

FOI/25/2024

Caroline Muscat

vs

Lands Authority

FREEDOM OF INFORMATION REQUEST

1. On the 15th May 2024, Ms Caroline Muscat (the “**applicant**”) made a freedom of information request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting the Lands Authority (the “**Public Authority**”) to provide the following documents in an electronic format:
 - “*Copy of all engagement contracts related to Chief Audit Officer Charmaine Muscat until the day of reply to this FOI*”
 - *Copy of ALL engagement contracts related to the same position of Ms Muscat’s predecessor*” (the “**requested documents**”).
2. On the 14th June 2024, the Public Authority informed the applicant that the period to reply to her freedom of information request was being extended by twenty (20) working days due to the fact that “*discussions are still ongoing*”.
3. On the 11th July 2024, the Public Authority refused the request of the applicant on the grounds of article 32(1)(c)(i) of the Act. On the same day, the applicant requested the Public Authority to revise its decision pursuant to the internal complaints procedure on the basis that “*the documents requested are not exempt as you deliberately imply to gain time*”.
4. On the 25th July 2024, the Public Authority reiterated its refusal on the basis that the documents requested by the applicant are exempt in terms of article 32(1)(c)(i) of the Act.

FREEDOM OF INFORMATION APPLICATION

5. On the 27th July 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 complied with the requirements of the Act.
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 this freedom of information application, together with the procedural steps involved between the applicant and the Public Authority in the request for the documentation, the Commissioner deemed the application made by the applicant as admissible for the purpose of article 23(2) of the Act.

INVESTIGATION

The Issuance of the Information Notice

7. As part of the investigation procedure, by means of an information notice dated 2nd August 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 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 addition, the Commissioner requested the Public Authority to make available a copy of the requested documentation and to clearly explain the harm that would, or could reasonably be suffered 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

8. On the 30th August 2024, the Public Authority provided the Commissioner with a copy of the engagement contracts, and, on the 2nd October 2024, the Public Authority submitted the following arguments for the Commissioner to consider during the legal analysis of this case:
 - a. that the Public Authority refused the request of the applicant on the basis that the requested documentation constitutes an exempt document as set forth in article 32(1)(c)(i) of the Act given that if the Public Authority had to accede to the request, it would have unreasonably affect Dr Charmaine Muscat and her predecessor adversely in respect of their professional affairs insofar as to the employment opportunities of the said employees in their future endeavors;

- b. that, in addition, and without prejudice to the foregoing, the Public Authority would like to point out that the information being requested cannot be divulged in accordance with article 5(3)(a) of the Act insofar as the employment contracts are deemed to be the personal data of the employees, and so said, the information cannot be relayed to third parties;
- c. that the Public Authority was unable to meet the request of the applicant because disclosure of the requested documents could compromise the confidentiality of the third parties, 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 employees;
- d. that the disclosure of the requested documents would infringe the confidentiality of the agreement contained in the agreement entered into between the employees and their employer;
- e. that it is important to mention as well that if the disclosure of the information is acceded to, the employees might prefer to work with private entities over the public sector, potentially putting the Public Authority at a significant disadvantage;
- f. that another reason to justify the refusal of the request of the applicant lies in article 31(2) of the Act, which states that a "*document is an exempt document if its disclosure under this Act would find an action by a person (other than a public authority for breach of confidence*";
- g. that in view of the article mentioned in the preceding sub-paragraph, if the confidential information in the agreements would come out, an action by the Public Authority's counterparty could be instituted for breach of confidence and the Public Authority could expose itself to possible legal action and could be required to pay financial damages as a result of the breach of confidentiality contained in the requested documentation;
- h. that the public interest in non-disclosure outweighs the public interest in disclosure as possible legal action against the Public Authority would render the said Public Authority liable to damages that are ultimately paid by public funds;

- i. that the said contracts contain highly confidential information that has been provided by the third party and other information, including the identity and revenue of the said party, and therefore, if any or part of the information is revealed, it will instantly expose the third party's identity and compromise her 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;
 - j. that it is true that in the context of the Act, the prominence of individuals and their presence in the public life, coupled with the use of public funds, very often lead to the disclosure of these type of contracts, however, the individual in question in no case qualifies as a public figure, and as an ordinary employee, disclosure of her contract is not justified on the grounds that it does not fall within the remit of the public interest;
 - k. 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 the third party and the Public Authority; and
 - l. that, therefore, the Public Authority has acted within the remit of the law when deciding to refuse the request of the applicant given the fact that the public interest that is served by non-disclosure outweighs the public interest in disclosure.
9. Pursuant to the internal investigative procedure of this Office, the Commissioner sent a copy of the submissions of the Public Authority to the applicant and provided her with the opportunity to rebut the arguments raised by the Public Authority. On the 2nd October 2024, the applicant informed the Commissioner that she would like to rely on the contents of her freedom of information application.

LEGAL ANALYSIS AND DECISION

10. As a preliminary step of the investigation of this freedom of information application, the Commissioner proceeded to examine the freedom of information request made by the applicant on the 15th May 2024 pursuant to the requirements set forth in article 6(1) of the Act, wherein the applicant requested the Public Authority to provide access to the following documents in an electronic format:

- *“Copy of all engagement contracts related to Chief Audit Officer Charmaine Muscat until the day of reply to this FOI*
- *Copy of ALL engagement contracts related to the same position of Ms Muscat’s predecessor”.*

11. On the 11th and 25th July 2024, the Public Authority replied to the request of the applicant and informed her that her request was being refused on the basis of article 32(1)(c)(i) of the Act. Therefore, for the purpose of this legal analysis, the Commissioner sought to establish whether the reason cited by the Public Authority in its replies, namely the exemption cited in terms of article 32(1)(c)(i) of the Act, was justified pursuant to the requirements of the Act. To this end, by means of an information notice dated the 2nd August 2024 and issued pursuant to article 24(1)(a) of the Act, the Commissioner requested the Public Authority to clearly explain how Ms Charmaine Muscat and her predecessor would, or could reasonably be expected to suffer any prejudice as a result of the disclosure of the requested documents pursuant to article 32(1)(c)(i) of the Act.
12. After examining the submissions of the Public Authority, the Commissioner noted that the information provided during the course of the investigation was not limited to the reason of refusal provided to the applicant on the 11th and 25th July 2024, but the Public Authority cited more reasons to justify its refusal. In addition to the exemption cited in terms of article 32(1)(c)(i) of the Act, the Public Authority invoked the non-applicability of the Act pursuant to article 5(3)(a) of the Act and cited article 31(2) of the Act as another exemption to refuse access to the documents requested by the applicant.
13. The Commissioner refers to article 23(1)(a) of the Act, which mandates the Commissioner to handle freedom of information applications and examine whether the *“request for information made by the applicant to a public authority has been dealt with in accordance with the requirements of the Act”*. Therefore, the task of the Commissioner is strictly limited to determine whether the reason of refusal as provided by the Public Authority pursuant to the requirement set forth in article 15(1)(a) of the Act is justified in terms of the Act. For this reason, the Commissioner will not consider other reasons of refusal cited during the course of the investigation and which were not provided to the applicant at the time of handling her freedom of information request.

14. Without prejudice to the preceding paragraph, the Public Authority’s claim of risk insofar as these relate to confidentiality is counter to the judgments delivered by the Court of Appeal¹ which denounced the use of confidentiality clauses by authorities which they themselves agree to in contracts.

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

15. The Commissioner assessed the exemption cited by the Public Authority in its replies, 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”.

16. 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.

17. 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

¹ Appell Inferjuri Numru 11/2020 LM, Allied Newspapers Limited vs Foundation for Medical Services, decided on the 18th November 2020 and Appell Inferjuri Numru 83/2023 LM, Rebecca Bonello Ghio vs Malta Film Commission, decided on the 31st January 2024.

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.

18. 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 1049/2001², 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”³.

19. Furthermore, the CJEU in ‘Covington & VanVooren vs European Commission’⁴ 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”.

20. The Court of Appeal in the judgment ‘Allied Newspapers Limited vs Projects Malta Limited’⁵ concurred with the case-law of the CJEU and held that:

“Il-Qorti hija tal-fehma li dan l-hekk imsejjaħ preġudizzju huwa għalkollox remot, jekk mhux ukoll ipotetiku, meta tqis il-kwantità kbira ta’ nies ikkwalifikati

² 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.

³ 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.

⁴ Case T-201/21, judgment of the 14th June 2023, paragraph 52.

⁵ Appell Inferjuri Numru 33/2019 LM, decided on the 2nd September 2020.

li għandu dan il-pajjiż, li jistgħu jaqdu inkarigi sensittivi 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.”

21. The Court of Appeal in the judgment ‘Rebecca Bonello Ghio vs Malta Film Commission’⁶ 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 tghid li l-informazzjoni mitluba trid tghaddi 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 [emphasis has been added].

22. Thus, the onus rests upon the Public Authority to demonstrate the prejudice that Dr Charmaine Muscat and her predecessor could, or would reasonably suffer in respect of their professional affairs as a result of the disclosure of the requested documents. To this end, the Commissioner proceeded to consider the arguments raised by the Public Authority to justify the reason of refusal cited in terms of article 32(1)(c)(i) of the Act: (a) that the disclosure would unreasonably affect Dr Charmaine Muscat and her predecessor in respect of their professional affairs insofar as to the employment opportunities of the said individuals in their future endeavors; (b) that employees may prefer to work with private entities over the public sector, potentially putting the Public Authority at significant disadvantage; (c) that the details and information may be misunderstood by individuals lacking financial expertise, posing a risk of

⁶ Appell Inferjuri Numru 83/2023 LM, decided on the 31st January 2024.

inaccurate assessment of the third party and such misunderstanding could also harm both the third party and the Public Authority; and (d) that the individuals in question in no case qualify as public figures, and hence, as ordinary employees, the disclosure of the contracts is not justified.

23. The Commissioner emphasises that it is not sufficient for the Public Authority to merely claim to be protected from disclosure by an article of the law, but it must clearly show how the disclosure of that information would cause harm to the third parties. 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. After examining the submissions of the Public Authority, the Commissioner noted that the Public Authority failed to elaborate on how the disclosure of the engagement contracts of Dr Charmaine Muscat and her predecessor would affect their future employment opportunities. The Public Authority did not substantiate how this perceived risk is likely to materialise and how it could negatively impact the individuals in question. In addition, the argument that the disclosure of the information may be misunderstood goes contrary to the scope of the Act. The law creates a mechanism that enables the public to scrutinise the documents that are held by public authorities for the purpose of promoting transparency and ensuring accountability. Withholding an employment contract because it may be misunderstood is certainly not acceptable in a democratic society.
24. The Commissioner clarifies that employees who occupy or occupied top managerial posts within public authorities should have a reasonable expectation that their employment contract would be disclosed to the general public, particularly, the remuneration and the employment conditions. This has also been affirmed by the Court of Appeal, which provides that “*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*”⁷. Thus, the Commissioner could not accept the argument of the Public Authority that an employee who occupy the role of the Chief Audit Officer is merely an “*ordinary employee*”. The role of the ‘Chief Audit Officer’ indisputably carries a great level of accountability and responsibility, and therefore, in line with the main objectives of the Act, the Public Authority should be held accountable for its own actions and decisions, particularly, those that involve public funds.
25. The settled case-law of the Information and Data Protection Appeals Tribunal (the “**Tribunal**”) and the Court of Appeal provides that employment contracts which are financed

⁷ Appell Inferjuri Numru 11/2020 LM, Allied Newspapers Limited vs Foundation for Medical Services, decided on the 18th November 2020.

by public funds, particularly of those individuals who occupy top managerial posts, should be disclosed to the public. To this end, the Commissioner considered the decisions delivered by the Tribunal in relation to the employment contracts of top managerial positions held by employees of the Public Broadcasting Services Limited⁸, wherein the Tribunal confirmed the decision notices of the Commissioner that ordered the disclosure of such employment contracts to the public. In addition, the Court of Appeal in the judgment ‘Allied Newspapers Limited vs Foundation for Medical Services’⁹ also confirmed the decision notice of the Commissioner that ordered the disclosure of employment contracts pertaining to two individuals that occupied top managerial posts within the Foundation for Medical Services. In particular, the Court of Appeal held that:

“Din il-Qorti assolutament ma taqbilx illi l-iżvelar tal-imsemmija kuntratti ta’ impjiegi ser jimpatta negattivament ... Anzi għal kuntrarju tali iżvelar għandu jsaħħah it-tmexxija xierqa u l-operat tagħha bħala entita’ pubblika li suppost thaddan b’mod shiħ il-prinċipji tal-kontabilita’ u tat-trasparenza”.

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 pursuant to article 32(1)(c)(i) 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 documents in electronic format, after redacting the identity card numbers, addresses and signatures.

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: 2024.10.11
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**Ian Deguara
Information and Data Protection Commissioner**

⁸ Appell Numru 5/2017, Public Broadcasting Services Limited vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data, decided on the 12th July 2018 and Appell Numru CDP/FOI/92/2021, ‘Caroline Muscat vs Public Broadcasting Services Limited’, decided on the 2nd March 2023.

⁹ ibid. 7

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’.