

Information and Data Protection Commissioner

CDP/FOI/66/2022

Caroline Muscat

vs

Office of the Prime Minister

THE REQUEST

1. On the 1st September 2022, Ms Caroline Muscat (the “**applicant**”) submitted a request to the Office of the Prime Minister (the “**Public Authority**”) in terms of the requirements set forth in article 6(1) of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting a “[c]opy of contract related to the engagement of Ryan Spagnol as Cabinet Secretary” in electronic format.
2. On the 5th October 2022, the Public Authority informed the applicant that her request was being refused on the basis that “*the requested document is a Cabinet document and is therefore exempt in terms of Article 29(2) of the Freedom of Information Act. The Secretary to Cabinet's contract is on salary scale 1 (please refer to publicly available information in Appendix N of the Financial Estimates - 47,742E for 2022)*”.
3. The applicant was not satisfied with the Public Authority’s reply, and on the 7th October 2022, pursuant to the Internal Complaints Procedure, she requested the Public Authority to reconsider its decision, by contending that “*your reason for declining our request is not valid. An engagement contract cannot be deemed as a Cabinet document!*”.
4. On the 24th October 2022, the Public Authority reconfirmed its position. The applicant was not satisfied with the Public Authority's decision, and on the 31st October 2022, the applicant submitted an application to the Information and Data Protection Commissioner (the “**Commissioner**”) in terms of article 23(1)(a) of the Act, to investigate the case and issue a decision notice in terms of his powers at law. The applicant submitted that “[w]e would appreciate it if you start an investigation on the OPM's refusal to send us the required information. The OPM is stating that an engagement contract of one of the top positions in

the administration is a cabinet document and is covered by secrecy. We deem that this is a very wide interpretation as cabinet secrecy is not also related to engagement contracts”.

INVESTIGATION

Admissibility of the application

5. 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.

The Issuance of an Information Notice

6. As part of the investigation procedure, by means of an information notice, dated the 3rd November 2022, issued in terms of 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 the Commissioner to exercise his functions under the Act, and to determine whether the Public Authority has compiled or is complying with the requirements of the Act. Additionally, the Commissioner requested the Public Authority to provide a copy of the requested documentation in order to be able to analyse the contents and determine whether such documentation is indeed precluded from being disclosed by virtue of the Act.
7. On the 21st December 2022, the Public Authority provided the Commissioner with a copy of the Performance Agreement entered into between the Government of Malta and Mr Ryan Spagnol.

LEGAL ANALYSIS AND DECISION

General Considerations

8. The Commissioner acknowledges that the spirit and scope of the freedom of information legislation is to establish a right to information in order to promote added transparency and accountability in public authorities. The legislation reflects the fundamental premise that all information held by public authorities is in principle public, save for those documents that specifically fall within the exemptions provided for by law. This has been supported by the

jurisprudence of the Court of Appeal in the judgment *Din l-Art Ħelwa vs l-Awtorita' tal-Ippjanar*¹, which held that “[l]-Att dwar il-Liberta' tal-*Informazzjoni* hi ligi intiża biex tipprovdi b'mod ampju iżda b'restrizzjonijiet ċari fl-istess ligi, sens ta' trasparenza u kontabilita fid-deċizzjonijiet, ordnijiet jew direttivi fl-amministrazzjoni pubblika li wara kollox qiegħda hemm għas-servizz tas-soċjeta.” Similarly, the Court of Appeal in the judgment *Allied Newspapers Limited vs Foundation for Medical Services*² highlighted that the “legiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovdi ċerti garanziji għat-tweqqif fil-prattika tal-libertà tal-informazzjoni **bħala s-sisien tal-libertà fundamentali tal-espressjoni**” [emphasis has been added].

9. Moreover, the Court of Appeal in the judgment *Allied Newspapers Limited vs Projects Malta Ltd*³ made reference to the parliamentary debates in relation to the freedom of information legislation, which accentuate the spirit and scope of the legislation:

*“Fi kliem l-Onor. Prim Ministru meta kien qiegħed jippilota l-Att dwar il-Libertà tal-*Informazzjoni* mill-Parlament: “il-prattika kienet li l-*informazzjoni* tibqa' kunfidenzjali sakemm ma jkunx hemm raġuni biex isir mod ieħor. ... Bil-proposta ta' din il-ligi qegħdin naqilbu din il-prattika kompletament ta' taħt fuq, għax issa il-premessa li qegħdin inressqu għall-konsiderazzjoni tal-Qorti hija premessa li tgħid li l-*informazzjoni* issa se tkun soġġetta li tiġi żvelata sakemm ma jkunx hemm raġuni valida skont kriterji stabbiliti mil-ligi għaliex m'għandhiex tkun żvelata. ... It-trasparenza hija wkoll mezz ewlieni biex tiżgura li l-korruzzjoni u l-abbuż ta' poter ma jaqbdux għeruaq u li jinkixfu u jinqerdu fejn ikunu preżenti.”*

Article 29(2) of the Act

10. Primarily, the Commissioner assessed the request of the applicant requesting a “[c]opy of contract related to the engagement of Ryan Spagnol as Cabinet Secretary”, and the exemption invoked by the Public Authority to refuse to provide access to the document in terms of article 29(2) of the Act.
11. The Commissioner noted that the replies of the Public Authority solely refer to article 29(2) of the Act, without indicating and specifying the paragraph(s) upon which it relied to refuse

¹ Appeal Number 7/2019, decided on the 16th May 2019.

² Appeal Number 11/2020 LM, decided on the 18th November 2020.

³ Appeal Number 33/2019LM, decided on the 2nd September 2020.

to provide access to the requested document. Article 29(2) of the Act sets out four paragraphs and it was therefore incumbent on the Public Authority to identify the appropriate reason(s) of the FOI refusal, in order to enable the applicant to clearly understand the refusal of the FOI request and subsequently exercise her rights and remedies in the most effective manner as provided by law.

12. The underlying rationale of the Act is to promote transparency in relation to the documents held by the public authorities and therefore the Public Authority should also exercise a high degree of transparency in relation to the information provided to the applicant vis-à-vis the reason(s) of the refusal to comply with a FOI request. In terms of article 15(1)(a) of the Act, the Public Authority is obliged to give the applicant the reasons for the refusal by citing the appropriate legal exemption in terms of the Act. This is also in line with the settled-case law⁴ of the Court of Justice of the European Union in the interpretation of article 7(1) of Regulation 1049/2001⁵, which provides that *“the purpose of the obligation to state the reasons for an individual decision is to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested”*.
13. In his considerations, the Commissioner noted that article 29(2) of the Act sets forth four instances which could classify the document as a cabinet document and, as a result, exempt from disclosure:

“(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission to the Cabinet;

(b) an official record of the Cabinet;

(c) a document that is a copy of all or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was published”.

⁴ Case T-187/03 *Scippacercola v Commission* [2005], para 66; Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others v Commission* [1996], para. 140; Joined Cases T-46/98 and T-151/98 *CEMR v Commission* [2000], para. 46, and Case T-80/00 *Associação Comercial de Aveiro v Commission* [2002], para. 35.

⁵ 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 decision.

14. The Commissioner clarifies that article 29(2) of the Act intends to cover records covered by cabinet confidentiality and specifically refers to discussions or deliberations of the Cabinet or decisions made by the Cabinet which have not yet been published. Accordingly, the purpose of the creation of the document is the key consideration to determine whether the document requested by the applicant is exempt in terms of article 29(2)(a) to (d) of the Act.
15. The Commissioner emphasises that the Public Authority should effectively demonstrate how the document requested by the applicant is indeed a cabinet document which has been specifically brought into existence for the purpose of submitting it to Cabinet. However, during the course of the investigation, the Commissioner was not presented with any information or explanation as to how the Performance Agreement entered into between the Government of Malta and Mr Ryan Spagnol in relation to the appointment of his role as the Secretary to the Cabinet is in fact a cabinet document which is exempt from disclosure.
16. Article 94(1) of the Constitution provides the manner how the Secretary to the Cabinet is to be appointed. This provision states that the “*Principal Permanent Secretary shall be the most senior public officer and shall act as a Secretary to the Cabinet*”. The proviso to article 94(1) of the Constitution states that “*the Prime Minister may appoint a different person to act as Secretary to the Cabinet, and in such case the Secretary to the Cabinet shall be appointed in the same manner as a Permanent Secretary from amongst persons having the qualifications to be so appointed in terms of article 92*” [emphasis has been added].
17. By means of a press release dated the 1st September 2022, the “*Principal Permanent Secretary Tony Sultana announces the appointment of two new Permanent Secretaries and a Cabinet Secretary, after these nominations were approved by the Public Service Commission It was also announced that Mr Ryan Spagnol would be serving as Cabinet Secretary. Mr Spagnol graduated from the University of Malta with a Master in Public Policy, and has years of experience in the field of home affairs and national security.*”⁶ [emphasis has been added].
18. Consequently, it is clearly evident that the decision to appoint the Secretary to the Cabinet is not made by the Cabinet and it therefore follows that the document requested by the applicant is not a document which has been submitted for the Cabinet’s consideration or was proposed by a Minister. This concretely demonstrates that the document requested by the applicant

⁶ <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2022/09/01/pr221119en.aspx>, last accessed on the 24th May 2023.

would not reveal any information which relates to discussions or deliberations of the Cabinet or decisions made by the Cabinet.

19. Furthermore, the responsibilities of the Secretary to the Cabinet are laid down in article 94(2) of the Constitution, wherein he “*shall be responsible, in accordance with such instructions as may be given to him by the Prime Minister, for arranging the business for, and keeping the minutes of the meetings of the Cabinet and for conveying the decisions of the Cabinet to the appropriate person or authority, and shall have such other functions as the Prime Minister may from time to time direct.*” Pursuant to the reply dated the 5th October 2022, the Public Authority informed the applicant that the “*Secretary to Cabinet's contract is on salary scale 1 (please refer to publicly available information in Appendix N of the Financial Estimates - 47,742E for 2022)*”. In accordance with the Manual on Resourcing Policies and Procedures, the role of the Cabinet to the Secretary is one of the few positions which attracts the highest salary scale within the public service.
20. In this regard, the Commissioner stresses that financial scrutiny lies at the heart of the principle of accountability, which principle reflects the spirit and scope of the Act that contributes to the proper functioning of a democratic society. The settled case-law⁷ of the Information and Data Protection Appeals Tribunal makes it amply clear that employment contracts of individuals occupying top management positions within public authorities should be disclosed to the public.
21. The Court of Appeal confirmed this reasoning in *Allied Newspapers Limited vs Foundation for Medical Services*⁸, wherein it was provided that “[b]l-ebda mod il-kuntratt ta’ impjieg ta’ Neville Gafà u Carmen Ciantar mal-fondazzjoni appellanta, **entità pubblika ffinanzjata minn fondi pubbliċi, ma jistgħu jitqiesu li huma dokumenti eżentati taħt l-artikolu 31(2) tal-Kap. 496, ’il għaliex huwa fl-interess pubbliku li tiġi żvelata l-informazzjoni mitluba, biex jitharsu wkoll il-prinċipji tat-trasparenza u tal-kontabilità f’kuntest ta’ kuntratti ta’ impjieg**” [emphasis has been added].

⁷ Public Broadcasting Services Limited vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data, decided on the the 12th July 2017, Allied Newspapers Limited vs Foundation for Medical Services, decided on the 30th January 2020 and Caroline Muscat vs Public Broadcasting Services Limited decided on the 2nd March 2023.

⁸ Ibid. 2

On the basis of the foregoing considerations, in terms of 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 the applicant with “[c]opy of contract related to the engagement of Ryan Spagnol as Cabinet Secretary” on the basis of article 29(2) of the Act is not justified.

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 document in its entirety after redacting the identity card number of Mr Ryan Spagnol, and the signatures of the parties, within twenty (20) working days from the date of receipt of this decision notice, and inform the Commissioner of the action taken to comply with this order immediately thereafter.

Ian
DEGUARA
(Signature)

Digitally signed
by Ian DEGUARA
(Signature)
Date: 2023.05.30
14:43:50 +02'00'

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.