

FREEDOM OF INFORMATION REQUEST

1. On the 21st December 2023, Mr Karl Azzopardi (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 Home Affairs, Security, Reforms and Equality (the “**Public Authority**”) to provide the following documents in an electronic format:

“I am requesting:

- 1) *The contracts awarded by direct order from the Armed Forces of Malta (AFM), or the Ministry responsible, to James Caterers for the provision of food to irregular migrants, from 2006 (inclusive onwards) and the invoices issued by James Caterers for such services¹.*
- 2) *The contract awarded by tender from the AFM to James Caterers in 2010 (the “2010 tender”) for the provision of catering to detainees at detention centres for migrants, and any subsequent agreement or letter extending to catering service to open centres and the prison at Corradino.²*
- 3) *The invoices from James Caterers to the AFM or any other Public Authority in terms of the FOI Act, from 2010 to date, for the provision of catering under the terms of the 2010 tender.”* (the “**requested documents**”).

¹ <http://archive.maltatoday.com.mt/2008/08/13/t9.html>

² <https://www.independent.com.mt/articles/2010-11-05/news/food-for-asylum-seekers-now-given-to-open-centres-and-corradino-prison-as-well-282744/>

2. On the 23rd January 2024, the Public Authority informed the applicant that his request was being refused “*on the basis of Article 14(b) in conjunction with article 32(b) and article 38(d) of Chapter 496 (Freedom of Information Act) of the Laws of Malta*”.
3. On the 25th January 2024, the applicant sought the reconsideration of the decision and lodged a complaint through the internal complaints procedure of the Public Authority. The applicant submitted the following arguments for the Public Authority to consider:
 - a. that the initial information relating to the provision of food to the AFM, detainees at detention centres, open centres and the Corradino Correctional Facility up to 2010 can be found in the public domain, but subsequent searches were unable to locate any contracts or extensions for the same service; and
 - b. that given that these are public institutions and public funds, this is a matter of public interest and the issues of such documentation being requested do not: (i) have commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; (ii) have a substantial adverse effect on the conduct of negotiations, including commercial and industrial negotiations, by, or on behalf of the Government, or another public authority.
4. On the 26th February 2024, the Public Authority reiterated its reason of refusal to the applicant.

FREEDOM OF INFORMATION APPLICATION

5. On the 4th April 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. The applicant submitted the following salient arguments:
 - a. that the request seeks documentation which represents the expenditure of public funds for the provision of catering for irregular migrants, detention centres, open centres and the Corradino prison, and therefore, the request is focused exclusively on the use of public funds made through direct orders and contracts;
 - b. that the Public Authority claims that there are two reasons for refusing the request and these are the following: (i) the document is exempt as it is information with a

commercial value that would be, or could reasonably be expected to be destroyed or diminished if the information were disclosed in terms of article 32(1)(b) of the Act; and (ii) the disclosure would have a substantial adverse effect on the conduct of negotiations by or on behalf of the government or another public authority in terms of article 38(d);

- c. that both reasons given by the Public Authority do not exempt the information from being provided and that the reasons provided are only an abuse of the Act intended solely to continue the Public Authority's culture of secrecy which is contrary to its obligations of transparency and accountability in terms of the Act;
- d. that the circumstances in which the Public Authority has refused the applicant's request are of particular importance as they show the extent to which that refusal is entirely unfounded in law, for example, information on direct orders and contracts given to James Caterers by the AFM;
- e. that such information was also reported in the media, for example, in the article published by MaltaToday on the 13th August 2008³ and in another article published by the Malta Independent on the 5th November 2010⁴, and indeed, this information was also provided in replies to parliamentary questions such as those numbered 20246, 28373 and 3659 all in the XI Legislature;
- f. that, moreover, on the 16th January 2024, the Public Authority directly through its minister provided part of the information requested in reply to a parliamentary question and when asked who is providing catering services to the Correction Facility at Kordin and what the expense was for the year 2023, the Minister indicated James Caterers Limited and also the amount spent as being that of Eur 1,630,017.91c, and this is reflected in parliamentary question 14599 of the XIV Legislature;
- g. that the Public Authority has a legal obligation to publish at least part of the information requested under regulation 111(2) of the Public Procurement Regulations, and this obligation is repeatedly acknowledged by it in its replies to parliamentary

³ <http://archive.maltatoday.com.mt/2008/08/13/t9.html>

⁴ <https://www.independent.com.mt/articles/2010-11-05/news/food-for-asylum-seekers-now-given-to-open-centres-and-corradino-prison-as-well-282744/cookie-declaration>

questions on subject matters similar to those of the request, such as in the reply to parliamentary question 13843 in the XIV Legislature;

- h. that the Public Authority fails to provide an explanation and to substantiate its claim that the disclosure would destroy the commercial value of the service in question, and in this respect, it fails to meet the required standard established even in the decisions of the Commissioner which require public authorities to explain and substantiate the reasons for refusing requests;
- i. that the Information and Data Protection Appeals Tribunal and the Court of Appeal have also confirmed the obligation of public authorities that are obliged to provide such explanation and evidence to the extent that their refusal must be based on convincing evidence and one can refer here for example to the case of ‘Bonello Ghio vs Malta Film Commission’, where the Court of Appeal noted in paragraph 18 that it is up to the authority to bring forward evidence of the prejudice it claims;
- j. that the Public Authority has failed to convincingly establish that the disclosure of the requested documents would lead to information of commercial value to be destroyed or diminished, and, in fact, article 32(1)(b) of the Act does not automatically exclude all information that relates to commerce, nor does it absolutely exclude the disclosure of that information that relates to public funds by a public authority to a third person;
- k. that one cannot assume that commercial value of these contracts would be destroyed or diminished merely by disclosure of how and the terms under which public funds were paid to third parties, and this assumption would mean, for example, that with respect to government and James Caterers on a different project, the publication by the National Audit Office of its report on the “*Contract awarded to the JCL and MHC consortium by the St Vincent de Paul residence for the management of four residential blocks through a negotiated procedure*” destroyed the commercial value of information which is similar to that being sought by the applicant;
- l. that the Public Authority has also failed to substantiate its claim that the disclosure of the requested information would have substantial adverse effects on the conduct of negotiations by Government, and, moreover, article 38(d) of the Act does not exempt the disclosure of information that would effect negotiations, but only that which have “*substantial adverse effect*”;

- m. that, furthermore, article 38(d) of the Act could only be relied on where the interest in non-disclosure surpasses the public interest in disclosure, and, the public interest strongly militates in favour of disclosure where there is the use of public funds, in the execution of administrative discretion; and
- n. that the applicant firmly believes that nothing in the information requested leads to the circumstances established in article 32(1)(b) and article 38(d) of the Act, and, even if the agreements contracted between the Public Authority and James Caterers could contain some clauses which could cause substantial adverse effects or bring about the destruction of commercial information, the Act obliges the Public Authority to disclose all other information and parts of those agreements which do not cause such prejudice.

INVESTIGATION

The Issuance of an Information Notice

- 6. As part of the investigation procedure, by means of an information notice dated the 5th April 2024, issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to provide any 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:
 - a. substantiate its arguments that led to the refusal of the requested documents in terms of article 32(1)(b) and article 38(d) of the Act;
 - b. clearly explain the prejudice which would, or could reasonably be suffered if the information requested by the applicant were to be disclosed; and
 - c. indicate which factors were taken into consideration in terms of article 38(d) of the Act to carry out the public interest test as required by article 35(2) of the Act.

Submissions of the Public Authority

- 7. On the 25th April 2024, the Public Authority provided its reply to the information notice and submitted the following arguments for the Commissioner to consider during the legal analysis of this case:

- a. that the Public Authority refused the request on the basis of article 32(1)(b) of the Act, which designates a document as exempt if its disclosure would unveil information possessing commercial value that may be adversely affected, either by destruction or diminishment, upon disclosure, and article 38(d) of the Act, which classifies a document as exempt if its release under the Act would likely to result in a substantial adverse impact on ongoing negotiations, including those of a commercial or industrial nature, conducted by the Government or another public authority;
- b. that the cited provisions underscore the delicate balance between transparency and protection of sensitive information, which is integral to the effective functioning of the Government and its negotiation processes;
- c. that article 14(b) of the Act reflects a recognition that not all information could or should be readily accessible to the public and it acknowledges that there are circumstances where the disclosure of certain documents could have detrimental consequences, either by compromising commercial interests or undermining negotiation effects crucial to the interest of the State;
- d. that article 32(1)(b) of the Act extends this principle to encompass documents which their disclosure could harm commercial interest by devaluing proprietary information or market advantage, and therefore, by exempting such documents from mandatory disclosure, the Act seeks to preserve the competitive edge of businesses and prevent economic harm that may arise from unrestricted dissemination of commercially sensitive data;
- e. that, similarly, article 38(d) of the Act acknowledges the importance of confidentiality in negotiation processes, particularly, those undertaken by governmental bodies or public authorities, and it recognises that premature disclosure of negotiation-related information could undermine the effectiveness of these efforts, potentially compromising the attainment of favourable outcomes or jeopardising the State's strategic interests;
- f. that the decision to refuse the FOI request underscores the careful deliberation involved in balancing the principles of transparency and confidentiality within the realm of governance, and, while transparency is vital for fostering accountability and public

trust, it must be tampered by the need to safeguard sensitive information essential for effective decision-making and governance; and

- g. that the refusal highlights the procedural mechanism in place to ensure adherence to legal frameworks governing access to information and by citing specific provisions within the Act, the Public Authority demonstrates a commitment to upholding the rule of law and respecting the parameters established by legislative authorities;

The prejudice which would, or could reasonably be suffered by the Public Authority as a result of the disclosure of the requested documents.

- h. that if the information were to be disclosed to the applicant, several potential prejudice could be suffered, particularly in the context of negotiations conducted by or on behalf of the Government or another public authority, and these are as follows:
 - i. **Compromised Negotiation Positions:** that the disclosure of sensitive negotiation-related information could compromise the bargaining positions of the Government, or the public authority involved, and the negotiations often involve strategic maneuvering and the exchange of confidential proposals or concessions, and if these details were disclosed prematurely, it could weaken negotiating stance and diminish the likelihood of achieving favourable outcomes;
 - ii. **Undermined Trust and Confidentiality:** that negotiations rely on a foundation of trust and confidentiality among parties involved and if confidential information shared during negotiations were to be disclosed, it could have far-reaching implications, particularly, in diplomatic negotiations or complex commercial agreements where maintaining confidentiality is essential for fostering productive dialogue;
 - iii. **Weakened Leverage:** that information disclosed prematurely could provide insight into the Government or Public Authority's priorities, preferences, or fall back positions, and this transparency could weaken their leverage in negotiations by allowing counterparties to anticipate their strategies and adjust their own positions accordingly, and, as a result, the Government or public authority may find themselves at a disadvantage during negotiations, unable to secure optimal outcomes for the public interest;

- iv. **Damage to Reputation or Public Perception:** that the disclosure of certain negotiation-related information could damage the reputation or public perception of the Government or public authority involved, and if the disclosed information reflects poorly on their decision-making processes, priorities, or handling of negotiations, it could undermine public trust and confidence in their ability to represent the interests of the citizenry effectively;
- v. **Legal or Regulatory Risks:** that certain negotiation-related information may be subject to legal or regulatory restrictions, such as, confidentiality agreements or national security considerations, and the disclosure of such information could expose the Government or Public Authority to legal liabilities, including breach of contract or violation of national security protocols, and these risks could have significant consequences, including, legal disputes, financial penalties, or damage to national security interests;
- vi. **Negative Impact on Stakeholders:** that disclosure of negotiation-related information could have adverse effect on stakeholders, including businesses, individuals, or other entities involved in the negotiation process, for example, premature disclosure of commercial negotiation details could harm the competitive interests of businesses or compromise the proprietary information, leading to economic harm or market disadvantage;
- vii. **Disruption of Negotiation Dynamics:** that negotiation processes often rely on a delicate balance of information asymmetry and strategic ambiguity to facilitate productive dialogue and compromise, and, if sensitive negotiation-related information were to be disclosed, it could disrupt this dynamic by removing the element of surprise or undermining the confidentiality necessary for candid discussions, and this disruption could impede progress and prolong the negotiation process, ultimately delaying the achievement of mutually beneficially agreements; and
- viii. that the potential prejudice that could be suffered if the information were to be disclosed underscore the importance of preserving confidentiality and discretion in negotiation processes conducted by or on behalf of the Government or public authorities;

The factors that were taken into consideration in terms of article 38(d) of the Act to carry out the public interest test as required under article 35(2) of the Act.

- i. that in considering whether to apply article 38(d) of the Act, the Public Authority weighed several factors to determine whether disclosure of the requested documents would have a substantial adverse effect on negotiations conducted by or on behalf of the Government or another public authority, which include the following:
 - i. Nature of Negotiations: that the Public Authority assessed the nature of the negotiations involved, including their scope, importance, and potential impact on governmental or public interests, and negotiations encompass a wide range of activities, from diplomatic discussions to commercial contracts, each with its unique considerations;
 - ii. Confidentiality Requirements: that the negotiations require a high level of confidentiality to protect sensitive information or strategic interests, and, therefore, the Public Authority is inclined to withhold the documents to maintain the integrity of the negotiation process;
 - iii. Potential Consequences of Disclosure: that article 35(2) of the Act mandates that documents may be withheld only if the public interest served by non-disclosure outweighs the public interest in disclosure, and therefore, the Public Authority needed to assess the broader public interest implications of both disclosing and withholding the document;
 - iv. Transparency and Accountability: that while acknowledging the importance of transparency and accountability in governance, the Public Authority needed to balance these principles with the need to protect sensitive negotiation-related information, and it assessed whether disclosing the documents aligns with the overarching goal of promoting transparency while also safeguarding the public interest; and
 - v. Legal Considerations: that the Public Authority considered any legal obligations or precedents related to document disclosure, ensuring that its decision aligns with the provisions of the Act and other relevant legislation.
8. Following a request made by the Commissioner, the Public Authority provided the Commissioner with copies of contract agreements and addenda.

Submissions of the Applicant

9. 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 9th July 2024, the applicant provided the following principal arguments:
- a. that the Public Authority was requested “*to substantiate the legal exemptions cited*”, but instead, the Public Authority provided a description of the legal provisions of the Act, and then simply claimed that the “*decision to refuse the FOI request underscores the careful deliberation involved in balancing the principles of transparency and confidentiality within the realm of governance*” and continued to claim that the safeguarding of sensitive information is essential for effective decision making and governance;
 - b. that the preceding point exposes the *forma mentis* of the Public Authority and exposes it as being one preferring secrecy and non-transparency as a method of governance, and this does not explain what the claimed “*careful deliberation*” in this particular case consisted of;
 - c. that the Public Authority’s decision “*reflected a nuanced understanding of the competing interests at stake*”, then the Public Authority should have indicated what the nuanced understanding of these interests consists of, which interests were taken into consideration and why in this case the deliberation led to a refusal, for example, the Public Authority does not even indicate whether it considered the disclosure of some parts of the documents requested;
 - d. that the submissions of the Public Authority on the second question contains a few utterances which reaffirm the Public Authority’s choice of secretive governance directly in violation of the aim of the Act and of freedom of information, and while it was asked to “*clearly explain the prejudice which would or could be suffered*”, the Public Authority instead gave a list of all possible prejudices under the sun; and
 - e. that the Public Authority lists, for example, that it considered the disclosure to be prejudicial because it can “*damage to reputation or public perception*” is clearly indicative that the Public Authority first followed its policy of refusing FOI requests and is now throwing at the Commissioner every possible reason under the sun;

The rebuttal of the applicant in connection with the prejudice that the Public Authority claimed that it would, or could reasonably suffer as a result of the disclosure of the requested documents

- f. that the applicant made the following comments in relation to the list of prejudices provided by the Public Authority;
 - i. **Compromised Negotiation Positions:** that no one is asking for the disclosure of information which relates to an agreement which has not yet been concluded and funded through secretive procedures chosen at will by the Public Authority but paid for through public funds, and therefore, claiming that this could be premature disclosure that could weaken the negotiating stance of government is merely a general vague claim not related specifically to the circumstances of the case;
 - ii. **Undermined Trust and Confidentiality:** that the Public Authority here claims that it cannot disclose confidential information, however, it appears that the Public Authority is not aware of the judgments of the Court of Appeal related to its obligations in respect of disclosure when the Public Authority itself chooses what is confidential or not, and, here, the Public Authority claims that the FOI request is seeking confidential information shared during negotiations, but fails to relate this to the information requested, which is for contracts and agreements concluded by the Public Authority, and not for internal negotiation documents;
 - iii. **Weakened Leverage:** that the Public Authority relies again on the premature disclosure of information, but, the Public Authority appears to prefer secrecy, and the Public Authority says that the premature disclosure of agreements already concluded could allow other parties to anticipate the strategies of the Government, which begs the question: Does this mean that the Public Authority intends to continue to contract through secretive negotiations rather than through public procurement thereby avoiding accountability on the use of public funds?
 - iv. **Damage to Reputation or Public Perception:** that the reply of the Public Authority is par excellence example of the authority's nefarious attitude towards its obligation of transparency, and the Public Authority expects to be exempted from disclosure of information related to the use of public funds because the information reflects poorly on the decision-making processes made by the Government or public authorities;

- v. Legal or Regulatory Risks: that the ridiculousness of claiming this prejudice is evident when one considers that the Public Authority is refusing to disclose agreements related to the provision of food to persons held in detention on the basis of considerations related to national security, and once again, the Public Authority does not indicate how this information could relate to national security, and the Public Authority's claim of legal or regulatory risks in so far as these relate to confidentiality agreements, is counter to the decisions made by the Court of Appeal which denounce the use of confidentiality conditions by authorities and their hiding behind conditions which they themselves agree to in contracts;
- vi. Negative Impact of Stakeholders: that the Public Authority fails to indicate how reasonable it is that in this case there could be damage to the contractor, and it merely claims disclosure could harm competitive interests of businesses but fails to explain why protecting a public funded contract with a company could lead to this claimed prejudice; and
- vii. Disruption of Negotiation Dynamics: that the Public Authority relies on confidentiality and disruption of its method of negotiation, but if this is the negotiation method shrouded in secrecy because as it claims its disclosure could damage the reputation of the Government then the reason behind the refusal of this freedom of information request becomes very clear;

The rebuttal of the applicant in relation to the factors which were taken into consideration by the Public Authority in terms of article 38(d) of the Act.

- g. that the Public Authority was asked to "*explain the factors*" which were taken into consideration when assessing the dictates of the public interest, and, again, in this regard, the Public Authority indicated the same reasons it gave for the second aspect it was asked to address;
- h. that, in this case, the Public Authority claims that it evaluated the generally stated prejudices, but fails to indicate how it did so, what information it took into consideration, what criteria it considered, and, what specifically led to its decision of refusal in this case; and

- i. that, for example, the Public Authority was asked to explain the factors considered when carrying out the public interest test, the Public Authority merely says that “*the Ministry needed to assess the broader public interest implications of both disclosing and withholding*”, but it fails to explain how the Public Authority conducted its assessment, what it considered, what are the facts of the case it took into consideration.
10. The Commissioner provided the Public Authority with a copy of the counterarguments submitted by the applicant. However, the Public Authority informed the Commissioner that it does not wish to provide any further submissions.

LEGAL ANALYSIS AND DECISION

General Considerations

11. The Commissioner acknowledges that the spirit and scope of the freedom of information legislation is to establish a right to information in order to promote added transparency and accountability in public authorities. The legislation reflects the fundamental premise that all information held by public authorities is in principle public, save for those documents that specifically fall within the exemptions provided for by law.
12. This has been supported by the jurisprudence of the Court of Appeal in the judgment ‘Din l-Art Ħelwa vs l-Awtorita’ tal-Ippjanar’⁵, which held that “[l]-Att dwar il-Liberta’ tal-*Informazzjoni hi liġi intiża biex ttiprovd i b’mod ampju iżda b’restrizzjonijiet ċari fl-istess liġi, sens ta’ trasparenza u kontabilita fid-deċiżjonijiet, ordnijiet jew direttivi fl-amministrazzjoni pubblika li wara kollox qiegħda hemm għas-servizz tas-soċjeta’*”. Similarly, the Court of Appeal in the judgment ‘Allied Newspapers Limited vs Foundation for Medical Services’⁶ highlighted that the “*leġiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovd i ċerti garanziji għat-twettiq fil-prattika tal-libertà tal-informazzjoni bħala s-sisien tal-libertà fundamentali tal-espressjoni*”.
13. Moreover, the Court of Appeal in the judgment ‘Allied Newspapers Limited vs Projects Malta Ltd’⁷ made reference to the parliamentary debates in relation to the freedom of information legislation, which accentuate the spirit and scope of the legislation:

⁵ Appeal No. 7/2019, decided on the 16th May 2019.

⁶ Appell Inferjuri Numru 11/2020 LM, decided on the 18th November 2020.

⁷ Appell Inferjuri Numru 33/2019LM, decided on the 2nd September 2020.

“Fi kliem l-Onor. Prim Ministru meta kien qiegħed jippilota l-Att dwar il-Libertà tal-Infommazzjoni mill-Parlament: “il-prattika kienet li l-infommazzjoni tibqa’ kunfidenzjali sakemm ma jkunx hemm raġuni biex isir mod ieħor. ... Bil-proposta ta’ din il-ligi qegħdin naqilbu din il-prattika kompletament ta’ taħt fuq, għax issa il-premessa li qegħdin inressqu għall-konsiderazzjoni tal-Qorti hija premessa li tghid li l-infommazzjoni issa se tkun soġġetta li tiġi żvelata sakemm ma jkunx hemm raġuni valida skont kriterji stabbiliti mil-ligi għaliex m’għandhiex tkun żvelata. ... It-trasparenza hija wkoll mezz ewlieni biex tiżgura li l-korruzzjoni u l-abbuż ta’ poter ma jaqbdux għeruf u li jinkixfu u jinqerdu fejn ikunu preżenti.”

Freedom of Information Request

14. As a preliminary step of the investigation of this freedom of information application, the Commissioner sought to examine the freedom of information request submitted by the applicant on the 21st December 2023 pursuant to the requirements set forth in article 6(1) of the Act, wherein he requested the Public Authority to provide access to the following documents:

“I am requesting:

- 1) The contracts awarded by direct order from the Armed Forces of Malta (AFM), or the Ministry responsible, to James Caterers for the provision of food to irregular migrants, from 2006 (inclusive onwards) and the invoices issued by James Caterers for such services⁸.*
- 2) The contract awarded by tender from the AFM to James Caterers in 2010 (the “2010 tender”) for the provision of catering to detainees at detention centres for migrants, and any subsequent agreement or letter extending to catering service to open centres and the prison at Corradino.*
- 3) The invoices from James Caterers to the AFM or any other Public Authority in terms of the FOI Act, from 2010 to date, for the provision of catering under the terms of the 2010 tender.”*

15. Therefore, the applicant requested the Public Authority to disclose documents that relate to the provision of catering by James Caterers Limited for irregular migrants, detention centres, open centres and at the Corradino prison. This request covers contracts and subsequent extensions, including the invoices issued in connection with such contracts.

⁸ <http://archive.maltatoday.com.mt/2008/08/13/t9.html>

16. The Public Authority refused the request of the applicant on the 23rd January 2024 and the 26th February 2024, and cited article 32(1)(b) and article 38(d) of the Act as the reasons for the refusal. For the purpose of this legal analysis, the Commissioner sought to establish whether the exemptions cited by the Public Authority, namely article 32(1)(b) and article 38(d) of the Act, are justified.
17. The refusal of the Public Authority is based on two provisions of the Act: (a) that the documents requested by the applicant have a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; and (b) that subject to article 35 of the Act, the disclosure of the requested documents would, or could reasonably be expected to have a substantial adverse effect on the conduct of negotiations (including commercial and industrial negotiations) by or on behalf of the Government or another public authority.
18. During the course of the investigation, the Commissioner issued an information notice on the 5th April 2024 pursuant to article 24(1)(a) of the Act, wherein the Public Authority was specifically requested to explain the prejudice that it would, or could reasonably suffer as a result of the disclosure of the requested documents. Given that both exemptions intend to protect the Public Authority from harm, the Public Authority should be able to demonstrate that the harm it intends to protect is 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”) concerning the interpretation of Regulation 1049/2001⁹, wherein the CJEU held 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*”¹⁰.
19. Furthermore, in another ruling, the CJEU stated that the “*case-law cannot be interpreted as requiring the institutions to submit evidence to establish the existence of such a risk. It is sufficient in that regard if the contested decision contains tangible elements from which it can be inferred that the risk of the decision-making process being undermined was, on the date on*

⁹ 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.

¹⁰ 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, of 15 September 2016, *Herbert Smith Freehills v Council*, T-710/14, paragraph 33, and of 22 March 2018, *Emilio De Capitani vs European Parliament*, T-540/15, paragraph 62.

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 documents were disclosed”¹¹.

20. In a recent judgment ‘Rebecca Bonello Ghio vs Malta Film Commission’, the Court of Appeal adopted the same approach as that of the CJEU and clearly explained how the public authorities should conduct their assessment when invoking an exemption pursuant to the Act. In such case, the Court of Appeal referred to article 32(1)(c)(i) of the Act, which is also applicable to other prejudice-based exemptions, such as, article 32(1)(b) and article 38(d) of the Act. The Court of Appeal emphasised that the onus rests upon the public authorities to effectively demonstrate how the disclosure of the information would, or could reasonably led to prejudice:

“Il-Qorti hija tal-fehma li l-appellanta kellha l-oneru li ttiprova 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 tispijega b’mod ċar għafejn 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 tghid 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.”¹² [emphasis has been added].

21. Given that the scope of the legislation is to promote transparency and accountability, it remains the responsibility of the Public Authority to demonstrate how the disclosure of the information to the public could indeed harm any of the interests protected by the Act. Furthermore, as repeatedly stated by the Court of Appeal, access to documents held by public authorities should be the general rule, and, therefore, the public authorities should give a narrow interpretation of the exemptions contained in Part V and Part VI of the Act.

¹¹ Case T-471/08, *Toland v Parliament* (2011).

¹² Appell Inferjuri Numru 83/2023 LM, decided on the 31st January 2024.

Article 32(1)(b) of the Act

22. The Commissioner examined article 32(1)(b) of the Act, which is one of the exemptions cited by the Public Authority:

“32. (1) A document is an exempt document if its disclosure under this Act would disclose:

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(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed”.

23. The exemption is intended to protect documents which contain a commercial value, and therefore, it logically follows that the Public Authority should identify the nature of the commercial value, which must include the commercial context and significance of the information in that context.

24. Accordingly, the Commissioner carefully examined the contents of the contracts provided by the Public Authority during the course of the investigation and noted that some information is indeed considered as commercially sensitive, namely, the price of the supplies and the ‘Problem Solving, Business Continuity and Contingency Plan’. The Commissioner is of the view that the item pricing is information which is necessary for the general business operation of the contractor, and therefore, the disclosure of the prices could negatively impact the commercial value of the information and the commercial interests of the contractor. This could reasonably lead to a situation which distorts the procurement exercise and hinders the Public Authority or the Government from achieving the best value. In addition, the ‘Problem Solving, Business Continuity and Contingency Plan’ is strictly information that relates to the plan of the contractor, and, therefore, after inspecting the contents of this section of the contract, the Commissioner considered that this information is indeed commercially sensitive. This led him to conclude that the disclosure of the prices of the supplies and the ‘Problem Solving, Business Continuity and Contingency Plan’ would be likely to prejudice the interests of the contractor and the Public Authority.

25. However, the exemption should not apply to the remaining information contained in the requested documents, in particular, information in relation to the overall cost of the provision of the services and the applicable conditions. The Public Authority failed to effectively

demonstrate that there is a justified reason not to disclose the information requested by the applicant. The Commissioner emphasises that the Public Authority should be held accountable for the total expenditure of a service being funded by public funds, in particular, when the expenditure involves a significant amount of money. Therefore, the information requested by the applicant should be made available to the public to ensure transparency and openness on how public funds are being spent. Furthermore, there is already publicly available information in relation to the name of the contractor and the total expenditure of the provision of catering at the Corradino Facility for the year 2023:

Legjislatura	XIV	Kategorija	ORAL
Mistoqsija Numru:	14599	Data:	09/01/2024
Seduta:	195 - 16/01/2024 04:00 PM	Seduta Interim:	-
Titlu:	Facilità Korrettiva ta' Kordin – Kuntrattur li jforni l-ikel		

L-Onorevoli JEROME CARUANA CILIA staqsa lill-Onorevoli BYRON CAMILLERI (Ministru għall-Intern, is-Sigurtà, ir-Riformi u l-Ugwaljanza):
Jista' l-Ministru jgħid min hu l-kuntrattur li qed iforni l-ikel fil-Facilità Korrettiva ta' Kordin? Jista' jgħid ukoll kemm kienet l-ispiza għal dan is-servizz matul l-2023, maqsuma xahar b'xahar?

Tweġiba:
Infurmat illi l-kuntrattur huwa James Caterers L.td. u matul is-sena 2023 dan is-servizz sewa 1,630,017.91.

Parliamentary Question 14599

Thus, when considering the fact the Minister responsible for Home Affairs has already made certain information publicly about this contract available, it does not follow why the Public Authority has refused *in toto* the request of the applicant. This leads the Commissioner to conclude that the Public Authority did not conduct a proper assessment to determine the risk of varying likelihood and severity whilst taking into account the nature and context of the information.

26. In his considerations, the Commissioner also noted the settled case-law of the Court of Appeal in relation to freedom of information cases. From an analysis of this case-law, the Court of Appeal reiterated that the public should be able to scrutinise documents that contain information in relation to individuals or companies that received funds from public authorities.
27. In the judgment 'Allied Newspapers Limited vs Foundation for Medical Services', the Court of Appeal placed emphasis on the importance of transparency in those specific situations where there is no public call issued by the public authority, and therefore, the applicable conditions of the contract are not known:

“Bl-ebda mod il-kuntratt ta' impjeg ta' Neville Gafà u Carmen Ciantar mal-fondazzjoni appellanta, entità pubblika ffinanzjata minn fondi pubblici, ma

jistgħu jitqiesu li huma dokumenti eżentati taħt l-artikolu 31(2) tal-Kap. 496, 'il għaliex huwa fl-interess pubbliku li tigi żvelata l-informazzjoni mitluba, biex jiġiharsu wkoll il-prinċipji tat-trasparenza u tal-kontabilità f'kuntest ta' kuntratti ta' impjieg li ma sarux wara sejha pubblika, u allura ma kinux magħrufa l-kundizzjonijiet applikabbli għall-impjieg ta' dawn iż-żewġ individwi."¹³ [emphasis has been added].

28. The Court of Appeal reiterated its position in 'Rebecca Bonello Ghio vs Malta Film Commission':

“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 jiġiharsu l-prinċipji tat-trasparenza u l-kontabilità, hija għandha l-obbligu li tiżvela kif l-flus li tingħata minn fondi pubbliċi b'liema mod qegħdin jintefqu. L-informazzjoni li qiegħda tintalab tiżvela l-appellanta hija dwar ħlasijiet għal servizz ipprestat minn persuna li ntgħażlet b'mod dirett mill-appellanta mingħajr ma nħarġet sejha pubblika, u għalhekk aktar u aktar jinkombi fuq l-appellanta li tkun trasparenti f'dawn iċ-ċirkostanzi."¹⁴ [emphasis has been added].

29. Furthermore, the Court of Appeal in 'Caroline Muscat vs Malta Film Commission' emphasised that the public has a reasonable expectation to know how and why public funds are being spent.

“Beda billi qies li l-Kummissjoni appellanta bħala awtorità pubblika skont id-definizzjoni mogħtija fil-Kap. 496, kifsewwa jirriveva l-Kummissarju, tithallas minn fondi pubbliċi u għalhekk tirriżulta l-aspettattiva li l-pubbliku għandu jkun jaf fejn marru l-flus u għaliex"¹⁵ [emphasis has been added].

30. In light of the objectives pursued by the Act and the settled case-law of the Court of Appeal, and after examining the contents of the documents provided by the Public Authority during the course of the investigation, the Commissioner could not accept the argument of the Public Authority that all the requested documents have a commercial value. The Commissioner

¹³ Appell Inferjuri Numru 11/2020 LM, decided on the 18th November 2020.

¹⁴ Appell Inferjuri Numru 83/2023 LM, decided on the 31st January 2024.

¹⁵ Appell Inferjuri 72/22/LM, decided on the 22nd February 2023.

therefore concludes that the exemption cited by the Public Authority in terms of article 32(1)(b) of the Act does not apply, except for the item pricing and the ‘Problem Solving, Business Continuity and Contingency Plan’.

Article 38(d) of the Act

31. In its replies dated the 23rd January 2024 and the 26th February 2024, the Public Authority refused the request of the applicant on the basis of article 38(d) of the Act, which reads as follows:

“38. Subject to article 35, a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

-

(d) have a substantial adverse effect on the conduct of negotiations (including commercial and industrial negotiations) by or on behalf of the Government or another public authority”.

32. Before delving into the assessment of the arguments raised by the Public Authority, the Commissioner noted that this is an exemption set forth in part VI of the Act. Unlike the exemptions held in part V of the Act, article 38 is a qualified exemption, which means it is subject to the public interest test pursuant to article 35(2) of the Act. Article 35(2) of the Act reads as follows:

“(2) A document may be withheld in accordance with the provisions of this Part only if it contains matter in relation to which the public interest that is served by non-disclosure outweighs the public interest in disclosure.”

33. Therefore, the exemption cited by the Public Authority pursuant to Part VI of the Act must pass a more stringent assessment to apply. Accordingly, the Public Authority must conduct a public interest test by weighing the public interest in maintaining the exemption against the public interest in disclosure. In such case, article 38(d) of the Act speaks of “*substantial adverse effect*”, and therefore, given that the exemption relates to a prejudice which may be suffered by the Government or a public authority, the Public Authority should be in a position to effectively demonstrate that there is an inherent public interest in avoiding that prejudice.

34. Accordingly, the Commissioner requested the Public Authority to clearly explain the prejudice that the Public Authority would, or could reasonably suffer as a result of the disclosure of the requested documents and to indicate how it conducted the public interest test and which factors were taken into consideration when it decided that the public interest is better served by non-disclosure of the requested documents. To this end, the Public Authority provided a list of prejudices that the Public Authority may suffer, which included, compromised negotiation position, undermined trust, weakened leverage, damage to reputation or public perception, legal or regulatory risks, negative impact on stakeholders and disruption of negotiation dynamics.
35. The Commissioner proceeded to assess the list of possible harms that the Public Authority would, or could reasonably suffer as a result of the disclosure of the requested documents:

Compromised Negotiated Positions: The Public Authority provided that the “[d]isclosure of sensitive negotiation-related information could compromise the bargaining positions of the Government or public authority involved ... If these details were disclosed prematurely, it could weaken the negotiating stance and diminish the likelihood of achieving favourable outcomes”. The Commissioner clarifies that the freedom of information request is for contracts, which have already been concluded and not for contracts which are still at negotiating stage. Therefore, the Public Authority failed to explain how the disclosure of the contracts and the corresponding invoices would constitute a premature disclosure of information.

Undermined Trust and Confidentiality and Weakened Leverage: The Public Authority submitted that “[n]egotiations rely on a foundation of trust and confidentiality among parties involved. If confidential information shared during negotiations were to be disclosed, it could erode trust between negotiating parties and deter future collaborations. This could have far-reaching implications, particularly in diplomatic negotiations or complex commercial agreements where maintaining confidentiality is essential for fostering productive dialogue”. The Public Authority is once again referring to confidential information shared during negotiation stage when it is clear that the request is not for internal negotiation documents, but for contracts which have already been concluded and the corresponding invoices. Therefore, the Public Authority failed to demonstrate how the disclosure of information pertaining to the provision of catering services could impact diplomatic negotiations or complex commercial agreements.

Negative Impact on Stakeholders: The Public Authority argued that the “[d]isclosure of negotiation-related information could have adverse effects on stakeholders, including businesses, individuals or other entities involved in the negotiation process. For example, premature disclosure of commercial negotiation details could harm the competitive interest of businesses or compromise their proprietary information, leading to economic harm or market disadvantage”. Whereas the argument of the Public Authority is at best not properly formulated, the Commissioner noted that the price of the supplies contained in the contracts is commercially sensitive, and, therefore, the disclosure of such information, may prejudice procurement processes, distort competition, and consequently, negatively impact the contractor. However, this strictly applies to the price of the supplies and not to the other information held in the requested documents.

Without prejudice to the foregoing, 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. 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.

Damage to Reputation or Public Perception: The Public Authority stated that “[i]f the disclosed information reflects poorly on their decision-making processes, priorities, or handling of negotiations, it could undermine public trust and confidence in their ability to represent the interests of the citizenry effectively”. The Commissioner emphasises that it is precisely because of this argument that the freedom of information legislation was adopted - that is to hold public authorities accountable for their actions and decisions.

Legal or Regulatory Risks: The Public Authority argued that “disclosure of such information could expose the Government or public authority to legal liabilities, including breach of contract or violation of national security protocols. These risks could have significant consequences, including legal disputes, financial penalties, or damage to national security interests”. This is not in line with the case-law of the Court of Appeal in relation to breaches of contract in so far that these relate to the confidentiality of the agreements¹⁶. Furthermore, it is not clear how the disclosure of the documents would lead to damage to the national security interest when the freedom of information request is clearly for documents in relation to the provision of catering services.

¹⁶ ‘Allied Newspapers Limited vs Foundation for Medical Services, Appell Inferjuri Numru 11/2020 LM and ‘Rebecca Bonello Ghio vs Malta Film Commission’, Appell Inferjuri Numru 83/2023 LM.

36. This led the Commissioner to conclude that, save for the price of the supplies, there is no evidence that the disclosure of the requested documents would, or could reasonably be expected to have a substantial adverse effect on the conduct of negotiations.

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 exemption cited by the Public Authority in terms of article 32(1)(b) of the Act is not justified, except for the price of the supplies and the ‘*Problem Solving, Business Continuity and Contingency Plan*’; and**
- b. the exemption cited by the Public Authority in terms of article 38(d) of the Act is not justified, except for the price of the supplies.**

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 an electronic format, after redacting the following information:

- the price of the supplies;**
- the ‘*Problem Solving, Business Continuity and Contingency Plan*’;**
- the identity card numbers and signatures;**
- the bank account details; and**
- any other personal data within the meaning of article 4(1) of Regulation (EU) 2016/679.**

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: 2024.10.16
14:38:42 +02'00'

**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”.