Information and Data Protection Commissioner

CDP/FOI/87/2022

Christoph Schwaiger

vs

Office of the Prime Minister

FREEDOM OF INFORMATION REQUEST

1. On the 26th August 2022, Mr Christoph Schwaiger (the **"applicant"**) made a request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act (the **"Act"**) requesting the Office of the Prime Minister (the **"Public Authority"**) to provide an electronic copy of "*the final report/study produced by tender OPM_E/T/01/2021, namely Tender to carry out a study about a change in mobility management in the Maltese Public Service through the procurement of a cleaner fleet of government general-use vehicles*".

2. On the 28th September 2022, the Public Authority informed the applicant that the "*requested document is exempt in terms of Article 38(d) of the Freedom of Information Act*".

3. On the 29th September 2022, the applicant presented a complaint through the internal complaints procedure seeking the reconsideration of the refusal of the Public Authority. The applicant submitted that the "*PA has not sufficiently proved how this would be the case. Furthermore, the applicant notes that ironically this FOI request was refused by the OPM on the same day on which the Justice Minister was boasting about the new press reforms. The OPM is requested to overturn its initial decision*".

4. On the 14th October 2022, the Public Authority reiterated its decision that *"the document requested is exempt in terms of Article 38(d) of the Freedom of Information Act*".

FREEDOM OF INFORMATION APPLICATION

5. On the 12th December 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 Freedom of Information 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 FOI application, together with the procedural steps involved between the applicant and the Public Authority in the request for information, the Commissioner deemed the application made by the applicant as admissible for the purpose of article 23(2) of the Act.

INVESTIGATION

Issuance of an Information Notice

7. As part of the investigation procedure, by means of an information notice dated the 15th December 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 addition, the Commissioner requested the Public Authority to enclose with its reply or deliver by hand and under confidential cover, a true copy of the requested document.

8. On the 6th January 2023, the Public Authority submitted three (3) reports for the Commissioner to inspect during the course of the investigation. Given that no submissions were provided in its reply, the Commissioner reiterated his request for information, namely, the following:

    a. to provide submissions, in support of the decision to refuse access to the requested document, and clearly explain how the disclosure would, or could reasonably be expected to cause harm to the protected interest; and

b. to explain which factors were taken into consideration when carrying out the public interest test as set forth in article 35 of the Act in relation to the exemption cited by the Public Authority pursuant to Part VI of the Act.

Submissions received from the Public Authority

9. On the 24th January 2023, the Public Authority provided the following arguments in relation to the refusal of the document:

a. that the "*reports requested by the applicant and internally passed on to the IDPC are preliminary studies commissioned for the Public Service to move forward and switch its vehicles to vehicles that do the least harm to the environment. The reports, as you can also see, contain an amount of confidential information such as the composition analysis of the government fleet, infrastructural requirements and market assessment of entry prices. These include ideas that we agree with and ideas that we disagree with and it is therefore unfair to make them public because they may be interpreted that we agree with them. We do not want that such report mislead or alarm. It is to be noted that these documents are not based on purely factual information, but also provide for recommendations upon which decision making applies in due course*";

b. that "[o]*n a point of principle, we do not think that commissioned, technical and costly reports should be made public since they are full of recommendations hence they should be considered as internal working documents in terms of Article 36(1) of the Act. It is to be noted that some of the data in question can also be used commercially against the Public Service and may hinder the negotiation/procurement process of the fleet. This includes, although not exclusively, the Risk and Sensitivity Analysis, the local availability and pros and cons of each model*"; and

c. that "*now that the reports have been analysed and we have taken up what we need, a tender has already been issued which is publicly accessible on the electronic public procurement system (EPPS) and therefore the Tender document supercedes* [sic] *the requested reports. The Tender documents are publicly available at* https://www.etenders.gov.mt/epps/cft/prepareViewCfTWS.do?resourceId=9522394"

Submissions received from the Applicant

10. On the 7th March 2023, the Commissioner provided a copy of the Public Authority's submissions to the applicant in order to ensure that the right to be heard is guaranteed. The applicant submitted the following counterarguments:

    a. that "*a document may be withheld in accordance with the provisions of this Part of the act only if it contains matter in relation to which the public interest that is served by non-disclosure outweighs the public interest in disclosure*";

    b. that "*the public interest is best served by disclosure in this case as disclosure of the requested documentation will put the public's mind at ease that their monies are being spent well given that it concerns the fleet to be used by government workers which are paid by public monies to serve that same public*";

    c. that "[a]*s per a government communique (see: https://publicservice.gov.mt/en/Pages/News/2021/20210224_ElectricVehicles.aspx) the documents being requested pertain to a "budget measure being implemented." The Head of Public Service, Mario Cutajar, said that this was yet another measure that would change the way the Public Service works, to make it more efficient, effective, relevant and accountable. He said "this is not the first measure being taken in the Public Service that addresses not only an administrative need for better work but also has a wider aim of ensuring that the administrative solutions found take into account the needs of the country. It also states that the study being requested "should determine the best financial model to ensure accountability of the whole system*"; and

    d. that "[t]*hus, seeing that Public Service's main aim all along has been accountability of the whole system (taking into account the needs of the country), the applicant cannot help but participate in this enthusiasm for transparency and agree that accountability should indeed be the main aim. The applicant would like to see this exciting sense of accountability extended to the release of the documents requested (to take into account the needs of the country) in full and in the original format in which they were requested, i.e. an electronic copy sent vis email*".

11. The Public Authority did not wish to rebut any further the submissions of the Public Authority and informed the Commissioner that the *"Authority still holds that the said report should not be published for the reasons given in our letter of 20 January 2023*".

LEGAL ANALYSIS AND DECISION

General Considerations

12. The right to receive information is a fundamental right entrenched under article 11 of the Charter of Fundamental Rights of the European Union. Mindful of the fact that this right is not absolute, it is incumbent on the Commissioner to conduct a fair and fully impartial analysis designed to achieve the right balance between any competing interests in accordance with the principle of proportionality, thus ensuring that his decision further strengthens the proper functioning of a democratic society.

13. Whereas the objective of the Act is to confer on the applicants as wide a right of access to information, this right is nonetheless subject to certain limitations based on exemptions as set forth in Part V and Part VI of the Act. Within this context, the law provides for a number of exemptions that enable the public authorities to refuse access to information where its disclosure would, or could undermine the protection of one of the interests intended to be protected by Part V and Part VI of the Act. Notwithstanding this, the Commissioner emphasises that the exemptions derogate from the principle of the widest possible access to information, and as a result, the exemptions should be interpreted and applied strictly.

14. 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 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 ghas-servizz tas-soċjeta."* Similarly, the Court of Appeal in the judgment 'Allied Newspapers Limited vs Foundation for Medical Services'[2] highlighted that the "*leġiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovdi ċerti garanziji għat-twettiq fil-prattika tal-libertà tal-informazzjoni bħala s-sisien tal-libertà fundamentali tal-espressjoni".*

[1] Appeal Number 7/2019, decided on the 16th May 2019.
[2] Appeal Number 11/2020 LM, decided on the 18th November 2020.

15. 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-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-informazzjoni 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."*

Exemptions cited by the Public Authority

16. For the purpose of this legal analysis, the Commissioner proceeded to examine the reason of refusal which was cited by the Public Authority in relation to the refusal to provide the "*the final report/study produced by tender OPM_E/T/01/2021, namely Tender to carry out a study about a change in mobility management in the Maltese Public Service through the procurement of a cleaner fleet of government general-use vehicles*" on the basis of article 38(d) of the Act.

17. The exemption invoked by the Public Authority states that "[s]*ubject to article 35, a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to: (d) have a substantial adverse effect on the conduct of negotiations (including commercial and industrial negotiations) by or on behalf of the Government or another public authority*".

18. The onus rests on the Public Authority to effectively demonstrate the link between the refusal to provide the requested document and the claimed prejudice. When a public authority refuses to disclose the requested information, such refusal must be clearly substantiated by how the disclosure would prejudice the interests protected by the exemptions set forth in the Act. Within this context, the Commissioner refers to Regulation (EC) No. 1049/2011 of the European

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

Parliament and of the Council of the 30th May 2001 regarding public access to European Parliament, Council and Commission documents, which serves as a guidance when it comes to the interpretation of the provisions of the Act. The Court of Justice of the European Union (the "**CJEU**") in its settled-case law provides that the refusal to a request in terms of Regulation 1049/2001 should fulfill the following criteria:

> "*If the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it relies. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical*"[4]

19. Section 14.9 of the Code of Practice for Public Authorities refers to article 38(d) of the Act, which provides as follows:

> "*14.9 In considering whether the public interest in non-disclosure outweighs that in disclosure in relation to article 38(c) and (d), it shall be assessed whether:*
>
> ***a) the scenarios referred to in relation to article 36 apply; or***
> *b) whether any third party would stand to unduly benefit from the disclosure of the document; or,*
> *c) whether the disclosure of the document would hinder the effective enforcement of any applicable legislation by the Public Authority concerned*" [emphasis has been added].

20. The Code of Practice for Public Authorities provides that when conducting the public interest test, the Public Authority should assess whether the scenarios referred to in relation to article 36 apply, and in this context, the Public Authority submitted as follows:

> "[o]*n a point of principle, we do not think that commissioned, technical and costly reports should be made public since they are full of recommendations hence they should* ***be considered as internal working documents in terms of Article 36(1) of the Act.*** *It is to be noted that some*

[4] Case T-644/16, ClientEarth vs European Commission, Judgment of the General Court (Eighth Chamber) of the 11th July 2018, para. 22.

of the data in question can also be used commercially against the Public Service and may ***hinder the negotiation/procurement process of the fleet****. This includes, although not exclusively, the Risk and Sensitivity Analysis, the local availability and pros and cons of each model* [emphasis has been added].

21. Article 36(1) of the Act intends to preclude from disclosure the internal working documents of the public authorities which "*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*". However, article 36(2) and (3) outline the scenarios where the exemption of the 'internal working document' shall not apply:

"(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 or such experts or 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."

22. Section 14.3 of the Code of Practice for Public Authorities states that in considering whether article 36(1) of the Act applies, the Public Authority should consider whether:

"*a) The disclosure of the document would give rise to undue alarm or concern; or*
b) The disclosure of the document could give rise to misunderstandings or misconceptions with regard to Government Policy or intentions; 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 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*** *"* [emphasis has been added].

23. The Commissioner emphasises that public authorities need to strike a fair balance between disclosing the information to the public so that there can be increased public participation leading to increased scrutiny and review of the actions of the public authorities, whilst also ensuring that the public authorities can still function in the most efficient and effective manner.

24. Therefore, rather than applying an exemption in a 'blanket' manner and treating the study as a whole, the Commissioner strongly recommends that the freedom of information officer should document the assessment carried out by the Public Authority in relation to the exemptions cited vis-à-vis each section of the study with a view to identifying which information is exempt from disclosure. This would not only promote accountability but would also ensure that the decisions taken by the Public Authority are well-justified and well-reasoned.

25. The Commissioner noted that the requested document was commissioned following a public tender – OPM/E/T/01/2021, to carry out a study on change in mobility management in the Maltese Public Service through the procurement of a cleaner fleet of general use vehicles. To this end, the contractor delivered a voluminous study, which is divided as follows: (i) composition analysis of government vehicle fleet; (ii) infrastructural requirements; and (iii) market assessment of entry prices.

26. Accordingly, the Commissioner proceeded to inspect the contents of the first report which is intended to get a better understanding of the composition of the Government fleet used by the public authorities, through a data collection exercise. Article 36(1) states that a document is deemed to be an internal working document only if it contains '*purely factual information'*. Section 14.5 of the Code of Practice for Public Authorities provides that "*in the case of documents containing purely factual information. Such documents are therefore subject to disclosure*". This therefore led the Commissioner to conclude that information in relation to the *"composition of the current fleet of government"* is information, which is deemed to be factual and, therefore, there is no information in 'Activity 1 report – Final report' which would be exempt in terms of article 36(1) and article 38(d) of the Act.

27. The Commissioner proceeded to examine 'Activity 2 report – Final report' which contains an analysis of the system requirements to operate and maintain the fleet, including a detailed business case highlighting the different alternatives that the Public Authority could implement. These recommendations were submitted to the Public Authority as part of its decision-making process which subsequently led to the publication of the tender document. The Commissioner is of the view that the actions of the Public Authority should be scrutinised by the public in relation to its final decision. This in view of the fact that the recommendations made in the study reflect the possibilities or the options considered that were not eventually adopted by the Public Authority as in fact outlined in the submissions provided by the Public Authority on the 24th January 2023. Therefore, the disclosure of recommendations which took place within a deliberative process would in fact promote an ill-informed discussion as to what might have happened rather than what in fact did. This led the Commissioner to conclude that the material contained in 'Activity 2 report – Final report' is excluded from disclosure on the basis of article 36(1) of the Act.

28. Finally, the Commissioner assessed 'Activity 3 report – Final report' which contains market assessment on the prices and cost benefit analysis. In the submissions dated the 24th January 2023, the Public Authority substantiated its refusal by arguing that "*some of the data in question can also be used commercially against the Public Service and may hinder the negotiation/procurement process of the fleet. This includes, although not exclusively, the Risk and Sensitivity Analysis, the local availability and pros and cons of each model*". In his considerations, the Commissioner noted that the disclosure of the study prior to the publication of the tender document would have provided bidders with prior knowledge and insight of certain elements that could lead to a distinct commercial advantage. The disclosure of such information could have been easily exploited for profit or gain, with the possible risk of distorting or restricting competition. Therefore, the Public Authority had managed to prove that the disclosure of the study would, or could have undermined the ability of the Public Authority to maintain a competitive and meaningful negotiating position, including its ability to achieve best value for money. Given that the tender document was published after the reply to the FOI request, the Commissioner concluded that the disclosure of this part of the study at the time of the request would have indeed caused a real risk of serious prejudice, in particular on the spending of public funds. In this particular case, the Commissioner is of the opinion that there is a strong public interest in protecting the best use of public funding and enabling the Public Authority to conduct meaningful negotiations with the private sector. Consequently, the Commissioner concluded that

the information contained in 'Activity 3 report – Final report' is exempt in terms of article 38(d) of the Act.

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 an electronic copy of "*the final report/study produced by tender OPM_E/T/01/2021, namely Tender to carry out a study about a change in mobility management in the Maltese Public Service through the procurement of a cleaner fleet of government general-use vehicles*" is partially justified in relation to 'Activity 2 report – Final report' and 'Activity 3 report – Final report' in terms of article 36(1) and article 38(d) 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 'Activity 1 report – Final report' 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 (Authentication)

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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.