

FREEDOM OF INFORMATION REQUEST

1. On the 1st December 2022, Ms Caroline Muscat (the “**applicant**”) made a freedom of information request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act (Cap. 496 of the Laws of Malta) (the “**Act**”), wherein the Public Broadcasting Services Limited (the “**Public Authority**”) was requested to provide an electronic copy of the following information:
 - *“List of PSO funds received from the government for each year between 2017 and 2022*
 - *List of allocations made to each and every TV and Radio Programme from PSO funds for each year between 2017 and 2022”.*
2. On the 3rd January 2023, the Public Authority extended the time limit set out in article 10 of the Act 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 31st January 2023, the Public Authority provided a copy of the “*list of PSO funds received from the government for each year between 2017 and 2022*”. However, in relation to the “*list of allocations made to each and every TV and Radio Programme from PSO funds for each year between 2017 and 2022*”, the Public Authority submitted the following:

2017/2018	Available for Viewing
2018/2019	Available for Viewing
2019/2020	Available for Viewing
2020/2021	Not available – Still being audited
2021/2022	Not available

The Public Authority invited the applicant “to view the information in question on *Wednesday 15 February 2023, at 11:00hrs at PBS Offices at 75, St Luke’s Road, G’Mangia*”.

4. By means of an email dated the 6th July 2023, the applicant stated that:

“Reference is made to the above mentioned FOI request, accepted by your company. However the list of PSO allocations never arrived and instead you asked for a viewing.

Since we asked for an electronic copy to be sent by e-mail, can you kindly forward the requested documents on this address please.”

5. On the 19th July 2023, the Public Authority referred to its “invitation which was set for Wednesday 15 February 2023 at 11:00hrs to come and view the said documents at our premises but you did not show up for the appointment. We are once again inviting you to come and view the documents on Wednesday 26th July 2023 at 11:00hrs at PBS premises”. On the same day, the applicant replied that “[a]s we have communicated before, our request was for a copy and not a viewing. Please inform us whether you will be sending the copies of the documents requested as otherwise we will have to lodge a complaint with the IDPC” [emphasis has been added by the Public Authority].
6. On the 25th July 2023, the Public Authority provided its final reply and informed the applicant that the requested information could not be provided in the manner preferred by the applicant on the basis that the “[t]he information requested is commercially sensitive”.

FREEDOM OF INFORMATION APPLICATION

7. On the 27th July 2023, 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 request for information made by the applicant to the

Public Authority has been dealt with pursuant to the requirements of the Act. The applicant contended that the *“info requested concerns public funds and its disbursements and is in the public interest. Please also note that an exact similar request made by the Times of Malta in 2019, under a different PBS CEO, was accepted in full. See link here: <https://timesofmalta.com/articles/view/national-broadcaster-gets-more-state-funding.705774>”*.

INVESTIGATION

Admissibility of the Freedom of Information Application

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

The Issuance of the Information Notice

9. As part of the investigation procedure, by means of an information notice dated the 29th August 2023, issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to provide a true copy of the information requested by the applicant and any other 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 has complied with the requirements of the Act. In particular, the Commissioner requested the Public Authority to provide the legal basis of the decision taken by the Public Authority to refuse to provide the *“[l]ist of allocations made to each and every TV and Radio Programme from PSO funds for each year between 2017 and 2022”* on the basis that *“[t]he information requested is commercially sensitive”* in the manner preferred by the applicant.

Submissions received from the Public Authority

10. On the 19th September 2023, the Public Authority provided its reply to the information notice and submitted the following argumentation for the Commissioner to take into consideration during the legal analysis of this case:

- a. that the Public Authority is a commercial entity having the registered number C-13140 and the majority shareholder is the Government of Malta, and therefore, the Public Authority is exempt in terms of article 5(1)(f) of the Act;
- b. that the “[*l*]ist of PSO funds received from the government for each year between 2017 and 2022” is a public document and it was forwarded to the applicant despite the fact that the Public Authority is not obliged to do so;
- c. that the “[*l*]ist of allocations made to each and every TV and Radio Programme from PSO funds for each year between 2017 and 2022” is strictly related to the commercial activities of the Public Authority, and therefore, the information requested is commercially sensitive;
- d. that the disclosure of the second part of the FOI request may cause serious prejudice to the Public Authority and this is mainly due to the fact that the contracts entered into between the Public Authority and the programme producers are confidential in terms of article 31(2) of the Act;
- e. that the Public Authority is of the opinion that there is no substantial public interest to disclose the budget allocated to the production of each programme in particular when balancing this against the right of confidentiality of those individuals who are providing a service to the public broadcasting;
- f. that it is important to note that this confidential information is not even disclosed to the Government of Malta as what is usually sent is the allocation of funds for each genre and not the allocation of funds for each programme; and
- g. that as stated by the applicant herself, the Public Authority gave the applicant the opportunity to inspect the requested information at its offices.

Submissions received from the applicant

11. The Commissioner forwarded a copy of the submissions of the Public Authority to the applicant and provided the applicant with the opportunity to rebut the arguments of the Public Authority. The applicant submitted the following arguments:

- a. that the request is in relation to public funds given to a public authority to produce programmes for the public and the PBS in indeed a public entity financed through public funds, and is therefore obliged to give details to its funders on how it is spending their money;
- b. that the submissions of the Public Authority are superfluous, and it is a usual tactic to postpone the obvious in a real democracy;
- c. that it is not true that the applicant was provided with any physical access to view all the documentation as claimed by the Public Authority;
- d. that the documentation requested by the applicant was already disclosed in 2019 following a similar request made by the Times of Malta;
- e. that the applicant did not request anything to do with any contracts with programme producers as is being claimed, but the applicant only requested transparency on how many public funds are being used for every programme as part of a public service obligation; and
- f. that the applicant is not interested to know about other funds obtained from advertising or any other private sources invested in any program.

Final submissions received from the Public Authority

12. By means of a letter dated the 31st October 2023, the Public Authority provided its final submissions in relation to the remarks made by the applicant:
 - a. that the Public Authority reiterates that it has provided the applicant with ample opportunity to view the documents requested at its offices and this could be verified from the emails which were annexed with its submissions; and
 - b. that with reference to the freedom of information request made by the Times of Malta, the Public Authority noted that [REDACTED] viewed the documents at the offices of the Public Authority, and he was not provided with copies of the documents.

LEGAL ANALYSIS AND DECISION

13. As a preliminary observation, the Commissioner refers to the submissions of the Public Authority where it invoked the non-applicability of the Act, by stating that “[i]t-talba tirrigwardja dokumenti li għalihom ma japplikawx id-disposizzjonijiet tal-Kap 496 tal-Liġijiet ta’ Malta u a tenur tal-Artikolu 5(1)(f) tal-istess att”. Article 5(1)(f) of the Act provides that the freedom of information legislation shall not apply to documents which are held by a commercial partnership in which the Government of Malta has a controlling interest insofar as the documents requested by the applicant are in relation to the commercial activities of the commercial partnership.
14. The Public Authority has previously cited the non-applicability of the Act when it refused to disclose documents requested by applicants. However, this argument was rejected twice by the Information and Data Protection Appeals Tribunal (the “**Tribunal**”). On the 12th July 2018, the Tribunal delivered the decision ‘Public Broadcasting Services Limited vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data’¹ and confirmed that:

“Li għalhekk l-appellanti ma għandux raġun meta jgħid li l-PBS limited hija soċjetà kummerċjali u mhux awtorità pubblika meta kif jammetti huwa stess l-Gvern huwa azzjonista maġġoritarju.

Li għalhekk Public Broadcasting Services Limited għandha l-istess responsabilitajiet u dmirijiet bħal awtorità pubblika a fini tal-Kap. 496 tal-Liġijiet ta’ Malta.”

15. On the 2nd March 2023, the Tribunal delivered the decision ‘Caroline Muscat vs Public Broadcasting Services Limited’² and reiterated its reasoning:

“L-ewwelnett il-Public Broadcasting Services Limited taqa’ taht id-definizzjoni ta’ ‘awtorità pubblika kif mogħtija fil-Kap 496 tal-Liġijiet ta’ Malta għaladarba l-Gvern huwa azzjonista maġġoritarju u dan kif gie diġa stabbilit minn dan il-Bord diversi drabi fosthom fid-deċiżjoni numru 5/2017

¹ Appeal Number 5/2017.

² CDP/FOI/92/2021

tat-12 ta' Lulju 2018 fl-ismijiet Public Broadcasting Authority vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data.

Li għalhekk ma għandux raġun l-appellanti jikkontendi li huwa soċjetà kummerċjali u li ma jaqgħax taħt it-tifsira ta' awtorità pubblika”

16. In this regard, the Commissioner considers as puerile this umpteenth attempt made by the Public Authority to invoke article 5(1)(f) of the Act as a legal ground to justify the non-applicability of the Act to documents which it effectively holds, when taking into account the previous judgments delivered by the Tribunal which confirmed, *inter alia*, that the Public Broadcasting Services Ltd is indeed a public authority as defined under the Act and to which the law applies in its entirety. These judgments were never challenged by the Public Authority and, consequently have become final and conclusive.

17. For the purpose of this legal analysis, the Commissioner sought to establish whether the refusal of the Public Authority to provide the documents in the way preferred by the applicant is justified pursuant to the Act. Accordingly, the Commissioner proceeded to assess article 12(1) of the Act, which provides that the Public Authority may grant an applicant access to a document in one or more ways as set forth in paragraphs (a) to (e). However, article 12(2) provides that the Public Authority shall make the document available to the applicant in the way preferred by the applicant unless to do so would –

“(a) impair efficient administration; or

(b) be contrary to any legal duty of the public authority in respect of the document; or

(c) prejudice the interests protected by Part V and Part VI and (in the case of the interests protection by Part VI) those interests are not outweighed by a contrary public interest”.

18. After carefully examining the wording of article 12(2) of the Act, the Commissioner noted that the word “shall” indicates that the Public Authority has a legal obligation to make the document available to the applicant in the way preferred by the applicant. Notwithstanding this, the general rule is subject to three (3) exceptions, as clearly outlined in article 12(2)(a) to (c).

19. Article 12(3) of the Act states that “[w]here access is not granted in the way preferred by the applicant, the public authority shall give the applicant the reason for not providing the

information in that way and state that the applicant has the right under article 23 to make a complaint thereon to the Commissioner". The Public Authority by means of its reply dated the 25th July 2023 cited the following reason: "[t]he information requested is commercially sensitive".

20. Accordingly, the Commissioner examined if the reply provided by the Public Authority falls under any of the exceptions set forth in article 12(2)(a) to (c) of the Act.
21. The first exception laid down in article 12(2)(a) of the Act requires the Public Authority to sufficiently show how the disclosure in the format preferred by the applicant would "*impair efficient administration*", and this therefore means that the Public Authority should reasonably demonstrate how the disclosure in such format would cause any form of disruption of the operations of the Public Authority. Such exception would generally be upheld in those cases where the request for information would be substantially voluminous and therefore access would be granted in the form of an inspection for the purpose of efficiency and expediency.
22. The second exception set forth in article 12(2)(b) of the Act could only be invoked when disclosing a copy of the requested documentation would "*be contrary to any legal duty of the public authority in respect of the document*". The Commissioner emphasises that it is the duty of the Public Authority to demonstrate the existence of a legal obligation that specifically prohibits the disclosure of a copy of the requested documentation in the way preferred by the applicant. The submissions provided during the course of the investigation do not indicate that the Public Authority has any legal duty that justifies the non-disclosure of the document in the manner preferred by the applicant.
23. Finally, the third exception as held in article 12(2)(c) of the Act, provides that the disclosure of the copy of the requested documentation would "*prejudice the interests provided by Part V and Part VI and (in the case of the interests protected by Part VI) those interests are not outweighed by a contrary public interest*". Accordingly, part V and part VI of the Act stipulate a number of interests which would warrant protection, and in fact this exception may only be invoked by the Public Authority if this would prejudice the interests protected by any of such provisions. The wording "*would prejudice*" indicates that the harm to the protected interest should be sufficiently specific and concrete, and the Public Authority should effectively demonstrate the prejudice that it would suffer pursuant to articles 29 to 34 of the Act. Additionally, if the interest protected falls under any of the provisions as laid down in Part VI of the Act, the Public

Authority should also carry out a balancing exercise to determine whether there is an overriding public interest.

24. In the submissions dated the 19th September 2023, the Public Authority cited article 31(2) as the reason why the documents could not be provided in the manner preferred by the applicant. The Public Authority further explained that “*għar-rigward tat-tieni talba u cioè 'sabiex l-PBS tipprovdi (List of allocations made to each and every TV and Radio Programme from PSO funds for each year between 2017 and 2022) dawn id-dokumenti huma lkoll dokumenti strettament relatati mal-attivatijiet kummerċjali tal-kumpanija. Dawn id-dokumenti kollha huma kummerċjalment sensittivi u l-PBS taf tirrekka preġudizzju serju jekk dawn jiġu żvelati, anke għall-fatt waħdu li l-kuntratti li jsiru mal-prodotturi tal-programmi huma kunfidenzzjali, bl-għan illi jiġi salvagwardjat is-sensittivita' kummerċjali tal-produzzjoni ta' kull programm*”.
25. The Commissioner proceeded to assess article 31(2) of the Act, which states 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*” [emphasis has been added]. This provision exempts a public authority from disclosing a document in the manner preferred by the applicant where that disclosure would ‘found’ an action for breach of confidence and where that action would be taken against the public authority by a third person who is not a public authority. Essentially, this exception could only arise where the third party had a right to confidentiality to the Public Authority, and the Public Authority had a legal obligation of confidentiality towards the third party.
26. The Court of Appeal in the judgment ‘Allied Newspapers Limited vs Foundation for Medical Services’³ delivered on the 18th November 2020 provided a comprehensive analysis of article 31(2) of the Act. The Court stated that:

“Biex tagħmel dan l-appellanti tinterpreta l-artikolu 31(2) tal-Kap. 496 b'mod li ma jirrispekkjax il-kelma u l-ispirtu tal-istess liġi. It-titolu stess tal-imsemmi artikolu 31(2) tal-Kap. 496 “dokumenti suġġetti għall-privileġġ professjonali legali jew li fihom materjal miksub b'mod kunfidenzzjali”, jispeċifika b'mod ċar li dokument huwa dokument eżentat meta jkun fih materjal li jiġi miksub b'mod kunfidenzzjali, u mhux meta l-entità pubblika tidhol hija stess f'kuntratt u tkopri ruħha bi klawwsola ta' kunfidenzzjalità, jew meta tirredigi dokument u tikklassifikah hija stess bħala kunfidenzzjali. Huwa

³ Appell Inferjuri Numru 11/2020 LM.

evidenti l-għan tal-artikolu 31 tal-Kap. 496 x'inhuwa - li jiġi mħares is-sigriet professjonali legali u materjal miksub b'mod kunfidenzjali.”

27. In a recent judgment ‘Rebecca Bonello Ghio vs Malta Film Commission’⁴ delivered on the 31st January 2024, the Court of Appeal reiterated its reasoning:

“L-appellanta ma tistax targumenta li l-informazzjoni li qiegħda tintalab tiżvela għet miksuba mingħand xi hadd b'mod kunfidenzjali, imma dan huwa kaz fejn l-appellanta qiegħda tintalab tiżvela informazzjoni li toħroġ minn kuntratt li hija dahlet għalih minn jeddha, fejn qablet li fih għandha tiddaħħal klawsola ta' kunfidenzjalità. L-artikolu 31(2) tal-Kap. 4962 , jispeċifika b'mod ċar li dokument huwa dokument eżentat meta jkun fih materjal li jiġi miksub b'mod kunfidenzjali, u mhux meta l-awtorità pubblika tidhol hija stess f'kuntratt u tkopri ruhha bi klawsola ta' kunfidenzjalità, jew meta tirredigi dokument u tikklassifikah hija stess bħala kunfidenzjali. Hawnhekk qegħdin nitkellmu dwar awtorità pubblika li hija ffinanzjata minn fondi pubbliċi sabiex tkun tista' tmexxi 'l quddiem l-għanijiet li twaqqfet għalihom. Ċertament li sabiex jiħarsu l-prinċipji tat-trasparenza u l-kontabilità, hija għandha l-obbligu li tiżvela kif l-flus li tingħata minn fond pubbliċi b'liema mod qegħdin jintefqu.” [emphasis has been added].

28. It therefore follows that article 31(2) of the Act does not apply to the present case as the Public Authority did not demonstrate that the information being requested by the applicant was obtained in a confidential manner from a third party. On the contrary, the information being requested is the amount of public funds allocated to each and every TV and radio programme by the Public Authority. Pursuant to the settled case-law of the Tribunal and the Court of Appeal, public authorities should be absolutely transparent on the manner how they spend public funds. The Act establishes a right to information held by public authorities in order to promote added transparency and accountability in public authorities, and therefore, the applicant should be able to scrutinise the expenditure of the Public Authority in the manner permitted by law as set forth in article 12(2) of the Act.

⁴ Appell Inferjuri Numru 83/2023 LM.

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 the “[*list of allocations made to each and every TV and Radio Programme from PSO funds for each year between 2017 and 2022*]” in the way preferred by the applicant is not justified. Consequently, the Public Authority infringed the following provisions:

- article 12(2) of the Act for failing to make the requested documents available to the applicant in the way preferred by her; and
- article 12(3) of the Act for failing to give to the applicant the reason for not providing the requested documents in the way preferred by her in its first reply dated the 31st January 2023.

By virtue of article 23(4)(b) of the Act, the Public Authority is hereby being ordered to provide the applicant with the “[*list of allocations made to each and every TV and Radio Programme from PSO funds for each year between 2017 and 2022*]” in the manner preferred by the applicant in terms of article 12(1)(b) of the Act.

The requested documents shall be sent to the applicant within twenty (20) working days from the date of receipt of this decision notice and confirmation of the action taken shall be notified to the Commissioner immediately thereafter.

Ian
DEGUARA
(Signature)

Digitally signed
by Ian DEGUARA
(Signature)
Date: 2024.03.21
11:27:47 +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’.