

FREEDOM OF INFORMATION REQUEST

1. On the 29th December 2022, Mr Joseph Gatt (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 Planning Authority (the “**Public Authority**”) to provide the following information:

“May I please request to be given access to all documentation regarding PA 4980/03, PA 00990/09, and DNO 1978-2014, and any other documentation appertaining to 57/59, Guardamangia Hill, Pietà, that predates the year 2017.”

2. On the 27th January 2023, the Public Authority informed the applicant that his request could not be met on the basis of:

“(1) In terms of Article 5(1)(d) and Article 14(d) of the Freedom of Information Act (Cap. 496), full development applications and notifications in terms of the Development Notification Order (S.L. 552.08) are already available to the public in terms of the Development Planning Act (Cap 552).

(2) The request for “any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017” is too generic and in terms of Article 14(f) of the Freedom of Information Act (Cap 496) would require an unreasonable amount of resources to provide.”

3. On the 28th January 2023, 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:

“Please note that no documentation at all is being provided to the general public through eapps.pa.org.mt, for PA 4980/03 and DNO 1978-2014! By this I mean that under the “Documents” tab, all that one gets is “There are no documents available.”!

I also take strong issue with the second point raised that the request for “any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017” is too generic and in terms of Article 14(f) of the Freedom of Information Act (Cap 496) would require an unreasonable amount of resources to provide. This is not so, because the PA should have a decent indexing system in place, allowing it to search by address. Is the PA admitting that it is such an inept authority that it cannot ever search past applications through an address query? Is this the state of the art information retrieval system that they have in place? What about their map server? What is that for then?

Accordingly I plead all the information that I have requested is provided to me forthwith, in the interest of transparency and good governance.”

4. On the 14th February 2023, the Public Authority provided its final reply to the applicant:

“(1) In terms of Article 5(1)(d) and Article 14(d) of the Freedom of Information Act (Cap 496), full development applications and notifications in terms of the Development Notification Order (S.L. 552.08) are already available to the public in terms of the Development Planning Act (Cap 552). The documents are still available for inspection via a request to customer care, either at PA offices or through setting up of a video conference meeting after contacting the Authority via frontdesk@pa.org.mt.

(2) Article 6(1)(b) of the Freedom of Information Act (Cap 496) requires the provision of such information concerning the document as is reasonably necessary to enable the responsible officer to identify it. The

request for “any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017” is too generic and in terms of Article 14(f) of the Freedom of Information Act (Cap 496) would require an unreasonable amount of resources to provide”.

FREEDOM OF INFORMATION APPLICATION

5. On the 3rd April 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 Public Authority had dealt with the requirements of the Act. The applicant submitted the following:
 - a. that *“no documentation at all is being provided through eapps.pa.org.mt, for PA 4980/03 and DNO 1978-2014! By this I mean that under the “Documents” tab, all that one gets is “There are no documents available.!” In respect to PA 00990/09, the last document that is available through eapps.pa.org.mt is the Commencement Notice. However I also require all the subsequent documentation, right up to the release of the bank guarantee”;*
 - b. that *“I also took strong issue with the point raised by the PA that the request for “any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017” is too generic and in terms of Article 14(f) of the Freedom of Information Act (Cap 496) would require an unreasonable amount of resources to provide. This is not so, because the PA should have a decent indexing system in place, allowing it to search by address”;* and
 - c. that *“the PA falsely claimed that all the documentation is available for inspection via a customer care, either at PA offices or through setting up of a video conference meeting after contacting the Authority via frontdesk@pa.org.mt. However this is not true, because I still was not allowed access to the documentation, even after telephoning Customer Care and even after e-mailing frontdesk@pa.org.mt”*

INVESTIGATION

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 FOI application, together with the procedural steps

involved between the applicant and the Public Authority, 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

7. As part of the investigation procedure, by means of an information notice dated the 10th April 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 FOI application for the purpose of enabling him to exercise his functions under the Act and to determine whether the Public Authority complied with the requirements of the Act. In particular, the Commissioner requested the Public Authority to provide a copy of “*all documentation regarding PA 4980/03, PA 009909/09, and DNO 1978-2014*” and submit the following information in connection with the FOI request:
 - a. to state which type of documentation is held by the Public Authority regarding PA 4980/03, PA 009909/09, and DNO 1978-2014;
 - b. to explain how the public could access the full development applications and notifications in terms of the Development Planning Act (Cap. 522 of the Laws of Malta);
 - c. to outline the process that would need to be followed by the Public Authority to provide the applicant with “*any other documentation pertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017*”; and
 - d. to quantify the estimated time and cost of providing the applicant with access to “*any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017*”.

Submissions received from the Public Authority

8. On the 9th May 2023, the Public Authority provided the Commissioner with the information requested by the applicant in connection with PA 4980/03, PA 009909/09, and DNO 1978-2014, and submitted the following information in reply to the information notice:
 - a. *to state which type of documentation is held by the Public Authority regarding PA 4980/03, PA 009909/09, and DNO 1978-2014;*

- i. that the documents held by the Public Authority in relation to PA 4980/03 and PA 00990/09 are letters, minutes of committee, photos, application, drawings (including existing elevation, proposed plans, and sections), site plans, bills, case officer report, permit and billing; and
 - ii. that in relation to DNO 1978/2014, the documents held are information sheet, photos, drawings, application form, site plan, permit and billing;
- b. *to explain how the public could access the full development applications and notifications in terms of the Development Planning Act (Cap. 522 of the Laws of Malta);*
- i. that the proviso to article 33(2) of the Development Planning Act states that the Public Authority shall grant access to the public that part of the file which contains “*all decisions relating to development permissions issued by the Authority together with the relative plans and documents including the reasons for the grant of such permissions or refusal*”;
 - ii. that the documentation submitted in Planning Applications, Development Notifications and other applications which seek the Public Authority’s consent regarding development (whether planned or already carried out and sought to be sanctioned/regularised) is available through the Public Authority’s Customer Care Unit during office hours;
 - iii. that the documentation may be viewed either at the Public Authority’s premises in Malta or Gozo, or through web meetings;
 - iv. that scanned files are also available to e-ID holders via the eApplications system – <https://eapps.pa.org.mt>, however, some documents may not be made available online due to the GDPR sensitivity (e.g. documents containing the applicant’s ID card number or home address) and these are only made available via Customer Care, after the personal data is screened from view; and
 - v. that the Public Authority emphasises that such obligation was and is always fulfilled, and the case at hand, is no exception and the Public Authority referred to the email dated the 20th February 2023, according to which the Public Authority advised the applicant to book a web meeting and by means of a separate email proceeded to schedule a time for such web meeting, however, this was done to no avail.

- c. *to outline the process that would need to be followed by the Public Authority to provide the applicant with “any other documentation pertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017”;*
- i. that there is no process in place which must be followed by the Public Authority to provide all documentation relating to specific properties by their address;
 - ii. that originally the applicant’s request referred to “any other document” implied that the Public Authority had to furnish all documentation which contains reference to the specific address quoted in the request, including any cross references, and this would have required all units within the Public Authority to carry out a thorough search on the address without any clear indication of what needs to be found;
 - iii. that this request as originally drafted falls foul of Cap. 552 and the Act, and this is mainly because the marginal note of article 33 of Cap. 552 reads ‘Access to Information’, which lays down those documents that are to be made available for public inspection, and thus *a contrario sensu*, those documents which have been purposely omitted from the remit are prohibited from being publicised;
 - iv. that the applicant is well aware that his original request, namely ‘all other documents’ is in breach of article 14(f) of the Act, and the applicant is now limiting his request to ‘past applications’; and
 - v. that in relation to ‘past applications’, the Public Authority suggested that the applicant should abide by the procedure as highlighted in point (b) of this reply.
- d. *to quantify the estimated time and cost of providing the applicant with access to “any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017”:*
- i. that the process of furnishing all documentation to the applicant is contrary to law, since it is not permitted via Cap. 552, and from the latest correspondence between the applicant and the Commissioner, the request is now limited to past applications; and
 - ii. that, therefore, it is not advisable for the Public Authority to quantify the estimated time and cost required to grant access to all other documentation pertaining to the property in question since such task entails several human input and unquantifiable working hours.

Submissions received from the applicant

9. The Commissioner provided the applicant with the opportunity to rebut the submissions of the Public Authority, and, on the 29th May 2023, the applicant submitted the following salient arguments for the Commissioner to take into consideration during the legal analysis of this case:
- a. that the matter at hand is indeed subject not only to the principles of Maltese legislation, but also to international principles, such as those enshrined in the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) ratified by Malta on the 23rd April 2002 and in Directive 2003/4/EC of the European Parliament and of the Council;
 - b. that it must be noted that no documentation at all is being provided to the general public through eapps.pa.org.mt for PA 4980/03 and DNO 1978-2014 and that under the “Documents” tab, all that one gets is “There are no documents available.”;
 - c. that in respect to PA 00990/09, the last document that is available through eapps.pa.org.mt is the Commencement Notice, however, the applicant also requested the subsequent documentation up to the release of the bank guarantee;
 - d. that in relation to the argument raised by the Public Authority that the request for “*any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017*” is too generic, the applicant submitted that that Public Authority should have a decent indexing system in place;
 - e. that the attempt of the Public Authority to hide behind article 14(f) of the Act is extremely weak and not only does the Public Authority employ hundreds, if not thousands of people, so surely it must have ample resources to deal with the FOI request that incidentally relates directly to my own property;
 - f. that the self-admission of the Public Authority that it does not have a proper record keeping system should not suffice as an excuse to exempt the Public Authority from its obligations;
 - g. that the documentation requested relates to the private property of the applicant and this constitutes ‘*personal data*’, and therefore, the applicant contended that he has a right to receive a copy of his personal data; and

- h. that, accordingly, the applicant requested to be provided with all the records that the Public Authority holds in respect to his private property on the basis that the requested information is not only ‘environmental data, but also ‘personal data’ in terms of the General Data Protection Regulation.

Final submissions received from the Public Authority

10. By means of an email dated the 17th July 2023, the Public Authority provided its final submissions and submitted the following:
 - a. that the information in relation to older cases is not available via eApps, however, this does not mean that it is not available to the public through other means; and
 - b. that as regards the fact that Customer Care refrained from showing the documents other than the permit and the approved drawings, the Public Authority refers to article 33(2) of the Development Planning Act (Cap. 552 of the Laws of Malta), which stipulates the documents in a development application which are to be made available for public inspection.

Mediation attempt

11. During the course of the investigation, the possibility of a mediation attempt was explored, however, such possibility was eventually not accepted by the applicant, and therefore, the Commissioner proceeded with the issuance of a decision notice.

LEGAL ANALYSIS AND DECISION

12. As a preliminary step of the investigation, the Commissioner examined the freedom of information request made by the applicant in terms of the requirements set forth in article 6(1) of the Act. The applicant requested the Public Authority to provide “*access to all documentation regarding PA 4980/03, PA 00990/09, and DNO 1978 – 2014, and any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017*”.
13. The Commissioner proceeded to assess the replies provided by the Public Authority on the 27th January 2023 and the 14th February 2023, wherein the applicant was informed that his request could not be met for the following two (2) principal reasons: (i) the full development applications and notifications are made publicly available in terms of the Development Planning Act (Cap. 552 of the Laws of Malta), and therefore, the Public Authority invoked the non-

applicability of the Act in terms of article 5(1)(d) and cited article 14(d) of the Act as the reason of the refusal; and (ii) the request for “*any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017*” is too generic and in terms of article 14(f) of the Act would require an unreasonable amount of resources to provide.

14. For the purpose of this legal analysis, the Commissioner will be assessing the manner how the FOI request was handled by the Public Authority based on the two reasons provided in the replies dated the 27th January 2023 and the 14th February 2023.

The Non-Applicability of the Act

15. In its replies, the Public Authority invoked the non-applicability of the Act pursuant to article 5(1)(d) of the Act, which states that the Act shall not apply documents that “*are accessible to the public under any other law*” and cited article 14(d) of the Act as the reason of the refusal of the request, namely, that “*the document requested is publicly available*”.

16. The Commissioner examined article 33(2) of the Development Planning Act (Cap. 552 of the Laws of Malta) as the other law which enables the public to have access to information:

“Without prejudice to the generality of sub-article (1), the Authority shall keep and make available for public inspection at such reasonable times as it may determine, a register or registers:

(a) of all applications for development permission received by it containing the name of the applicant and details of the proposal, including documents and detailed plans of the proposal, including documents and detailed plans;

(b) of all decisions including documents and detailed plans made on such applications; and

Provided that for the purposes of this sub-article the application report and any plans concerning applications which relate to national security, defence, banks, prisons, the airport and other institutions or premises whose security it is desirable to safeguard as the Authority may establish shall not be made accessible to the public:

Provided further that for the purposes of this article, in the case of a file held by the Authority, any person shall have access to that part of the file containing the following information:

- (i) *the application report of all applications and any planning report regarding such applications;*
- (ii) *all decisions relating to development permission issued by the Authority together with the relative plans and documents including the reasons for the grant of such permissions or refusal;*
- (iii) *all environmental impact statements, environmental planning statements and traffic impact statements; and*
- (iv) *all alternative site assessments and cost-benefit analysis”.*

17. During the course of the investigation, the Public Authority explained that it has complied with its obligation emanating from regulation 33(2) of Subsidiary Legislation 552.08 by making available all the documents submitted in the Planning Applications, Development Notifications and other applications which seek the Public Authority’s approval regarding development. The Public Authority explained that this documentation may be inspected at the premises of the Public Authority or via web meetings. It further explained that certain documents may also be available to e-ID holders via the eApplications system – <https://eapps.pa.org.mt> except those documents which contain ‘*personal data*’ within the meaning of article 4(1) of Regulation (EU) 2016/679. In such case, the documents are made only available to the public via the customer care office. In its final submissions, the Public Authority further clarified that information in relation to older cases is not available via eApps, however, this may be viewed at the premises of the Public Authority.

18. After assessing the wording of article 33(2) of Cap. 552, the Commissioner noted that this provision obliges the Public Authority to keep and make available for public inspection a register of all applications for development permission and all decisions. In addition to article 33(2)(a) and (b) of Cap. 552, the Public Authority is also legally obliged to make available a number of documents pursuant to the second proviso to article 33(2) of Cap.552. Therefore, the Commissioner is of the view that the documents which are specifically mentioned in article 33(2) of Cap. 552 fall outside the scope of the Act on the basis of article 5(1)(d) of the Act. The Commissioner emphasises that, in such case, the appropriate reason of refusal is article 14(a) of the Act, which permits the Public Authority to refuse a FOI request if the documents are excluded from the scope of the Act by virtue of article 5.

19. However, the Commissioner noted that the request of the applicant is broader, and it includes other information than that mentioned in article 33(2) of the Development Planning Act (Cap. 552 of the Laws of Malta). To this end, the Commissioner requested the Public Authority to explain which other information would fall within the scope of the request made by the applicant. In the submission dated the 9th May 2023, the Public Authority confirmed that the request of the applicant would encompass other documentation which is not specifically mentioned in article 33 of Cap. 552. The Public Authority explained that the following documentation would meet the terms of the request:

FOI Request	Information that would meet the terms of the request
All documentation regarding PA 4980/03 and PA 00990/09	“Letters, Minutes of committee, Photos, Application, Drawings (including Existing Elevation, Proposed Plans and Sections, Existing Plans/Sections), Site Plans, Bills, Case officer Report, Permit and Billing”
All documentation regarding DNO 1978-2014	“Information sheet, Photos, Drawings, Application Form, Site Plan, Permit and Billing”.

20. In the reply to the information notice, the Public Authority explained that “*this request as originally drafted falls foul of Chapter 552 and Chapter 496. Article 33 of Chapter 552, the marginal note of which reads ‘Access to Information’ lays down those documents which are to be made available for public inspection, thus a contrario sensu, those documents which have been purposely omitted from the remit of the above-mentioned article are prohibited from being publicised*” [emphasis has been added].

21. The Commissioner noted that the Public Authority is refusing to provide the documents which are not specifically mentioned in article 33(2) of Cap. 552 on the basis that *a contrario sensu* the documents are being prohibited from disclosure. However, the Commissioner noted that article 5(3)(b) of the Act states that the Act shall not apply to documents that contain “*information the disclosure of which is prohibited by any other law*” [emphasis has been added]. Consequently, article 5(3)(b) of the Act makes it abundantly clear that the non-applicability of the Act shall only be triggered in those instances where there is a *lex specialis* that specifically prohibits the disclosure of a document.

22. Article 33(2) of Cap. 552, which is the provision cited by the Public Authority, only prohibits the disclosure of the following information: “*for the purposes of this sub-article, the application report and any plans concerning applications which relate to national security, defence, banks, prisons, the airport and other institutions or premises whose security it is desirable to safeguard as the Authority may establish shall not be made accessible to the public*” [emphasis has been added]. This is indicative that when the legislator wanted to prohibit the disclosure of certain information based on the particular likelihood and severity of the risk presented by the disclosure, the legislator specifically stated so, and therefore, the Commissioner is of the view that the principle of ‘*ubi lex voluit, dixit*’ applies.
23. Furthermore, the Commissioner referred to the judgment delivered on the 11th October 2019 ‘*Intrapriza ta’ Malta vs Il-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data, Allied Newspapers Limited, Jacob Borg għal kull interess li jista’ jkollu*’¹, where the Court of Appeal decided that article 33(1) of Cap. 325 is a provision contained in a *lex specialis* which specifically prohibits the disclosure of information. In such case, the wording used by the legislator to prohibit the disclosure of information is that “*no such person shall be required to produce ...*” documents and information relating to matters contemplated by or pursuant to the provisions of Cap. 325.
24. Therefore, based on the foregoing, the provision cited by the Public Authority, namely article 33 of Cap. 552, does not amount to a prohibition, in the sense that, this provision is not explicitly obliging the Public Authority not to disclose the other information requested by the applicant. Consequently, in the absence of any *lex specialis* which specifically prohibits the disclosure of the requested information, the provisions of the Act shall apply in their entirety.

Article 14(f) of the Act

25. The Commissioner examined the second part of the reply in relation to request for “*any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017*”, where the Public Authority informed the applicant that his request could not be met on the basis that the request for “*any other documentation appertaining to 57/59, Guardamangia Hill, Pietà that predates the year 2017*” is too generic and in terms of Article 14(f) of the Freedom of Information Act (Cap 496) would require an unreasonable amount of resources to provide”.

¹ Appeal Number 61/2018, decided on the 11th October 2019.

26. In its submissions dated the 9th May 2023, the Public Authority stated that “[o]riginally the applicant’s request referred to ‘any other document’ which implied that the authority had to furnish all documentation which contains reference to the specific address above quoted, including any cross references. This would require that all units within the Authority carry out a thorough search on the address without any clear indication of what needs to be found”. The Public Authority further stated that it had learned that the applicant is “limiting his request to ‘past applications’” from the information contained in the FOI application of the applicant. In the submissions dated the 9th May 2023, the Public Authority provided that the request in relation to the 57/59, Guardamangia Hill, Pieta, is now being refused in terms of article 5(1)(d) of the Act.

27. The Commissioner emphasises that the Public Authority should not refuse a request in terms of article 14(f) in an outright manner without requesting the applicant to redefine his request in such a manner as to make it more easily addressed by the authority. This is also in line with clause 13.3 of the Code of Practice for Public Authorities, which states that “Wherever Public Authorities take into consideration the application of article 14(f) they shall give applicants the opportunity to redefine the request in such a manner as to make it more easily addressed by the Public Authority. A refusal in accordance with article 14(f) would be issued when the applicant in question refuses or is otherwise unable to redefine the request”.

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:

- a. that the documents which are specifically mentioned in article 33(2) of Cap. 552 are accessible to the public under Cap. 552, and therefore, are excluded from the applicability of the Act by virtue of article 5;**
- b. that the documents which are not specifically mentioned in article 33(2) of Cap. 552 are not prohibited from being disclosed in terms of Cap. 552 or any other law, and therefore, the request for these documents falls within the scope of the Act;**
- c. that the reason cited by the Public Authority in its replies dated the 27th January 2023 and the 14th February 2023 in terms of article 14(f) of the Act is not justified.**

By virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with a reasonable opportunity to inspect the requested information.

The Public Authority shall redact any ‘personal data’ within the meaning of article 4(1) of Regulation 2016/679 except information in relation to the applicant and the names and surnames of individuals acting in their professional capacity.

The Public Authority shall comply with this order 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)

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by Ian DEGUARA
(Signature)
Date: 2024.05.30
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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’.