

## **FREEDOM OF INFORMATION REQUEST**

1. On the 24<sup>th</sup> July 2023, Ms Caroline Muscat (the “**applicant**”) made a request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act (the “**Act**”), Chapter 496 of the Laws of Malta, requesting the Malta Tourism Authority (the “**Public Authority**”) to provide the following documents in electronic format:
  - “*Copy of all contracts signed since 2013 in connection with Tenor Joseph Calleja concerts*”
  - “*List of payments made by MTA since 2013 in connection with above concerts until the date of reply to this FOI*” (the “**requested documents**”).
2. On the 1<sup>st</sup> February 2024, the Public Authority informed the applicant that her request was being refused on the basis that “[i]-informazzjoni mitluba mill-applikant hi ezenti taht l-Artikolu 32 (1)(c)(i) tal-Kapitolu 496 tal-Ligijiet ta’ Malta”.

## **INVESTIGATION**

3. On the 4<sup>th</sup> February 2024, 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 that “*the MTA answered to our complaint, this week, almost 7 months after we made it!*”

## INVESTIGATION

### The Issuance of the Information Notice

4. As part of the investigation procedure, by means of an information notice dated the 20<sup>th</sup> February 2024, issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to provide a true copy of the requested documents and any other information which it deemed relevant and necessary 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 clearly explain the prejudice that the third party would, or could reasonably suffer as a result of the disclosure of the requested documents pursuant to article 32(1)(c)(i) of the Act.

### Submissions of the Public Authority

5. An onsite inspection was held by this Office on the 18<sup>th</sup> June 2024 where the Commissioner was provided with the opportunity to physically analyse the documents requested by the applicant. The Public Authority provided the Commissioner with the following submissions prepared by the Management Team of Mr Calleja in connection with the FOI request:
  - a. that the Management Team agrees with the Public Authority that article 32(1)(c)(i) of the Act is intended to protect information that, if disclosed, could reasonably be expected to adversely affect a person or an organisation in respect of their lawful business, commercial or financial affairs;
  - b. that the contracts between the Management Team and the Public Authority contain sensitive information pertaining to pricing, personal terms and strategic considerations unique to each engagement, and therefore, the disclosure of these terms could potentially expose its business strategies and negotiations to competitors, resulting in an unfair competitive disadvantage, and this is especially pertinent in the highly competitive and niche market of classical music and live performances;
  - c. that detailed financial transactions, including payments, are intrinsically confidential and these details are closely held to prevent any manipulative practices in the market and to ensure that its negotiations with other parties remain unbiased and in good faith, and revealing payment structures and amounts could skew the market perception of Mr

Calleja's worth and potentially devalue his market stance in future negotiations with other concert organisers and sponsors;

- d. that as a renowned artist, Mr Calleja's professional engagements and associated financial arrangements are integral to his personal and professional reputation, and public access to this sensitive information could lead to misinterpretations and potentially harm his reputation, which has been built over decades of dedication to the arts; and
- e. that the release of the requested documents under the Act would unreasonably affect Mr Calleja's lawful business, commercial and financial affairs, and it is in the interest of maintaining the integrity of his professional engagement and those of his partners, including the Public Authority, that such information remains confidential.

#### Submissions of the Applicant

- 6. As part of the internal investigative procedure of this Office, the Commissioner provided the applicant with the opportunity to rebut the submissions provided by the Public Authority. On the 19<sup>th</sup> June 2024, the applicant submitted the following:
  - a. that the applicant appreciates Mr Calleja's talent, however, this does not mean that he should be treated differently from any other artist or citizen;
  - b. that the applicant requested documents concerning the use of public funds by a public authority and awarded without any sort of transparency or competition;
  - c. that the contracts may also include obligations on the part of the artist which need to be observed, and thus, it is only through the document's availability that the Public Authority's disbursement of public funds can be scrutinised in a normal functioning democracy;
  - d. that the commercial and business effects mentioned by the management of Mr Calleja are tied to every other artist or person who accepts to enter into such agreements with any government and where public funds are involved, and consequently, there is no excuse for a Public Authority not to be scrutinised or transparent; and
  - e. that the Public Authority is obliged to be accountable and transparent in how it disburses public funds especially when it comes to artists who can easily organise concerts without the public's help due to their high profile as mentioned by the artist's management.

7. The Public Authority did not wish to rebut the arguments submitted by the Public Authority, and therefore, the Commissioner proceeded with the issuance of the decision notice.

## LEGAL ANALYSIS AND DECISION

### Article 10 of the Act

8. Before entering into the merits of the case, the Commissioner noted that the applicant submitted her freedom of information request on the **24<sup>th</sup> July 2023** pursuant to the requirements set forth in article 6(1) of the Act and it was only on the **1<sup>st</sup> February 2024** that the Public Authority provided a reply to such request.
9. The Commissioner emphasises that the timeframes stipulated in the Act are necessary to provide the applicants with sufficient assurances that the FOI requests would be handled by the public authorities within the set timeframes. Thus, delays by the public authorities in the handling of requests pursuant to the requirements of the Act hinder applicants from receiving a decision and exercising their rights in the most effective manner. Article 10 of the Act regulates the timeframe which must be followed by the public authorities when replying to freedom of information requests:

*“Subject to this Act, the public authority to which a request is made in accordance with article 6 or is transferred in accordance with article 8 shall, as soon as reasonably practicable, and in any case **not later than twenty working days** after the day on which the request is received by the authority –*

*(a) decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and*

*(b) inform the applicant accordingly in writing”.*

10. The Public Authority received the request on the 24<sup>th</sup> July 2023, and therefore, pursuant to article 10 of the Act, the Public Authority had to provide a reply by no later than the 22<sup>nd</sup> August 2023. Despite the clear timeframe imposed by the Act, the Public Authority provided a reply almost six (6) months later. This unjustified delay is symptomatic of the Public Authority’s systematic and persistent failure to handle the requests of the applicants pursuant to the requirements of the Act. The Commissioner strongly urges the Public Authority to ensure that it has in place an internal governance structure, together with the necessary procedures,

designed to handle requests for access to information in an appropriate and timely manner. Furthermore, the FOI officer should be involved in all the requests received by the Public Authority and provided with the necessary training on the requirements of the Act.

#### Article 32(1)(c)(i) of the Act

11. As a preliminary step of the investigation, the Commissioner proceeded to examine the request made by the applicant, wherein the Public Authority was requested to disclose a “[c]opy of all contracts signed since 2013 in connection with Tenor Joseph Calleja concerts” and a “[l]ist of payments made by MTA since 2013 in connection with above concerts until the date of reply to this FOP”. The Public Authority refused to comply with this freedom of information request on the basis of article 32(1)(c)(i) of the Act.

12. The Commissioner assessed the exemption cited by the Public Authority, which provides that a document is an exempt document if its disclosure under the Act would disclose:

*“(c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or an undertaking, being information:*

*(i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs”.*

13. The Commissioner examined the submissions of the Public Authority provided on the 18<sup>th</sup> June 2024 on the strength of which the Public Authority refused the request of the applicant. The Management Team emphasised that the disclosure of the requested documents would unreasonably affect the lawful business, commercial and financial affairs of Mr Calleja and his team, and it is in the interest of maintaining the integrity of Mr Calleja’s professional engagement and those of his partners, including the Public Authority, that such information should remain confidential. Consequently, the Public presented the arguments of Mr Calleja’s management team and outlined the following reasons:

- a. that the contracts could potentially expose its business strategies and negotiations to competitors, resulting in an unfair competitive disadvantage, and this is especially

pertinent in the highly competitive and niche market of classical music and live performances:

- b. that detailed financial transactions, including payments, are intrinsically confidential and these details are closely held to prevent any manipulative practices in the market and to ensure that its negotiations with other parties remain unbiased and in good faith, and revealing payment structures and amounts could skew the market perception of Mr Calleja's worth and potentially devalue his market stance in future negotiations with other concert organisers and sponsors; and
  - c. that as a renowned artist, Mr Calleja's professional engagements and associated financial arrangements are integral to his personal and professional reputation, and public access to this sensitive information could lead to misinterpretations and potentially harm his reputation, which has been built over decades of dedication to the arts.
14. First and foremost, the Commissioner highlights that whoever enters into a contract with a public authority should have the expectation that the information could be subject to a freedom of information request and possibly disclosed to the public. The Public Authority is subject to the provisions of the Act, and therefore, it is explicitly bound by the obligation of mandatory disclosure of the documents that it holds, save for the exemptions provided by law which may justify non-disclosure in certain specific instances. It is in the Commissioner's judicious view that public authorities in general should adopt a horizontal standard practice to inform, *a priori*, the other party to a contract that such contract is subject to the provisions of the Act.
15. The first step in the application of article 32(1)(c)(i) of the Act would require the proper characterisation of the relevant information to ascertain whether the requested documents concern the "*business or professional affairs*" of a person or the "*business, commercial or financial affairs of an organisation or undertaking*". This would then need to be followed by an assessment of the harm that a person or an organisation or undertaking would, or could reasonably be expected to suffer as a result of the disclosure of the requested information.
16. The Commissioner is of the view that the harm which the Public Authority intends to protect should be sufficiently specific and concrete, and not merely speculative or remote. This is also

in accordance with the settled case-law of the Court of Justice of the European Union (the “CJEU”) in relation to Regulation 1049/2001<sup>1</sup>, where the CJEU stated that:

*“if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by the exception – among those laid down 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”<sup>2</sup>.*

17. Furthermore, the CJEU in ‘Covington & VanVooren vs European Commission’<sup>3</sup> held that:

*“The institutions cannot be required to submit evidence to establish the existence of such a risk. It is sufficient in that regard if the decision contains tangible elements from which it can be inferred that the risk of the decision-making process being undermined is, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical, showing, in particular, the existence, on that date, of objective reasons on the basis of which it could reasonably be foreseen that the decision-making process would be undermined if the requested documents were disclosed”.*

18. The Court of Appeal in the judgment ‘Allied Newspapers Limited vs Projects Malta Limited’<sup>4</sup> concurred with the case-law of the CJEU and held that:

*“Il-Qorti hija tal-fehma li dan l-hekk imsejjah preġudizzju huwa għalkollox remot, jekk mhux ukoll ipotetiku, meta tqis il-kwantità kbira ta’ nies ikkwalifikati li għandu dan il-pajjiż, li jistgħu jaqdu inkarigi sensitivi bħalma kellhom il-membri tal-evaluation committee fil-każ odjern. Dan apparti li l-evaluation committee f’dan il-każ kien wieħed ad hoc u mhux permanenti, li jagħmel il-preġudizzju aktar remot u ipotetiku.”*

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<sup>1</sup> 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.

<sup>2</sup> Judgments of 21 July 2011, Sweden v MyTravel and Commission, C-506/08 P, paragraph 76; of 17 October 2013, Council v Access Info Europe, C-280/11 P, paragraph 31.

<sup>3</sup> Case T-201/21, judgment of the 14<sup>th</sup> June 2023, paragraph 52.

<sup>4</sup> Appeal No. 33/2019 LM, decided on the 2<sup>nd</sup> September 2020.

19. The Court of Appeal in the judgment ‘Rebecca Bonello Ghio vs Malta Film Commission’<sup>5</sup> was requested to decide whether the Malta Film Commission was justified in refusing the freedom of information request for “copies of all invoices received by the Film Commission from David Walliams or his agents or associated companies or individuals or on their behalf in connection with the 2022 Malta Film Awards” on the basis of article 32(1)(c)(i) of the Act. The Court of Appeal reiterated that the Public Authority should effectively demonstrate the envisaged prejudice that the third party is expected to suffer as a result of the disclosure of the requested information:

*“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’ jigi 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 ttipprova 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 għalfejn 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].*

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<sup>5</sup> Appeal No: 83/2023 LM, decided on the 31<sup>st</sup> January 2024.



20. The Commissioner also considered the case-law of the UK Tribunal in connection with the freedom of information legislation, where it held that a Public Authority should demonstrate a causal link between disclosure of the requested information and the claimed prejudice that a third party would suffer. In ‘Hartlepool Borough Council vs The Information Commission’<sup>6</sup> held that:

*“... the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. **It would need to demonstrate the link between the specific information in issue and the claimed prejudice.** So for example, it might show that the information would disclose that its manufacturers its widgets in a particular way that is cost effective, and that is known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual” [emphasis has been added].*

21. After examining the submissions of the Public Authority, the Commissioner concluded that it is not sufficient for the Public Authority to merely claim to be protected from disclosure by an article of the law but must clearly show how that disclosure of information would cause harm to the legitimate aim. It is only where the effect of disclosure is shown to cause real harm to the aim it seeks to protect that non-disclosure would fall within the Act. In such case, the Commissioner established that the Public Authority failed to concretely demonstrate how the disclosure of the requested documents could, or would result in an unfair competitive disadvantage or erode the negotiation position of the third party or affect the reputation of the third party. It remains the responsibility of the Public Authority to substantiate its reason of refusal by providing tangible elements from which it could be inferred that the risk is likely to materialise.

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<sup>6</sup> Case No. EA/2017/0057, decision of the 21<sup>st</sup> February 2017.

22. The decision of the Commissioner is also motivated by the fact that the request for information concerns the expenditure of public funds by a public authority. The objective of the Act is to establish a right to information in relation to documents held by public authorities in order to promote added transparency and accountability in government. In a functioning democratic society, the public should be entitled to receive information as to how public funds are being utilised by public authorities. This of itself places the Public Authority under the obligation of transparency and accountability.
23. The settled case-law of the Court of Appeal<sup>7</sup> makes it abundantly clear that public authorities should disclose information in connection with the expenditure of public funds, particularly, when the public authorities do not issue a public call for the contracted services. In the recent judgment ‘Rebecca Bonello Ghio vs Malta Film Commission’<sup>8</sup>, the Court of Appeal held that:

*“Hawnhekk qegħdin nitkellmu dwar awtorità pubblika li hija ffinanzjata minn fondi pubbliċi sabiex tkun tista’ tmexxi ’l quddiem l-għanijiet li twaqqfet għalihom. Ċertament li sabiex jitharsu l-prinċipji tat-trasparenza u l-kontabilità, hija għandha l-obbligu li tiżvela kif l-flus li tingħata minn fond pubbliċi b’liema mod qegħdin jintefqu. **L-informazzjoni li qiegħda tintalab tiżvela l-appellanta hija dwar hlasijiet għal servizz ipprestat minn persuna li ntgħazlet b’mod dirett mill-appellanta mingħajr ma nharġet sejha pubblika, u għalhekk aktar u aktar jinkombi fuq l-appellanta li tkun trasparenti f’dawn iċ-ċirkostanzi. Il-Qorti tirrileva wkoll li t-talba tal-appellata saret fil-kuntest tal-ħidma tagħha bħala public watchdog, li għandha l-għan li tinforma lill-pubbliku u li żżomm lill-awtoritajiet pubbliċi kontabbli għal għemilhom.**” [emphasis has been added].*

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<sup>7</sup> Appeal No. 11/2020 LM, ‘Allied Newspapers Limited vs Foundation for Medical Services’ decided on the 18<sup>th</sup> November 2020: *“Il-fatt illi persuni jkunu qed jithallsu mill-fondi pubbliċi ma jistax ma jwassalx għall-aspettattiva illi l-pubbliku jkun jaf fejn qed imorru l-flus, għand min u għaliex. Tgħid ukoll li l-fatt li Carmen Ciantar u Neville Gafa ma gewx ingaġġati wara sejha pubblika għandu jkompli jżid il-livell ta’ trasparenza meħtieġa, u għalhekk ladarba ma gietx pubblikata mill-awtorità pubblika stess, din l-informazzjoni kellha għall-inqas tingħata lill-istampa meta talbet li tiġi żvelata l-informazzjoni”.*

Appeal No. 72/22/LM, ‘Caroline Muscat vs Malta Film Commission’ decided on the 22<sup>nd</sup> February 2023, *‘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 jirrileva l-Kummissarju, tithallas minn fondi pubbliċi u għalhekk tirriżulta l-aspettattiva li l-pubbliku għandu jkun jaf fejn marru l-flus u għaliex’.*

<sup>8</sup> ibid. 5.

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:

- a. the Public Authority failed to reply to the freedom of information request submitted by the applicant within twenty (20) working days, and therefore, the Public Authority infringed article 10 of the Act; and
- b. the refusal of the Public Authority to provide access to the documents requested by the applicant is not justified in terms of article 32(1)(c)(i) 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 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 receipt of this decision notice and confirmation of the action taken shall be notified to the Commissioner immediately thereafter.

The Commissioner rebukes the Public Authority for its lack of compliance with the timeframe set forth in article 10 of the Act and takes the opportunity to emphasise on the urgent need for legislative amendments to be introduced to the Act in order to ensure, *inter alia*, that this office is armed with appropriate powers to effectively and dissuasively sanction public authorities which deliberately fail to adhere with the requirements of the Act.

Ian  
DEGUARA  
(Signature)

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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’.