

## THE FREEDOM OF INFORMATION REQUEST

1. On the 15<sup>th</sup> September 2022, Mr Christoph Schwaiger (the “**applicant**”) submitted a request to the Environment and Resources Authority (ERA) (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 “[a] copy of the minutes of ERA Board Meeting 4571 of 03/09/2021”, in electronic format.
2. On the 17<sup>th</sup> October 2022, the Public Authority informed the applicant that his request could not be met because “*by virtue of Part V or Part VI, there is good reason for withholding the document requested*”.
3. The applicant was not satisfied with the Public Authority’s reply, and on the 21<sup>st</sup> October 2022, pursuant to the Internal Complaints Procedure, he requested the Public Authority to reconsider its decision, by contending that “[t]he PA failed to indicate to the applicant a specific reason as to why the request was being refused”.
4. On the 7<sup>th</sup> November 2022, the Public Authority reconfirmed its position by stating that “*by virtue of Part V or Part VI, there is good reason for withholding the document requested. Board minutes of discussions which are not held in public are privileged documents and exempted by virtue of the Freedom of Information Act (Chapter 496 of the Laws of Malta)*”.

## FREEDOM OF INFORMATION APPLICATION

5. The applicant was not satisfied with the Public Authority’s decision and, on the 21<sup>st</sup> December 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. The applicant argued that the Public Authority “*did not provide the applicant with a sufficient reason to enable him to understand the refusal of the FOI request*” and “[i]n the event that it is found that the PA did in fact comply with the entirety of Article 15, the applicant further argues that board minutes of discussions which are not held in public are not privileged documents and thus are not exempted by virtue of the Freedom of Information Act (Chapter 496 of the Laws of Malta)”.

## 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 copy of “*the minutes of ERA Board Meeting 4571 of 03/09/2021*” (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 2<sup>nd</sup> February 2023, 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:
  - a. to specify which is/are the legal exemption(s) upon which the Public Authority is relying to refuse access to the requested documentation in terms of Part V or Part VI of the Act as indicated in the reply of the 17<sup>th</sup> October 2022 and 7<sup>th</sup> November 2022;

- b. to indicate which type of information is contained in the requested documentation;
- c. to explain how and why the information contained in the requested documentation is deemed '*privileged*'; and
- d. if all the information held in the requested documentation is deemed to be '*privileged*'.

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

8. On the 20<sup>th</sup> February 2023, the Public Authority submitted the following arguments for the Commissioner to consider in the legal analysis of this case:
  - a. that the Public Authority refused the applicant's request on the basis of article 14(b) of the Act, which stated that "[a] request made in accordance with article 6 may be refused only for one or more of the following reasons: (b) that, by virtue of Part V or Part VI, there is good reason for withholding the document requested";
  - b. that more specifically, the Public Authority's legal basis for refusing the applicant's request is article 36 of the Act, particularly that the requested documentation is considered an '*internal working document*';
  - c. that the requested documentation pertains to a specific minute of a particular Board meeting. The Board is established through article 6 of the Environment Protection Act, Chapter 549 of the Laws of Malta, and holds regular meetings. In accordance with applicable legislation, some meetings and deliberations are open to the public. All meetings conducted by the Public Authority's Board are assigned a specific number, and each minute is given a different number. While minutes of meetings held in public are made available upon request, there are certain deliberations which are held by the Board which, in line with article 36 of the Act, constitute an internal working document. In this instance, on the 3<sup>rd</sup> September 2021, Board sitting 141 took place, during which various items were discussed, including the specific matter mentioned in the requested minute;
  - d. that the requested documentation "*relates to an item which is considered as an internal working document exempted by virtue of article 36 in that it contains matters relating to opinions, advice or recommendations obtained, prepared or recorded, or*

*consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of a public authority, i.e. ERA”;*

- e. that *“the exemption under article 36(1) is subject to sub-articles (2) and (3) as well as to article 35. In this instance, sub-articles (2) and (3) of article 36 do not apply as the document requested does not contain purely factual information, reports or records as specified therein (above quoted). Furthermore, article 35(2) states that a document may be withheld "only if it contains matter in relation to which the public interest that is served by non-disclosure outweighs the public interest in disclosure." (Emphasis added). This balancing exercise of weighing the public interest of the disclosure versus its nondisclosure, was so conducted by the Authority and, bearing in mind the content of the document, it was decided that the interests served by its non-disclosure in its entirety indeed outweigh the public interest that would be served by its disclosure”;*
- f. that internal working documents are considered as privileged documents in terms of article 637(3) of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, stating that:

*“(3) It shall not be lawful to demand the production of any document which is held by a public authority and –*

- (a) which is an exempt document under articles 29, 30 or 36(1) or sub-articles (4) or (5) of article 32 of the Freedom of Information Act; or*  
*(b) the disclosure of which is prohibited by any other law”.*

9. On the 2<sup>nd</sup> March 2023, the Public Authority provided the Commissioner with a true copy of the requested documentation.
10. Pursuant to this Office’s internal procedure, on the 27<sup>th</sup> February 2023, the Commissioner extended to the applicant the opportunity to respond to the arguments put forth by the Public Authority. Subsequently, on the 26<sup>th</sup> March 2023, the applicant informed the Commissioner that he had no additional submissions to provide.
11. In line with the investigation procedure of this Office, on the 30<sup>th</sup> March 2023, the Commissioner informed the Public Authority that the applicant had no further submissions to provide concerning this matter. The Commissioner also inquired whether the Public Authority

wished to provide any additional comments or present further arguments. On the 11<sup>th</sup> April 2023, the Public Authority confirmed that it had no additional submissions to present.

## LEGAL ANALYSIS AND DECISION

### The Handling of the FOI Request

12. As a preliminary step of the investigation, the Commissioner sought to establish, to the extent appropriate, whether the Public Authority has complied with the requirements of the Act. In this regard, the Commissioner examined the first reply provided by the Public Authority on the 17<sup>th</sup> October 2022, wherein the applicant was informed that his freedom of information request could not be met because *“by virtue of Part V or Part VI, there is good reason for withholding the document requested”*. Following the exercise of the right of the applicant to seek the reconsideration of the decision of the Public Authority through the Internal Complaints Procedure, the Public Authority provided its final reply on the 7<sup>th</sup> November 2022, where the Public Authority noted that *“by virtue of Part V or Part VI, there is good reason for withholding the document requested. Board minutes of discussions which are not held in public are privileged documents and exempted by virtue of the Freedom of Information Act (Chapter 496 of the Laws of Malta)”*.
13. After the Commissioner examined the freedom of information application lodged by the applicant pursuant to article 23(1)(a) of the Act, it has been established that the replies provided are not compliant with the requirements of article 15(1)(a) of the Act, and this is because the applicant has not been provided with adequate and clear reasons for refusal. Therefore, before entering into the merits of the case, the Commissioner emphasises that the Public Authority must provide, in a clear and unequivocal manner, the reasoning which it followed to reach its decision to refuse the freedom of information request in terms of the exemptions set forth in Part V and, or Part VI of the Act<sup>1</sup>. This is necessary to enable the applicant to seek the review of the decision of the Public Authority and to exercise his right to review and appeal in the most effective manner.
14. Accordingly, the Commissioner noted that article 15(1)(a) should also be interpreted in line with the settled-case law<sup>2</sup> of the Court of Justice of the European Union in its interpretation of

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<sup>1</sup> Article 15(1)(a) of the Act provides that: *“[w]here a request made in accordance with this Act is refused, the public authority shall - (a) subject to article 34, give the applicant the reasons for the refusal”*.

<sup>2</sup> 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

article 7(1) of Regulation 1049/2001<sup>3</sup>, 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*”.

### General Considerations

15. 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.
16. This has been supported by the jurisprudence of the Court of Appeal in the judgment *Din l-Art Ħelwa vs l-Awtorita' tal-Ippjanar*<sup>4</sup>, which held that “[l]-Att dwar il-Liberta' tal-*Informazzjoni hi liġi intiża biex ttiprovdi b'mod ampju iżda b'restrizzjonijiet ċari fl-istess liġi, 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*<sup>5</sup> highlighted that the “*legiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovdi ċerti garanziji għat-twettiq fil-prattika tal-libertà tal-informazzjoni bhala s-sisien tal-libertà fundamentali tal-espressjoni*”.
17. 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-*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-liġi qegħdin naqilbu din il-prattika kompletament ta' taħt fuq, għax issa**

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*CEMR v Commission* [2000], para. 46, and Case T-80/00 *Associação Comercial de Aveiro v Commission* [2002], para. 35.

<sup>3</sup> 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.

<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.

*il-premessa li qegħdin inressqu għall-konsiderazzjoni tal-Qorti hija premessa li tgħid li l-informazzjoni issa se tkun sogġetta 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 għeruaq u li jinkixfu u jinqerdu fejn ikunu preżenti."*

#### Article 36 of the Act

18. The Public Authority cited article 36 of the Act as the reason to justify the refusal of the documentation requested by the applicant. For this purpose, the Commissioner examined article 36 of the Act, which provides that:

*"(1) Subject to article 35 and to subarticles (2) and (3) hereof, a document is an exempt document if its disclosure under this Act would disclose matter in the nature of, or relating to, opinions, advice or recommendations obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of the Government or another public authority.*

*(2) Subarticle (1) shall not apply to a document by reason only of purely factual information contained in the document.*

*(3) Subarticle (1) shall not apply to:*

*(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed by a public authority or not, including reports expressing the opinions of such experts on scientific or technical matters; or*

*(b) the record of, or a final statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.*

*(4) In subarticle (3) the term "scientific or technical expert" shall be construed as excluding senior managers in public authorities".*

19. The Commissioner acknowledged that some documents merit higher protection than others due to the sensitive nature of their content and the harm which the Public Authority or an individual can realistically suffer as a result of the disclosure, and in this regard, the Act distinguishes between qualified and absolute exemptions.
20. The Commissioner established that the objective pursued by article 36(1) of the Act is to protect the internal working documents of the Public Authority, however, this exemption is not absolute and consequently, the Public Authority should satisfy the public interest test by concretely demonstrating how the *“public interest that is served by non-disclosure outweighs the public interest in disclosure”*. In addition, the applicability of the exemption is subject to article 36(2) of the Act, which states that *“[s]ubarticle 1 shall not apply to a document by reason only of purely factual information contained in the document”*. Therefore, article 36(1) of the Act could only apply if the Public Authority effectively demonstrates that: (a) the public interest that is served by non-disclosure outweighs the public interest in disclosure; (b) the document does not contain factual information; and (c) the document is not a report of scientific or technical experts.
21. In this connection, the Commissioner examines section 14.3 of the Code of Practice for Public Authorities (the **“Code”**), published in accordance with article 41 of the Act, which provides guidance in relation to situations where article 36(1) of the Act may apply:
- “a) The disclosure of the document would give rise to undue alarm or concerns;*  
*or*
- b) The disclosure of the document could give rise to misunderstandings or misconceptions with regard to Government Policy or intention; or*
- c) The document, if disclosed, may result in dissemination of information that is not factually accurate or out of date; or*
- d) The document is a work in progress which is likely to undergo significant change before it is finalized; or*
- e) The disclosure of the document would reveal internal discussions, deliberations, exchange of views, proposals, advice or recommendations on the part of officials or holders of political office concerning Government policy.”*
22. After reading article 36 of the Act in conjunction with section 14.3 of the Code, the Commissioner also considered the submissions of the Public Authority, whereby it was



outlined that “relates to an item which is considered as an internal working document exempted by virtue of article 36 in that it contains matters relating to opinions, advice or recommendations obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of a public authority, i.e. ERA”. In this regard, the Commissioner conducted a thorough examination of the requested documentation provided by the Public Authority and concluded that the document does not contain any of the requirements that would qualify the document as an internal working document pursuant to article 36(1) of the Act.

23. In its submissions, the Public Authority argued that “*the exemption under article 36(1) is subject to sub-articles (2) and (3) as well as to article 35. In this instance, sub-articles (2) and (3) of article 36 do not apply as the document requested does not contain purely factual information, reports or records as specified therein*” [emphasis has been added]. The Commissioner determined that the document requested by the applicant contains factual information, and thus, the Public Authority failed to effectively demonstrate how the document requested by the applicant is exempt under sub-articles (2) and (3) of article 36 of the Act. It is essential to emphasise that this document indeed contains factual information, namely minutes of the meeting detailing past events. Therefore its disclosure should not be construed as disclosing content pertaining to opinions, advice, recommendations, consultations, or deliberations integral to the Government or another public authority's decision-making processes.

24. Furthermore, in the submissions provided to the Commissioner, the Public Authority stated that the “*balancing exercise of weighing the public interest of the disclosure versus its nondisclosure, was so conducted by the Authority and, bearing in mind the content of the document, it was decided that the interests served by its non-disclosure in its entirety indeed outweigh the public interest that would be served by its disclosure*”. However, the Public Authority failed to provide compelling reasons to effectively demonstrate how the public interest that is served by non-disclosure outweighs the public interest in disclosure.

**On the basis of the foregoing, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and concluding that the refusal of the Public Authority to provide the applicant with a “[a] copy of the minutes of ERA Board Meeting 4571 of 03/09/2021” 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 documentation, after redacting the full**

**name of the individuals mentioned in the document, as well as the signature of the Board Secretary. The redacted copy of the requested 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.**

**Moreover, pursuant to article 23(4)(b) of the Act, the Public Authority failed to comply with the requirements of Part II, in particular, with article 15(1)(a) thereof, as it did not provide the applicant with a sufficient reason to enable the applicant to understand the refusal of his request. The Public Authority must ensure that it handles future requests in accordance with the requirements of the Act and therefore provide applicants with clear and correct reasons when refusing requests for information.**

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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.