

Information and Data Protection Commissioner

CDP/FOI/79/2022

Jacob Borg

vs

Enemalta p.l.c.

FOI REQUEST

1. On the 13th June 2022, Mr Jacob Borg (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 a “*full copy (not a summary) of the review carried out by a law firm into Enemalta’s Mozura transaction, as referenced in Enemalta’s 2019 and 2020 accounts*” (the “**requested documentation**”) in electronic format.
2. On the 13th July 2022, the Public Authority informed the applicant that his request could not be met because by virtue of Part V or Part VI of the Act, there is a good reason for withholding the requested documentation. 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*”. Furthermore, the Public Authority provided that “[t]o the extent that a summary of the document has been published by Enemalta in its Annual Report for 2019 and for 2020”, the salient excerpts from the Annual Reports were cited in its reply.
3. On the 11th August 2022, the applicant presented a complaint seeking the reconsideration of the Public Authority and submitted:
 - a. that the reply of the Public Authority indicates that while the report was drafted by a law firm yet the nature of the report is not that of providing legal advice, but that of establishing the circumstances surrounding internal investment processes, the change

from original price to acquiring price, business rationale behind a higher price, knowledge of ultimate beneficial owner and potential conflicts, and if the company standing or position is effected;

- b. that the report in question therefore could not be classified as enjoying any legal privilege and further noted that it is unclear to which paragraph of article 31 it is considering this report to be exempt, and this is in itself an abuse of process and for the purposes of the internal complaint, all paragraphs of article 31 of the Act were considered;
- c. that paragraph 3 of article 31 of the Act does not apply since the report in question is not an internal working document nor it is prepared by a member, officer or employee of the government or any other public authority;
- d. that article 31(1) and article 31(2) of the Act establish the following principles: (i) a document which is considered privileged from production in legal proceedings on the ground of legal professional privilege is an exempt document; and (ii) where the disclosure of a document would give rise to a breach of confidence then the document is exempt;
- e. that article 31(1) of the Act does not provide an absolute exemption from disclosure for legal professional privilege and indeed, in Malta, the legal professional privilege is not absolute, so this paragraph only exempts from disclosure that document which is covered by legal professional privilege and which is not allowed to be presented in normal legal proceedings;
- f. that, if one reads Part III, Exceptions, of the Professional Secrecy Act (Cap. 377 of the Laws of Malta) one will find a list of circumstances in which the legal privilege may be done with and the most relevant of these exceptions is, for example, that the legal professional may be exempted from confidentiality by the client;
- g. that article 6(1) of Cap. 377 clearly indicates therefore that the legal privilege belongs to the client (the person commissioning the legal professional and providing the information) and therefore, the privilege in this case belongs to the Public Authority and not to the legal professional engaged by it, and consequently, it is the Public

Authority which is to decide whether it wants to disclose the document in question with the legal professional having no say at all in this regard;

- h. that another exemption from confidentiality in relation to legal documents is established in article 9 of Cap. 377, which establishes that “*a court may authorise or make an order requiring the disclosure of secret information pursuant to an express provision of law for the specific purpose for which that provision was enacted, or ...*”, and in this particular case, the Act provides an obligation in favour of disclosure on public entities in fulfillment of article 6 of the Act and which is based on the principle that non-disclosure is only preferred where the public interest is better served by non-disclosure rather than by disclosure;
- i. that article 588 of the Code of Organisation and Civil Procedure also speaks of what is a privileged communication and establishes that “[n]o *advocate or legal procurator without the consent of the client ... may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause ...*”, and thus, the applicant argued that the legal privilege belongs to the client, and the obligation of confidence is imposed on the lawyer and this means, that in the current case, the Public Authority owns the legal privilege;
- j. that the jurisprudence established the following principles: (a) the legal privilege is not only about professional secrecy but also about the obligation of confidentiality, which relationship may only and exclusively be dissolved by the client or when the client renounces to it; (b) that the only scope of this obligation is to protect the client; (c) that our rules on legal privilege and the rules of procedure on what may be presented as evidence in legal proceedings are derived from the Anglo-Saxon civil procedural system; (d) that 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 the solicitor or legal adviser; (e) that legal privilege extends to advice about litigation as well as advice for non-litigious business and includes what should prudently and sensibly be done in the relevant legal context; (f) that rules of procedure are to be applied in a way that facilitates the proceedings to be administered justly and in search of the truth and that the interpretation of procedural rules is to be such that these aims are reached and not to facilitate the non-disclosure of information; (g) that the relationship between a legal professional and a client is that of mandate regulated by the Civil Code and therefore

acts on behalf of and in the name of the client; and (h) that the acts which the legal representative carries out are those authorised that fall within the mandate provided to him/her by the client;

- k. that, therefore, considering the principles established by Maltese Courts in relation to the extent and application of legal privilege, it becomes amply clear that: (a) the Public Authority has no legal obligation of confidentiality towards the legal professionals who were commissioned (mandated in terms of law) to carry out a task (the report) for it; (b) the Public Authority can only claim the report to be protected by legal privilege after it expressly refuses to release that legal privilege, since it is up to the Public Authority to withdraw the confidentiality of the report;
- l. that in the current case, the overriding public interest is blatantly clear seeing that the request is for a document related to the negotiation of a business contract funded by public funds, carried out by a public authority, upon which the Public Authority is relying in its accounts and annual report; and
- m. that a public authority, such as Enemalta, is not called upon to publish accounts and annual reports merely for show but as a consequence of its obligations as a public service provider and public authority.

4. On the 13th September 2022, the Public Authority provided its final reply:

- a. that contrary to what is submitted by the applicant, the notion of legal privilege in the context of Maltese law in general and on freedom of information, in particular, is not to be interpreted in the obtuse manner being propagated in the complaint; and
- b. that in terms of Maltese law and particularly Cap. 377 of the Laws of Malta, “*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 contrary to what the applicant stated, the Maltese Courts will not ordinarily order the production of documents compiled by advocates for their clients, irrespective of the scope of the document.

FOI APPLICATION

5. On the 14th November 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 on whether the Public Authority has dealt with the requirements of the Act when it refused to provide access to the requested documentation.

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. On the 28th September 2022, the Commissioner received an application from another applicant wherein a copy of the same document was requested from the Public Authority. For the purpose of investigating the FOI application bearing the reference number FOI/50/2022, the Commissioner issued an information notice on the 3rd October 2022, wherein the Public Authority was requested 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 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 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 the contents of the requested documentation are 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 to certain conditions.

9. Upon receipt of the FOI application lodged by the applicant on the 14th November 2022, the Commissioner proceeded to inform the Public Authority that a FOI application was received by another applicant in relation to same report. A copy of the FOI application made by Mr Jacob Borg in terms of article 23(1)(a) of the Act was provided to the Public Authority for the purpose of enabling the Public Authority to rebut the arguments submitted by the applicant in relation to the refusal of his FOI request.
10. The Commissioner had repeatedly requested the Public Authority to provide its submissions in relation to the information notice issued on the 3rd October 2022, including the application lodged by the applicant. Notwithstanding this, the Public Authority had failed to provide any submissions or information to substantiate its 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

11. 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

12. 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 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.
13. Following the exercise of the applicant’s right to seek the reversal of the first decision through the internal complaints procedure, the final reply provided on the 13th September 2022 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.

14. 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.
15. Article 31 of the Act establishes an exemption in relation to documents subject to legal professional privilege or containing material obtained in confidence. In this regard, this 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 document 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

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

17. 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].*

18. 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].

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

*“[m]až-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 ċitat:*

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.

- **Legal Advice Privilege** jittratta kull komunikazzjoni li tgħaddi bejn l-avukat prattikanti u l-klijent, bl-iskop li jingħata 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-thejjija ta' proċeduri li jkunu ser jinbdeu fi żmien qasir, inkluż id-difiza tal-każ u kull sforz sabiex jiġu evitati l-proċeduri ġudizzjarji jew bl-iskop li sseħħ transazzjoni ta' kawża”³*

20. 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”.

21. 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 klawwsola ta’ kunfidenzjalità, jew meta tirredigi dokument u tikklassifikah hija stess bħala kunfidenzjali. **Huwa evidenti l-għan 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].

22. In this regard, article 31(2) of the Act would render the document 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

³ Ibid. paragraph 18.

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

Authority and the Public Authority had a legal obligation of confidentiality, which is not the case.

The FOI Application and the Requested Documentation

23. For the purpose of investigating this FOI application, the Commissioner proceeded to examine whether the document, or parts of the document, contain any information which is deemed to be exempt in terms of article 31 of the Act.

24. 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 paġna il-kliem “Legal Advice” izda meta wiehed jifli r-rapport anke l-inkarigu mogħti lil avukat [REDACTED] [REDACTED] 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”.

25. 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:

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

“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”.

26. As part of the investigation of this FOI application, the Commissioner inspected a copy of the requested documentation, 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 “full copy (not a summary) of the review carried out by a law firm into Enemalta’s Mozura transaction, as referenced in Enemalta’s 2019 and 2020 accounts” 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.

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
DEGUARA
(Signature)
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by Ian DEGUARA
(Signature)
Date: 2023.06.02
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**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.