

**THE FREEDOM OF INFORMATION REQUEST**

1. On the 1<sup>st</sup> August 2022, Mr Christoph Schwaiger (the “**applicant**”) submitted a request to the Ministry for Education, Sport, Youth, Research and Innovation (MEYR) (the “**Public Authority**”) pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting an electronic “[a] copy of the report for tender MEDE421/2020 for “Request for the Provision of a Due Diligence Report within the MEDE” awarded on 28/09/2020 to GCS Assurance Malta for the cost of €4,250.00”.
2. On the 31<sup>st</sup> August 2022, the Public Authority informed the applicant that his request was being refused on the basis of article 32(1)(c)(i) of the Act.
3. The applicant was not satisfied with the Public Authority’s reply, and on the same day, pursuant to the Internal Complaints Procedure, he requested the Public Authority to reconsider its decision, by contending that, “[t]he Ministry for Education, Sport, Youth, Research and Innovation (MEYR) has not sufficiently explained/proven why the document is excluded from the scope of this Act by virtue of Article 32(1)(c)(i)”.
4. On the 22<sup>nd</sup> September 2022, the Public Authority reconfirmed its position by stating that “[t]he document requested is excluded from the scope of this Act by virtue of Article 32(1)(c)(i)”.

## FREEDOM OF INFORMATION APPLICATION

5. The applicant was not satisfied with the Public Authority's decision and, on the 20<sup>th</sup> October 2022, 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 has dealt with his application in accordance with the requirements of the Act.

## INVESTIGATION

### Admissibility of the 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 the freedom of information application, together with the procedural steps involved between the applicant and the Public Authority in the request for an electronic "[a] copy of the report for tender MEDE421/2020 for "Request for the Provision of a Due Diligence Report within the MEDE" awarded on 28/09/2020 to GCS Assurance Malta for the cost of €4,250.00" (the "**requested documentation**"), the Commissioner considers this freedom of information application as admissible for the purpose of article 23(2) of the Act.

### The Issuance of the Information Notice

7. As part of the investigation procedure, by means of the information notice dated the 27<sup>th</sup> 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 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 with the requirements of the Act. In particular, the Commissioner requested the Public Authority to make any comments or submissions, which are deemed necessary and relevant to support its decision in relation to the refusal of the request, on the basis of article 32(1)(c)(i) of the Act, and additionally requested the Public Authority to enclose with its reply, a true copy of the requested documentation.

### Submissions received from the Public Authority

8. On the 24<sup>th</sup> November 2022, the Public Authority provided a true copy of the requested documentation and submitted the following arguments for the Commissioner to consider in the legal analysis of this case:

- a. that the Public Authority had a signed contract with a company called '*Learning Machine*' for the provision of Blockchain credentialing, valid until the end of December 2020. In February 2020, *Learning Machine* was acquired by [REDACTED]. In this regard, the General Contracts Committee (GCC), requested the Public Authority to conduct due diligence on [REDACTED]. This was needed as a security measure before making an addendum to the original contract to account for this acquisition. Following an Accelerated Open Procedure, on the 28<sup>th</sup> September 2020, the Public Authority awarded the tender for the provision of this due diligence report to GCS Assurance Malta;
- b. that a due diligence report delves deep into certain aspects of the company and the individuals involved, and not all information contained within it is publicly available. The due diligence report carried out by GCS Assurance Malta on [REDACTED] contains:
- data related to the financial standing of the company (which are explicitly marked as confidential by the authors of the report);
  - financial analysis made by the authors of the report. If made public such analysis can be easily misinterpreted, especially if made by persons who are not well versed in the financial analysis. This can lead to financial and commercial damage to the company and thus article 32(1)(c)(i) of the Act applies;
  - bank's status opinion in relation to the company which is issued only upon a specific request of the client itself. In this case it was issued upon a specific request by the company to the bank in order to allow the conduction of the due diligence. Once again this would highly prejudice the confidentiality of such document, and as per previous point, article 32(1)(c)(i) of the Act applies;
  - passport copies of the board of directors and executive management, which would amount to a breach of data protection and possibly amount to a security issue;
  - internal documents of the company; and
  - criminal and other sensitive information about third parties resulting from in-depth search on persons involved in the company.
- c. that the disclosure of the requested documentation can also lead to [REDACTED] to file an action against the Public Authority for breach of confidence as per article 31(2) of the Act; and

- d. that other information in the report in question, such as information on the Executive Team the company's acquisitions, is available in the public domain on the company's website.

### **Submissions received from the Applicant**

9. Pursuant to this Office's internal procedure, the Commissioner provided the applicant with the opportunity to rebut the arguments made by the Public Authority. In this regard, on the 12<sup>th</sup> December 2022, the applicant submitted the following principal arguments:

- a. that having seen the reasoning submitted by the Public Authority arguing against disclosure, the applicant is satisfied with a redaction of the passport copies, in so far as they are likely to contain personal data;
- b. that without having seen the documentation mentioned by the Public Authority, the applicant is only able to rely on the list provided by the Public Authority as to a description of said documentation, which narrows the discussion to documentation pertaining to, among other things, data on the financial standing of the company, a financial analysis, a bank status opinion, internal documents, and details of third parties with criminal histories that the Public Authority is negotiating with;
- c. that in summary, the Public Authority is arguing that disclosure would adversely affect [REDACTED]. In this regard, the applicant referred to '*Derry City Council vs Information Commissioner*'<sup>1</sup> in which the Tribunal stated:

*“(a) Ryanair did not place before us any evidence of its commercial interests, let alone the likely prejudice which it might suffer as a result of disclosure. In the course of correspondence between the Council and the Information Commissioner some arguments were put forward as to the damage which might be suffered by Ryanair, but it was readily accepted by Mr McGurk during his cross-examination that those reflected the Council's thoughts on the point, not any representations made to it by Ryanair.*

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<sup>1</sup> Appeal Number: EA/2006/0014, '*Derry City Council vs Information Commissioner*', decided on the 11<sup>th</sup> December 2006, available at: <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i69/Derry.pdf>

*(b) As we have already said Ryanair, did not participate in the appeal and was not represented before us. Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced”.*

- d. that when submitting its arguments to the Commissioner, the Public Authority did not seek [REDACTED]'s input regarding the alleged prejudices, but rather provided its own perspective. Since these viewpoints exclusively represent the Public Authority's stance, the applicant finds no alternative but to exclude them from this investigation;
- e. that it is insufficient for the Public Authority to simply argue that the disclosure of commercially sensitive information is likely to prejudice commercial interests. The Public Authority must demonstrate a causal relationship between the disclosure of the requested documentation and the prejudice it is talking about;
- f. that in response to claims that [REDACTED] may or may not take action against the Public Authority, as per Information Commissioner's Office (ICO)'s guidance:

*“Having a confidentiality clause in place does not guarantee that information will not be disclosed under FOIA, and you should be wary of attempts to impose a blanket confidentiality clause on all the information contained in a contract”<sup>2</sup>.*

- g. that the applicant noted the press release<sup>3</sup> issued by the Government of Malta, stating that *“[t]he Ministry for Education and Employment (MEDE) and Learning Machine signed a two-year agreement to roll out Blockcerts to **all Maltese education institutions**. Academic credentials like diplomas, school leaving certificates, and transcripts will be issued to Maltese students in an internationally portable, instantly verifiable digital format”* [emphasis added by the applicant];

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<sup>2</sup> Information Commissioner's Office (ICO), 'Section 43 - Commercial interests', available at: <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

<sup>3</sup> Press Release by the Office of the Prime Minister, 'PR190340' dated 21<sup>st</sup> February 2019, available at: <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2019/February/21/pr190340.aspx>

- h. that “[g]iven that the due diligence documentation in question pertains to a company that has access to the most sensitive of records of Maltese students **including minors**, the public interest is most definitely served best when the public is allowed to ensure that any third company coming within such a close range of documentation pertaining to students is fit and proper. Even more so when criminal behaviour is involved” [emphasis added by the applicant];
- i. that in the aforementioned case EA/2006/0014, there are several factors in favour of disclosing the requested documentation, including:
- the desirability of furthering the understanding of, and participation in, public debate on the topic;
  - facilitating accountability and transparency of public authorities for their decisions;
  - facilitating accountability and transparency in the spending of public money; and
  - allowing individuals to understand decisions made by public authorities affecting their lives.
- j. that “[t]he good people of the Republic of Malta deserve to rest with the serenity that documentation pertaining to their education, with implications on their further education and job prospects (all of which have real tangible effects on their whole livelihoods) are in safe and reliable hands. The MEYR’s argumentation is principally about shielding [REDACTED] from any perceived commercial prejudices. The applicant would look favourably upon the MEYR instead arguing in favour of the rights of the Maltese general public and Maltese students”.

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

10. In line with the investigation procedure of this Office, on 15<sup>th</sup> December 2022, the Commissioner provided the Public Authority with the opportunity to rebut the arguments made by the applicant. In this regard, the Public Authority had the final opportunity to rebut the arguments of the applicant, and submitted the following salient arguments:

- a. that “[i]t is a baseless assumption to say that [REDACTED] will not take any action against MEYR if the latter divulges sensitive information. UK ICO cannot be compared leisurely to the Maltese FOI Act as this is not GDPR and they reflect two different

*jurisdictions. In fact even the Maltese Act in article 31(2) makes reference to breach of confidentiality. It is frivolous and baseless to allege that such a company is not aware of the Laws of Malta with particular reference to Cap 496. Indeed, here MEYR is not judging the seriousness of the company but conducted a due diligence exercise”;*

- b. that “[a]nother erroneous frivolous assumption brought forward is that the company has access to the most sensitive records of Maltese students, including minors. Wha [REDACTED] has access to is regulated by the Law and is within the parameters of providing the service. Access is reflected in any audit trail. The applicant alleges that the public is the best judge to decide whether a company is fit and proper to access documentation. Such assumption would mean that one can do without all procedures and structures in place to evaluate the suitability of service providers and leave the decisions to the general public. MEYR does not agree and believes that making such document public will also run counter to article 30(2)(b)”;
- and
- c. that “the document does not only solely contain information about the directors of the company but also about others which have the same or similar names such as criminal records. Besides, such information, even on the directors, is considered as sensitive, so much so that the general public do not have access to criminal records. Such data is protected by the Freedom of Information Act of article 32(1)(c)”.

## **LEGAL ANALYSIS AND DECISION**

### The Freedom of Information Request

11. The Commissioner examined the request submitted by the applicant pursuant to article 3 of the Act, wherein the Public Authority was requested to provide “[a] copy of the report for tender MEDE421/2020 for “Request for the Provision of a Due Diligence Report within the MEDE” awarded on 28/09/2020 to GCS Assurance Malta for the cost of €4,250.00”.
12. The Commissioner will only consider the exemption outlined in article 32(1)(c)(i) of the Act, as invoked by the Public Authority in its initial response on 31<sup>st</sup> August 2022 and reaffirmed through the Internal Complaints Procedure on 22<sup>nd</sup> September 2022. Consequently, the alternative exemption put forth by the Public Authority on the 24<sup>th</sup> November 2022, specifically contending that the disclosure of the requested document is exempt under article 31(2) of the Act, will not be taken into consideration.

## General Considerations

13. 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.
14. This has been supported by the jurisprudence of the Court of Appeal in the judgment *Din l-Art Hehwa vs l-Awtorita' tal-Ippjanar*<sup>4</sup>, which held that “[l]-Att dwar il-Liberta' tal-Infommazzjoni hi liġi intiża biex tipprovdi b'mod ampju iżda b'restrizzjonijiet ċari fl-istess liġi, sens ta' trasparenza u kontabilita fid-deċiżjonijiet, 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*<sup>5</sup> highlighted that the “*leġiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovdi ċerti garanziji għat-twettiq fil-prattika tal-libertà tal-infommazzjoni bħala s-sisien tal-libertà fundamentali tal-espressjoni*”.
15. Moreover, the Court of Appeal in the judgment *Allied Newspapers Limited vs Projects Malta Ltd*<sup>6</sup> 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-Infommazzjoni mill-Parlament: “il-prattika kienet li l-infommazzjoni tibqa' kunfidenzjali sakemm ma jkunx hemm raġuni biex isir mod ieħor. ... Bil-proposta ta' din il-liġi 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-infommazzjoni issa se tkun soġġetta li tiġi żvelata sakemm ma jkunx hemm raġuni valida skont kriterji stabbiliti mil-liġi għaliex m'għandhiex tkun żvelata. ... It-trasparenza hija wkoll mezz ewlieni biex tiżgura li l-korruzzjoni u l-abbuż ta' poter ma jaqbdux għeruq u li jinkixfu u jinqerdu fejn ikunu preżenti.”*

## Article 32(1)(c)(i) of the Act

16. The Public Authority cited article 32(1)(c)(i) of the Act as the reason to justify the refusal of the

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<sup>4</sup> Appeal Number 7/2019, decided on the 16th May 2019.

<sup>5</sup> Appeal Number 11/2020 LM, decided on the 18<sup>th</sup> November 2020.

<sup>6</sup> Appeal Number 33/2019LM, decided on the 2<sup>nd</sup> September 2020.



documentation requested by the applicant. For this purpose, the Commissioner examined article 32(1)(c)(i) of the Act, which prohibits the disclosure of a document if “*information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information: (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs*”.

17. The first step in the application of article 32(1)(c)(i) of the Act requires the proper characterisation of the relevant information to ascertain whether the requested documentation concerns the “*business or professional affairs*” of a person or the “*business, commercial or financial affairs of an organisation or undertaking*”. Therefore, this exemption intends to protect the harm that a person, or an organisation, or an undertaking, would or could reasonably be expected to, unreasonably suffer, because of the disclosure of the requested documentation.
18. The Commissioner remarks that this exemption is intended to protect any prejudice which third parties, other than the Public Authority, might suffer because of the disclosure of the requested documentation. In his analysis, the Commissioner scrutinised the true copy of the requested documentation provided on the 24<sup>th</sup> November 2022, as well as the submissions received from the Public Authority on the same date. The Commissioner continued by examining the objectives and procedures of the due diligence report, as well as the components contained in such report carried out by GCS Assurance Malta on [REDACTED].
19. Within this context, the Commissioner examined the explanations provided by the Public Authority, for each aspect of the due diligence report, outlining the potential harm that could arise if such document was to be disclosed:
  - a. that the Public Authority clarified that that the financial analysis may be misinterpreted if read by individuals lacking financial expertise, and therefore this poses a risk of misinterpretation, potentially leading to inaccurate assessments of the company's financial health and causing unwarranted commercial damage;
  - b. that the Public Authority outlined that the “*bank's status opinion in relation to the company which is issued only upon a specific request of the client itself*”. The Commissioner noted that disclosing this information without proper authorisation could

breach the confidentiality of the document and impact the relationship between the company and its financial institutions;

- c. that the Commissioner observed that the requested documentation contains copies of the passports of the board of directors and executive management, as well as criminal and sensitive information about third parties. The Commissioner further noted that the disclosure of these documentation would violate data protection regulations and potentially jeopardise the personal security of these individuals;
- d. that the Commissioner conducted a thorough analysis of the true copy of the requested documentation, specifically the section containing the internal documents of the company, which includes its policies and procedures. It was noted that the disclosure of this section will expose the company's internal procedures, and could unreasonably affect the lawful business or professional affairs of [REDACTED].

**On the basis of the foregoing, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and determining that the decision taken by the Public Authority to refuse the applicant's request for "[a] copy of the report for tender MEDE421/2020 for "Request for the Provision of a Due Diligence Report within the MEDE" awarded on 28/09/2020 to GCS Assurance Malta for the cost of €4,250.00", is justified on the basis of article 32(1)(c)(i) of the Act.**

Ian  
DEGUARA  
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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, Merchants Street  
Valletta.