

**FREEDOM OF INFORMATION REQUEST**

1. On the 5<sup>th</sup> February 2024, Ms Sabrina Vella (the “**applicant**”) made a freedom of information request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act (Cap. 496 of the Laws of Malta) (the “**Act**”), wherein the Public Broadcasting Services Limited (the “**Public Authority**”) was requested to provide an electronic copy of the following information:

*“I am requesting a list detailing the financial costings for the Malta Eurovision Song Contest which culminated in a Grand Final being held on Saturday 3 February.*

*We would like this list to include a breakdown of the costs by item, and to whom the expenses were paid”.*

2. On the 23<sup>rd</sup> February 2024, the Public Authority informed the applicant that her request could not be met as “[i]d-dokumenti u l-informazzjoni kontenenti mitluba huma ezenti skond l-Artikolu 5(1)(f) tal-Kap 496 tal-Ligijiet ta’ Malta”. On the 28<sup>th</sup> February 2024, the applicant requested the Public Authority to revise its decision pursuant to its internal complaints procedure and submitted the following argumentation:

*“The public entity is one that receives abundant public funds, including funds which are utilised for the organisation, preparation, implementation or otherwise related to the Eurovision. In this regard, the public entity cannot expect to be free from public scrutiny on how public funds received by it were used.*

*Moreover, any activities which the entity undertakes even it chooses to consider these as being commercial activities are carried out with the use of public funds. Even in circumstances in which the entity contracts with third parties it is still obliged to provide information on the use and utilisation of public funds which may have been contributed by it to such an undertaking and for which it cannot unilaterally exclude its obligations under the Freedom of Information Act. Judgments by the court have amply indicated this.*

*Furthermore, the article under which the entity purports to exonerate it from public scrutiny of its use of public funds does not provide it with an absolute exemption from the obligations of providing access to information in the public interest.*

*In view of the above, the public entity is asked to reconsider its original refusal of the 23 February 2024 and to provide the undersigned with the requested information”.*

3. On the 11<sup>th</sup> March 2024, the Public Authority reiterated its refusal and stated that “[w]e have nothing further to add to our previous response”.

#### **FREEDOM OF INFORMATION APPLICATION**

4. The applicant, through her legal counsel, applied for a decision notice pursuant to article 23(1)(a) of the Act and requested the Information and Data Protection Commissioner (the “**Commissioner**”) to decide whether the request for documents made by the applicant to the Public Authority was handled pursuant to the requirements of the Act. The applicant referred to the refusal of the Public Authority and held:
  - i. that the Public Authority claimed that the information is exempt under article 5(1)(f) of the Act, which exempts documents held by commercial partnerships in which a public authority has a controlling interest, provided that these documents relate to the commercial activities of the commercial partnership;
  - ii. that the European Song Contest is not a commercial private event but a public service, the responsibility of which lies with public service media;

- iii. that article (5)(1)(f) of the Act only applies to those activities which are of a commercial nature where a commercial partnership is held by a public authority through a controlling interest. This does not apply to the Malta Eurovision Song Contest, as its purpose is to select a national representative rather than merely represent a commercial entity. The contest is organized to identify a Maltese artist to represent Malta, not to showcase the talent of artists on behalf of the Public Authority or any other company;
- iv. that the Public Authority differs from other commercial partnerships where the government or a public authority holds a controlling interest, as the Public Authority is funded through public funds to fulfill its role as public service media. The organisation of this contest is part of this public service media role and is not compatible to “[s]ome reality tv show which PBS may decide to undertake as if it were a commercial activity”. Even if the Public Authority collaborates with a private entity for commercial profit, the activity remains part of its public service obligations, whether managed independently by the Public Authority or through a private company;
- v. that the European Song Contest is organised by the European Broadcasting Union (the “EBU”) as an alliance of public service media. No commercial broadcaster without public service obligations, as defined by national legislation, would be allowed to participate. The organisation of this contest is not of itself a commercial activity, but a public service activity organised by public service media, each one of them answerable and accountable to the public as they are vested in national legislations with a public service function. Part of the role of the public service media is that of fostering the development of culture and society and the purpose of the contest is as such a public purpose;
- vi. that even if public service media contracts with third parties for organising the contest at national level, the agreement is characterised by its public service nature. As stated by the EBU, “*public service media (PSM) is broadcasting made, financed and controlled by the public, for the public*”<sup>1</sup>;
- vii. that the applicant submitted the information sought is not exempt. The fact that the Public Authority may have chosen to fulfil its public service role by contracting with

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<sup>1</sup> European Broadcasting Union (EBU), ‘*What is Public Service Media?*’, available at: <https://www.ebu.ch/about/public-service-media>

third parties does not automatically exclude that activity from its public role. Profits or income generated by the Public Authority or third parties from this public service role does not exonerate the execution of that role from public scrutiny under the Act;

- viii. that article 5(1)(f) of the Act excludes '*commercial activities*' but not activities related to the Public Authority's role as public service media;
- ix. that even if the Public Authority contracted third parties for profit-related activities in organising the contest, the use of public funds before and during that partnership is not exempt from disclosure. The reply provided by the Public Authority does not indicate whether public funds were used in any manner which contributed to the holding of this contest, but merely says that information on the contest is exempt from disclosure because there was some commercial activity which it undertook;
- x. that the Public Authority does not substantiate its reply at all. It opts for complete and absolute lack of transparency by failing to explain how it organised an event in which it could only participate due to its character as a public service media by labelling it as a commercial activity. It also failed to indicate if it undertook this activity with a third party or parties with whom it shared its role as a public service media. It also does not exclude the use of public funds in a manner that may have contributed towards the organisation or holding of the contest. The use of any public funds in any manner that may have contributed to the organisation and execution of the contest, from beginning to end, is not excluded from disclosure by article 5(1)(f) of the Act;
- xi. that "*it is not in line with the obligation of transparency and accountability to opine that the fulfillment of an activity which falls within PBS' role as a public service media is excluded from the Act merely because PBS claims it considered it to be a commercial activity. No matter the number or nature of the contracts in which PBS entered in relation to this contest, the event remains a public service subject to scrutiny. That PBS arbitrarily decides to classify part of its public service media role as a commercial activity does not exonerate it from responsibilities under the Act. This is like public authorities arbitrarily deciding to sign confidentiality clauses. Allowing public authorities the arbitrary right to classify their activities as falling under an exemption provided for in the Act is merely allowing public authorities to escape their obligations under the Act*"; and

- xii. that the applicant asked the Commissioner to find that: “(i) *Public Broadcasting Services Ltd has failed to provide access to document where it was required to provide access in terms of the Freedom of Information Act; (ii) Order Public Broadcasting Services Ltd to provide applicant with the information sought in the Freedom of Information request presented by her on the 5 February 2024 within such time frame and under such terms and conditions as the Commissioner deems appropriate; (iii) Issue an enforcement notice on Public Broadcasting Services Ltd to oblige it to comply with its obligations under the Act; and (iv) Should Public Broadcasting Services Ltd remain in default take such action against it as is authorised in terms of article 27 Of the Act”.*

## **INVESTIGATION**

### **Admissibility of the Freedom of Information application**

5. 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.

### **The Issuance of the Information Notice**

6. As part of the investigation procedure, by means of an information notice dated the 3<sup>rd</sup> May 2024, 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 had complied with the requirements of the Act. In particular, the Commissioner requested the Public Authority to make submissions in relation to the decision taken to refuse access to the requested documentation on the basis that of article 5(1)(f) of the Act, and to provide a true copy of the requested documentation.

### **Submissions received from the Public Authority**

7. On the 17<sup>th</sup> June 2024, the Public Authority only provided a copy of the documentation requested by the applicant. On the 18<sup>th</sup> June 2024, the Commissioner requested the Public Authority to confirm whether it would like “*to provide any information which it deems relevant and necessary*

to support its decision and rebut the arguments made by the applicant. In particular, the Commissioner is requesting 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 5(1)(f) of the Act”. However, no reply was received.

## LEGAL ANALYSIS AND DECISION

8. For the purpose of this legal analysis, the Commissioner proceeded to assess the freedom of information request made by the applicant pursuant to the requirements set forth in article 6(1) of the Act, where the Public Authority was requested to submit in electronic format a copy of “*a list detailing the financial costings for the Malta Eurovision Song Contest which culminated in a Grand Final being held on Saturday 3 February*”.
9. As a preliminary observation, the Commissioner refers to the reply of the Public Authority dated the 23<sup>rd</sup> February 2024, where it invoked the non-applicability of the Act, by stating that “[i]d-dokumenti u l-informazzjoni kontenenti mitluba huma ezenti skond l-Artikolu 5(1)(f) tal-Kap 496 tal-Ligijiet ta’ Malta”. Article 5(1)(f) of the Act provides that the freedom of information legislation shall not apply to documents which are held by a commercial partnership in which the Government of Malta has a controlling interest insofar as the documents requested by the applicant are in relation to the commercial activities of the commercial partnership.
10. The Commissioner noted that the non-applicability of the provisions of the Act in terms of article 5(1)(f) shall only be triggered when the following two (2) cumulative elements are satisfied: (i) where the requested documents are held by a commercial partnership in which the Government has a controlling interest; **and** (ii) where the documents relate specifically to the commercial activities of the commercial partnership.
11. The Public Authority has cited the non-applicability of the Act in separate cases when it refused to disclose documents requested by other applicants. However, this argument was rejected twice by the Information and Data Protection Appeals Tribunal (the “**Tribunal**”) where, on the 12<sup>th</sup> July 2018, it delivered the decision ‘*Public Broadcasting Services Limited vs Il-Kummissarju għall- Informazzjoni u l-Protezzjoni tad-Data*’<sup>2</sup> and confirmed that:

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<sup>2</sup> Appeal Number 5/2017, Information and Data Protection Appeals Tribunal ‘*Public Broadcasting Services Limited vs Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data*’, decided on the 12<sup>th</sup> July 2018

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

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

12. On the 2<sup>nd</sup> March 2023, the Tribunal delivered the decision ‘*Caroline Muscat vs Public Broadcasting Services Limited*’<sup>3</sup> and reiterated its reasoning:

*“L-ewwelnett il-Public Broadcasting Services Limited taqa’ taħt id-definizzjoni ta’ ‘awtorità pubblika kif mogħtija fil-Kap 496 tal-Liġijiet ta’ Malta għaladarba l-Gvern huwa azzjonista maġġoritarju u dan kif gie diġa stabilit minn dan il-Bord diversi drabi fosthom fid-deċiżjoni numru 5/2017 tat-12 ta’ Lulju 2018 fl-ismijiet Public Broadcasting Authority vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data.*

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

13. Since both cumulative elements must be met for the Public Authority to invoke the non-applicability of the Act by virtue of article 5(1)(f) of the Act, and given that the first condition is not satisfied in the light of the final decisions delivered by the Tribunal, the Commissioner shall not proceed to conduct a legal analysis on whether the requested documentation pertains to commercial activities, or otherwise, in terms of the second condition set out under article 5(1)(f) of the Act.

**On the basis of the foregoing considerations, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and deciding that the refusal of the Public Authority to provide access to the documents requested by the applicant is not justified in terms of article 5(1)(f) of the Act.**

**By virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with an electronic copy of the requested documents, after redacting any personal**

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<sup>3</sup> Appeal Number CDP/FOI/92/2021, Information and Data Protection Appeals Tribunal, ‘*Caroline Muscat vs Public Broadcasting Services Limited*’, decided on the 2<sup>nd</sup> March 2023

**data within the meaning of article 4(1) of Regulation (EU) 2016/679, which may include *inter alia*, identity card numbers, addresses, bank details and, or signatures of natural persons.**

**The Public Authority shall comply with this order within twenty (20) working days from the date of service 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: 2024.07.25  
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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’.