

FOI/33/2023

Joseph Gatt

vs

Planning Authority

FREEDOM OF INFORMATION REQUEST

1. On the 25th May 2023, 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 documentation in electronic format:

“Fil-kuntest tal-informazzjoni provduta hawnhekk: <https://pa.org.mt/irrestawra-darek-2023> qed nitlob kopji tal-applikazzjonijiet tal-Irrestawra Darek, kopji tal-FDAs relatati, kif ukoll kopji tal-Commencement Notices relatati, ta’ dawn l-applikanti: (i) tal-Perit Alan Galea, (ii) Owen Bonnici, (iii) Andromeda Saliba, u (iv) Ryan Pillow”.

2. On the 26th June 2023, the Public Authority informed the applicant that his request could not be met on the basis of the following:

“The personal details of private individuals who benefited from the Irrestawra Darek Scheme are subject to the Data Protection Act and therefore, in terms of article 5(3)(a) of the Freedom of Information Act (Cap 496), this Act does not apply to these documents. Consequently, the FDAs linked to these four beneficiaries cannot be identified. The publication of Commencement Notices is prohibited by the Development Planning Act (Cap 552) and hence article 5(3)(b) of the Freedom of Information Act (Cap 496) applies to these documents”.

3. On the 5th July 2023, the applicant presented a complaint through the internal complaints procedure seeking the reconsideration of the refusal of the Public Authority.
4. On the 19th July 2023, the Public Authority provided its final decision and informed the applicant that “*no reasons to support the complaint have been provided, there is no justification to reverse the Authority’s original decision*”.

FREEDOM OF INFORMATION APPLICATION

5. On the 30th 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 Public Authority had dealt with the requirements of the Act when handling his FOI request. The applicant argued that:

“The Planning Authority is bringing up the excuse that “the personal details of private individuals who benefited from the Irrestawra Darek Scheme are subject to the Data Protection Act”, which, in the interest of transparency and good governance, should not be the case. The Planning Authority is falsely claiming that “the publication of Commencement Notices is prohibited by the Development Planning Act (Cap 552)”.

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.

Issuance of the Information Notice

7. As part of the investigation procedure, by means of an information notice dated the 30th August 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 true copy of the documents requested by the applicant and to indicate the provision(s) contained in the Development Planning Act (Cap. 552) that specifically prohibits the publication of commencement notices.

Submissions received from the Public Authority

8. On the 29th September 2023, the Public Authority provided the Commissioner with a copy of the documents requested by the applicant and submitted the following salient arguments for the Commissioner to consider during the legal analysis of this case:

The Reasons of the Refusal

- a. that the Public Authority refused the request of the applicant on the basis that the personal data of private individuals who benefited from the ‘Irrestawra Darek Scheme’ are subject to the Data Protection Act (Cap. 586 of the Laws of Malta), and therefore, the Freedom of Information Act (Cap. 496 of the Laws of Malta) does not apply;
- b. that the FDA’s linked to the four beneficiaries mentioned in the request cannot be identified;
- c. that the publication of Commencement Notices is prohibited by the Development Planning Act (Cap. 552 of the Laws of Malta) and hence article 5(3)(b) of the Act applies to these documents;

Article 33 of the Development Planning Act (Cap. 552 of the Laws of Malta)

- d. that the Public Authority referred to article 33 of the Development Planning Act (Cap. 552 of the Laws of Malta), specifically, the marginal note of this provision ‘Access to Information’, which demonstrates that this article is intended to regulate which documents are to be disclosed and the manner in which it could be disclosed, and thus, *a contrario sensu*, those documents which have been purposely omitted from the remit of article 33 are prohibited from being publicised; and
- e. that the requested documents, namely commencement notices, do not fall within the remit of article 33(2) of Cap. 552.

9. The Commissioner reviewed the documents submitted by the Public Authority in relation to Architect Alan Galea, namely GS 00486/19, GS 00755/18, GS 00897/18, GS 00910/18 and GS 01105/18, and noted that these documents relate to cases where Architect Alan Galea was acting in his professional capacity. Given that the applicant requested the relative documents in relation to Architect Galea in his capacity as an applicant in the context of <https://pa.org.mt/irrestawra-darek-2023>, the Commissioner requested the Public Authority to clarify this matter.

10. On the same day, the Public Authority confirmed that Architect Galea did not submit any applications to the grant scheme in his own name and that the documents previously provided were those in which he was acting in a professional capacity on behalf of a client.

Submissions received from the applicant

11. Pursuant to the internal investigation procedure of this Office, the applicant was provided with the opportunity to rebut the arguments submitted by the Public Authority. On the 10th October 2023, the applicant submitted the following principal arguments:
 - a. that the applicant referred to the submissions of the Public Authority where it implicitly referred to the maxim '*lex voluit lex dixit*', however, the applicant contended that this most certainly does not apply to sub-article 33(1) of Cap. 552, which begins with these words "*Without prejudice to the generality of sub-article (1) ...*";
 - b. that the generality that is being referred to by article 33(1) of Cap. 552 is the following: "*provide the members of the public ... shall be entitled to request... such information that may have in their possession and relating to development planning*";
 - c. that in accordance with article 9 of the Data Protection Act (Cap. 586 of the Laws of Malta), the right to the protection of personal data should come secondary to the right to freedom of expression and information; and
 - d. that once the Public Authority chose to put forward the names of Architect Alan Galea, Owen Bonnici, Andromeda Saliba and Ryan Pillow, as testimonials on their website <https://pa.org.mt/irrestawra-darek-2023>, these persons became public persons and their testimonials are subject to legitimate journalistic enquiry.

14. Pursuant to the investigation procedure of this Office, the Commissioner provided the Public Authority with the final opportunity to rebut the submissions of the applicant. However, the Public Authority informed the Commissioner that it has no further submissions to make.

Mediation attempt

15. 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 this decision notice.

LEGAL ANALYSIS AND DECISION

16. For the purpose of the investigation of this freedom of information application, the Commissioner proceeded to examine in detail the request made by the applicant, wherein he specifically requested the Public Authority to provide “*kopji tal-applikazzjonijiet tal-Irrestawra Darekm kopji tal-FDAs relatati, kif ukoll kopji tal-Commencement Notices relatati, ta’ dawn l-applikanti: (i) tal-Perit Alan Galea, (ii) Owen Bonnici, (iii) Andromeda Saliba, u (iv) Ryan Pillow*”.

17. The Commissioner examined the reply provided to the applicant on the 26th June 2023, wherein the Public Authority invoked the non-applicability of the Act in terms of article 5(3) of the Act. The Public Authority refused to provide: (i) the copies of the application forms on the basis that these contain personal data of natural persons; and (ii) the Commencement Notices on the basis that these are prohibited from disclosure in terms of the Development Planning Act (Cap. 552 of the Laws of Malta).

Personal Data

18. By means of an information notice dated the 30th August 2023 and issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to provide copies of the documents requested by the applicant in order to assess whether these documents contain personal data within the meaning of article 4(1) of Regulation (EU) 2016/679¹. Accordingly, the Public Authority complied with the request of the Commissioner and provided copies of the requested documents in connection with the following individuals: (i) Architect Alan Galea; (ii)

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

Owen Bonnici; (iii) Andromeda Saliba; and (iv) Ryan Pillow.

19. After inspecting the information submitted by the Public Authority, the Commissioner noted that the documents in relation to Architect Alan Galea were not submitted by him in his personal capacity. Indeed, the Public Authority confirmed that Architect Galea is not a direct beneficiary of the Irrestawra Darek Grant Scheme. Given that the freedom of information request was specifically for information in connection with beneficiaries of the Grant Scheme, the Commissioner concluded that the Public Authority does not hold any documents in relation to Architect Galea. Thus, the Public Authority had the obligation to inform the applicant that the request for information in relation to Architect Galea was being refused in terms of article 14(g) of the Act.
20. The Commissioner sought to establish whether the refusal of the Public Authority to provide the applicant with copies of the applications submitted by the beneficiaries, namely, Owen Bonnici, Andromeda Saliba, and Ryan Pillow in relation to the *Irrestawra Darek* Grant Scheme is justified on the basis of article 5(3)(a) of the Act. This provision triggers the non-applicability of the Act if the document requested by the applicant contains personal data within the meaning of article 4(1) of Regulation (EU) 2016/679. However, this shall not be treated as a blanket provision, particularly, when there is substantial public interest.
21. The outright denial of a document based on the fact that the document contains personal data is not in accordance with the law. In fact, the Court of Justice of the European Union (the “CJEU”) has not treated the exemption of personal data protection² within the context of Regulation 1049/2001 as an outright denial to the right of access to documents but applied a necessity and proportionality test to assess if the public interest outweighs the data protection rights of the individual in question. In ‘Volker und Markus Schecke and Eifert vs Hessen’³, the CJEU noted that “*the right to the protection of personal data is not however an absolute right, but must be considered in relation to its function in society.*”
22. The relationship between the two opposing rights was analysed by the Court of Appeal in the judgment ‘Allied Newspapers Limited vs Projects Malta Ltd’⁴, where it held that, “[g]halkemm

² Article 4(1)(b) of the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding the public access to the European Parliament, Council and Commission documents reads as follows: “*The institution shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*”

³ C-92/09, delivered on the 9th November 2010.

⁴ Appeal No. 33/2019 LM, delivered on the 2nd September 2020.

*huwa veru li d-dritt għall-informazzjoni mhux wieħed assolut, speċjalment fejn id-dritt għall-privatezza u l-kunfidenzjalità tabilhaqq ikun mhedded, minn naħa l-oħra l-Qorti tqis li l-ewwel presuppost għandu dejjem jkun favur l-‘interess pubbliku sostanzjali’ li jiġu mharsa d-dritt għall-informazzjoni u l-libertà tal-espressjoni. Biex ma tingħatax l-informazzjoni rikjesta, irid jiġi żgurat illi l-pubblikazzjoni tal-informazzjoni tikkostitwixxi ksur ta’ xi prinċipju tal-protezzjoni tad-data, kif salvagwardjati mill-GDPR u l-liġijiet nazzjonali, fil-każ ta’ Malta, il-Kap. 586. Barra minn hekk ma jistgħux jiġu rikonċiljati d-drittijiet tal-libertà tal-espressjoni u dik tal-privatezza jekk ma ssir evalwazzjoni dwar jekk l-iżvelar tal-informazzjoni mitluba, tirriżulta fi ksur irragonevoli u ingustifikat tad-drittijiet tal-privatezza tal-individwu konċernat. **Il-privatezza tad-data u l-kunfidenzjalità huma eccezzjonijiet għad-dritt għall-informazzjoni, u mhux bil-maqlub.**” [emphasis has been added].*

23. In his considerations, the Commissioner noted that the applicant is requesting copies of applications submitted within the context of a grant scheme that is financed by public funds. In fact, the Public Authority itself stated on its website that it has made available €5 million to help safeguard Malta’s village core areas and ensure that they remain an important part of the Islands’ architectural, cultural, and social heritage.
24. The Commissioner emphasises that the scope of the Act is to hold public authorities accountable for their actions and enable the public to scrutinise how the public authorities are allocating and spending public funds. This is absolutely necessary in a functioning democratic society, and therefore, as a general rule, the Public Authority should make any information in relation to public expenditure publicly available, unless there is a justified reason in terms of the Act. Thus, the disclosure of information within the context of a grant scheme would generally cover a wide public interest as it leads to increasing accountability and transparency in the spending of public funds.
25. It has been repeatedly reaffirmed by the Court of Appeal that the public should be able to closely scrutinise the manner how public funds are being disbursed by public authorities. In the judgment ‘Caroline Muscat vs Malta Film Commission’⁵, the Court of Appeal stated that:

*“Il-Qorti tgħid li issa jonqos li jiġi nvestigat dak li qal it-Tribunal. Beda billi qies li l-Kummissjoni appellanta bħala awtorità pubblika skont id-definizzjoni mogħtija fil-Kap. 496, kif sewwa jirriveva l-Kummissarju, **tithallas minn fondi pubbliċi u għalhekk tirriżulta l-aspettattiva li l-pubbliku għandu jkun jaf fejn marru l-flus u għaliex.**”* [emphasis has been added].

⁵ Appeal Number 72/22/LM, delivered on the 22nd February 2023.

In a recent judgment ‘Rebecca Bonello Ghio vs Malta Film Commission’⁶, the Court of Appeal reiterated that:

*“Hawnhekk qeghdin nitkellmu dwar awtorità pubblika li hija ffinanzjata minn fondi pubbliċi sabiex tkun tista’ tmexxi ’l quddiem l-għanijiet li twaqfiet għalihom. Ċertament li sabiex jitharsu l-prinċipji tat-trasparenza u l-kontabilità, hija **għandha l-obbligu li tiżvela kif l-flus li tinghata minn fond pubbliċi b’liema mod qeghdin jintefqu**”* [emphasis has been added].

26. The Commissioner examined the documents to assess which information would constitute ‘*personal data*’ and it transpired that the documents contain not only the personal data of the three (3) beneficiaries mentioned in the FOI request, but also information in relation to other individuals acting in their professional or business capacity, such as, architects, site managers, and masons. This information includes *inter alia* identity card numbers, postal addresses, telephone numbers, email addresses and signatures.
27. When receiving a FOI request, it is the responsibility of the Public Authority to assess how to meet the legitimate aim of transparency and accountability in the spending of public funds, without disclosing personal data that is not necessary to attain its aim. In such case, the Commissioner noted that the Public Authority had chosen to publish itself the names of the beneficiaries that received funds from the Public Authority. Therefore, the names and surnames of the beneficiaries have already been made publicly available. Additionally, the nature of personal data of individuals who are acting in their professional capacity, such as the name and surname, is deemed to be less intrusive in comparison to personal data in relation to their private lives. Where individuals carry out professional tasks, they must have a reasonable expectation that their personal data is subject to greater scrutiny than would be the case in respect of their private lives.
28. This led the Commissioner to conclude that the allocation of public funds through a grant scheme needs to fulfil the requirements of transparency and accountability. It is the view of the Commissioner that in this case the balance shifts towards the right of access to information provided that the disclosure of personal data should be limited to what is strictly necessary to attain the intended objectives of the Act.

⁶ Appeal Number 83/2023 LM, delivered on the 31st January 2024.

The Commencement Notices

29. In this part of the legal analysis, the Commissioner considered, to the extent possible, whether the Public Authority was justified in refusing to disclose the commencement notices in relation to the three (3) individuals identified as beneficiaries in the FOI request.
30. The Commissioner assessed the reply of the Public Authority, particularly that the commencement notice is not specifically mentioned in article 33(2) of Cap. 552, and therefore, *a contrario sensu*, this document is being prohibited from disclosure. To this end, the Commissioner examined article 5(3)(b) of the Act, which is the reason provided by the Public Authority to refuse to comply with the freedom of information request. This provision 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].
31. The Commissioner is of the view that article 5(3)(b) of the Act should only be invoked in those instances where there is a *lex specialis* that specifically prohibits the disclosure of a document. 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.
32. Furthermore, the Commissioner referred to the judgment delivered on the 11th October 2019 ‘Intrapriza ta’ Malta vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data, Allied Newspapers Limited, Jacob Borg għal kull interess li jista’ jkollu’⁷, 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.

⁷ Appeal Number 61/2018, 11th October 2019.

33. Therefore, based on the foregoing, the provision cited by the Public Authority in the present case, namely article 33 of Cap. 552, does not amount to a prohibition. Consequently, in the absence of any *lex specialis* which specifically prohibits the disclosure of the commencement notices, the provisions of the Act shall apply in their entirety.

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 “*kopji tal-applikazzjonijiet tal-Irrestawra Darek, kopji tal-FDAs relatati, kif ukoll kopji tal-Commencement Notices relatati, ta’ dawn l-applikanti: (i) tal-Perit Alan Galea...*” are not held by the Public Authority, and consequently, the Public Authority failed to cite the appropriate reason of refusal in terms of article 14 of the Act; and
- b. that the refusal of the Public Authority to provide the following “*kopji tal-applikazzjonijiet tal-Irrestawra Darek, kopji tal-FDAs relatati, kif ukoll kopji tal-Commencement Notices relatati, ta’ dawn l-applikanti: ... (ii) Owen Bonnici, (iii) Andromeda Saliba, u (iv) Ryan Pillow*” pursuant to article 5(3) 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 copy of these applications and commencement notices after redacting all the personal data contained thereon, except for the names and surnames of the three beneficiaries as identified in the freedom of information request and the names and surnames of architects, site managers and masons. The information pertaining to companies is not deemed to be personal data, and therefore, shall be disclosed to the applicant.

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)

Digitally signed
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’.