

**CDP/COMP/44/2022**

**Christoph Schwaiger**

**VS**

**Ministry for Tourism**

**FREEDOM OF INFORMATION REQUEST**

1. On the 27<sup>th</sup> July 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**”), Chapter 496 of the Laws of Malta, requesting the Ministry for Tourism (the “**Public Authority**”) to provide a “*copy of the review carried out for direct order MT/13/2020/4 for “Operational Review” awarded 11<sup>th</sup> March 2020 to KSI Malta for the cost of €9,900.00*” in an electronic format.
2. On the 26<sup>th</sup> August 2022, the Public Authority informed the applicant that his request was being refused “*on the basis of Articles 32(1b), 35, and 38 of the Freedom of Information Act (Cap. 496 of the Laws of Malta)*”.
3. On the 29<sup>th</sup> August 2022, the applicant presented a complaint through the Internal Complaints Procedure seeking the reconsideration of the refusal of the Public Authority. The applicant submitted the following salient arguments:
  - a. that the Public Authority had failed to demonstrate how the disclosure would diminish any of its perceived commercial value;
  - b. that the Public Authority had failed to show how the public interest that is served by non-disclosure outweighs the public interest in disclosure; and

- c. that the Public Authority could not seem to decide which of the sub-articles of article 38 of the Act it likes the best, because these provisions could be anything from prejudicing the effectiveness of the conduct of tests to having substantial adverse effect on the conduct of negotiations.
4. On the 13<sup>th</sup> September 2022, the Public Authority reiterated its decision and informed the applicant that it *“does not have any further clarifications to give”*.

## **FREEDOM OF INFORMATION APPLICATION**

5. On the 14<sup>th</sup> September 2022, the applicant applied to the Commissioner for a decision in terms of article 23(1)(a) of the Act and requested the Commissioner to determine whether the request for information made by the applicant to the Public Authority has been dealt with in accordance with the requirements of the Act.

## **INVESTIGATION**

### **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 the background of this 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 as admissible for the purpose of article 23(2) of the Act.

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

7. As part of the investigation procedure, by means of an information notice dated the 16<sup>th</sup> September 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.
8. On the 20<sup>th</sup> October 2022, the Public Authority provided the following arguments:

- a. that the Operational Review is intended as an internal working document on the manner in which the ITS operates, providing insight into cost-cutting, more efficient use of resources, including collaboration with similar institutions;
  - b. that its disclosure would bring this information intended for internal use into public domain, which would adversely affect the Public Authority in terms of the provisions as set forth in article 38 of the Act;
  - c. that the disclosure would mean that other similar reviews would be up for public scrutiny and put the Public Authority in a vulnerable position to negotiate similar reviews in the future; and
  - d. that the commercial aspect of the activities of the ITS could also be diminished if reports of this nature are placed in the public domain.
9. On the same day, the Commissioner requested the Public Authority to submit the following clarifications:
  - a. to specify which is the legal exemption cited in terms of article 38 of the Act;
  - b. to clearly explain the prejudice that the Public Authority would, or could reasonably be expected to suffer as a result of the disclosure of the requested document in terms of article 32(1)(b) and article 38 of the Act; and
  - c. to explain the factors which 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 invoked by the Public Authority pursuant to Part VI of the Act.
10. By means of an email dated the 3<sup>rd</sup> November 2022, the Public Authority informed the Commissioner that the refusal of the document is based on article 38(a) and (b) of the Act. However, no new argumentation was provided.
11. On the 23<sup>rd</sup> November 2022, a meeting was held between the Commissioner and the Public Authority, for the purpose of enabling the Commissioner to physically examine the contents of the requested document.

## **Submissions received from the applicant**

12. On the 2<sup>nd</sup> December 2022, the applicant submitted the following counterarguments in relation to the submissions provided by the Public Authority:

- a. that any decision made by the Public Authority should be accompanied by reasoned and specific justification in order to enable the applicant to clearly understand the refusal of the document;
- b. that the Public Authority invoked article 38(a) and (b) of the Act after being requested by the Commissioner;
- c. that the Public Authority argued that the disclosure of the completed review done via a direct order could affect the Public Authority, and in this regard, the applicant referred to a decision issued by the Irish's Office of the Information Commissioner, bearing the names 'X and University College Cork'<sup>1</sup>: *"It seems to me that there is a distinction to be drawn between the process of conducting a review of the Body's Finance Office and the process of implementing the recommendations arising from that review. In its submission of 21 December 2011, the Body confirmed that the report which was prepared in the course of the review is now complete, that initial feedback on the report arising from the consultation process has been consolidated and that consultations - as distinct from mediation - with key members of the staff of the Finance Office in relation to the recommendations are not ongoing. This suggests to me that the review process has effectively been completed and that the Body is now at the stage of addressing outstanding issues relating to the implementation of the recommendations arising from that review. In such circumstances, it is not clear to me how the release of the records at this stage could reasonably be expected to prejudice the effectiveness of the review process. Accordingly, I find that section 21(1)(a) does not apply."*;
- d. that it appears that the review by KSI Malta has been completed and the disclosure of the document could not reasonably be expected to prejudice the effectiveness of the review process;

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<sup>1</sup> <https://www.oic.ie/decisions/d100112-X-and-University-College-Co/>

- e. that the applicant also subscribes to the Irish Commissioner's view in favour of disclosure in that: (i) the public interest in individuals being able to exercise their rights under the Act to the fullest extent; (ii) the public interest in members of the public knowing how a public body performs its functions and being able to form an opinion as to whether those functions are being properly discharged; and (iii) the public interest in increasing the openness and transparency of decisions taken by public bodies thereby enhancing understanding of the reasons for courses of action taken by a public body;
- f. that in line with good practice, the Public Authority had already made public its strategic plan and policies, and therefore any changes or information about the direction in which the future changes will head are already made publicly available; and
- g. that the audit process and negotiations have ceased, and it is now time for the Public Authority to understand its obligations in line with the laws of Malta.

13. On the 5th December 2022, the Commissioner provided the Public Authority the final opportunity to rebut the arguments of the applicant, however, on the 23rd December 2022, the Public Authority informed the Commissioner that it had no additional submissions to make.

## **LEGAL ANALYSIS AND DECISION**

### **General Considerations**

14. 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.
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 Helwa vs l-Awtorita' tal-Ippjanar*<sup>2</sup>, which held that “[l]-Att dwar il-Liberta' tal-Infommazzjoni hi liġi intiża biex tippovdi 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>3</sup> highlighted that the “*leġiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovdi ċerti garanziji għat-twettiq fil-prattika tal-libertà tal-infommazzjoni bhala s-sisien tal-libertà fundamentali tal-espressjoni*”.
17. 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.
18. For the purposes of this legal analysis, the Commissioner examined the request of the applicant, wherein the Public Authority was requested to provide a copy of the operational review of the Institute of Tourism Studies. This document aims to provide recommendations on how the operations of the Institute of Tourism Studies could improve through the introduction of a number of changes. During the onsite inspection held by this Office, the Public Authority stated that the majority of the recommendations contained in the requested report were implemented, whilst the remaining recommendations were in the process of being implemented.

#### **Article 32(1)(b) of the Act**

19. The Public Authority invoked article 32(1)(b) of the Act, which states that a “*document is an exempt document if its disclosure under this Act would disclose: any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed*”.

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<sup>2</sup> Appeal No. 7/2019, decided on the 16th May 2019.

<sup>3</sup> Appell No. 11/2020 LM, decided on the 18<sup>th</sup> November 2020.

20. During the course of the investigation, the Public Authority submitted that the “*Operational Review is intended as an internal working document on the manner in which ITS operates, providing insight into cost-cutting, more efficient use of resources, including collaborations with similar institutions*”. The Public Authority’s line of argument is tantamount to invoking a general presumption of confidentiality in relation to the entire document on the basis that the Public Authority had intended to use this document for its own internal purposes. However, the definition of a ‘document’ as set forth in article 2 of the Act refers to any article that is held by a public authority and on which information has been recorded in whatever form. Therefore, any document which fulfills these criteria is subject to the provisions of the Act, irrespective of the fact that the Public Authority had intended to keep this document internally. For this reason, the reason cited by the Public Authority is not sufficient to withhold a document insofar as the document does not fall within the exemption held in article 36 of the Act, which specifically covers ‘internal working documents’.
21. Article 32(1)(b) of the Act intends to protect the commercial interests and the onus rests with the Public Authority to show the link between the requested document and the claimed prejudice. When a public authority refuses to provide the requested information, such refusal must be clearly substantiated by how the disclosure would effectively prejudice the interest protected by the exemptions set forth in the Act. Within this context, the Commissioner refers to 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 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”<sup>4</sup>*

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

22. After examining the submissions of the Public Authority, the Commissioner established that the Public Authority had failed to demonstrate that the document, or parts of that report, have commercial value and explain how access to the requested report could specifically and actually undermine the commercial interests of the Public Authority.

### **Article 38(a) and (b) of the Act**

23. In refusing the original request on the 26<sup>th</sup> August 2023, the Public Authority indicated article 38 of the Act as a whole without distinguishing between the circumstances outlined in that provision. Article 38 of the Act covers different situations in relation to documents concerning certain operations of public authorities, and therefore, citing article 38 of the Act without specifying the sub-article(s) does not enable the applicant to understand the refusal of the request.
12. Pursuant to article 15(1)(a) of the Act, the Public Authority shall give the applicant the reasons for the refusal and not cite a whole provision in a 'blanket' manner without any explanation or justification. 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 FOI request in terms of the reasons for refusal as set forth in article 14(a) to (h) of the Act. This is absolutely necessary to enable the applicant to seek the review of the decision of the Public Authority and to exercise his right of review and appeal in the most effective manner.
24. By means of the information notice dated the 16<sup>th</sup> September 2022, the Public Authority was requested to specify which is the legal exemption cited in terms of article 38 of the Act and clearly explain which factors were taken into consideration when carrying out the public interest test as set forth in article 35 of the Act. Article 38 is a qualified exemption, which means that the Public Authority needs to conduct a public interest test pursuant to article 35 of the Act. This test is meant to function as a prejudice test, requiring the Public Authority to engage in a balancing exercise of relevant interests against the public interest. Naturally this has to be examined in the light of the objectives of the Act, which are aimed at increasing openness, transparency and accountability. Unlike the absolute exemptions held in Part V of the Act, the Public Authority has to provide more significant reasoning in relation to its decision to protect an interest over the public interest in disclosure.



25. During the course of the investigation, the Public Authority cited article 38(a) and (b) of the Act, which provides that a document is an exempt document if its disclosure would, or could reasonably be expected to “(a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by a public authority” and “(b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by a public authority”. The Public Authority further submitted that the disclosure “would mean that other similar reviews would be up for public scrutiny even as changes are affected for ITS to align itself with such reviews and place it in a vulnerable position to negotiate similar reviews in the future”.
26. However, the Public Authority had failed to indicate why the document, or parts of the document, should be withheld on the basis that there is an overriding public interest in non-disclosure. It is not clear how the disclosure could prejudice the effectiveness and the attainment of the audit when the Public Authority submitted that it had completed the implementation of fifteen (15) recommendations and is actively working on completing the remaining six (6) recommendations. Within such context, the Commissioner examined the decision of the Irish Commissioner cited by the applicant, namely ‘Mr X and University College, Cork’<sup>5</sup>, where a distinction was drawn between the process of conducting a review and the process undertaken by the public authority to implement the recommendations arising from the review. In such case, it was concluded that once the review process had been completed and the public authority was at the stage of implementing the recommendations, there was no risk that the release of the information could reasonably be expected to prejudice the effectiveness of the review process.

**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 “copy of the review carried out for direct order MT/13/2020/4 for “Operational Review” awarded 11<sup>th</sup> March 2020 to KSI Malta for the cost €9,900.00” is not justified.**

**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 the appropriate and suitable reasons to enable the applicant to understand the refusal of his request in terms of article 14(a) to (h). The Commissioner rebukes the Public Authority on the manner how the applicant’s request was handled and emphasises on the**


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<sup>5</sup> *ibid.* 1

requirements incumbent of public authorities to provide applicants with clear and correct reasons when refusing requests for information.

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 review carried out for direct order MT/13/2020/4 for “Operational Review” awarded 11<sup>th</sup> March 2020 to KSI Malta for the cost €9,900.00” within twenty (20) working days from the date of receipt of the decision notice and inform the Commissioner of the action taken immediately thereafter.

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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.