

FREEDOM OF INFORMATION REQUEST

1. On the 28th June 2022, Ms Monique Agius (the “**applicant**”) made a request 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 the Malta Tourism Authority (the “**Public Authority**”) to provide “[a] *copy of the concession agreements awarded to deckchair and umbrella operators in Blue Lagoon between 2013 and 2022*” in an electronic format.
2. On the 28th July 2022, the Public Authority informed the applicant that her request had been extended by twenty (20) working days due to the fact that the Public Authority needed to consult third parties before it could decide on the request, and more time was needed to obtain the necessary feedback.
3. On the 25th August 2022, the Public Authority informed the applicant that her request could not be met on the basis of article 32(1)(c)(i) of the Act.
4. On the 20th 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 the following arguments:
 - a. that the “*purpose of the Act is to enhance and ensure that public authorities adhere to the principles of transparency and accountability. Public authorities administer public funds and public assets, they bring into effect or follow policies on matters of public interest and they make decisions, including grant concessions or contract in any*”

manner with third parties, which have effects on the administration of public funds and on public assets”;

- b. that the “*actions of public authorities are, in a democracy, subject to public accountability and hence their obligation to disclose information on matters related to public interest and public debate. The role of the media in seeking such information is enshrined and protected in international law as well as national law, predominantly through the European Convention Act. All other ordinary law, including the Act, is subjected to its adherence with the European Convention Act which provides for a right of access to information held by public authorities*”;
- c. that with reference to the exemption cited by the Public Authority, the applicant argued that article 32(1)(c)(i) of the Act prescribes the following criteria that enable the non-disclosure of a document: “*(i) information concerns business affairs; (ii) the disclosure of that information will or could reasonably be expected to affect those business affairs; (iii) the business affairs must be lawful; (iv) the disclosure has an adverse effect on those lawful business affairs*”;
- d. that the “*MTA has not indicated the reasons for which disclosure of the concession agreements granted to operators by the public authority to use a public asset for their private commercial purposes would be tantamount to unreasonable adverse effects on that business affair. MTA has failed to indicate what unreasonably adverse effect these private business making profit from a public asset could reasonably suffer should ... a journalist, be granted a copy of the concession agreements*”;
- e. that “[i]n essence, MTA is a public authority who in the administration of public assets (public beach in this case) and public finances has granted rights to third parties to make use of that public asset. The request is here dealing with a matter of public interest since it places a public authority under scrutiny for how it is administering a public asset (public beach) and public finances (the public’s income from such concessions), in the light of the use by the public of the country’s shoreline and the administration of public beaches by the public authority”;
- f. that the “*request is therefore predominantly one seeking information which is in the public interest and which the public interest is better fulfilled by its disclosure rather than its non-disclosure. But it is also a request for information the disclosure of which*

does not reasonably bring about unreasonable adverse effects on the private operators. Holding the contrary means that non-disclosure is being sought so as to ensure that the administration of public assets and policies related to the management of public assets remains a 'secret' so that the authority may do as it pleases"; and

- g. that “[a]rticle 32(1)(c)(i) makes a clear reference to ‘lawful business’. It is within the public interest, and a public interest that necessitates disclosure, for the request to be granted since it is in the public interest for one to assess whether this business and other business that is carried on public beaches is actually lawful. By stopping the disclosure of the requested information, the public authority is essentially prohibiting a public assessment of whether the third party is adhering to its obligations under contract or concession, but it is also prohibiting public assessment of whether the public authority itself is or has adhered to applicable laws, policies and regulations”.

5. On the 20th October 2022, the Public Authority reiterated its refusal to the request of the applicant on the basis of article 32(1)(c)(i) of the Act.

FREEDOM OF INFORMATION APPLICATION

6. On the 16th 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. The applicant submitted the following principal arguments:

- a. that “[t]hough the Act does not require any inquiry into the scope or purpose of a request, in this case the scope of the request itself identifies the public interest in disclosure. Appellant is a journalist, a public watchdog, and the subject matter to which the request relates focuses on the accountability of public authorities in administering public assets and public funds. The scope of the request is therefore to hold authorities and the exercise of discretion granted to them to account”;
- b. that “[t]he public authority in this case is not only a grantor of licences for concessions of deckchairs and umbrellas on public beaches but it is also entrusted with the task of administering public beaches and of preparing and implementing police [sic.] related thereto. The public authority therefore plays an important role in regulation and

administration of public beaches in a way that places it at the heart of accountability on that administration”;

- c. that “[t]he public authority’s own website indicates that it is the responsible authority to receive applications for and consequently to issue ‘licences to hire umbrellas, deckchairs and sunbeds from a licensed tourism operation according to policies and guidelines as stipulated by the Malta Tourism Authority”;
- d. that “[t]he public authority is not only connected to the agreements signed by public authorities and third parties for the hiring of deckchairs but is actually the licensing authority. Moreover, Subsidiary Legislation 409.05 even establishes the fees for the issue by the public authority of a classification certificate, licence rate and transfer of licence”;
- e. that “[b]esides a licensing role, the public authority has publicly spoken of its role in granting concession agreements to third parties for deckchairs for a number of bays”;
- f. that “in establishing policy the Malta Tourism Authority has included the management of beaches within its role and function”;
- g. that “therefore, the public interest requires disclosure for holding the public authority to account not only in the administration of public funds and public assets, but also for the policy developed and implemented as well as the granting of concessions through licences to third parties. The actions of public authorities are, in a democracy, subject to public accountability and hence their obligation to disclose information on matters related to public interest and public debate. The role of the media in seeking such information is enshrined and protected in international law as well as national law, predominantly through the European Convention Act. All other ordinary law, including the FOI, is subject to its adherence with the European Convention Act which provides for a right of access to information held by public authorities”;
- h. that “[t]he Act does not provide for a full and absolute exemption of documents merely because they concern a business but establishes a number of criteria thereby limiting the application of the exception”; and
- i. that “[t]he Authority has not indicated the reasons for which disclosure of the document of an encroachment concession or any type of contract from a public authority to use a

public asset for their private commercial purposes to be tantamount to unreasonable adverse effects on that business affair. The Authority fails to appreciate that persons contracting with public entities have a reasonable expectation that their contract with a State entity may come under scrutiny. The allocation of rights of enjoyment over public property which consequently limits the use of that property by the public brings with it a clear and foreseeable expectation of one's contract being disclosed by the authority for purposes of transparency and accountability”.

Admissibility of the Freedom of Information application

7. 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

8. As part of the investigation procedure, by means of an information notice dated the 22nd 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.

The Reply of the Public Authority

9. Following several reminders, the Public Authority referred to Parliamentary Questions 8366¹ in its reply to the information notice:

¹<https://pq.gov.mt/PQWeb.nsf/7561f7daddf0609ac1257d1800311f18/c1257d2e0046dfa1c12589a40029fad0!OpenDocument>

Legiżlatura XIV
Mistoqsija Numru: 8366
Seduta: 117 - 03/05/2023 04:00 PM
Titlu: Kemmuna Beach Concessions

Kategorija ORAL
Data: 28/04/2023
Seduta Interim: -

L-Onorevoli ALBERT BUTTIGIEG staqsa lill-Onorevoli CLAYTON BARTOLO (Ministru ghat-Turizmu):

Jista' l-Ministru jghegħed fuq il-Mejda tal-Kamra kopja tad-dokument li bih ġew estiżi l-konċessjonijiet tal-bajjiet f'Kemmuna? Jista' jghid ukoll liema kienu l-bajjiet li kellhom il-konċessjoni mġedda awtomatikament?

Tweġiba:

Ninforma lill-Onor. Interpellant li f'Kemmuna ma hemm l-ebda konċessjoni.

LEGAL ANALYSIS AND DECISION

10. As a preliminary step, the Commissioner examined the replies provided by the Public Authority on the 25th August 2022 and the 20th October 2022 in relation to the request for “[a] copy of *the concession agreements awarded to deckchair and umbrella operators in Blue Lagoon between 2013 and 2022*”, which request was refused on the basis of article 32(1)(c)(i) of the Act. Additionally, the Commissioner noted that the Public Authority extended the time-limit set out in article 10 of the Act by an additional twenty (20) working days in respect of the request as it needed more time to “*consult third parties before it could decide on the request*”.
11. The Commissioner noted that article 15(1)(a) of the Act obliges the Public Authority to give the applicant the reasons for the refusal of the FOI request. In this regard, article 14 of the Act sets forth the number of reasons which enable the Public Authority the basis upon which to refuse the request. In view of the spirit and scope of the Act, the public authorities should be transparent in the replies and provide sufficient information to enable the applicant to understand the refusal in the most comprehensive manner.
12. The Court of Justice of the European Union² (CJEU) in its interpretation of Regulation 1049/2001³ emphasises that applicants should be provided with sufficient information to clearly understand the reason for refusal:

“As a preliminary point, it must be observed that the obligation to state reasons is a general principle of EU law, enshrined in the second paragraph of Article 296 TFEU and in Article 41(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’), under which any legal act adopted by the EU institutions must state the

² Case T-185/19, Public.Resource.Org.mInc, Right to Know CLG vs European Commission, Judgment of the General Court, decided on the 14th July 2021, paragraphs 82 and 83.

³ 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.

*reasons on which it is based (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, T-485/18, EU:T:2020:35, paragraph 19 and the case-law cited). That obligation on the part of EU institutions to state the reasons on which a decision is based is not merely taking formal considerations into account, but is intended to enable the EU judiciary to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded. Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question (see judgment of 28 November 2019, *Mélin v Parliament*, T-726/18, not published, EU:T:2019:816, paragraph 40 and the case-law cited).*

*In the context of applying the provisions of Regulation No 1049/2001, it has been held that the purpose of the obligation for the institution to state the reasons for its decision refusing to grant access to a document is, **first, 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 and, secondly, to enable the Courts of the European Union to review the lawfulness of the decision.** The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, T-485/18, EU:T:2020:35, paragraph 20 and the case-law cited).” [emphasis has been added].*

13. Accordingly, the Commissioner examined the information provided by the Public Authority during the course of the investigation, specifically, the reference made to the reply to the Parliamentary Question 8366, where the Minister for Tourism stated that “*f’Kemmuna ma hemm l-ebda konċessjoni.*” This effectively demonstrates that not only the Public Authority did not cite the correct reason to the applicant, but also there was no valid reason to extend the time-limit by an additional twenty (20) working days in terms of article 11(1) of the Act. It is not clear why the Public Authority extended the time-limit to consult third parties, when according to the Minister for Tourism “*f’Kemmuna ma hemm l-ebda konċessjoni.*”

14. The Commissioner is very 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 provides the applicant with all the 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.

15. Furthermore, the Commissioner is also dissatisfied to note that the Public Authority had extended the limit of the request without a justified reason at law. The extension of time-limits in terms of article 11 of the Act should be used by public authorities in very exceptional circumstances, and not as a delaying tactic to unnecessarily lengthen the process and make the process even more arduous for the applicant. This runs contrary to the scope and objectives of the Act, which are intended to instill a sense of transparency and accountability in public authorities.

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 reason of the refusal cited by the Public Authority in terms of article 32(1)(c)(i) of the Act in relation to “[a] copy of *the concession agreements awarded to deckchair and umbrella operators in Blue Lagoon between 2013 and 2022*” 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 correct reason to enable her to understand the refusal of the 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 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(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.