

FREEDOM OF INFORMATION REQUEST

1. On the 16th April 2023, Mr Joseph Gatt (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 Planning Authority (the “**Public Authority**”) to provide the following information in electronic format:

“Further to the reportage by TVM (<https://tvmnews.mt/en/news/watch-new-life-for-marsamxett-balconies/>), could you please inform me (i) how much funds did each applicant actually receive under the scheme, and (ii) if there were applicants who received nothing, and the reasons why said applicants received nothing”.

2. On the 15th May 2023, the Public Authority informed the applicant that his request could not be met because “[t]his request does not specify any document as defined by Article 2 of the Freedom of Information Act (Cap 496) and hence the right of access to documents held by public authorities granted by Article 3 of the Freedom of Information Act (Cap 496) does not apply”. On the same day of the refusal, the applicant requested the Public Authority to revise its decision pursuant to the internal complaints procedure of the Public Authority “on the grounds that my request was illogically and nonsensically denied”.
3. On the 31st May 2023, the Public Authority provided its final reply and informed the applicant the following: “As no supporting technical, legal or procedural arguments were brought forward to justify reversal of the original decision, the original reason for refusal is confirmed”.

FREEDOM OF INFORMATION APPLICATION

4. On the 31st May 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 request for information made by the applicant to the Public Authority was handled pursuant to the requirements of the Act. The applicant contended that “*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 informed (i) how much funds did each applicant actually receive under the said scheme, and (ii) if there were applicants who received nothing, and the reasons why said applicants received nothing*”¹.

INVESTIGATION

Admissibility of the Freedom of Information Application

5. After having considered that the applicant is an eligible person in terms of article 2 of the Act and the nature and background of the freedom of information application, together with the procedural steps involved between the applicant and the Public Authority, the Commissioner deemed the application made by the applicant as admissible for the purpose of article 23(2) of the Act.

The Issuance of the Information Notice

6. As part of the investigation procedure, by means of an information notice dated the 29th August 2023, the Commissioner requested the Public Authority to provide information in relation to the FOI application for the purposes of enabling him to exercise his functions under the Act and to determine whether the Public Authority had complied with the requirements of the Act. In particular, the Commissioner requested the Public Authority:
 - a. to provide further submissions in relation to the decision taken by the Public Authority to refuse access on the basis of article 2 of the Act, specifically because “*the request does not specify any document as defined by Article 2 of the Freedom of Information Act (cap 496)*”;

¹ <https://tvmnews.mt/en/news/watch-new-life-for-marsamxett-balconies/>

- b. to indicate if the Public Authority had assisted the applicant pursuant to its obligations at law to reformulate the request if the Public Authority deemed that the request is not compliant with the provisions of the Act;
 - c. to specify the means and the manner how the Public Authority received and processed the applications in relation to the scheme in question;
 - d. to specify how the Public Authority informed the applicants of its approval and/or rejection of the funds and the scheme; and
 - e. to explain how the information requested by the applicant can be retrieved and how is the information stored by the Public Authority.
7. On the 29th September 2024, the Public Authority provided the following reply to the information notice:

Article 2 – Definition of a ‘document’ pursuant to article 2 of the Act

- a. that from the wording used by the applicant in his FOI request, it clearly emanates that the applicant is merely requesting the passing over of information, and not a ‘document’ pursuant to article 2 of Cap. 496;
- b. that the definition of ‘document’ is clear and the right to access only extends to documents, and in fact, the marginal note of article 3 reads ‘*right of access to official documents*’, and therefore, the pivotal point is what amounts to a document;
- c. that according to article 2 of the Act, a document is an article which contains information, and the said information can be recorded in whatever form;

Assistance to the Applicant

- d. that article 7 of the Act is not applicable in such scenario and this is because the law provides that such assistance is to be given by the Public Authority when the applicant fails to satisfy the requisites mentioned in article 6 of the same Act, and in this case, the FOI request was clear and there were no reasons for the responsible officer to request the applicant to redefine his request to make it more easily addressed;

The Processing of the Application Forms in connection with the scheme

- e. that the beneficiary is required to engage the services of an architect of his/her choice so that the necessary/required information is compiled and electronically submitted by the architect via 'eapps';
- f. that this information is available for retrieval by the PA officials via the inhouse Artemis software and once all the mandatory information is submitted and checked by a validation officer, the case officer carries out an assessment of the proposed works and submitted Bill of Quantities;
- g. that if required, the case officer is able to request a clarification from the architect and once such clarification is provided, the case officer finalises an assessment report and refers the case to the Development Planning Fund Committee for its approval;
- h. that once the Committee provides its approval, the beneficiary is provided with a Letter of Conditional Approval indicating that the grant has been awarded subject to the completion of works to the satisfaction of the Public Authority and covered by a valid planning permit;

Information in relation to the manner how applicants are informed of the approval or rejection of the scheme.

- i. that any communication between the Public Authority and the beneficiary/architect is carried out via electronic means; and

How the information can be retrieved and how is the information stored by the Public Authority

- j. that the data is stored in databases and can be retrieved via an electronic query to the Artemis software by its officials.
8. Pursuant to the internal investigative procedure of this Office, the Commissioner provided the applicant with the opportunity to rebut the arguments of the Public Authority. Accordingly, the applicant submitted the following salient and relevant arguments for the Commissioner to consider during the legal analysis of this case:

- a. that the applicant referred to article 16(2) of the National Archives Act (Cap. 477 of the Laws of Malta), which provides that “*Records Officers shall be responsible for creating and maintaining adequate documentation of the functions and activities of their respective public offices through the establishment of good records keeping practices, including: (a) creating and managing current records within appropriate filing and registry systems*”;
 - b. that the self-admission by the Public Authority that it does not actually have such an essential and efficient record keeping system in place, is all the more glaring in view of the specific legal requirements stipulated in article 41(2)(f) of Cap. 496;
 - c. that financial and administrative decisions constitute “*environmental data*” in terms of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; and
 - d. that, in April 2009, the European Court of Human Rights delivered an important judgment² in which it recognised the right of access to official documents, and the Court made it clear that, when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting access, is a violation of the right to freedom of expression and information guaranteed under article 10 of the Convention.
9. By means of an email dated the 26th March 2024, the Commissioner requested the Public Authority to provide a copy/sample of the invoices and receipts which are held on file in connection with the scheme mentioned by the applicant in his freedom of information request. Additionally, the Public Authority was provided with the final opportunity to rebut the arguments of the applicant.
10. On the 24th April 2024, the Public Authority submitted samples of the invoices and receipts and informed the Commissioner that “*personal information has not been redacted from the samples as these are to be strictly kept internally on file and solely used by the Commissioner for internal legal analysis purposes during the decision-making process*”. The Public Authority submitted the following final arguments:

² Application Number 37374/05, delivered on the 14th April 2009.

- a. that from the wording used by the applicant himself, it clearly emanates that what was requested is the mere passing over of information, and not a '*document*' as specified in article 2 of the Act;
- b. that the Public Authority undertakes to give a loyal interpretation of the wording used by the legislator when enacting the Act and the law is clear that such right only extends to official documents, in fact, the marginal note of article 3 reads 'right of access to official documents', and therefore, the pivotal point is what amounts to a document;
- c. that should the applicant's arguments be accepted, then it would imply that any person may ask for any information whatsoever, disregarding the very wording of the law, and as already mentioned, the wording of the law is clear since it creates clear parameters on the right of access;
- d. that the argument brought forward by the applicant whereby reference is made to the National Archives Act (Cap. 477 of the Laws of Malta), the Public Authority argued that this is not applicable under access to documents in terms of the Act, and this is being said in light of the fact that any documents which have been transferred to the National Archives are not regulated by the Act as per article 5(1)(c);
- e. that article 16 of the National Archives Act refers to records as may be required by the National Archivist and not to any information or data which a public office may receive or hold;
- f. that the applicant refers to article 41(2)(f) of the Act in his submissions, however, this particular article refers to the code of practice which shall be issued by the Minister and this same article suggests the provisions that shall be included in the same code of practices;
- g. that the Public Authority reiterates that the matter at hand is not that it does not have an efficient record keeping system, to the contrary the Authority has a record keeping systems available to the public in accordance with article 33 of the Development Planning Act (Cap. 552 of the Laws of Malta), which however excludes information relating to Grant Schemes; and
- h. that this being said, the very matter at hand is that the applicant is expecting the passing over of raw information which is not held in a document by the Public Authority.

LEGAL ANALYSIS AND DECISION

11. As a preliminary step of the investigation, the Commissioner examined the freedom of information request made by the applicant pursuant to article 6(1) of the Act, wherein the Public Authority was requested to provide the following information: “*Further to the reportage by TVM (<https://tvmnews.mt/en/news/watch-new-life-for-marsamxett-balconies/>), could you please inform me (i) how much funds did each applicant actually receive under the scheme, and (ii) if there were applicants who received nothing, and the reasons why said applicants received nothing*”.
12. The Public Authority refused the request of the applicant on the basis that “[t]his request does not specify any document as defined by Article 2 of the Freedom of Information Act (Cap 496) and hence the right of access to documents held by public authorities granted by Article 3 of the Freedom of Information Act (Cap 496) does not apply”.
13. The Commissioner highlights that the scope of the legislation is to promote added transparency and accountability in public authorities, and therefore, the definitions contained in the Act, particularly the definition of a ‘document’, should be assigned a wide interpretation. Thus, it remains the responsibility of the Public Authority to give the broadest effect to the right of access to information and to ensure that, as a general rule, the applicant is provided with access to information, save for those exceptions provided by law. This is especially when the freedom of information request is for information that concerns the public expenditure, and therefore, the public should be provided with sufficient information to effectively scrutinise the actions of the Public Authority.
14. During the course of the investigation of the present case, the Commissioner established that the Public Authority does not hold documents containing the exact information as requested by the applicant, however, the Public Authority holds receipts and invoices in connection with the payments made as part of the Grant Scheme. Therefore, the Public Authority could not argue that it does not hold any information in relation to how public funds were utilised.
15. The Commissioner considered the judgments³ delivered by the Court of Appeal in relation to the interpretation of the term ‘document’ as defined in article 2 of the Act. The subject-matter

³ Appell Inferjuri Numri 69/2022/LM, 71/2022/LM; 72/2022/LM; 83/2022/LM; 89/2022/LM; 119/2022/LM; 123/2022/LM; 126/2022/LM; 127/2022/LM; 145/2022/LM; 146/2022/LM; 147/2022/LM; 148/2022/LM; 149/2022/LM; 150/2022/LM and 151/2022/LM, delivered by Hon. Lawrence Mintoff.

of these cases related to a freedom of information request submitted by the appellant, Ms Muscat, wherein she requested various public authorities to disclose the list of payments made to certain companies and a particular individual. The appellant refused the freedom of information request on the basis that it did not hold a copy of the list of payments, and therefore, the request was not for a copy of a ‘document’ pursuant to article 2 of the Act. The investigation of the Commissioner revealed that the appellant did indeed hold documents that could meet the terms of the request, such as, invoices and receipts, and consequently, the Commissioner considered the reason of refusal of the appellant as unjustified. The Court of Appeal dismissed the arguments of the appellant and confirmed the decision notice of the Commissioner as follows:

“Il-Qorti tghid li jekk kif hija ddikjarat fit-tweġiba tagħha lill-Kummissarju, il-Kummissjoni appellanta ma kinitx fil-pussess ta’ dak mitlub minnha, jiġifieri l-lista bid-dettalji skont ir-rikjesta tal-appellata tal-4 ta’ Frar, 2021, imma l-istess informazzjoni kienet tinstab u setgħet tittiehed mid-diversi dokumenti fil-pussess tagħha, il-Qorti tikkunsidra li d-deċiżjonijiet rispettivi tal-Kummissarju u tat-Tribunal huma tajba, għaliex l-istess informazzjoni l-appellata kienet ser tirċeviha minflok permezz tad-dokumenti nnifushom. Il-Kummissjoni appellanta ma tistax tippretendi li d-disposizzjonijiet tal-ligi, u anki ir-rikjesta tal-appellata, għandhom jingħataw interpretazzjoni tant restrittiva li hija b’hekk tista’ tahrab mill-obbligi tagħha kif imfissra fil-Kap. 496.” [emphasis has been added].

16. In accordance with the case-law of the Court of Appeal, public authorities should not apply a restrictive interpretation to the term ‘document’ to such an extent that it arbitrarily exonerates themselves from complying with the provisions of the Act. During the course of the investigation of the present case, the Commissioner established that the Public Authority holds sufficient information to be able to partially address the request of the complainant, namely, the information in relation to the amounts of funds disbursed in terms of the Scheme awarded by the Public Authority. The continuous developments in technology have made it increasingly easier to manage and extract data, and therefore, there is a reasonable expectation that the Public Authority should be able to easily meet the terms of the request. In a recent judgment, the Court of Appeal also remarked that “[f]l-*era digitali li ninsabu fiha, ċertament li m’għandux ikun li awtorità pubblika tersaq quddiem il-Qrati u tipprova tiġġustifika n-nuqqas*

*tagħha li tikkopera ma' talba għall-għoti ta' informazzjoni...*⁴. This reinforces the belief that, in this digital age, public authorities should have in place the appropriate processes and systems that enable the efficient retrieval of information in compliance with the principles of accountability and transparency.

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 reason of refusal cited by the Public Authority in its replies dated the 15th and the 31st May 2023 is partially justified in relation to the request for this information: “if there were applicants who received nothing, and the reasons why said applicants received nothing”.

By virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with information that meets the terms of the freedom of information request, namely, information in relation to “how much funds did each applicant actually receive under the scheme”. Any personal data within the meaning of article 4(1) of Regulation (EU) 2016/679 shall be redacted.

The Public Authority shall comply with this order within twenty (20) working days from the date of service of this decision notice and information on the action taken shall be notified to the Commissioner immediately thereafter.

Ian
DEGUARA
(Signature)

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by Ian DEGUARA
(Signature)
Date: 2024.11.04
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**Ian Deguara
Information and Data Protection Commissioner**

⁴ Appell Numru 30/2024, Andre Callus vs Awtorita' tal-Artijiet, 16th October 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’⁵.

⁵ Further information is available on this Office’s portal at: <https://idpc.org.mt/appeals-tribunal/>