

**Information and Data Protection Commissioner**

**CDP/FOI/55/2022**

**Caroline Muscat**

**vs**

**Malta Tourism Authority**

**FREEDOM OF INFORMATION REQUEST**

1. On the 9<sup>th</sup> August 2022, Ms Caroline Muscat (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 Malta Tourism Authority (the **“Public Authority”**) to provide an electronic copy of the following documents:

*“ – Copy of all agreements signed with Manchester United*

- *Copy of all invoices paid in relation to these agreements until the time of reply to this FOI*
- *List of members of delegation, including partners, accompanying Minister to Manchester during the visit in August 2022*
- *List of persons given complimentary Man United football tickets as a result of the agreements with Man United.”*

2. On the 9<sup>th</sup> September 2022, the Public Authority provided the “[i]ist of members of delegation, including partners, accompanying Minister to Manchester during the visit in August 2022” and invoked the following exemptions in relation to the other requested documents (the **“requested documents”**):

- *‘Copy of all agreements signed with Manchester United –*

- (a) *Article 31(2), in view of the confidentiality obligations in the Agreement itself, which would found an action by MTA's counterparty for breach of confidence;*
  - (b) *Article 32(1)(a) and (b) in view of the fact that if a copy of such information is sent to you, the Authority would disclose trade secrets and/or other information having commercial value that would be, or could be expected to be destroyed or diminished if the information were disclosed; and*
  - (c) *Article 38(c) and (d) in view of the fact that if a copy of such information is sent to you, it could reasonably be expected to have a substantial adverse effect on both (i) the proper and efficient conduct of the operations of the Authority and (ii) the conduct of negotiations (including commercial negotiations) by the Authority”*
- *Copy of all invoices paid in relation to these agreements until the time of reply to this FOI-*

*Kindly note we are unable to meet your request as per Sub-paragraph (c) of article 32 of the FOI Act provides that a document is an exempt document if its disclosure would disclose information 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 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.*

- *List of persons given complimentary Man United football tickets as a result of the agreements with Man United.*

*Kindly note that we are unable to meet your request as this falls outside the scope of the FOIA on the basis of Article 5(3)(a) which provides: The Act shall not apply to documents in so far as such documents contain personal data subject to the Data Protection Act.”*

3. On the 18<sup>th</sup> September 2022, the applicant addressed a complaint to the Public Authority through the Internal Complaints Procedure and requested the Public Authority to reconsider its

decision. On the 8<sup>th</sup> October 2022, the Public Authority reiterated its refusal and cited the following reasoning:

*“(a) Article 31(2), in view of the confidentiality obligations in the Agreement itself, which would found an action by MTA’s counterparty for breach of confidence;*

*(b) Article 32(1)(a) & (b) in view of the fact that if a copy of such information is sent to you, the Authority would disclose trade secrets and/or other information having commercial value that would be, or could be expected to be destroyed or diminished if the information were disclosed; and*

*(c) Article 38(c) & (d) in view of the fact that if a copy of such information is sent to you, it could reasonably be expected to have a substantial adverse effect on both (i) the proper and efficient conduct of the operations of the Authority and (ii) the conduct of negotiations (including commercial negotiations) by the Authority”.*

## **FOI APPLICATION**

4. On the 9<sup>th</sup> October 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 if the Public Authority had dealt with the requirements of the Act. The applicant contended that *“this was a direct order without a call, paid by taxpayers funds, by a public entity, we feel that the agency is obliged to be transparent and accountable according to good governance rules”.*

### **Admissibility of the FOI Application**

5. 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 documents, the Commissioner deemed the FOI application made by the applicant as admissible for the purpose of article 23(2) of the Act.

## **INVESTIGATION**

### **The Issuance of the Information Notice**

6. As part of the investigation procedure, by means of an information notice dated the 11<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 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 particular, the Commissioner requested the Public Authority to provide a copy of the requested documents and clearly:
  - a. explain which prejudice would, or could reasonably be expected to be suffered as a result of the disclosure of the requested documents in terms of the exemptions cited in the replies; and
  - b. 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 exemptions invoked by the Public Authority pursuant to article 38(c) and (d) of the Act.
7. By means of an email dated the 10<sup>th</sup> January 2023, the Public Authority reproduced clause 10 of the Global Sponsorship Agreement and informed the Commissioner that the copies of the agreements could not be made available on the basis of the confidentiality clause contained in the said agreement. Notwithstanding this, the Commissioner reiterated his request to provide a copy of the requested documents pursuant to the information notice dated the 11<sup>th</sup> October 2022. The Public Authority informed the Commissioner that *“the Malta Tourism Authority has been constantly chasing personnel at Manchester United to seek (as per relative contract) their clearance, or otherwise”*.

### **The Issuance of the Enforcement Notice**

8. On the 2<sup>nd</sup> May 2023, the Commissioner proceeded to issue an enforcement notice pursuant to article 25(1) of the Act, wherein the Public Authority was requested to provide him with the requested documents as specified in the information notice. This was subsequently followed by a meeting held on the 1<sup>st</sup> June 2023, where the Public Authority had made available copies of the agreements entered into between Manchester United Football Club Limited and the Government of the Republic of Malta and the Malta Tourism Authority. The Commissioner was also informed that the Public Authority does not hold a *‘[l]ist of persons given*

*complimentary Man United football tickets as a result of the agreements with Man United*’ or any other information that could meet the terms of the request of the applicant.

### Written Submissions provided by the Public Authority

9. The Public Authority consulted the third party in relation to the disclosure of the agreements and submitted a letter prepared by the third party outlining the following salient points:

- a. that the Sponsorship Agreement constitutes highly confidential information and its disclosure to the public would be prejudicial to its commercial interests, specifically, the disclosure is likely to be damaging to the third party’s ability to legitimately exploit its commercial rights in the future; and
- b. that most of the commercial revenue<sup>1</sup> is generated from the commercial agreements with sponsors and therefore, the disclosure of confidential information pertaining to any of these commercial agreements is likely to harm relations with other partners or otherwise impact the third party’s ability to attract new partners and/or retain existing partners.

10. With reference to the “[l]ist of persons given complimentary Man United football tickets as a result of the agreements with Man United”, the Public Authority referred to the parliamentary questions 4149<sup>2</sup> and 5059<sup>3</sup>. The parliamentary questions are being reproduced hereunder:

Legislatura	XIV	Kategorija	ORAL
Mistoqsija Numru:	4149	Data:	17/11/2022
Seduta:	60 - 23/11/2022 04:00 PM	Seduta Interim:	-
Titlu:	VisitMalta – flehim ma' Manchester United FC		

L-Onorevoli **DARREN CARABOTT** staqsa lill-Onorevoli **CLAYTON BARTOLO** (Ministru ghat-Turizmu):

Jista' l-Ministru jghid x'beneficċji qed jinghataw fl-isponsorship deal li hemm bejn il-Manchester United FC u VisitMalta, speċifikament jekk b'miex jinghataw xi pedacċi jew tnaqqis fil-prezz fil-biljetti tal-loghob tal-imsemmi klabb?

**Tweġiba:**

Ninforma lill-Onor. Interpellant li l-flehim ma' Manchester United jipprovdi ghal numru ta' biljetti ghal loghob tal-kampjonat Premier u FA Cup li jintlagħbu go Old Trafford. Dawn il-biljetti jintuzaw sabiex l-MTA sospita ġurnalisti, influencers, prize-winners, agenti tal-ivjaġġar, operaturi turistiċi u organizzaturi ta' konferenzi barranin bhala promozzjoni għall-pajjiża u sabiex imahhu l-koperazzjoni professjonali ta' VisitMalta magħhom.

<sup>1</sup> The percentages covering the commercial revenue of the Manchester United Group for the years 2020, 2021 and 2022 were provided to the Commissioner.

<sup>2</sup><https://pq.gov.mt/PQWeb.nsf/7561f7daddf0609ac1257d1800311f18/c1257d2e0046dfa1c12589030043a53f!OpenDocument>

<sup>3</sup><https://pq.gov.mt/PQWeb.nsf/7561f7daddf0609ac1257d1800311f18/c1257d2e0046dfa1c125893900405a6f!OpenDocument>

Legislatura	XIV	Kategorija	ORAL
Mistoqsija Numru:	5099	Data:	10/01/2023
Seduta:	76 - 16/01/2023 04:00 PM	Seduta Interim:	-
Titlu:	ViżMarta - fehim ma' Manchester United FC		

L-Onorevoli **DARREN CARABOTT** staqsa lill-Onorevoli **CLAYTON BARTOLO** (Ministru għat-Turizmu):

B'referenza għat-tweġiba tal-mistoqsija parlamentari 4149, jista' l-Ministru jipprovdi lista tal-ismijiet ta' dawk li hadu dawn il-biljetti tal-Manchester United, flimkien mas-sezzjoni li fiha ġew idkategorizzati bbala elegibbli kif intqal fl-istess risposta, u çjoe jekk humiex: ġurnalisti, influencers, prize-winners, aġenti tal-ivjaġġar, operaturi turistiçi u organizzaturi ta' konferenzi barranin?

**Tweġiba:**

Ninforma lill-Onor. Interpellant li tul dawn l-aħbar tliet snin tal-fehim, il-biljetti ntażaw minn rappreżentanti ta' operaturi turistiçi barranin, prinçipalment mir-Renju Unit. Minbarra hekk, għadd ta' biljetti ntażaw ukoll f'inizjattivi ma' stazzjonijiet tar-radju Ingliži sabiex jittellgħu bhala premju għall-kompetizzjonijiet marbuta mal-gżejjer Maltin.

L-informazzjoni mitluba hija kummerçjalment sensitiva u għaldaqstant ma tistax tingħata. Madanakollu, l-Onor. Interpellant, jekk iħoss il-btieġa, jingħata l-opportunità li jara hu personalment l-informazzjoni mitluba.

## LEGAL ANALYSIS AND DECISION

### General Considerations

11. 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.
12. 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-Infommazzjoni hi ligi intiża biex ttiprovdi b'mod ampju iżda b'restrizzjonijiet çari fl-istess ligi, sens ta' trasparenza u kontabilita fid-deçizjonijiet, ordnijiet jew direttivi fl-amministrazzjoni pubblika li wara kollox qiegħda hemm għas-servizz tas-soçjeta." 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 çerti garanziji għat-twettiq fil-prattika tal-libertà tal-infommazzjoni bhala s-sisien tal-libertà fundamentali tal-espressjoni".

<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.

13. 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 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’għandiex 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 5(3)(a) of the Act**

14. The Public Authority refused to provide the “[l]ist of persons given complimentary Man United football tickets as a result of the agreements with Man United” on the basis that this part of the request falls outside the scope of the Act. Within this context, the Public Authority cited article 5(3)(a) of the Act, which provides that the “Act shall not apply to documents in so far as such documents contain - (a) personal data subject to the Data Protection Act”.
15. During the course of the investigation, the Public Authority submitted that it does not hold a record of the names and surnames of those “persons given complimentary Man United football tickets as a result of the agreements with Man United”, and thus, the list requested by the applicant does not exist and there is no information which could meet the terms of the request.
16. However, the first reply provided by the Public Authority on the 9<sup>th</sup> September 2022 refers to article 5(3)(a) of the Act which provision could only be invoked if the document contains personal data pertaining to natural persons. In such case, it resulted that the document does not exist and there is no information held by the Public Authority that could effectively meet the terms of the request, and therefore, the reason cited by the Public Authority in its reply to the applicant is incorrect.

---

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

17. The Commissioner is disappointed to note that the Public Authority only came up with the actual circumstances related to the applicant’s request for information and, on the strength of which, the decision should have been taken, during the course of his investigation. The Public Authority is duty-bound to carry out its functions in accordance with the law and therefore provide the applicant with all these facts, in a clear and unequivocal manner, together with 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 her right of review and appeal in the most effective manner.

### **Article 31(2) of the Act**

18. The Public Authority cited article 31(2) of the Act as the reason to justify the refusal to provide a “[c]opy of all agreements signed with Manchester United”. For this reason, the Commissioner examined article 31(2) of the Act, which stipulates that “[a] document is an exempt document if its disclosure under this Act would found an action by a person (other than a public authority) for breach of confidence”.

19. The Commissioner examined the settled case-law<sup>7</sup> of the Information and Data Protection Appeals Tribunal (the “**Tribunal**”) where it decided that a contract containing a confidentiality clause is not considered exempt according to article 31(2) of the Act. In fact, the Tribunal remarked that “*jekk fil-kuntratt tagħhom ma saritx tali klawnsola li l-kuntratt huwa sugġett għal dan il-Kap u għal Kap 440 dwar l-Att dwar il-Protezzjoni u l-Privatezza tad-Data dik hija problema tal-PBS u mhux tal-Kummissarju jew ta’ dan it-Tribunal*”.

20. The Commissioner has further taken into account the decision ‘Allied Newspapers Limited vs Foundation for Medical Services’<sup>8</sup> of the Tribunal, which stated that “*l-confidentiality clauses hafna drabi magħrufa bhala gaggin clauses veru li jorbtu lil partijiet iżda vera wkoll li huma sugġetti għal Att dwar il-Libertà tal-Infommazzjoni u din tista’; tinghata jew bil-kunsens tal-parti, jew bil-liġi jew meta hemm dak li jissejjaħ overriding public interest*”. The Tribunal further remarked that “*kieku verament kien il-każ cioe li kull kuntratt ta’ kunfidenzjalita jirbaħ fuq l-interess pubbliku kieku din il-liġi tirrendi ruhha ineffettiva u ma hi tajba għal xejn*”.

---

<sup>7</sup> Public Broadcasting Services Limited vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data, decided on the the 12<sup>th</sup> July 2017; Allied Newspapers Limited vs Foundation for Medical Services, decided on the 30<sup>th</sup> January 2020.

<sup>8</sup> Appeal Numru 9/2018, 30<sup>th</sup> January 2020.



21. Within this context, the Court of Appeal in the judgment ‘Allied Newspapers Limited vs Foundation for Medical Services’<sup>9</sup> confirmed that:

*“Il-Qorti tqis li huwa assolutament illoġiku u kontrasens li l-ewwel il-legiżlatur 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, u mbagħad entitajiet pubbliċi bhall-appellanta jippruvaw jiżgiċċaw mill-effetti tal-imsemmija legiżlazzjoni meta jidhlu f’kuntratti bi klawnsoli ta’ kunfidenzjalità, li jiġu interpretati mill-imsemmija entitajiet pubbliċi b’tali mod li jispiċċaw ma jikkonformawx mal-obbligi legali taht l-imsemmija legiżlazzjoni. Il-fondazzjoni appellanta tippretendi li b’semplici klawnsola ta’ kunfidenzjalità f’kuntratt, tqiegħed lilha nnifisha ’l fuq mill-liġi u teżenta lilha nnifisha mill-obbligi legali tagħha taht il-Kap. 496. Biex tagħmel dan l-appellanta tinterpreta l-artikolu 31(2) tal-Kap. 496 b’mod li ma jirrispekkjax il-kelma u l-ispirtu tal-istess liġi.”*

22. A recent decision ‘Rebecca Bonello Ghio vs Malta Film Commission’<sup>10</sup> delivered by the Tribunal sheds further light on the interpretation of article 31(2) of the Act. The Tribunal sets forth the cumulative criteria that need to be fulfilled in order to deem a document exempt in terms of article 31(2) of the Act:

*“Illi sabiex japplika dan l-artikolu 31(2) tal-Kap 496 jeħtieġ li s-segwenti kriterji jiġu sodisfatti:*

- 1. l-awtorita tkun ottjeniet din l-informazzjoni minn persuna oħra;*
- 2. li l-iżvelar ta’ din l-informazzjoni jikkostitwixxi ksur ta’ kunfidenzjalita;*
- 3. persuna tista’ tibda proċeduri bil-qorti għal ksur ta’ kunfidenzjalita;*
- 4. li tali persuna għandha ċans qawwi li tiegħu raġun mill-qorti.*

*Rigward rekwiżit numru (1), il-kontenut ta’ kuntratt bejn awtorita’ pubblika u persuna oħra generalment ma hux kunsidrat bħala informazzjoni ottenuta mill-Awtorita minn persuna oħra. Dan għaliex dak li jgħid il-kuntratt ikun gie maqbul bejn iż-żewġ partijiet milli provdut minn parti lil parti l-oħra ...*

<sup>9</sup> Appeal Number 11/2020 LM, 18<sup>th</sup> November 2020.

<sup>10</sup> Appeal Number FOI/19/2022, 6<sup>th</sup> July 2023.

*Rigward rekwiżiti numru (2) sa numru (4) – dejjem ġie ritenut li l-iżvelar ta' informazzjoni kummerċjali jikkostitwixxi ksur ta' kunfidenzjalità jekk dan iħalli impatt detrimentali lil min ikun zvelha.”*

23. Therefore, based on the first criteria established by the Tribunal, article 31(2) of the Act is intended to protect existing confidential information held by the third party, which is obtained by the public authority. This means that a contract which is agreed between the parties is not considered as information obtained by the Public Authority from another person, and therefore, article 31(2) of the Act would not apply.
24. In line with the case-law of the Tribunal and the Court of Appeal, a confidentiality clause contained in an agreement would not exonerate the Public Authority from complying with its obligations emanating from the Act. The Act is not intended to enable a public authority to make an agreement with another person and simply insert a clause in the agreement that the contents shall be treated as confidential, with the result that article 31(2) of the Act applies.
25. It must be borne in mind that the Public Authority is bound by the obligation of mandatory disclosure of the documentation that it holds, save for the exemptions provided by law which may justify non-disclosure in certain specific instances. It is in the Commissioner's judicious view that public authorities in general should adopt a horizontal standard practice to inform, *a priori*, the other party to a contract that such contract is subject to provisions of the national law governing the access to documents. The Tribunal further stated in the decision '*Rebecca Bonello Ghio vs Malta Film Commission*'<sup>11</sup> that:

*“Dan it-Tribunal ma jistgħax ma josservax li f'Malta għad ma għandniex Code of practice rigward dan il-punt u wasal iż-żmien li dan isir u kif diġà jeżisti f'pajjiżi ohra sabiex dan il-Kodiċi jagħmilha ċara lil awtoritajiet pubbliċi u lil min jagħmel kuntratti mal-istess awtoritajiet li għandhom ikunu jafu dwar il-limitazzjoni tal-infurzar ta' klawnsoli kunfidenzjali u dan fid-dawl tal-Att dwar il-Libertà tal- Informazzjoni (Kap. 496 tal-Ligijiet ta' Malta).”*

This therefore led the Commissioner to conclude that article 31(2) of the Act does not apply to the present case.

---

<sup>11</sup> *ibid.* 10

**Article 32(1)(a) of the Act**

26. The Public Authority cited article 32(1)(a) of the Act as one of its reasons to justify the refusal of the “[c]opy of all agreements signed with Manchester United” and the “[c]opy of all invoices paid in relation to these agreements until the time of reply to this FOP”. This provision states that a document is an exempt document if its disclosure under this Act would disclose trade secrets. However, the Act does not define ‘trade secret’.

27. For this purpose, the Commissioner examined the definition of ‘trade secret’ as held in article 2 of the Trade Secret Act (Cap. 589 of the Laws of Malta), which means:

*“information which meets all of the following requirements:*

*(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*

*(b) it has commercial value because it is secret;*

*(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;”*

28. Furthermore, the Commissioner considered the decision of ‘*Roberto Ragonesi vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data*’<sup>12</sup>, wherein the Tribunal pointed out that:

*“Fatturi li għandhom jiġu kkunsidrati meta wieħed jifli jekk l-infommazzjoni mitluba jammontaw għal trade secret jinkludu: the extent to which the information is known outside of the plaintiff’s business; the extent to it is known by employees and other involved in his business; the extent of measures taken by him to guard the secrecy of the information; the value of the information to him and to his contemporaries; the amount of effort or money expended by him*

---

<sup>12</sup> Appeal Number 17/2013, decided on the 15<sup>th</sup> February 2018.

*in developing the information; the ease of difficulty with which the information could be properly acquired or duplicated by others. (vide Ansell Rubber C Pty Ltd v Allied Rubber Industries Pty Ltd 91967) V.R. 373”.*

29. The Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 defines ‘business secret’ as:

*“In so far as disclosure of information about an undertaking’s business activity could result in a serious harm to the same undertaking, such information constitutes business secrets. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking’s know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy”.*

30. Furthermore, the Commissioner noted the decision of the UK Tribunal of ‘Department of Health v Information Commissioner’<sup>13</sup> which defined the concept of ‘trade secret’ within the context of the UK freedom of information legislation as follows:

*“the concept of a “trade secret” was one that related to a particular kind and quality of information. As regards kind, it stated that “[t]he ordinary understanding of the phrase usually suggests something technical, unique and achieved with a degree of difficulty and investment.”*

31. After assessing the circumstances of the case, the Commissioner concluded that the Public Authority did not manage to demonstrate how the contents of the agreements, or parts of the agreements, amount to a ‘trade secret’. Based on the foregoing considerations, the Commissioner established that the information contained in the requested documents do not constitute a ‘trade secret’ and, as a result, article 32(1)(a) of the Act does not apply.

---

<sup>13</sup> Reference EA/2008/0074, decided on the 15<sup>th</sup> October 2009.

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

32. The Public Authority cited article 32(1)(b) of the Act as another reason for not disclosing the requested documents to the applicant. Article 32(1)(b) of the Act provides that a document is exempt if its disclosure 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*”. The reasoning behind this provision is that information that may not rise to the level of a trade secret, may also be deemed to be confidential on the basis of the commercial value of the information.
33. The Commissioner referred to the case-law of the UK Tribunal<sup>14</sup>, particularly, the case ‘University of Central Lancashire vs IC’ which provides that “[w]e respectfully agree with the approach adopted by this Tribunal in the Student Loans appeal at paragraph 42, namely that “commercial interests” is a term which deserves a broad interpretation which will depend largely on the particular context.”
34. The Commissioner noted that the information concerning the specific sponsorship rights granted, the terms on which they have granted and the financial terms, is considered to be commercially sensitive information in terms of article 32(1)(b) of the Act, which would be, or could reasonably be expected to be, destroyed or diminished if the information were to be disclosed. However, not all of the clauses contained in the agreements constitute commercially sensitive information, which ought to be protected from disclosure. The Commissioner emphasises that the Public Authority should carry out a thorough exercise in order to determine which clauses would fall under the exemptions held in the Act. The fact that certain clauses would fall under the umbrella of commercial sensitivity should not serve as a justification to refuse the request in full. This would in fact run counter to the letter and spirit of the Act which considers access to the document as the rule and its refusal as an exception thereto. Therefore, rather than applying article 32(1)(b) of the Act in a ‘blanket’ manner and treating the agreements 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 clause within the contract, with a view to identifying which clauses are 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.

---

<sup>14</sup> Information Tribunal Appeal Number: EA/2009/0034, decided on the 8<sup>th</sup> December 2009, para. 31.

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

35. In the reply dated the 9<sup>th</sup> September 2022, the Public Authority cited article 32(1)(c)(i) of the Act, which provides that a document is exempt if its disclosure under the Act would disclose *“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”*.
36. 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 documents.
37. For this reason, the Commissioner examined the submissions provided by the Public Authority, specifically, the fact that the Public Authority had consulted the other party to the Agreement in relation to this FOI request. In the case of ‘Derry City Council v Information Commissioner’<sup>15</sup>, the UK Tribunal held that when a public authority cites an exemption that the requested information would prejudice the commercial interests of a third party, the public authority should ask the third party for its views concerning the prejudice and not simply speculate. The UK Tribunal stated as follows:

*“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”*.

---

<sup>15</sup> Information Tribunal Appeal Number: EA/2006/0014, decided on the 11<sup>th</sup> December 2006, para.24.

38. In the present case, the Commissioner was presented with an explanation as to how the third party would be expected to suffer prejudice and what kind of prejudice it would be expected to reasonably suffer as a result of the disclosure of the requested documents. The third party submitted the percentages of the commercial revenue generated for the years 2020, 2021 and 2022, which most of this revenue is generated from commercial agreements with sponsors, and explained how the disclosure of confidential information pertaining to any of the agreements would, or could impact its total revenue. The third party pointed out how the disclosure of the requested documents could specifically undermine its commercial interest by explaining that the disclosure would be prejudicial to its relationship with existing partners and is likely to be damaging to its ability to legitimately exploit its commercial rights in the future.
39. After assessing the foregoing considerations, the Commissioner concluded that the disclosure of the sponsorship rights, the terms on which they have been granted and the financial terms would, or could reasonably be expected to have a material adverse impact on the third party, and therefore, this specific information is exempt in terms of article 32(1)(c)(i) of the Act.

#### **Article 38(c) and (d) of the Act**

40. The Public Authority cited article 38(c) and (d) of the Act in its replies to the applicant. Article 38 states that a document is deemed to be exempt if its disclosure would, or could reasonably be expected to “*have a substantial adverse effect on the proper and efficient conduct of the operations of a public authority*” and “*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*”. Given that article 38 of the Act is a qualified exemption, by means of the information notice dated the 11<sup>th</sup> October 2022, the Commissioner specifically requested the Public Authority to indicate which factors were taken into consideration when carrying out the public interest test as set forth in article 35 of the Act. Within this context, the Commissioner examined section 14.9 of the ‘Code of Practice for Public Authorities’, which guides the public authorities as to how they should conduct the public interest test in connection with article 38(c) and (d) of the Act:

*“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”.*

41. However, the Public Authority failed to provide any information or attempt to explain how the disclosure of the requested documents would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Public Authority or the conduct of negotiations by or on behalf of the Government or another public authority.

42. Given that the Public Authority completely disregarded article 38(c) and (d) of the Act in its submissions and failed to substantiate its reasoning during the course of the investigation, the Commissioner did not have any information which would enable him to determine if the exemptions cited in the replies of the Public Authority apply to the present case. The Commissioner reiterates that the Public Authority should not cite exemptions without a careful assessment or a justified reason.

**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:**

- **“[c]opy of all agreements signed with Manchester United” is partially justified in terms of article 32(1)(b) and article 32(1)(c)(i) of the Act in relation to the sponsorship rights granted, the terms on which they have been granted and the financial terms;**
- **“[c]opy of all invoices paid in relation to these agreements until the time of reply to this FOI” is justified in terms of article 32(1)(b) and article 32(1)(c)(i) of the Act.**

**Furthermore, the “[l]ist of persons given complimentary Man United football tickets as a result of the agreements with Man United” does not exist and there is no information held by the Public Authority which could effectively meet the terms of the request, and therefore, the reason cited in terms of article 5(3)(a) and article 14(a) of the Act is incorrect.**




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 parts of her 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 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 'Global Sponsorship Agreement' and the 'Variation Agreement in respect of Global Sponsorship Agreement' after redacting the clauses in relation to the sponsorship rights granted, the terms on which they have been granted, and the financial terms of the agreements.

The redacted agreements shall be provided within twenty (20) working days from the date of receipt of this decision notice and the Commissioner shall be informed of the action taken immediately thereafter.

Ian  
DEGUARA  
(Authenticati  
on)



Digitally signed  
by Ian DEGUARA  
(Authentication)  
Date: 2023.11.17  
10:18:44 +01'00'

**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.