

FREEDOM OF INFORMATION REQUEST

1. On the 5th December 2022, Ms Caroline Muscat (the “**applicant**”) submitted 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 Malta Tourism Authority (the “**Public Authority**”) to provide the following documents in electronic format:

“Copy of ALL agreements and extensions between 2013 and the date of reply to this FOI covering the three concessionaires operating beach concessions in Comino in 2022.

*Copy of all tenders/EOI’s issued to cover the above” (the “**requested documents**”).*

2. On the 9th February 2024, the Public Authority informed the applicant that her request was being refused on the basis of article 32(1)(c)(i) of the Act.
3. On the 16th February 2024, the applicant requested the Public Authority to revise its decision pursuant to the internal complaints procedure on the basis that “[t]he information sought is not exempt, as you are suggesting, and is in the public interest. Also, please note that, as has been the custom at the MTA, your first reply is late and is in breach of the law”.

FREEDOM OF INFORMATION APPLICATION

4. On the 23rd March 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 Public Authority had complied with the requirements of the Act.

5. After having considered that the applicant is an eligible person in terms of article 2 of the Act, as well as the nature and background of this freedom of information application, particularly the excessive delay of the Public Authority in responding to the request of the applicant, the Commissioner concluded that the complaints procedure of the Public Authority was unlikely to be resolved within a reasonable period. Consequently, the Commissioner proceeded with the investigation of the freedom of information application.

INVESTIGATION

6. As part of the investigation procedure, by means of an information notice dated the 2nd April 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 freedom of information application for the purposes of enabling him to exercise his functions under the Act and determine whether the Public Authority had complied with the requirements of the Act.
7. Following a meeting held with the Public Authority on the 18th June 2024, the Public Authority confirmed that it holds copies of the agreements requested by the applicant. By means of an email dated the 18th June 2024, the Commissioner reiterated his request for information, particularly, to:
 - a. substantiate the reasoning that led to the refusal of the request in terms of article 32(1)(c)(i) of the Act and to clearly specify the prejudice that third parties would, or could reasonably suffer as a result of the disclosure of the requested documents; and
 - b. enclose with the reply, or deliver by hand and under confidential cover, a true copy of the requested documents.
8. Following several reminders sent by the Commissioner, the Public Authority failed to provide him with the information requested during the course of the investigation. In the absence of a reply, the Commissioner proceeded to issue a decision notice on the basis of the information available at hand.

LEGAL ANALYSIS AND DECISION NOTICE

Lack of Cooperation

9. As a preliminary observation, the Commissioner remarks the fact that the Public Authority has persistently chosen not to cooperate with his office during the course of the investigation by

failing to provide submissions and copies of the requested documents. The main purpose of requesting information from the Public Authority is to enable the Commissioner to perform his functions under the Act and to determine whether the exemption cited by the Public Authority, namely article 32(1)(c)(i) of the Act, is justified.

10. Although the Commissioner was not provided with copies of the requested documents to be able to examine its contents and ascertain the justification of the exemption invoked by the Public Authority, in order to still provide the applicant with a legal remedy, the Commissioner proceeded to examine the freedom of information request, including the reply of the Public Authority.

Non-compliance with the timeframe set forth in article 10 of the Act

11. Before delving into the merits of the refusal of the request, the Commissioner noted that the applicant submitted her freedom of information request on **the 5th December 2022** pursuant to the requirements set forth in article 6(1) of the Act. The Public Authority replied to the request of the applicant on the **9th February 2024**.
12. The Commissioner emphasises that the timeframes stipulated in the Act are necessary to provide the applicants with sufficient assurances that the freedom of information 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 decisions 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:

“10. 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”.

13. The Public Authority received the request on the 5th December 2022, and therefore, pursuant to article 10 of the Act, the Public Authority had to provide a reply by no later than the 4th January 2023. However, despite the clear timeframe prescribed by law, the Public Authority did not provide a reply until more than one year later. This unjustified and excessive 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 considers this significant delay as unacceptable and deplores, in absolute terms, the behaviour which is being perpetrated by the Public Authority which runs contrary to the fundamental elements of what is considered to be acceptable in a democratic society.**

Non-compliance with article 15(1)(a) of the Act

14. The Commissioner observed that the reply of the Public Authority dated the 9th February 2024 merely cited article 32(1)(c)(i) of the Act without attempting to provide any context or explanation regarding the applicability of this exemption, despite the fact that it took over a year to provide a reply. Article 15(1)(a) of the Act imposes an obligation on the public authorities to provide reasons for refusal of a freedom of information request:

*“15. (1) Where a request made in accordance with this Act is refused, the public authority shall –
(a) subject to article 34, give the applicant the reasons for refusal”.*

15. The Commissioner emphasises that public authorities should provide clear and meaningful reasons when refusing requests from applicants. This is absolutely necessary to promote fairness, transparency and accountability, and to enable the applicant to challenge the decision of the Public Authority in the most effective manner. This is also in line with the case-law of the Court of Justice of the European Union (the “CJEU”) in relation to Regulation 1049/2001¹, which emphasises that the EU institutions should clearly state the reason(s) of refusal. The CJEU held that:

“That obligation on the part of EU institutions to state the reasons on which a decision is based is not merely taking formal considerations into account, but is intended to enable the EU judicature to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain

¹ 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.

*whether or not the decision is well founded. Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question*² [emphasis has been added].

16. After considering article 15(1)(a) of the Act and the case-law of the CJEU, it is abundantly clear that the reply of the Public Authority lacks the necessary elements required by law to enable the applicant to clearly understand the refusal of the Public Authority. The absence of an explanation or context for the exemption highlights ongoing transparency issues within the operations of the Public Authority.

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

17. The Commissioner proceeded to examine the request made by the applicant wherein copies of the following documents were requested in electronic format:

“Copy of ALL agreements and extensions between 2013 and the date of reply to this FOI covering the three concessionaires operating beach concessions in Comino in 2022.

Copy of all tenders/EOI's issued to cover the above”.

18. The Commissioner examined the exemption cited by the Public Authority in terms of article 32(1)(c)(i) of the Act, which provides that a document is exempt 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”.

² Case T-185/19, ‘Public.Resource.Org.Inc, Right to Know CLG vs European Commissioner’, decided on the 14th July 2021, paragraph 82.

19. 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 suffer as a result of the disclosure of the requested information. Therefore, the onus rests on the Public Authority to effectively demonstrate that the documents requested by the applicant are indeed exempt.
20. In a recent judgment ‘Rebecca Bonello Ghio vs Malta Film Commission’³, the Court of Appeal held that the Public Authority should effectively demonstrate the prejudice that the third party would, or could reasonably suffer when citing article 32(1)(c)(i) of the Act as a reason of refusal:

“Il-Qorti tqis li hawnhekk ghandha ragun l-appellata meta tgħid li l-informazzjoni mitluba trid tgħaddi mill-għarbiel tar-ragonevolezza darbtejn, jiġifieri jekk l-iżvelar tagħha hux ser jolqot ħażin jew huwiex ragonevolment mistenni li jolqot ħażin, u b’mod li mhux ragonevoli 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 ragonevolment mistenni li jintlaqat ħażin, b’mod li mhux ragonevoli jekk il-fatturi u d-dokumenti li qegħdin jintalbu li jiġu żvelati fil-fatt jiġu żvelati. Huwa minnu li l-informazzjoni li qieghda tintalab hija ta’ natura kummerċjali, iżda b’daqshekk ma jfissirx li l-iżvelar ta’ din l-informazzjoni ser taffettwa lit-terz b’mod ħażin. Fi kwalunkwe każ huwa t-terz li semmai jista’ jiġi affettwat, u mhux l-appellanta li qieghda tappella mid-deċiżjoni tat-Tribunal u li qieghda tintalab tagħmel pubblika din l-informazzjoni.”

21. Given that the Public Authority chose to ignore the Commissioner’s request for information, particularly to specify the harm that the third parties would suffer as a result of the disclosure and to provide a copy of the requested documents, the Commissioner found himself unable to conduct a thorough assessment designed to ascertain whether the exemption invoked by the Public Authority is justified in terms of article 32(1)(c)(i) of the Act and whether any potential risks associated with disclosure exist.

³ Appeal Inferior Number 83/2023 LM, ‘Rebecca Bonello Ghio vs Malta Film Commission’, paragraph 18.

22. In his considerations, the Commissioner noted the most recent judgment of the Court of Appeal ‘Andre Callus vs Awtorità tal-Artijiet’⁴ delivered on the 16th October 2024, wherein Mr Andre Callus requested the Lands Authority to disclose “*any/all contracts of acquisition, transfer, emphyteusis, lease, encroachment, usufruct, use, tolerance, encroachment or concession of any form relating to Comino*”. The Lands Authority refused the freedom of information request of Mr Callus, citing several reasons, including article 32(1)(c)(i) of the Act. Both the Information and Data Protection Appeals Tribunal⁵ and the Court of Appeal upheld the decision notice of the Commissioner, which ordered the Lands Authority to disclose the documents in relation to Comino.

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 on the 5th December 2022 within twenty (20) working days, and therefore, the Public Authority infringed article 10 of the Act;**
- b. the Public Authority failed to give the applicant an explanation for refusing the freedom of information request, and therefore, the Public Authority infringed article 15(1)(a) of the Act; and**
- c. the refusal of the Public Authority to provide access to the documents requested by the applicant in terms of 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 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: 2024.10.18
12:39:33 +02'00'

**Ian Deguara
Information and Data Protection Commissioner**

⁴ Appeal Inferior Number 30/2024 LM, 16th October 2024.

⁵ Appeal Number FOI/59/2022, ‘Andre Callus vs Awtorita tal-Artijiet’, 15th April 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’.