħħ transazzjoni ta’ kawża”³

18. Given that the Public Authority cited article 31 of the Act, the Commissioner also proceeded to assess article 31(2) of the Act, which provides that a “document is an exempt document if its disclosure under this Act would found an action by a person (other than a public authority) for breach of confidence”.

19. The Court of Appeal in ‘Allied Newspapers Limited vs Foundation for Medical Services’⁴ had shed further light on article 31(2) of the Act, by providing the following:

“Biex tagħmel dan l-appellanta tinterpreta l-artikolu 31(2) tal-Kap. 496 b’mod li ma jirrispekkjax il-kelma u l-ispirtu tal-istess liġi. It-titolu stess tal-imsemmi Artikolu 31(2) tal-Kap. 496 “dokumenti sugġett għall-privileġġ professjonali legali jew li fihom materjal miksub b’mod kunfidenzjali”, jispeċifika b’mod ċar li dokument huwa dokument eżentat meta jkun fih materjal li jiġi miksub b’mod kunfidenzjali, u mhux meta l-entità pubblika tidhol hija stess f’kuntratt u tkopri ruħha bi klawnsola ta’ kunfidenzjalità, jew meta tirredigi dokument u tikklassifikah hija stess bħala

³ Ibid. paragraph 18.

⁴ Inferior Appeal No. 11/2020 LM, delivered on the 18th November 2020.

kunfidenzjali. Huwa evidenti l-ghan tal-artikolu 31 tal-Kap. 496 x'inhuwa - li jiġi mħares is-sigriet professjonali legali u materjal miksub b'mod kunfidenzjali."

[emphasis has been added].

20. In this regard, article 31(2) of the Act would render the documentation exempt if the disclosure would not only expose the Public Authority to an action for breach of confidence, but where that action would be taken against the Public Authority by the law firm. Thus, this exemption could have only been invoked if the law firm had a right to confidentiality against the Public Authority and the Public Authority had a legal obligation of confidentiality, which is not the case.

The FOI Application and the Requested Documentation

21. For the purpose of investigating this FOI application, the Commissioner proceeded to examine whether the documentation, or parts of the documentation, contain any information which is deemed to be exempt in terms of article 31 of the Act.
22. The Commissioner considered the decision '*Ian Caldicott vs Methode Electronics*'⁵, wherein the Information and Data Protection Appeals Tribunal (the "**Tribunal**") held that documents which are prepared by a legal professional for the purpose of investigating an employment matter is not necessarily covered by legal privilege. For this purpose, the Tribunal emphasised that the mandate should be examined in order to determine whether the lawyer had been requested to provide any legal advice to the client. After examining a copy of the report prepared by the lawyer, the Tribunal concluded that the report was of an investigative nature, and thus, it did not include any material which could be classified as legally privileged. Within this context, the Tribunal established the following:

"Illi ma hemmx dubju mid-dokumenti esebiti minn [REDACTED] fis-seduta tal-1 ta' Diċembru 2022 li r-rapport esibit li sar mill-avukat [REDACTED] f'para. 2 jagħmilha ċara li hija ġiet maħtura "to investigate the report" u minn imkien ma jirrizulta li hija kellha inkarigu sabiex tagħti parir legali jew tat parir legali fir-rapport tagħha. Huwa minnu li fl-ewwel pagna il-kliem "Legal Advice" izda meta wiehed jifli r-rapport anke l-inkarigu mogħti lil avukat [REDACTED]

⁵ Appell Number CDP/COMP/431/2020, decided on the 13th April 2023.

██████████ f'para 2, jirrizulta li huwa rapport investigattiv dwar l-ilment tal-intimat

...

Li għalhekk tali rapport ma għandux min-natura la ta' Legal Advice Privilege u lanqas ta' Litigation privilege stante li oltre r-rizultat tal-investigazzjoni ma jsemmu dwar pariri legali jew azzjoni legali kontemplata fir-rigward".

23. Based on the reasoning of the Tribunal, the Commissioner proceeded to examine the replies of the Public Authority, wherein it cited parts of the Annual Report 2019 that highlight the terms of reference of the review carried out by the law firm:

“The terms of reference of this review included an assessment of: the Company’s adoption of internal investment processes: whether there are awareness of the price originally paid by the Vendor when acquiring the investment and the Company’s business rationale behind the eventual significantly higher contract price; whether management was aware of the ultimate beneficiary owner of the Vendor and any potential conflicts; and if any of the current board of directors of the Company who had a decision making role at the time of the execution of the transaction were directly involved in any wrong doing that could possibly effect the standing or position of the Company today”.

24. As part of the investigation of this FOI application, the Commissioner inspected a copy of the requested report, including the terms of reference, and assessed the nature of the report, and established that the report was commissioned by the Public Authority to enable the law firm to carry out a review in relation to the Mozura transaction. This led the Commissioner to conclude that the requested documentation does not have any information which could be classified or covered by legal privilege, professional secrecy, and confidentiality.

On the basis of the foregoing considerations, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and deciding that the refusal of the Public Authority to provide a “copy of the full report of the review of the Mozura Transaction conducted by the unnamed legal firm commissioned by Enemalta” and a “copy of the terms of reference of this review” is not justified in terms of article 31 of the Act.

By virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with an electronic copy of the requested documentation in its entirety after redacting the personal data pertaining to the legal professionals who prepared the report of the review of the Mozura Transaction.

The redacted documentation shall be sent to the applicant within twenty (20) working days from the date of receipt of this decision notice and confirmation of the action taken shall be notified to the Commissioner immediately thereafter.

Ian Digitally signed
DEGUARA by Ian DEGUARA
(Signature) (Signature)
 Date: 2023.06.02
 09:28:56 +02'00'

Ian Deguara
Information and Data Protection Commissioner

Right of Appeal

In terms of article 39(1) of the Act, “[w]here a decision notice has been served, the applicant or the public authority may appeal to the Tribunal against the notice within twenty working days”.

An appeal to the Information and Data Protection Appeals Tribunal shall be made in writing and addressed to: The Secretary, Information and Data Protection Appeals Tribunal, 158, Merchants Street, Valletta.