

**Information and Data Protection Commissioner**

**CDP/FOI/18/2023**

**Joseph Gatt**

**VS**

**Planning Authority**

**FREEDOM OF INFORMATION REQUEST**

1. On the 29<sup>th</sup> December 2022, Mr Joseph Gatt (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 Planning Authority (the “**Public Authority**”) to provide the following in electronic format:

*“Reference is being made to the reportage by TVM (<https://tvmnews.mt/en/news/watch-new-life-for-marsamxett-balconies/>), where it was stated that an official from the PS’s Heritage Section stated that 59 properties benefitted from a redecoration and renovation scheme carried out by the Planning Authority.*

*In respect to the scheme's applications of these 59 properties, I wish to be given copies of the FDA applications made pursuant to said scheme's applications, as well as copies of the Commencement Notices submitted to activate said FDA applications”.*

2. On the 27<sup>th</sup> January 2023, the Public Authority informed the applicant that his request could not be met on the basis of the following:

*“1. In terms of Article 5(1)(d) and Article 14(d) of the Freedom of Information Act (Cap 496), full development applications are already available to the public in terms of the Development Planning Act (Cap 552); and*

2. *The publication of commencements notices is prohibited in terms of Article 33 of the Development Planning Act (Cap 552) and therefore the Freedom of Information Act does not apply in terms of Article 5(3)(b) ”.*
3. The applicant was not satisfied with the Public Authority’s decision and on the 28<sup>th</sup> January 2023, pursuant to the Internal Complaints’ Procedure, requested the Public Authority to reconsider its position in terms of the Act. On the 14<sup>th</sup> February 2023, the Public Authority reconfirmed its position and reiterated the exemptions invoked by the Public Authority in its first reply.

### **FREEDOM OF INFORMATION APPLICATION**

4. On the 3<sup>rd</sup> April 2023, 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 his freedom of information request. The applicant argued that:

*“Reference was made to the reportage by TVM (<https://tvmnews.mt/en/news/watch-new-life-for-marsamxett-balconies/>), where an official from the Heritage Section stated that 59 properties benefitted from a redecoration and renovation scheme carried out by the Planning Authority. In respect to the scheme's applications of these 59 properties, I asked to be given copies of the FDA applications made pursuant to said scheme's applications, as well as copies of the Commencement Notices submitted to activate said FDA applications.*

*In reply, the PA falsely claimed that Article 33 of the Development Planning Act (Cap 552) prohibits the publication of Commencement Notices. In respect to the point raised by the PA that FDAs are already available to the public, I noted that in order to access such information, the PA has to first provide me with the relevant FDA reference numbers related to the 59 properties that were mentioned in the TVM news article.*

*The PA nonetheless still declined to provide me either the Commencement Notices that I had asked for, nor the related FDA reference numbers. Accordingly I plead that all the information that I have requested is provided to me forthwith, in the interest of transparency and good governance ”.*

## 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 24<sup>th</sup> April 2023, 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

7. The Public Authority provided the Commissioner with a sample of the documentation requested by the applicant and submitted the following salient arguments for the Commissioner to consider during the legal analysis of this case:
  - a. that the Public Authority refused the applicant's request, citing article 5(1)(d) and 14(d) of the Act and article 33 of Development Planning Act, Chapter 552 of the Laws of Malta ("**Cap. 552**"). This decision was communicated to the applicant via email on the 27<sup>th</sup> January 2023. The applicant contested the refusal, asserting that the reasons provided were unfounded, arguing that commencement notices are accessible under article 33(2)(i) of Cap. 552, and that obtaining full development applications (the "**FDAs**") requires the relevant planning application number. Following reconsideration, the Public Authority reaffirmed its initial decision on the 14<sup>th</sup> February 2023, maintaining that the applicant's request should be refused;

- b. that in response, the applicant filed an application under article 23(1)(a) of the Act. In rebuttal, the Public Authority defended its decision, asserting that its interpretation of article 33 of Cap. 552 aligns with the legislative framework. Specifically, the Authority referred to article 33(2), which explicitly lists the documents accessible to the public, including applications and any planning report regarding such applications, decisions relating to development permissions, environmental impact statements and alternative site assessments and cost benefit analysis. The Public Authority highlighted that commencement notices are not included in this list, rendering the applicant's assertion unfounded (*lex voluit lex dixit*);
- c. that the Public Authority further clarified its refusal to provide the FDAs, emphasising that these documents fall outside the scope of the Act. This position is supported by article 5(1)(d) of the Act, which exempts documents publicly accessible under other legislation from the Act. Additionally, the Authority pointed to article 33(2) of Cap. 552, which provides for public access to the FDAs. Consequently, the Public Authority reiterated that it acted appropriately in rejecting the request; and
- d. that the Public Authority also noted that it had already provided the applicant with copies of the applications for the fifty-nine (59) properties benefitting from the scheme, as part of freedom of information request bearing reference number 388220383516. These documents contained sufficient information for the applicant to locate the required FDAs. Therefore, the Public Authority asserted that the applicant's subsequent submissions, dated the 3<sup>rd</sup> April 2023, were again incorrect.

#### Submissions received from the applicant

8. Pursuant to the internal investigation procedure of this Office, the applicant was provided with the opportunity to rebut the arguments submitted by the Public Authority. On the 31<sup>st</sup> May 2023, the applicant submitted the following principal arguments:
  - a. that the Public Authority's reliance on the principle of *lex voluit lex dixit* in interpreting article 33(2) of the Cap. 552 does not apply, given that the sub-article explicitly maintains the generality of the preceding sub-article. The applicant contends that his request, covering specific FDAs and commencement notices, falls squarely within the scope of information that the law requires to be made accessible;

- b. that the Public Authority's assertion that sufficient information has already been provided is inaccurate. The applicant demonstrated that access to the required FDAs remains inaccessible due to technical limitations in the eApps and map server interfaces. Without the necessary reference numbers, navigating these systems amounts to an unreasonable burden on the public;
  - c. that the applicant has established that article 5(2)(d) of the Act does not exempt the requested information from disclosure, as it is not practically accessible under any other law;
  - d. that international obligations under instruments such as the Aarhus Convention and Directive 2003/4/EC reinforce the applicant's claim. These frameworks mandate that public authorities provide access to environmental information without undue impediments and ensure that such access supports transparency and public participation;
  - e. that precedents set by the European Court of Human Rights further affirm the applicant's position. The applicant made reference to cases recognising the right of access to official documents, particularly when such access is necessary for matters of public importance. Arbitrary restrictions or unnecessary administrative barriers are inconsistent with these legal and human rights standards; and
  - f. that the applicant concludes by reiterating the fundamental obligation of the Public Authority to comply with both national and international legal standards. The request seeks to uphold the principles of open governance and to challenge what is perceived as an undue monopoly over critical public information.
9. Pursuant to the investigation procedure of this Office, the Commissioner provided the Public Authority with the final opportunity to rebut the submissions of the applicant. In this regard, the Public Authority reiterated that *"the electronic platforms it operates and the public information available on them can be used to obtain the information requested by the applicant"*.

## **LEGAL ANALYSIS AND CONSIDERATIONS**

10. For the purpose of the investigation of this freedom of information application, the Commissioner proceeded to examine in detail the request made by the applicant, wherein he

specifically requested the Public Authority to provide a copy of the FDA applications associated with the fifty-nine (59) properties outlined under the scheme's provisions, as well as copies of the commencement notices submitted to activate these FDA applications.

11. The Commissioner examined the reply provided to the applicant on the 27<sup>th</sup> January 2023, wherein the Public Authority refused to provide: (i) the copies of the FDAs on the basis article 5(1)(d) and article 14(d) of the Act; and (ii) the Commencement Notices on the basis that these are prohibited from disclosure in terms of article 33 of Cap. 552 and article 5(3)(b) of the Act.

#### The Non-Applicability of the Act

12. In its replies, the Public Authority invoked the non-applicability of the Act pursuant to article 5(1)(d) of the Act, which states that the Act shall not apply documents that “*are accessible to the public under any other law*” and cited article 14(d) of the Act as the reason of the refusal of the request, namely, that “*the document requested is publicly available*”.
13. The Commissioner examined article 33(2) of the Development Planning Act (Cap. 552 of the Laws of Malta) as the other law which enables the public to have access to information:

*“Without prejudice to the generality of sub-article (1), the Authority shall keep and make available for public inspection at such reasonable times as it may determine, a register or registers:*

*(a) of all applications for development permission received by it containing the name of the applicant and details of the proposal, including documents and detailed plans of the proposal, including documents and detailed plans;*

*(b) of all decisions including documents and detailed plans made on such applications; and*

*Provided that for the purposes of this sub-article the application report and any plans concerning applications which relate to national security, defence, banks, prisons, the airport and other institutions or premises whose security it is desirable to safeguard as the Authority may establish shall not be made accessible to the public:*

*Provided further that for the purposes of this article, in the case of a file held by the Authority, any person shall have access to that part of the file containing the following information:*

*(i) the application report of all applications and any planning report regarding such applications;*

*(ii) all decisions relating to development permission issued by the Authority together with the relative plans and documents including the reasons for the grant of such permissions or refusal;*

*(iii) all environmental impact statements, environmental planning statements and traffic impact statements; and*

*(iv) all alternative site assessments and cost-benefit analysis”.*

14. After assessing the wording of article 33(2) of Cap. 552, the Commissioner noted that this provision obliges the Public Authority to keep and make available for public inspection a register of all applications for development permission and all decisions. In addition to article 33(2)(a) and (b) of Cap. 552, the Public Authority is also legally obliged to make available a number of documents pursuant to the second proviso to article 33(2) of Cap.552. Therefore, the Commissioner is of the view that the documents which are specifically mentioned in article 33(2) of Cap. 552 fall outside the scope of the Act on the basis of article 5(1)(d) of the Act. The Commissioner emphasises that, in such case, the appropriate reason of refusal is article 14(a) of the Act, which permits the Public Authority to refuse a freedom of information request if the documents are excluded from the scope of the Act by virtue of article 5.
15. The Commissioner noted that the Public Authority is refusing to provide the documents which are not specifically mentioned in article 33(2) of Cap. 552 and therefore such documents are being prohibited from disclosure. However, the Commissioner noted that article 5(3)(b) of the Act states that the Act shall not apply to documents that contain “***information the disclosure of which is prohibited by any other law***” [emphasis has been added]. Consequently, article 5(3)(b) of the Act makes it abundantly clear that the non-applicability of the Act shall only be triggered in those instances where there is a *lex specialis* that specifically prohibits the disclosure of a document.

16. Article 33(2) of Cap. 552, which is the provision cited by the Public Authority, only prohibits the disclosure of the following information: “*for the purposes of this sub-article, the application report and any plans concerning applications which relate to national security, defence, banks, prisons, the airport and other institutions or premises whose security it is desirable to safeguard as the Authority may establish shall not be made accessible to the public*” [emphasis has been added]. This is indicative that when the legislator wanted to prohibit the disclosure of certain information based on the particular likelihood and severity of the risk presented by the disclosure, the legislator specifically stated so, and therefore, the Commissioner is of the view that the principle of ‘*ubi lex voluit, dixit*’ applies.
17. Furthermore, the Commissioner referred to the judgment delivered on the 11<sup>th</sup> October 2019 ‘*Intrapriza ta’ Malta vs Il-Kummissarju għall-Infurmazzjoni u l-Protezzjoni tad-Data, Allied Newspapers Limited, Jacob Borg għal kull interess li jista’ jkollu*’<sup>1</sup>, where the Court of Appeal decided that article 33(1) of Cap. 325 is a provision contained in a *lex specialis* which specifically prohibits the disclosure of information. In such case, the wording used by the legislator to prohibit the disclosure of information is that “*no such person shall be required to produce...*” documents and information relating to matters contemplated by or pursuant to the provisions of Cap. 325.
18. Therefore, based on the foregoing, the provision cited by the Public Authority, namely article 33 of Cap. 552, does not amount to a prohibition, in the sense that, this provision is not explicitly obliging the Public Authority not to disclose the other information requested by the applicant. Consequently, in the absence of any *lex specialis* which specifically prohibits the disclosure of the requested information, the provisions of the Act shall apply in their entirety.

**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:**

- a. that the documents which are specifically mentioned in article 33(2) of Cap. 552 are accessible to the public under Cap. 552, and therefore, are excluded from the applicability of the Act by virtue of article 5; and**
- b. that the documents which are not specifically mentioned in article 33(2) of Cap. 552 are not prohibited from being disclosed in terms of Cap. 552 or any other law, and therefore,**

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<sup>1</sup> Appeal Number 61/2018, decided on the 11<sup>th</sup> October 2019.



the request for these documents falls within the scope of the Act. Thus, the refusal of the Public Authority to provide “copies of the FDA applications made pursuant to said scheme's applications, as well as copies of the Commencement Notices submitted to activate said FDA applications” pursuant to article 5(1)(d), article 5(3)(b) and article 14(d) of the Act and article 33 of Cap. 552, 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 a reasonable opportunity to inspect the requested documentation.

The Public Authority shall take measures to redact any ‘personal data’ within the meaning of article 4(1) of Regulation 2016/679 except information in relation to the applicant and the names and surnames of individuals acting in their professional capacity.

The Public Authority shall comply with this order within twenty (20) working days from the date of receipt of this decision notice and provide the Commissioner with a confirmation of the action taken immediately thereafter.

Ian  
DEGUARA  
(Signature)

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by Ian DEGUARA  
(Signature)  
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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’.