

## FREEDOM OF INFORMATION REQUEST

1. On the 2<sup>nd</sup> February 2024, Ms Caroline Muscat (the “**applicant**”) made a request pursuant to the requirements set forth in article 6(1) of the Freedom of Information Act, Chapter 496 of the Laws of Malta (the “**Act**”), requesting the Public Broadcasting Services Ltd (the “**Public Authority**”) to provide in electronic format, a copy of the “*[l]ist of all tenders, quotations and direct orders issued by PBS for the refurbishment of the TV studio used for the 2024 Malta Eurovision Song Contest. List should include date of issue of tender/direct order, subject of request, date of approval to assignee, value of contract, beneficiary and PBS official approving the requested procurement*”.
2. On the 23<sup>rd</sup> February 2024, the Public Authority informed the applicant that her request could not be met on the basis that “*[i]d-dokumenti mitluba huma direttament relatati mal-izvilupp u produzzjoni tal- programm televiziv Malta Eurovision Song Contest li jixxandar fuq TVM. Dan il-programm televiziv huwa fondut kompletament minn dhul ta’ natura kummercjali. Ghaldaqstant id-dokumenti mitluba huma ezenti skond l-Artikolu 5(1)(f) tal-Kap 496 tal-Ligijiet ta’ Malta*”.
3. The applicant was not satisfied with the Public Authority’s decision and on the 25<sup>th</sup> February 2024, pursuant to the Internal Complaints’ Procedure, requested the Public Authority to reconsider its position in terms of the Act. On the 6<sup>th</sup> March 2024, the Public Authority reconfirmed its position and noted that “*[w]e have nothing further to add to our previous response*”.

## **FREEDOM OF INFORMATION APPLICATION**

4. On the 16<sup>th</sup> March 2024, the applicant applied for a decision notice pursuant to article 23(1)(a) of the Act, requesting the Information and Data Protection Commissioner (the “**Commissioner**”) to decide whether the Public Authority had dealt with the requirements of the Act when handling her freedom of information request. The applicant argued that “*the info sought is in the public interest and concerns public spending*” [sic].

## **INVESTIGATION**

### Admissibility of the Freedom of Information Application

5. After having considered the nature and background of this application, together with the procedural steps involved between the applicant and the Public Authority in the request for the documentation, the Commissioner considered the application made by the applicant as admissible for the purposes of article 23(2) of the Act.

### Issuance of Information Notice

6. As part of the investigation procedure, by means of an information notice dated the 3<sup>rd</sup> 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 purpose of enabling him to exercise his functions under the Act and to determine whether the Public Authority complied with the requirements of the Act. In particular, the Commissioner requested the Public Authority to provide a true copy of the documents requested by the applicant.

### Submissions received from the Public Authority and the Applicant

7. The Public Authority provided the Commissioner submitted the following salient argument for the Commissioner to consider during the legal analysis of this case:

*“PBS took the commercial decision that the economic scale of operation of the MESC for this year with evergrowing costs was not feasible and an alternative approach for the commercial viability of the MESC production had to be found. This resulted in the MESC being produced from within Television House like most other*

*television programmes. The MESC television production is completely funded by commercial activity.*

*The expenditure directly attributable to the MESC for an audio console to handle the music requirements is being provided”.*

8. Pursuant to the internal investigation procedure of this Office, on the 10<sup>th</sup> June 2024, the applicant was provided with the opportunity to rebut the arguments submitted by the Public Authority, however no further submissions were received.

## LEGAL ANALYSIS AND CONSIDERATIONS

9. For the purpose of this legal analysis, the Commissioner proceeded to assess the freedom of information request made by the applicant pursuant to the requirements set forth in article 6(1) of the Act, where the Public Authority was requested to provide in electronic format a copy of the “[l]ist of all tenders, quotations and direct orders issued by PBS for the refurbishment of the TV studio used for the 2024 Malta Eurovision Song Contest. List should include date of issue of tender/direct order, subject of request, date of approval to assignee, value of contract, beneficiary and PBS official approving the requested procurement”.
10. As a preliminary observation, the Commissioner refers to the reply of the Public Authority dated the 23<sup>rd</sup> February 2024, where it invoked the non-applicability of the Act, by stating that “[i]d-dokumenti mitluba huma direttament relatati mal-izvilupp u produzzjoni tal- programm televiziv Malta Eurovision Song Contest li jixxandar fuq TVM. Dan il-programm televiziv huwa fondut kompletament minn dhul ta’ natura kummercjali. Ghaldaqstant id-dokumenti mitluba huma ezenti skond l-Artikolu 5(1)(f) tal-Kap 496 tal-Ligijiet ta’ Malta”. Article 5(1)(f) of the Act provides that the freedom of information legislation shall not apply to documents which are held by a commercial partnership in which the Government of Malta has a controlling interest insofar as the documents requested by the applicant are in relation to the commercial activities of the commercial partnership.
11. The Commissioner noted that the non-applicability of the provisions of the Act in terms of article 5(1)(f) shall only be triggered when the following two (2) cumulative elements are satisfied: (i) where the requested documents are held by a commercial partnership in which the Government has a controlling interest; **and** (ii) where the documents relate specifically to the commercial activities of the commercial partnership.

12. The Public Authority has cited the non-applicability of the Act in separate cases when it refused to disclose documents requested by other applicants. However, this argument was rejected twice by the Information and Data Protection Appeals Tribunal (the “**Tribunal**”) where, on the 12<sup>th</sup> July 2018, it delivered the decision ‘*Public Broadcasting Services Limited vs Il-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data*’<sup>1</sup> and confirmed that:

*“Li għalhekk l-appellanti ma għandux raġun meta jgħid li l-PBS limited hija soċjetà kummerċjali u mhux awtorità pubblika meta kif jammetti huwa stess l-Gvern huwa azzjonista maġġoritarju.*

*Li għalhekk Public Broadcasting Services Limited għandha l-istess responsabilitajiet u dmirijiet bħal awtorità pubblika a fini tal-Kap. 496 tal-Liġijiet ta’ Malta”.*

13. On the 2<sup>nd</sup> March 2023, the Tribunal delivered the decision ‘*Caroline Muscat vs Public Broadcasting Services Limited*’<sup>2</sup> and reiterated its reasoning:

*“L-ewwelnett il-Public Broadcasting Services Limited taqa’ taht id-definizzjoni ta’ ‘awtorità pubblika kif mogħtija fil-Kap 496 tal-Liġijiet ta’ Malta għaladarba l-Gvern huwa azzjonista maġġoritarju u dan kif ġie diġa stabilit minn dan il-Bord diversi drabi fosthom fid-deċiżjoni numru 5/2017 tat-12 ta’ Lulju 2018 fl-ismijiet Public Broadcasting Authority vs Il-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data.*

*Li għalhekk ma għandux raġun l-appellanti jikkontendi li huwa soċjetà kummerċjali u li ma jaqgħax taht it-tifsira ta’ awtorità pubblika”.*

14. Since both cumulative elements must be met for the Public Authority to invoke the non-applicability of the Act by virtue of article 5(1)(f) of the Act, and given that the first condition is not satisfied in the light of the final decisions delivered by the Tribunal, the Commissioner shall not proceed to conduct a legal analysis on whether the requested documentation pertains to commercial activities, or otherwise, in terms of the second condition set out under article 5(1)(f) of the Act.

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<sup>1</sup> Appeal Number 5/2017, Information and Data Protection Appeals Tribunal ‘*Public Broadcasting Services Limited vs Il-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data*’, decided on the 12<sup>th</sup> July 2018

<sup>2</sup> Appeal Number CDP/FOI/92/2021, Information and Data Protection Appeals Tribunal, ‘*Caroline Muscat vs Public Broadcasting Services Limited*’, decided on the 2<sup>nd</sup> March 2023

**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 is not justified in terms of article 5(1)(f) of the Act.**

**By virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with an electronic copy of the requested documents, after redacting any personal data within the meaning of article 4(1) of Regulation (EU) 2016/679.**

**The Public Authority shall comply with this order 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: 2024.11.21  
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**Ian Deguara  
Information and Data Protection Commissioner**

## **Right of Appeal**

In terms of article 39(1) of the Act where a “[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.**