

Jacob Borg

vs

National Orchestra Limited

FREEDOM OF INFORMATION REQUEST

1. On the 31st October 2022, Mr Jacob Borg (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 National Orchestra Limited (the “**Public Authority**”) was requested to provide “*copies of all agreements signed between the national orchestra and the European Foundation for Support of Culture from 1 January 2012 till the date of replying to this FOI request*”, in electronic format.
2. On the 29th November 2022, the Public Authority informed the applicant that his request could not be met as “[a] document is an exempt document if its disclosure under this Act would disclose (b) 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”.
3. On the 20th December 2022, the applicant presented a complaint through the internal complaints procedure seeking the reconsideration of the refusal of the Public Authority, for the following reasons, which are being outlined hereunder:

“4. Though the Malta Philharmonic Orchestra did not indicate the specific article of the law upon which it was founding its refusal, the above words are lifted from article 32(1)(b) of the Freedom of Information Act. It is therefore being assumed, but you are asked to confirm, that article 32(1)(b) of the Act is the reason for your refusal of the request.

Public Interest - Circumstances relevant to the Request

5. *While in terms of article 6(2) of the Act, no authority may ask an applicant to justify or provide reasons for presenting a request, the circumstances surrounding this request are such that clearly indicate a strong public interest which supersedes any reason for non-disclosure that the authority may seek to provide.*

6. *The Malta Philharmonic Orchestra is a government owned national orchestra managed and administered through a government owned company named National Orchestra Limited. It falls under the Ministry for Justice, Culture and Local Government.*

7. *As a state owned orchestra it receives public funds in significant amounts. For example the budget estimates for 2023 indicate that its Music Academy had an actual expenditure for 2021 amounting to €230,000, an approved estimate for 2022 of €250,000, and an estimate for 2023 of €250,000.*

8. *The total contribution to the Malta Philharmonic Orchestra as a government entity is indicated in the budget estimates of 2023 as follows: actual expenditure 2021 €2,895,515, an approved estimate for 2022 of €2,870,000 and an estimate for 2023 of €2,870,000. The same budget estimates provides the 'details of expenditure' for the Malta Philharmonic Orchestra under line 7604 to refer to 'Property, Plant and Equipment' in the amounts of: actual expenditure 2021 is €50,000, approved estimate 2022 is €50,000, and estimate 2023 is €60,000.*

9. *Meanwhile the 'Outturns' for National Orchestra Limited are indicated in the same budget estimates as amounting to a 'Revenue' of €3,692,894 and an 'Expenditure' of €3,763,069.*

10. *The European Foundation for Support of Culture, is a Malta registered non-governmental organisation with VO no. 1098, whose president is Mr Kostantin Ishkhanov. The Malta Philharmonic Orchestra, a public entity, is indicated on the Foundation's website as having benefitted from a number of collaborations and partnerships with the Foundation.*

11. *For example, the Music Academy towards which public funds are contributed, appears to have been launched in partnership with the Foundation. The MPO's then CEO Sigmund Mifsud, had indicated that the purpose of this academy was to 'specialises in helping our young musicians to focus on being professional*

orchestral musician'. He indicated that a British conductor was to lead the academy and three other full-time tutors were to be involved. The Malta Philharmonic Orchestra's Valletta 2018 International Tour around the USA and Russia was organised by the public authority as well as the Foundation, as well with the support of the Malta Tourism Authority . The Malta International Music Festival was held by the Malta Philharmonic Orchestra together with the Foundation .

12. Each of these events, and several others, are publicised by either the public entity and the Foundation rendering their partnership and collaboration public. The MPO's Chairman in 2018 had also claimed that the Foundation was "one of the MPO's main partners. We have been collaborating together in different projects for the past three years and we have a very good working relationship. They are the main tour producers and organisers."

13. Yet amidst this collaboration between the national orchestra and the Foundation as a main partner, journalistic investigations have exposed links of the Foundation to a "Russian agency often accused of being a cover for intelligence operations in foreign countries." The investigation of Russian influence in European countries through covert infiltration of different sectors, including the cultural sector, and the extent of reliance on and influence of that Russian influence on national entities is an issue of public interest and public debate on a European and international level. The debate has become even more particularly important in the light of Russia's war on Ukraine, and the obligations agreed on and undertaken by EU Member States, including Malta.

14. The issue at hand, that is, the receipt and use of money by the Malta Philharmonic Orchestra as a public authority from the Foundation whose source of funds is unknown, is an issue which reflects on a number of issues that are of public interest, such as money laundering, and foreign influence. The relationship of the Malta Philharmonic Orchestra with the Foundation was also halted upon the then Minister for Culture's instructions who had sought a due diligence report on the source of funds.

15. The Malta Philharmonic Orchestra continued its collaboration and partnership with the Foundation despite the increased public debate on Russian

influence in European countries. The collaboration was confirmed by the Malta Philharmonic Orchestra CEO this year, who sought to distance the Foundation from its Russian links.

16. The documents sought are therefore documents that substantiate the collaboration and partnership that the public entity has boasted of and has sought to retain and will serve to give clarity on the administration of a public entity that receives a substantial amount of public funds, and also its administration in determining and managing its links with third parties.

17. The documents in question show the terms and conditions upon which the public entity's partnership with a third party is administered. Transparency in the disclosure of these documents provides a clearer and objective presentation of the public entity's decision to contract with the Foundation and also provides for accountability of the administration of that public entity.

18. The public interest in the disclosure of such documents is therefore of a very high standard and surpasses the need of secrecy under the guise of being commercial information which loses its value upon disclosure.

Commercial information the value of which would be destroyed with disclosure
19. The Malta Philharmonic Orchestra has failed to adhere to its obligations in terms of the Freedom of Information Act in rejecting the request. As has been repeatedly held by the Information and Data Protection Commissioner, the Tribunal for Information and Data Protection and the Court of Appeal, the objective of the Act is to secure transparency and accountability for all public entities.

20. The Court of Appeal established the standard of the obligation of disclosure with reference to the words of the Prime Minister then debating the passing of this Act into law in parliament, who stated as follows:

““Fi kliem l-Onor. Prim Ministru meta kien qiegħed jippilota l-Att dwar il-Liberta tal-Infommazzjoni mill-Parlament: “il-prattika kienet li l-infommazzjoni tibqa’ kunfidenzjali sakemm ma jkunx hemm raguni biex isir mod iehor. ... Bil-proposta ta’ din il-ligi qedghin naqilbu din il-prattika kompletament ta’ that fuq, ghax issa

il-premessa li qedghin inressqu ghall-konsiderazzjoni tal-qorti hija premessa li tghid li l-informazzjoni issa se tkun soggetta li tigi zvelata sakemm ma jkunx hemm raguni valida skont kriterji stabbiliti mil-ligi ghaliex m'ghandhiex tigi zvelata. ... It-trasparenza hija ukoll mezz ewlieni biex tizgura li l-korruzzjoni u l-abbuz ta' poter ma jaqbdux gheruq u li jinkixfu u jinquerdu fejn ikunu prezenti."

21. The scarce provision of reasons included in the refusal of the request by the Malta Philharmonic Orchestra fails to adhere to the culture of transparency and accountability called for by the Act and shows an approach based on secrecy and lack of transparency. The Malta Philharmonic Orchestra has failed to substantiate the use of the exemption it claims. Its refusal merely quotes part of an article of the Act but the public authority does not explain the nature of the information, the commercial value of that information, how that information would lose or diminish in its value upon disclosure, whether this loss of value is assumed or based on objective reasons which show a causal link between disclosure and loss of value and whether the public authority has sought to find a way to be transparent and accountable while not prejudicing the commercial value it claims.

22. Though the Act provides for exemptions by listing a number of reasons fulfilment of which would excuse non-disclosure, these exemptions are not to be interpreted loosely. Moreover, it is only where the public authority shows that disclosure of the information would cause substantial harm to the legitimate aim established by the Act for non-disclosure, that refusal of the request may be held to be compliant with the Act. Even exempt documents may need to be disclosed for an overriding public interest.

23. Often reference is made to the interpretation of Regulation (EC) no 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents so as to interpret national legislation related to access to information. The Data Protection Appeals Tribunal set up under the Act also makes reference to the interpretation of this Regulation as a guidance for the interpretation of the Act.

24. In the joined cases of C-39/05 P and C-52/05 P Sweden and Turco v Council (2008) ECR I-4723 para 49; and Case C-139/07 P Commission v Technische Glaswerke Ilmenau 29 June (2010) ECR I-nyr.para 53, the court held that "if a

body subject to the provisions of the regulation (EC) no 1049/2001 decides to refuse access to a requested document it must in principle explain how disclosure of that document could specifically and effectively undermine the interest protested by the Article 4 exceptions.”

25. *In Case T-851/16 in the names of Access Info Europe v. European Commission, the Court collated the principles established and applicable to the implementation of exceptions for disclosure. The Court stated as follows:*

“General considerations regarding Regulation No 1049/2001

33 As a preliminary observation, it should be noted that, in accordance with recital 1 of Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 TEU ‘of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’. As is stated in recital 2 of Regulation No 1049/2001, the right of public access to documents of the institutions is related to the democratic nature of those institutions (judgments of 1 July 2008, Sweden and Turco v Council, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 34, and of 17 October 2013, Council v Access Info Europe, C-280/11 P, EU:C:2013:671, paragraph 27).

34 To that end, the purpose of Regulation No 1049/2001, as indicated in recital 4 and Article 1 thereof, is to give the public a right of access to documents of the institutions that is as wide as possible (judgments of 1 February 2007, Sison v Council, C-266/05 P, EU:C:2007:75, paragraph 61; of 21 September 2010, Sweden and Others v API and Commission, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 69; and of 17 October 2013, Council v Access Info Europe, C-280/11 P, EU:C:2013:671, paragraph 28).

35 That right is nonetheless subject to certain limitations based on grounds of public or private interest (judgment of 1 February 2007, Sison v Council, C-266/05 P, EU:C:2007:75, paragraph 62). More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (judgments of 21 September 2010, Sweden and Others v API and Commission, C-514/07 P, C-528/07 P and C-532/07

P, EU:C:2010:541, paragraph 71, and of 17 October 2013, Council v Access Info Europe, C-280/11 P, EU:C:2013:671, paragraph 29).

36 As such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (judgments of 1 February 2007, Sison v Council, C-266/05 P, EU:C:2007:75, paragraph 63; of 1 July 2008, Sweden and Turco v Council, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 36; and of 17 October 2013, Council v Access Info Europe, C-280/11 P, EU:C:2013:671, paragraph 30), with the result that the mere fact that a document concerns an interest protected by an exception is not in itself sufficient to justify application of the exception (judgments of 27 February 2014, Commission v EnBW, C-365/12 P, EU:C:2014:112, paragraph 64; of 13 April 2005, Verein für Konsumenteninformation v Commission, T-2/03, EU:T:2005:125, paragraph 69; and of 7 June 2011, Toland v Parliament, T-471/08, EU:T:2011:252, paragraph 29).

37 If the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in Article 4 of Regulation No 1049/2001 upon which it is relying. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (see judgments of 17 October 2013, Council v Access Info Europe, C-280/11 P, EU:C:2013:671, paragraph 31 and the case-law cited, and of 3 July 2014, Council v in 't Veld, C-350/12 P, EU:C:2014:2039, paragraph 52).”

26. In the light of these principles, the Malta Philharmonic Orchestra must therefore substantiate its decision to refuse the request by indicating how its assessment of the request and its decision to refuse it fulfil the criteria indicated above in paragraph 21. That is it has failed to explain the nature of the information, the commercial value of that information, how that information would lose or diminish in its value upon disclosure, whether this loss of value is assumed or based on objective reasons which show a causal link between disclosure and loss of value, and whether the public authority has sought to find a way to be transparent and accountable while not prejudicing the commercial value it claims.

27. *Without prejudice to this, the undersigned hereby submits that none of those criteria can be fulfilled in the circumstances of this request. The information requested consists of agreements contracted with a public authority and connected to its public role and public activities as well as the merging of public funds with funds obtained from third parties. As such, every entity that contracts with a public authority has a reasonable expectation that its contract will be disclosed since its partnership and contract are subject to the same public scrutiny to which the public authority is subjected. The nature of the information is therefore one that represents the relationship of a public authority with another party in the fulfilment of that public role assigned to it.*

28. *The information in question does not have a commercial value that would be lost or diminished upon disclosure. The nature of the information is such that brings about accountability for the Malta Philharmonic Orchestra in relation to the administration of its public role. Moreover, the Malta Philharmonic Orchestra has consistently boasted of its partnership indicating these agreements as reflecting one of its main partnerships. Its reliance on this partnership itself exposes the information to publication especially in circumstances where the public authority's main purpose is not to administer the national orchestra as an instrument of profit but as a State owned cultural instrument.*

29. *Furthermore, in dismissing the request the Malta Philharmonic Orchestra has failed to indicate how it has considered the application of article 13 of the Act. The Act requires the public authority to consider the deletion of exempt matter from the requested document rather than immediately proceeding with the outright non-disclosure of the document in its totality. The Malta Philharmonic Orchestra has failed to make this assessment and has failed to indicate how and why the deletion of exempt matter was not followed in this case and that full non-disclosure was preferred by it.*

Conclusion

30. *In view of the above, and without prejudice to other submissions that may be raised in furtherance of action related to the freedom of information request in question, in terms of this complaint, the Malta Philharmonic Orchestra is hereby asked to reconsider its decision to refuse the request and instead to provide a copy of all the agreements signed between it as a national State-owned orchestra and*

the European Foundation for Support of Culture from 1 January 2012 to the date of replying to the request”.

4. On the 4th January 2023, the Public Authority informed the applicant that in accordance with *“Article 31.(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege. (2) 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”.*

FREEDOM OF INFORMATION APPLICATION

5. On the 2nd March 2023, the applicant through his legal counsel, 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 freedom of information request pursuant to the requirements of the Act.

Admissibility of the Freedom of Information 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 the freedom of information application, together with the procedural steps involved between the applicant and the Public Authority in the request for an electronic copy of the requested documentation, the Commissioner deemed the application made by the applicant as admissible for the purpose of article 23(2) of the Act.

INVESTIGATION

The Issuance of the Information Notice

7. As part of the investigation procedure, by means of the information notice dated the 3rd 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. 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 32(1)(b), article 31(1) and article 31(2) of the Act. The Public Authority was requested, in particular:

- a. to further elaborate on how and why the requested documentation is considered to be legally privileged; and
 - b. to indicate if there are parts of the requested documentation which are not subject to article 31 of the Act.

8. Following several reminders sent by this Office, specifically on the 24th April 2023, the 22nd May 2023 and the 26th June 2023, the Public Authority replied by means on an email dated the 4th July 2023, stating the following: *“[i]t is being proposed that a meeting be held at IDPC, inviting the requestor and an official from the public entity in question, in the presence of the respective legal representatives, to discuss the handling of this request with a bona fide prospect of finding common ground”*. In this regard, before proceeding with proposing mediation to the applicant concerning his freedom of information application, the Commissioner requested that the Public Authority to provide its way forward for addressing this matter. This was deemed necessary to ensure a clear understanding of the Public Authority’s approach, allowing the Commissioner to assess the potential for resolving the issue through mediation. Specifically, the Commissioner requested the Public Authority to provide an overview of proposed common ground that could lead to a satisfactory outcome for both parties.

9. On the 6th July 2023, the Public Authority presented the following key points for the Commissioner’s consideration:
 - a. that, on a without prejudice basis, the understanding would be that the respective parties withdraw all their complaints, appeals and proceedings against each other;
 - b. that the Public Authority commits to allowing the applicant access to the requested documents, however, it stipulates that these documents shall not be released for publication in the media due to confidentiality obligations. The proposed compromise aims to maintain confidentiality to protect potential sponsors and collaborations, while still granting the applicant access to the requested documentation for all good intents and purposes;
 - c. that the applicant must agree that any subsequent publication or media report on the matter should be factual and not speculative, as past reports have been. Furthermore, the Public Authority’s official position would also be published alongside any article that may be penned on this matter; and

- d. that this approach seeks to strike a balance between the applicant’s right to access documents held by a public authority, ensuring transparency, while also preventing the misuse of freedom of information requests to generate speculative articles that could harm the reputation of the Public Authority, which goes against the spirit of the law.
10. On the 12th July 2023, the Commissioner contacted the applicant, requesting his input on the possibility of reaching an amicable settlement in this case. The Commissioner also inquired whether the applicant was in agreement to proceed with a mediation session, which the Commissioner offered to facilitate. On the 3rd August 2023, the applicant indicated that he had no choice but to refuse the terms proposed by the Public Authority, citing the following arguments:
- a. that the decision to decline the proposed terms was not taken lightly. However, upon thorough consideration of all circumstances surrounding this case, it became evident that accepting the terms would require the applicant to default on the tenets of responsible journalism and completely disrespect the obligations that come with his role as a journalist;
 - b. that the Public Authority’s proposal is clearly in breach of the law and takes an offensive stand towards the journalist’s work, where no such offence was committed by the journalist;
 - c. that “[i]n so far as the public authority claims is bound by confidentiality, this is a confidentiality which it contracted purely of its own accord, disrespecting its obligations of transparency and accountability as a national entity. Moreover, responsible journalism does not allow my client to become an accomplice in keeping unpublished information which is undoubtedly in the public interest. The public authority is not a source or a whistleblower, and cannot a priori be considered by my client as deserving the protection given to sources or whistleblowers. Ethical journalism requires my client to determine how the information is published as best serves the public interest”;
 - d. that “[a]s for the second condition being imposed by the public authority, my client brings to the attention of the public authority that all past reports have fully complied with the standards of ethical journalism. The public authority has

repeatedly and for months been asked to provide information which includes its position. My client refutes any imputation of wrongdoing in the past articles, and assures the public authority that questions on the position of the authority will continue to be sent and its reply considered in published articles”;

- e. *that “[a]s for the public authority’s assertion in its third paragraph, my client is holding firm his rights at law and refutes any allegation of harm to its reputation including the imputation of the alleged intention to foment this harm. Suffice to say that this third paragraph reads very similar to SLAPP letters that journalists receive from those who abusively seek to silence journalists”;*
- f. *that as a gesture of goodwill, the applicant indicated that should the Public Authority be willing to provide the requested copies without restricting the use of their content, the applicant would be willing to stop the procedures, the applicant would welcome responses from the Public Authority to any questions sent regarding the matter, with the intention of considering its perspective for potential inclusion in any forthcoming articles.*

11. On the 6th September 2023, the Commissioner forwarded the applicant’s reply to the Public Authority and requested it to determine the way forward, that is, by either accepting the applicant’s position and acceding to his request, or else to proceed with the Commissioner’s investigation procedure and thus, responding to the information notice issued on the 3rd March 2023. On the same day the Public Authority made the following arguments:

“It is clearly evident from the tone of Dr Comodini Cachia's reply, that the applicant is not at all interested in seeking a workable solution that would allow for transparency on one hand, whilst ensuring fair and responsible journalism on the other.

The applicant's reply is littered with patronising and demeaning allegations, attacking the public authority's position described as 'offensive', 'in breach of the law', 'disrespecting transparency and accountability', 'SLAPP action' etc. By adopting this attitude on the part of the applicant or his legal adviser, the public authority has more reasons to believe that the journalist is either outright prejudiced against the public authority or unnecessarily playing the victim, and this calls for caution on the part of the Commissioner.

Whereas the public authority has been forthcoming in proposing a solution by providing the requested documentation as long as prudence is applied, the applicant interprets this move as an 'imposition' - which is surely not the case. It is actually the applicant who is imposing conditions under the guise of 'public interest'. The public authority is likewise stunned to read and fails to understand how its bona fide solution is being compared to a SLAPP action!

Furthermore, the applicant has yet again confirmed that the public authority's position may not necessarily feature in any article concerning these documents. Responsible journalism, to use the applicant's words, means ethical reporting without any manipulation or biases. It entails true and fair news to bring a positive impact. How can any journalist for that matter, be seen to be responsible, impartial and unbiased, if a concerned party is being attacked in this way? Worse still, the applicant has not guaranteed that the public authority's position is published. The journalist is suggesting that the public authority's position may be considered in the form of replies to questions that might be asked, and yet still, their inclusion would be up to the journalist's discretion. The public authority respectfully objects to this condescending position and should be afforded, at least, a guarantee that its position would be published unedited.

It is thus humbly concluded that whilst the public authority remains open to public scrutiny and promotes good governance, on the other hand it will not allow anyone to tarnish its reputation or publish spun articles with fanciful titles that are far from being responsible and ethical as already happened in the past”.

12. In light of this, on the 15th September 2023, the Commissioner communicated with the Public Authority and stated that:

*“Given that a mutual decision to conduct a mediation session has not been reached, the Commissioner is proceeding with the Office’s investigation procedure and thus, he instructs you to provide a reply to the Information Notice dated the 3rd March 2023, **at your earliest convenience, and, in any event by no later than Friday 29th September 2023** (see attached). In accordance with article 24(2) of the Act, the Commissioner is informing the Public Authority that the information requested in the information notice is for the purposes of enabling him to exercise his functions under the Act and to determine whether the Public*

Authority has complied or is complying with any of the requirements of the Act”
[emphasis has been added].

ISSUANCE OF AN ENFORCEMENT NOTICE

13. In this regard, despite the fact that the Commissioner sent several reminders, more specifically, those sent on the 24th April 2023, the 22nd May 2023 and the 26th June 2023, the Public Authority failed to reply to the Information Notice. Therefore, pursuant to article 25(1) of the Act, the Commissioner was left with no alternative but to serve the Public Authority with an enforcement notice. In the Commissioner’s notice dated the 26th October 2023, the Public Authority was ordered:

- a. to provide any information which it deems relevant and necessary to support the Public Authority’s decision and rebut the arguments made by the applicant;
- b. to further elaborate on how and why the requested documentation is considered to be legally privileged;
- c. to indicate if there are parts of the requested documentation which are not subject to article 31 of the Act; and
- d. to provide with its reply, a true copy of the requested documentation (**marked and annexed as IDPC DN 1**).

14. A final reminder was sent on the 24th January 2024, however, no reply was forthcoming from the Public Authority.

LEGAL ANALYSIS AND DECISION

Lack of Cooperation

15. As a preliminary observation, the Commissioner puts on record the fact that the Public Authority has deliberately and persistently failed to cooperate with his office during the course of the investigation. This lack of cooperation has been clearly established when no reply was received from the Public Authority, first, when the information notice was issued pursuant to article 24(1)(a) of the Act, followed by various chaser emails, and subsequently when the Commissioner was compelled to serve the Public Authority with an enforcement notice dated

the 26th October 2023, ordering the Public Authority to comply with the information notice. The principle objective of issuing the information notice is to enable the Commissioner to conduct a thorough and individual examination of each agreement that is the subject of the freedom of information application under investigation, and to determine whether the requested documentation falls within the scope of the exemptions cited by the Public Authority. Clearly, the Public Authority considers itself above the law and this kind of behaviour, coming from a reputable musical institution, is certainly deplorable and is unacceptable in a democratic society.

16. The Court of Appeal in its judgment *‘Intrapriża ta’ Malta vs Il-Kummissarju għall- Informazzjoni u l-Protezzjoni tad-Data et’*¹, highlighted that the Commissioner has every right to request the public authority to provide any information which he deems necessary for the purpose of examining the requested information, and in fact, the Court of Appeal held as follows:

“Illi ma hemmx dubju li f’ċirkostanzi normali fejn ma jkun hemm l-ebda esklużjoni speċifika fil-ligi l-Kummissarju appellat kellu kull jedd fil-ligi li jitlob li dokumentazzjoni mizmuma minn Awtorita’ pubblika jgħaddi għandu sabiex ikun hu fid-diskrezzjoni li tagħtih il-ligi li jiddeciedi finalment dan għandux jgħaddi għand l-appellanti odjern jew le” [emphasis has been added].

17. Although the Commissioner was not provided with the documentation to be able to examine its contents and ascertain the justification of exemptions invoked by the Public Authority, he nonetheless proceeded to evaluate whether the Public Authority’s refusal to furnish the requested documentation to the applicant was justified pursuant to article 31(1), article 31(2), and article 32(1)(b) of the Act.

The Replies Provided by the Public Authority to the Applicant

18. In the first reply provided by the Public Authority on the 29th November 2022, the applicant was informed that the request could not be met as “[a] document is an exempt document if its disclosure under this Act would disclose (b) 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”. Moreover, on the 4th January 2023, the Public Authority cited article 32(1)(b) of the Act as another reason for not disclosing the requested document to the applicant, by

¹ Appeal Number: 61/2018, *‘Intrapriża ta’ Malta vs Il-Kummissarju għall- Informazzjoni u l-Protezzjoni tad-Data et’*, decided on the 11th October 2019.

stating that “*Article 31.(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege. (2) 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 analysed the exemptions invoked by the Public Authority and established that, regarding the first exemption invoked under article 32(1)(b) of the Act, which pertains to the failure of the Public Authority to adequately justify the withholding of the requested documentation based on its commercial value, the Public Authority did not provide a clear demonstration of the potential harm to its commercial interests should the information be disclosed, as mandated by article 32(1)(b) of the Act, in order to substantiate its claim.
20. The Commissioner acknowledges the other exemptions invoked by the Public Authority, as outlined in article 31 of Act. However, the Commissioner noted that it is incumbent upon the Public Authority to provide a detailed explanation regarding how the disclosure of the requested documentation would give rise to prejudice, particularly by clarifying how the document is considered legally privileged. Additionally, the Public Authority has failed to sufficiently explain how the requested documentation meets the criteria for exemption under article 31(2) of the Act, by clearly demonstrating how its disclosure under the Act “*would found an action by a person (other than a public authority) for breach of confidence*”.
21. Given that the Public Authority chose to ignore the Commissioner’s lawful request for the documents subject to this investigation, which are indeed necessary for him to deliberate on the case, the Commissioner found himself unable to conduct a thorough assessment designed to ascertain whether the exemptions invoked by the Public Authority are justified and whether any potential risks, associated with disclosure, exist.
22. The Commissioner emphasises that it is incumbent upon the Public Authority to furnish the Commissioner with a clear rationale for invoking these exemptions, and therefore for not disclosing the requested documentation to the applicant. This was indeed confirmed by the judgment ‘*Rebecca Bonello Ghio vs Malta Film Commission*’², which was recently delivered by the Court of Appeal:

² Appell Inferjuri Numru 83/2023 LM, ‘*Rebecca Bonello Ghio vs Malta Film Commission*’ decided on the 31st January 2024

*“Il-Qorti tqis li hawnhekk għandha raġun l-appellata meta tgħid li l-informazzjoni mitluba trid tgħaddi mill-għarbiel tar-raġonevolezza darbtejn, jiġifieri jekk l-iżvelar tagħha hux ser jolqot hażin jew huwiex raġonevolment mistenni li jolqot hażin, u b’mod li mhux raġonevoli lill-persuna li dwarha tkun l-informazzjoni mitluba li tingħata. L-appellanta ma ressqet l-ebda prova ta’ dan, u ma ssostanzjatx b’liema mod it-terz li hija kkontrattat biex jippresta s-servizzi tiegħu waqt il-Malta Film Awards huwa raġonevolment mistenni li jintlaqat hażin, b’mod li mhux raġonevoli jekk il-fatturi u d-dokumenti li qegħdin jintalbu li jiġu żvelati fil-fatt jiġu żvelati. Huwa minnu li l-informazzjoni li qiegħda tintalab hija ta’ natura kummerċjali, iżda b’daqshekk ma jfissirx li l-iżvelar ta’ din l-informazzjoni ser taffettwa lit-terz b’mod hażin. Fi kwalunkwe każ huwa t-terz li semmai jista’ jiġi affettwat, u mhux l-appellanta li qiegħda tappella mid-deċiżjoni tat-Tribunal u li qiegħda tintalab tagħmel pubblika din l-informazzjoni. **Il-Qorti hija tal-fehma li l-appellanta kellha l-oneru li tipprova b’liema mod hija ser tiġi affettwata negattivament jew b’liema mod hija raġonevolment mistennija li tiġi affettwata negattivament f’każ li l-informazzjoni mitluba minnha tiġi żvelata, imma hija naqset milli tagħmel dan. Quddiem sitwazzjoni fejn iż-żamma tal-informazzjoni mill-pubbliku għandha tkun l-eċċezzjoni u mhux ir-regola, kien jinkombi fuq il-Kummissjoni appellanta li tispjega b’mod ċar għafejn hija raġonevolment mistennija li tintlaqat hażin b’mod mhux raġonevoli, fejn jidhlu l-interessi professjonali u kummerċjali tagħha. Imma dan m’għamlitux, u minflok qalet li ladarba ma giet żvelata l-ebda informazzjoni sa issa, ma tistax tgħid b’liema mod l-iżvelar ta’ din l-informazzjoni kif sejra tolqot negattivament lill-benefiċjarju. Il-Qorti għalhekk tqis li dan l-aggravju mhuwiex misthoqq, u tiċhdu”*** [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 the Public Authority with a decision notice on the basis that it has failed to demonstrate that the exemptions cited in its replies are justified and additionally, it has failed to provide access to “copies of all agreements signed between the national orchestra and the European Foundation for Support of Culture from 1 January 2012 till the date of replying to this FOI request”, where it is required to do so under the Act.

By virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with a copy of “all agreements signed between the national orchestra and the European Foundation for Support of Culture from 1 January 2012 till the date of replying to this

FOI request” 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. Identification document numbers or personal residential addresses which may be contained in these agreements shall be redacted accordingly.

The Commissioner rebukes the Public Authority for its lack of cooperation shown during the course of the investigation and takes the opportunity to emphasise on the urgent need for legislative changes to be introduced to the Act in order to ensure, *inter alia*, that this office is armed with the necessary powers to effectively and dissuasively sanction public authorities which deliberately fail to adhere with the orders of the Commissioner.

Ian
DEGUARA
(Signature)

Digitally signed
by Ian DEGUARA
(Signature)
Date: 2024.04.26
10:04:41 +02'00'

**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 Tribunal shall be made in writing and addressed to:

The Secretary
Information and Data Protection Appeals Tribunal
158, Merchants Street
Valletta.