

CDP/FOI/19/2024

Caroline Muscat

vs

Ministry for Gozo and Planning

FREEDOM OF INFORMATION REQUEST

1. On the 21st March 2024, 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 Ministry for Gozo and Planning (the “**Public Authority**”) to provide the following document in electronic format:

*“List of all engagement contracts, including contracts for service, consultancy/advisory, and any other related to Architect Godwin Agius between 2017 and the date of reply to this FOI, awarded by the Ministry, and all agencies it is responsible for” (the “**requested document**”).*

2. On the 22nd April 2024, the Public Authority informed the applicant that the time limit set out in article 10 is being extended by twenty (20) working days.
3. On the 20th May 2024, the Public Authority refused the request of the applicant on the basis that the information requested is exempt in terms of article 30(b) and article 31(2) of the Act.
4. On the same day, the applicant requested the Public Authority to revise its decision pursuant to the internal complaints procedure of the Public Authority and argued that the “[d]ocuments requested are not exempt and are in the public interest”.
5. On the 4th June 2024, the Public Authority provided its final reply and reiterated its reasons of refusal.

FREEDOM OF INFORMATION APPLICATION

6. On the 4th June 2024, the applicant 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 information made by the applicant to the Public Authority was handled pursuant to the requirements of the Act.

INVESTIGATION

Admissibility of the Freedom of Information Application

7. 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, 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

8. As part of the investigation procedure, by means of an information notice dated the 13th June 2024, 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 the requested document, including the following information:
 - a. to clearly indicate which exemptions were cited by the Public Authority in its replies;
 - b. to substantiate the exemptions cited by the Public Authority in its replies dated the 20th May 2024 and the 4th June 2024; and
 - c. to clearly explain the prejudice that would, or could reasonably be suffered as a result of the disclosure of the information requested by the applicant.

Submissions received by the Public Authority

9. On the 4th July 2024, the Public Authority provided the Commissioner with a copy of the agreement entered into between the Public Authority and Architect Godwin Agius, including the addendum. Additionally, the Public Authority submitted the following salient arguments for the Commissioner to consider during the legal analysis of the case:

Article 30(1)(b) of the Act

- a. that the Public Authority is primarily basing its decision on article 30(1)(b) of the Act which states that a “*document is an exempt document if its disclosure under this Act would, or could reasonably be expected to: (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law*”;
- b. that the Public Authority is unable to meet the request of the applicant because disclosing a copy of the requested document could compromise the confidentiality of the third party, and publicising this information could jeopardise future opportunities with other potential third parties and negatively impact the Public Authority’s ability to attract new and retain existing third parties and contractors; and
- c. that it is important to mention as well that if the disclosure of the information is acceded, contractors might prefer to work with private entities over the public sector, potentially putting the Public Authority at a significant disadvantage;

Article 31(2) of the Act

- d. that another reason to justify the refusal of disclosing the requested document is article 31(2) of the Act, which states that a “*document is an exempt document if its disclosure under this Act would found an action by a person (other than a public authority) for breach of confidence*”;
- e. that in view of this article, if the confidential information in the Agreement itself would come out, an action by the Public Authority’s counterparty could be instituted for breach of confidence;

- f. that contracts entered into between the Public Authority and the third parties are confidential in terms of the stipulated articles mentioned in the same agreements/contracts;
- g. that the Agreement contains highly confidential information that has been provided by the third party and other information, including the identity and revenue of the same party, and therefore, if any or part of the information is revealed, it will instantly expose the third party's identity and compromise his privacy, potentially leading to unintended consequences and the Public Authority could be required to pay financial damages as a result of this breach of confidence;
- h. that, therefore, maintaining confidentiality is essential to ensure the safety and preserve the integrity of professional relationship; and
- i. that, in addition to the foregoing, the details and information might be misunderstood by individuals lacking financial expertise, posing a risk of inaccurate assessment of the third party and such misunderstanding could also harm both the third party and the Public Authority.

Submissions of the Applicant

10. Pursuant to the internal investigative procedure of this Office, the applicant was provided with the opportunity to rebut the arguments submitted by the Public Authority. On the 8th July 2024, the applicant informed the Commissioner that “[t]he government is obliged to be transparent and the document requested, including Mr Agius’s engagement contract with the GRDA and others, including services provided to the Ministry, particularly through direct orders and quotes, are a matter of scrutiny and deemed as of public interest in a normally functioning democracy”.

LEGAL ANALYSIS AND DECISION

11. The Commissioner proceeded to examine the freedom of information request submitted by the applicant pursuant to the requirements set forth in article 6(1) of the Act, wherein the Public Authority was requested to provide in electronic format the following document:

“List of all engagement contracts, including contracts for service, consultancy/advisory, and any other related to Architect Godwin Agius between

2017 and the date of reply to this FOI, awarded by the Ministry, and all agencies it is responsible for”.

12. In its replies dated the 20th May 2024 and the 4th June 2024, the Public Authority refused the request of the applicant on the basis of article 30(1)(b) and article 31(2) of the Act. For the purpose of this legal analysis, the Commissioner sought to establish whether the Public Authority had a good reason for withholding the document requested in terms of the exemptions cited in its replies to refuse the request of the applicant.

Article 30(1)(b) of the Act

13. The Public Authority stated that it is primarily basing its refusal of the request pursuant to article 30(1)(b) of the Act, which states that:

“(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

...

(b) disclose, or enable a person to ascertain, the existence or identify of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law”.

14. The Commissioner noted that this exemption is intended to protect: (i) information that would allow the applicant to ascertain the existence or non-existence of a confidential source of information; or (ii) the identity of a confidential source of information. This exemption could only be invoked if the Public Authority manages to effectively demonstrate that the disclosure of this information would, or could reasonably be expected to prejudice the enforcement or administration of the law.
15. The Act is primarily modelled on the Australian freedom of information legislation, in fact, the Australian Freedom of Information Act contains a provision¹, which has the exact wording of article 30(1)(b) of the Act. The Commissioner examined the Guidelines issued by the Australian Commissioner for the purpose of understanding how this exemption is being interpreted by other jurisdictions:

¹ Section 37(1)(b) of the Australian FOI legislation: *“A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to: - (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law”.*

“Section 37(1)(b) is intended to protect the identity of a confidential source of information connected with the administration or the enforcement of the law. It is the source, rather than the information, which is confidential...”

The exemption applies where:

- *the information in question may enable the agency responsible for enforcing or administering a law to enforce or administer it properly*
- *the person who supplies that information wishes their identity to be known only to those who need to know it for the purpose of enforcing or administering the law*
- *the information was supplied on the understanding, express or implied, that the source’s identity would remain confidential”².*

16. The Commissioner examined the submissions received during the course of the investigation, wherein the Public Authority explained that the disclosure of the requested document could compromise the confidentiality of the third party, jeopardise future opportunities with other potential third parties, and negatively impact the Public Authority’s ability to attract new and retain existing third-party contractors.
17. The Commissioner noted that the submissions do not explain or attempt to justify how the information being requested by the applicant would lead to the disclosure of the identity of a confidential source of information or enable the applicant to ascertain the existence or non-existence of a confidential source of information. The request is simply for information in relation to the services being provided, and, or were provided by Architect Godwin Abela to the Government. Therefore, the document requested would disclose information in connection with an individual who received public funds and not information in relation to the identity of a confidential source of information.
18. Additionally, article 30(1)(b) of the Act could only apply if the Public Authority manages to demonstrate that the disclosure of the requested information would hinder the effective administration or enforcement of a law. In the present case, the Public Authority did not even indicate the law which would be impacted as a result of the disclosure of information. This led the Commissioner to conclude the circumstances which the Public Authority ought to protect from disclosure clearly do not fall within the parameters of this exemption, and therefore, the Public Authority applied an incorrect interpretation of article 30(1)(b) of the Act.

²<https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-5-exemptions>, last accessed on the 29th July 2024.

Article 31(2) of the Act

19. In its replies, the Public Authority invoked article 31(2) of the Act, which provides that the “document is an exempt document if its disclosure under this Act would found an action by a person (other than a public authority) for breach of confidence”. In its submissions, the Public Authority argued that: (i) the disclosure of the requested document could lead to an action by the Public Authority’s counterparty for breach of confidence; (ii) the contracts entered into between the Public Authority and the third parties are confidential in terms of the stipulated articles mentioned in the same agreements/contracts; (iii) that such documents contain highly confidential information that have been provided by the third party and other information, including, the identity and revenue of the same third party; and (iv) if any or part of the information is revealed, it will instantly expose the third party’s identity and compromise his privacy, potentially leading to unintended consequences and the Public Authority could be required to pay financial damages as a result of this breach of confidence.
20. First and foremost, the Commissioner clarifies that the request is for a “[l]ist of all engagement contracts, including contracts for service, consultancy/advisory, and any other related to Architect Godwin Agius” which means that the applicant did not request the actual copies of the contracts, but a list that outlines all the contracts which the Public Authority had with Architect Godwin Agius between 2017 and the date of reply of the freedom of information request. Without prejudice to this, the Commissioner examined the copy of the documentation submitted by the Public Authority during the course of the investigation and noted that these agreements do not contain any confidentiality clauses. In fact, the contracts contain a clause which states that “[t]he provisions of this contract are without prejudice to the obligations of the Central Government Authority/Contracting Authority in terms of the Freedom of Information Act (Cap. 496 of the Laws of Malta”.
21. Within this context, the Commissioner noted that the Information and Data Protection Appeals Tribunal (the “**Tribunal**”) in its decision ‘*Public Broadcasting Services Limited vs Il-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data*’³ confirmed the decision notice of the Commissioner when the Public Broadcasting Services Limited unlawfully cited article 31(2) of the Act as a reason for refusal. The Tribunal held that “*jekk fil-kuntratt tagħhom ma saritx tali klawnsola li l-kuntratt huwa sugġett għal dan il-Kap [496] u għal Kap 440 dwar l-Att dwar il-Protezzjoni u l-Privatezza tad-Data dik hija problema tal-PBS u mhux tal-Kummissarju jew ta’ dan il-Tribunal*”. Therefore, in the present case, it is unclear why the

³ Appeal no. 5/2017, decided on the 12th July 2018.

Public Authority is refusing to comply with the request of the applicant when it is evident that the contract contains a clause that specifically recognises that the documents held by the Public Authority are subject to the freedom of information legislation. The Commissioner clarifies that even if this clause was not included in the agreements or the agreements contained a confidentiality clause, the reason cited by the Public Authority is still inapplicable. This is in accordance with the settled case-law of the Court of Appeal⁴, which refused to accept that confidentiality clauses should serve as a basis to exonerate public authorities from complying with their legal obligations.

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 to provide the applicant with the “[/]*list of all engagement contracts, including contracts for service, consultancy/advisory, and any other related to Architect Godwin Agius between 2017 and the date of reply to this FOI, awarded by the Ministry, and all agencies it is responsible for*” in terms of article 30(1)(b) and article 31(2) 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 the requested document, specifically the list mentioned in the request, in an electronic format within twenty (20) working days from the date of service of this decision notice, and to inform the Commissioner of the action taken immediately thereafter.

Ian
DEGUARA
(Signature)

Digitally signed
by Ian DEGUARA
(Signature)
Date: 2024.08.02
12:36:01 +02'00'

Ian Deguara
Information and Data Protection Commissioner

⁴ Appeal no. 11/2020 LM, Allied Newspapers Limited vs Foundation for Medical Services, decided on the 18th November 2020 and Appeal no. 83/2023 LM, Rebecca Bonello Ghio vs Malta Film Commission, decided on the 31st January 2024.

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’.