

Information and Data Protection Commissioner

CDP/FOI/21/2021

Caroline Muscat

vs

Court Service Agency

FREEDOM OF INFORMATION REQUEST

1. On the 13th June 2021, 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 Court Services Agency (the “**Public Authority**”) to provide a copy of the “[*l*]ist of payments made to Court experts during 2019 and 2020 including the name of the expert, the member of the judiciary appointing the expert and the global annual payment made to every court expert”, in an electronic format.
2. On the 8th February 2022, the Public Authority informed the applicant that her request could not be met because “[*t*]he information requested by the applicant does not satisfy the definition of ‘document’ found in the Freedom of Information Act (Chapter 496 of the Laws of Malta) since the applicant is not requesting a document but is requesting Court Services Agency to collate information”.
3. On the 11th February 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 basis that “[*p*]lease revise your decision. First of all your reply is (very) late and does not respect the parameters of the law. Secondly, the information should be provided as it is in the public interest, concerns public funds and accountability. Thirdly, the information is easily available at the agency as it has already been provided in the past through other FOI requests. We see no reason why it should not be provided this time round. Please provide reply within the parameters of the law (10 days) so that we can proceed further, if needed”.
4. On the 1st April 2022, the Public Authority reiterated that “[*t*]he Complainant is not requesting a document which already exists but is requesting the Court Services Agency to collate information”.

FREEDOM OF INFORMATION APPLICATION

5. On the 19th April 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 has dealt with the freedom of information request in accordance with the requirements of the Act. In particular, the applicant argued that *“we find no legal basis for refusal of this information which is in the public interest and paid by taxpayers. Also note that the same authority/department had already supplied the same identical information requested for previous years through FOIs. This shows that the public authority is taking this request lightly and is illegitimately refusing to be transparent and accountable. This, coming from the courts agency, is even more unacceptable”*.

INVESTIGATION

Admissibility of the Application

6. After having considered that the applicant is an eligible person in terms of article 2 of the Act and the nature and background of this freedom of information application, together with the procedural steps involved between the applicant and the Public Authority, the Commissioner deemed the application made by the applicant as admissible for the purpose of article 23(2) of the Act.

Freedom of Information Application put on hold

7. On the 5th May 2022, the Commissioner informed the applicant that her freedom of information application will temporarily put on hold in view of the pending appeals before the Information and Data Protection Appeals Tribunal in relation to the definition of “*document*” pursuant to article 2 of the Act.

The Issuance of the Information Notice & Enforcement Notice

8. As part of the investigation procedure, by means of an information notice dated the 2nd March 2023 issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to provide information in relation to the freedom of information 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 make submissions in relation to the decision taken to refuse access to the requested documentation on the basis that of article 2 of the Act, and to provide submissions in relation to the fact that the Public Authority did not comply with the timeframe stipulated in article 10 of the Act.

9. The Public Authority did not provide a reply to the information notice and therefore pursuant to article 25(1) of the Act, the Commissioner served the Public Authority with an enforcement notice on the basis that it had failed to provide the submissions in relation to the decision taken to refuse access to the requested documentation on the basis that of article 2 of the Act, and failed to provide submissions in relation to the fact that the Public Authority did not comply with the timeframe stipulated in article 10 of the Act.

Submissions received from the Public Authority and the Applicant

10. In this regard, on the 24th July 2023, the Public Authority provided its written submissions and reiterated the legal exemption cited to the applicant for not acceding to her request. Furthermore, the Public Authority submitted the following considerations for the Commissioner to take into account during the legal analysis of this case:

- a. that the information requested by the applicant does not satisfy the definition of ‘document’ as outlined in the Act, since the applicant is not specifically requesting a pre-existing document but rather requesting the Public Authority to collate information. Since the request does not pertain to a document in terms of the Act, then such request could not be further examined;
- b. that the applicant requested list of payments made to court experts during 2019 and 2020, including the name of expert and the name of the member of the judiciary appointing the expert. In this regard, the Public Authority referred to article 518 of the Criminal Code, Chapter 9 of the Laws of Malta which states:

“The acts and documents of the courts of criminal justice shall not be open to inspection, nor shall copies thereof be given, without the special permission of the court, except by or to the Attorney General, by or to the parties concerned or by or to any advocate or legal procurator authorized by such parties; but any act, which is pronounced in open court, shall be

open to inspection by any person, and copies thereof may be given on payment of the usual fee:

Provided that a procès-verbal and any depositions and documents filed therewith shall be open to inspection, and copies thereof shall be given, only at the discretion of the Attorney General and on payment of such fees as may be prescribed by the Minister responsible for justice as provided in article 695”.

- c. that access to the acts of criminal proceedings and magisterial inquiries is restricted to the Court, the Attorney General, the Inquiring Magistrate and legal counsel of the accused. Therefore, the Public Authority does not possess the information requested regarding the experts appointed in magisterial inquiries and compilation of evidence; and
 - d. that the Public Authority *“has available the global sum paid to court experts during the whole year that would be X amount for the year 2019 and X amount for the year 2020”.*
11. On the 3rd August 2023, the Commissioner provided the applicant with the opportunity to rebut the arguments made by the Public Authority. Consequently, on the same day, the applicant disagreed with the Public Authority’s reply for the subsequent reasons:
- a. that given the court experts are paid from public funds by a public authority, the same authority is obliged to ensure full accountability and transparency;
 - b. that *“[t]he same agency, under a different nomenclature, had no qualms in providing the exact same info The Shift is asking for to The Times of Malta in previous FOI’s on previous years. We do not understand what changed”;*
 - c. that the Appeals Court has established that public authorities are also obligated to provide lists and collate information, contrary to the claims made by the Public Authority;
 - d. that the applicant’s request for transparency has absolutely nothing to do with article 518 of the Criminal Code, Chapter 9 of the Laws of Malta, as erroneously stated by the Public Authority; and

- e. that “[i]t cannot be that the PA does not have the info requested as it already had in the past (see Times of Malta FOI) and is the PA which pays the court experts. Do we understand well that the PA does not know what experts are being paid for?? We are talking of millions of public funds per year!”.

12. In line with the investigation procedure of this Office, on 24th August 2023, the Commissioner provided the Public Authority with the opportunity to rebut the arguments made by the applicant, however no arguments were submitted by the Public Authority.

LEGAL ANALYSIS AND DECISION

Handling of the Applicant’s Freedom of Information Request

13. For the purpose of the investigation of this freedom of information application, the Commissioner sought to determine whether the Public Authority had handled the request pursuant to the requirement set forth in article 10 of the Act.
14. During the course of the investigation, the Commissioner established that the applicant submitted her freedom of information request on the on the **13th June 2021** and the Public Authority replied to the freedom of information request on the **8th February 2022**. However, the applicant was not satisfied with the reply provided by the Public Authority, and on the **11th February 2022**, the applicant lodged a complaint, pursuant to the internal complaint procedure of the Public Authority. The Public Authority informed the applicant with the decision taken with respect to her complaint on the **1st April 2022**.
15. The Commissioner emphasises that the timeframes stipulated in the Act are necessary to provide the applicants with sufficient assurances that their freedom of information requests would be handled by the public authorities within the set timeframes. The requirement of the Public Authority to provide a reply to the freedom of information request within twenty (20) working days is derived from article 10 of the Act, which provision states that “*the public authority to which a request is made in accordance with article 6 or is transferred in accordance with article 8 shall, as soon as reasonably practicable, and in any case not later than twenty working days after the day on which the request is received by the authority – (a) decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and (b) inform the applicant accordingly in writing*” [emphasis has been added].

16. Section 8.0 of the Code of Practice for Public Authorities (the “**Code**”) outlines the manner how complaints are to be handled by the Public Authority. Section 8.2 of the Code provides that each public authority should establish an internal complaints procedure whereby applicants can seek review of any decision taken or complain about any delays in relation to the release of documentation. Particularly, section 8.3(a) of the Code stipulates that it should not “***entail more than 10 working days, from the receipt of the complaint, to notify the applicant of the Public Authority’s decision***” [emphasis has been added].
17. This therefore shows that the Public Authority had an obligation to reply to the freedom of information request lodged on the **13th June 2021** by no later than the **11th July 2021**. Given that the Public Authority replied on the **8th February 2022**, the Commissioner established that the Public Authority infringed the requirements set forth in article 10 of the Act which oblige it to reply by no later than twenty working days after the day on which the request is received.
18. Furthermore, the Commissioner established that the applicant requested the Public Authority to reconsider its decision on the **11th February 2022**, thus, the Public Authority should have replied by no later than the **25th February 2022**. Even in this instance, the Public Authority provided the reply on the **1st April 2022** and clearly this was not in conformity with the practice set forth in section 8.3 of the Code.

The Exemption Invoked by the Public Authority

19. The Commissioner examined the request submitted by the applicant pursuant to article 3 of the Act, wherein the Public Authority was requested to provide an electronic copy of the “*[l]ist of payments made to Court experts during 2019 and 2020 including the name of the expert, the member of the judiciary appointing the expert and the global annual payment made to every court expert*”.
20. The Commissioner analysed the Public Authority’s submissions dated the 8th February 2022, wherein it stated that “*[t]he information requested by the **applicant does not satisfy the definition of ‘document’** found in the Freedom of Information Act (Chapter 496 of the Laws of Malta) since the applicant is not requesting a document but is requesting Court Services Agency to collate information*” [emphasis has been added].
21. Article 3 of the Act clearly establishes the right to eligible persons to access documents held by public authorities and article 2 of the Act defines ‘document’ in the following terms: “***any article that is held by a public authority and on which information has been recorded in***

whatever form, including electronic data, images, scale models and other visual representations, and audio or video recordings, regardless of whether the information can be read, seen, heard or retrieved with or without the aid of any other article or device” [emphasis has been added].

22. The Court of Appeal in the judgment ‘*Caroline Muscat vs Malta Film Commission*’¹ adopted a wide interpretation of the term ‘document’ and held that “[i]l-Kummissjoni appellanta ma tistax tippretendi li d-disposizzjonijiet tal-ligi, u anki ir-rikjesta tal-appellata, għandhom jinghataw interpretazzjoni tant restrittiva li hija b’hekk tista’ tahrab mill-obbligi tagħha kif imfissra fil-Kap. 496.”

The Commissioner’s Decision Notice in relation to ‘*Caroline Muscat vs Ministry for Justice (MFJ)*’

23. The Commissioner makes reference to the applicant’s request to the Ministry for Justice (MFJ), dated the 1st May 2022, wherein she requested an electronic copy of the “*lists of court experts compiled by the Department of Justice according to public calls since 2016*”. In this regard, the Commissioner noted in his decision notice dated the 12th January 2023 that:

*“On the basis of the foregoing considerations, the Commissioner examined the request submitted by the applicant, whereby she specifically requested a copy of the “lists of court experts compiled by the Department of Justice according to public calls since 2016”. The Commissioner analysed the documentation, provided by the Public Authority on the 5th January 2023, and established that the list which is held by the Public Authority is **not the list of court experts, as requested by the applicant, but rather the list of individuals who have shown interest to serve as court experts**. These persons will only be considered as court experts after being engaged by the members of the judiciary. Consequently, the Commissioner concludes that, prior to this engagement process, the individuals’ personal data contained in the list held by the Public Authority, should not be made publicly available but should be afforded with the necessary protection to guarantee their data protection rights and fundamental freedoms” [emphasis has been added].*

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 Public Authority:

¹ Appeal Inferior No. 72/22/LM, decided on the 22nd February 2023.

- a. **infringed article 10 of the Act when it failed to reply to the freedom of information request within twenty (20) working days after the day on which the request was received by the Public Authority; and**
- b. **did not conform with section 8.3 of the Code of Practice for Public Authorities when it failed to provide a reply with its decision within ten (10) working days, from the receipt of the complaint.**

The Commissioner strongly urges the Public Authority to allocate the necessary resources to safeguard the right of applicants to receive the information within the stipulated legal timeframe and ensure that any future requests are handled pursuant to the requirements of the Act.

Notwithstanding this, the Commissioner decides that the reason of the refusal cited by the Public Authority in its replies, is inapplicable on the basis that, during the course of the investigation, it was established that the document requested by the applicant is not even held by the Public Authority.

In this regard, the Commissioner draws the attention of the Public Authority on the manner how the request was handled and emphasises that public authorities are required to provide applicants with clear and correct reasons or grounds when refusing requests for information.

Ian
DEGUARA
(Signature)

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by Ian DEGUARA
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**Ian Deguara
Information and Data Protection Commissioner**

Right of Appeal

In terms of article 39(1) of the Act where a “[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.