Information and Data Protection Commissioner

CDP/FOI/21/2024

Caroline Muscat

vs

Ministry for Finance

FREEDOM OF INFORMATION REQUEST

1. On the 3rd April 2024, Ms Caroline Muscat (the **"applicant"**) made a freedom of information 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 Finance and Employment[1] (the **"Public Authority"**) to provide a copy of *"all engagement agreements/contracts of any nature including consultancy signed with David Curmi with the Ministry or any of its entities/companies including KM Malta Airlines between 2023 and the date of reply to this FOI"*, in electronic format.

2. On the 3rd May 2024, the Public Authority extended the time limit set out in article 10 of the Act due to the fact that the Public Authority needed to consult third parties before it could decide on the request, and more time was needed to obtain the necessary feedback.

3. On the 31st May 2024, the Public Authority provided the following reply to the applicant:

> *"The Authority cannot accede to this request because in line with :*
>
> *a) article 5(1)(f) of Cap. 496 of the Laws of Malta, the Act shall not apply to documents that are held by a commercial partnership in which the Government or another public authority has a controlling interest, in so far as the documents in question relate to the commercial activities of the commercial partnership;*

[1] At the time of the applicant's request, the ministry was referred to as the Ministry for Finance and Employment.

b) article 5(3)(a) of Cap 496, this Act shall not apply to documents which contain personal data subject to the Data Protection Act.

c) without prejudice to the reasons mentioned above, if the Act were to apply, the documents still cannot be acceded to because they would still be considered as exempt documents in line with article 32(1)(b) of Cap.496 which provides that: A document is an exempt document if its disclosure under this Act would disclose: 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".

4. On the 3rd June 2024, the applicant submitted a complaint through the internal complaints procedure and requested the Public Authority to reconsider its decision. On the 18th June 2024, the Public Authority reiterated its decision.

FREEDOM OF INFORMATION APPLICATION

5. On the 20th June 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 handled the freedom of information request of the applicant pursuant to the requirements of the Act.

INVESTIGATION

Admissibility of the Freedom of Information Application

6. 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, 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

7. As part of the investigation procedure, by means of an information notice dated the 26th June 2024, issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to furnish information in relation to the application made by the applicant. In particular, the Commissioner requested the Public Authority to make submissions in relation to

the decision taken to refuse access to the requested documentation on the basis of article 5(1)(f), article 5(3)(a) and article 32(1)(b) of the Act.

Submissions received from the Public Authority

8. By means of an email dated the 19th August 2024, the Public Authority submitted the following information:

   i. that the Public Authority asserted it has no intention of stifling the freedom of information process, but any requests are always considered in the light of the Act;

   ii. that article 5(1)(f) of the Act expressly excludes from the application of the Act those documents held by a commercial partnership in which the Government or another public authority has a controlling interest, insofar as such documents pertain to the commercial activities of that partnership. Mr David Curmi is the Executive Chairman of KM Malta Airlines and his role falls squarely within the scope of commercial activity as it represents the most senior executive function within the airline.

   iii. that from the 1st January 2023 to the date of the request, the Ministry for Finance has not entered into any contracts with Mr David Curmi. Mr Curmi, as Executive Chairman of KM Malta Airlines Limited, is legally bound by a contract with that particular company which, like all companies, has its own separate legal personality;

   iv. that article 5(3)(a) of the Act provides that the Act does not apply to documents that contain personal data as defined under the Data Protection Act. The documents requested are evidently of such a nature, as they contain personal data relating to Mr Curmi;

   v. that if the Act had to apply in this case, the requested documents would nonetheless be exempt from disclosure under article 32(1)(b) of the Act which provides that a document is exempt if its disclosure would reveal information possessing commercial value, the disclosure of which would, or could reasonably be expected to, result in the destruction or diminution of that value; and

   vi. that this has been reiterated in a decision given by the Information and Data Protection Commissioner on the 4th June 2020 in *'Ivan Camilleri vs Air Malta plc'*, wherein it was affirmed:

> *"Having noted that the salary of the CEO is pegged to a certain benchmark, which is dictated by the aviation industry in general, as well as to the airline's individual resources and market placement. If the terms of employment and the salary of the CEO were to be disclosed, this will disclose information relating to the internal workings of the Authority and accordingly, the competitors will be placed in a position which provide them with information they could use to obtain an advantage over the Authority, or to cause detriment to the Authority, including by possibly poaching the current CEO through the knowledge of the salary and the employment conditions. Therefore, the Commissioner is of the view that for this exceptional case, the terms of conditions and the annual salary of the CEO constitute "information having a commercial value" in terms of article 32(1)(b)".*

Submissions received from the applicant

9. Pursuant to the internal investigative procedure of this Office, the applicant was provided with the opportunity to rebut the submissions of the Public Authority. On the 26th August 2024, the applicant submitted the following reply:

> *"1. Km Malta Airlines is a fully owned Malta government property in which taxpayers have just pumped hundreds of millions to pick up the pieces of a failed Air Malta. The payers/owners of this airline are fully rightful to know how much their company is paying their handpicked CEO*
>
> *2. Although this is a commercial company, it is a publicly owned company and is obliged to be transparent and accountable like all other companies, for example, Enemalta. There is already jurisprudence settled on this*
>
> *3. The argument on Data protection does not hold any water*
>
> *4. Mr Curmi was handpicked by the Minister and is a political appointee. No local or international recruitment process was involved. There wasn't even a call.*
>
> *5. The argument that the CEO would be poached by other airlines is laughable. Unlike his predecessor, and that is probably why the IDPC decided that way befire, Curmi has no experience in the sector. On the other hand, Chetcuti was an experienced pilot and airine executive abroad, well before*

his appointment, and that is why he could be poached. While this is no excuse to hide the contract of the CEO of a public company, surely, this does not count in Mr Curmi's case, considering his non-existant airline qualifications and age.

6. The Ministry is aware that it is obliged to seek the info from any of its agencies/companies under its control, KM being one of them.

7. The Shift reiterates that the Ministry's latest reply is another excuse to stifle the FOI process, make it longer and try to avoid being transparent as any government in a proper democracy does.

The request was made to the Finance Ministry as KM Malta Airlines does not exist on the FOI portal. The situation is the same until today. Thus the MOF is the line Ministry responsible directly for the public entity".

10. During the course of the investigation, the Commissioner requested the Public Authority to rebut the applicant's arguments and once again, provide a copy of the requested documentation. Despite reminders, the Public Authority did not submit any additional arguments, but on the 30th April 2025 it did provide the requested documentation for the Commissioner's review.

LEGAL ANALYSIS AND DECISION

Preliminary 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'*[2], which held that "*[l]-Att dwar il-Liberta' tal-Informazzjoni hi liġi intiża biex tipprovdi 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 ghas-servizz tas-soċjeta."* Similarly, the Court of Appeal in the

[2] Appeal Number 7/2019, *'Din l-Art Ħelwa vs l-Awtorita' tal-Ippjanar',* decided on the 16th May 2019.

judgment *'Allied Newspapers Limited vs Foundation for Medical Services'*[3] highlighted that the "*leġiżlatur permezz tal-Kap. 496 jagħti tifsira legali u jipprovdi 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'*[4] made reference to the parliamentary debates in relation to the freedom of information legislation, which accentuate the spirit and scope of the legislation:

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

Article 5(1)(f) of the Act

14. The Commissioner assessed the replies which the Public Authority provided to the applicant on the 31st May 2024 and the 18th June 2024, wherein the Public Authority refused to provide a copy of the requested documents on the basis that it *"cannot be provided in terms of Article 5(f) of CAP.496 of the laws of Malta – Freedom of Information Act. This is in view of the fact that the requested information is subject to commercial confidentiality and sensitivity".*

15. Accordingly, the Commissioner examined article 5(1)(f) of the Act, which provides that the Act shall not apply to documents that "*are held by a commercial partnership in which the Government or another public authority has a controlling interest, in so far as the documents in question relate to the commercial activities of the commercial partnership".*

[3] Appeal Number 11/2020LM, *'Allied Newspapers Limited vs Foundation for Medical Services',* decided on the 18th November 2020.
[4] Appeal Number 33/2019LM, *'Allied Newspapers Limited vs Projects Malta Ltd',* decided on the 2nd September 2020.

16. The Commissioner notes 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.

17. Within this context, the Commissioner emphasises that article 5(1)(f) of the Act shall not apply to all the documents held by a public authority, but strictly to those documents that pertain to its commercial activities of the commercial partnership. By commercial activity, the Commissioner understands any activity involving a transaction of a commercial nature and character, *inter alia*, the purchase and sale of goods, which is conducted for the purpose of facilitating such activity. After analysing the documentation provided by the Public Authority as part of the investigation of this application, the Commissioner establishes that the documentation requested by the applicant, namely the engagement contracts or agreement signed between Mr Curmi and the Public Authority, do not relate to the commercial activities of the Public Authority.

18. Furthermore, the Commissioner examined the judgment *'Roberto Ragonesi vs Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data'*[5] delivered by the Information and Data Protection Appeals Tribunal (the **"Tribunal"**), wherein it has been held that:

> "*F'dan il-każ ma hemm ebda kwistjoni li l-Enemalta ma hix awtorita' pubblika. L-artiklu 5(1)(f) tal-Kap. 496 tal-Liġijiet ta' Malta cioe l-Att dwar l-Liberta' tal-Informazzjoni jgħid li l-Att ma għandu japplika għal dokumenti li huma miżmumin minn soċjeta kummercjali li fiha l-Gvern jew xi awtorita pubblika ohra għandhom interess li jagħtihom kontroll, safejn id-dokumenti inkwistjoni għandhom x'jaqsmu mal-attivitajiet kummerċjali tas-soċjeta' kummerċjali."*

19. In similar cases before the Tribunal, where the public authority invoked the non-applicability of the Act to justify the refusal to disclose the requested documentation, the Tribunal rejected this argument on two occasions. On the 12th July 2018, it delivered the decision *'Public Broadcasting Services Limited vs Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data'*[6], confirming that:

[5] Appell Numru 17/2013, *'Roberto Ragonesi vs Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data'*, decided on the 15th February 2018.
[6] Appeal Number 5/2017, *'Public Broadcasting Services Limited vs Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data',* decided on the 12th July 2018

> *"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 responsabiltajiet u dmirijiet bħal awtorità pubblika a fini tal-Kap. 496 tal-Liġijiet ta' Malta".*

20. On the 2nd March 2023, the Tribunal delivered the decision *'Caroline Muscat vs Public Broadcasting Services Limited'*[7] and reiterated its reasoning:

> *"L-ewwelnett il-Public Broadcasting Services Limited taqa' taħt id-definizzjoni ta' 'awtorità pubblika kif mogħtija fil-Kap 496 tal-Liġijiet ta' Malta ġaladarba 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-Informazzjoni u l-Protezzjoni tad-Data.*
>
> *Li għalhekk ma għandux raġun l-appellanti jikkontendi li huwa soċjetà kummerċjali u li ma jaqgħax taħt it-tifsira ta' awtorità pubblika".*

Article 5(3)(a) of the Act

21. The Public Authority invoked article 5(3)(a) of the Act as the ground for denying the requested documentation, which provision stipulates that the Act shall not apply to documents insofar as such documents contain personal data subject to the Data Protection Act (Cap. 586 of the Laws of Malta), however **this does not mean that all personal data is exempt from disclosure, particularly when there is substantial public interest, which merits the disclosure of the information** [emphasis has been added].

22. In this regard, the Commissioner analysed the definition of *'personal data'* as contained in article 4(1) of the General Data Protection Regulation[8] (the **"Regulation 2016/679"**), which provides that *"'personal data' means **any information relating to an identified or identifiable natural person** ('data subject'); an identifiable natural person is one who can be identified,*

[7] Appeal Number CDP/FOI/92/2021, *'Caroline Muscat vs Public Broadcasting Services Limited'*, decided on the 2nd March 2023.
[8] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;" [emphasis has been added].

23. The Commissioner noted that the definition of '*personal data*' is intended to be applied in such a broad manner considering that the protection of natural persons in relation to the processing of personal data is a fundamental right as enshrined in article 8(1)[9] of the Charter of Fundamental Rights of the European Union. Therefore, the Commissioner establishes that the information contained in the appointment letter, relating to an identified natural person, constitutes personal data within the meaning of article 4(1) of the Regulation 2016/679, and generally, triggers the non-applicability of the Act.

24. Whereas the Act is designed to ensure the greatest possible transparency of the documents held by the public authorities by enabling the applicants to exercise the right of access to documents, however, this right is not absolute and is subject to certain limitations which are clearly articulated in the Act. In this regard, when the requested documents contain personal data, a reconciling exercise shall be carried out in order to determine whether the right to have access to the documents pertaining to the public authorities prevails over the right to the protection of personal data pursuant to the provisions of the Regulation 2016/679. Indeed, the Court of Justice of the European Union (CJEU) held in several rulings that, *"in general, no automatic priority can be conferred on the objective of transparency over the right to protection of personal data"*[10].

25. In a similar vein, the Court of Appeal in the judgment *'Allied Newspapers Limited vs Projects Malta Ltd'*[11] highlighted the relationship between the two opposing rights, "*[g]ħalkemm huwa veru li d-dritt għall-informazzjoni mhuwiex wieħed assolut, speċjalment fejn id-dritt għall-privatezza u l-kunfidenzjalità tabilħaqq ikun mhedded, min-naħa l-oħra din il-Qorti tqis* ***li l-ewwel presuppost għandu dejjem jkun favur l-'interess pubbliku sostanzjali' li jiġu mħarsa d-dritt għall-informazzjoni u l-libertà tal-espressjoni.*** *Biex ma tingħatax l-informazzjoni rikjesta, irid jiġi żgurat illi l-pubblikazzjoni tal-informazzjoni tkun tikkostitwixxi ksur ta' xi prinċipju tal-protezzjoni tad-data, kif salvagwardjati mill-GDPR u l-liġijiet nazzjonali, fil-każ*

[9] Article 8(1) of the Charter of Fundamental Rights of the European Union: "*Everyone has the right to the protection of personal data concerning him or her.*"

[10] Case C-615/13 P, '*ClientEarth and PAN Europe vs European Food Safety Authority'*, decided on the 16th July 2015 and *'Volker und Markus Schecke and Eifert'*, C-92/09 and C-93/09, decided on the 9th November 2010.

[11] Inferior Appeal No. 33/2019 LM, *'Allied Newspapers Limited vs Projects Malta Ltd'*, decided on the 2nd September 2020.

ta' Malta, il-Kap. 586. Barra minn hekk ma jistgħux jiġu rikonċiljati d-drittijiet tal-libertà tal-espressjoni u dak tal-privatezza jekk ma ssirx evalwazzjoni dwar jekk l-iżvelar tal-informazzjoni mitluba, tirriżulta fi ksur irraġonevoli u inġustifikat tad-drittijiet tal-privatezza tal-individwu konċernat. Il-privatezza tad-data u l-kunfidenzjalità huma eċċezzjonijiet għad-dritt għall-informazzjoni, u mhux bil-maqlub." [emphasis has been added].

26. The Commissioner noted that the European Data Protection Supervisor's (**"EDPS"**) paper concerning the relationship between public access to documents and privacy, integrity and data protection[12], whereby it is held that employees in a public administration should be aware that for several reasons, their personal data may be disclosed for reasons of public interest. Furthermore, it was held that for accountability and transparency purposes, *"certain personal data (such as the name and function of an official) can, in general, be disclosed without consent, provided that it is appropriate and motivated by the activities of the institution".* It was further noted that *"[t]he general rule of thumb is that the mere act of disclosing the name of a person does not affect his or her privacy, especially not if it concerns officials of a public body acting in a public capacity".*

27. The Commissioner took into consideration the settled case-law of the CJEU, in particular the restrictive interpretation of the applicability of personal data protection[13] as a justification for refusing access to documents held by the European institutions, the Court has not treated this exemption as an outright denial to the right of access to documents, but applied a necessity and proportionality test to assess if the public interest outweighs the data protection rights of the individual(s) in question. In '*Volker und Markus Schecke and Eifert vs Hessen'*[14], the Court noted that *"the right to the protection of personal data is not, however, an absolute right, but must be considered in relation to its function in society".*

28. Article 86 of the Regulation 2016/679 states that *"[p]ersonal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant*

[12] European Data Protection Supervisor (2005), *Public access to documents and data protection*.
[13] Article 4(1)(b) of the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001regarding public access to European Parliament, Council and Commission documents, which reads as follows: *"The institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data".*
[14] Joined Cases C-92/09, C-93-09, '*Volker und Markus Schecke and Eifert vs Hessen'*, judgement of the Court (Grand Chamber) of 9 November 2010.

to this Regulation." This provision shall be read in conjunction with recital 154 of the Regulation 2016/679 which includes the following: *"[t]his Regulation allows the principle of public access to official documents to be taken into account when applying this Regulation. Public access to official documents may be considered to be in the public interest. Personal data in documents held by a public authority or a public body should be able to be publicly disclosed by that authority or body if the disclosure is provided for by Union or Member State law to which the public authority or public body is subject".*

29. In this regard, the Commissioner established that the requested documentation contains personal data within the meaning of article 4(1) of Regulation (EU) 2016/679 and in his analysis, the Commissioner considered whether the disclosure of personal data pertaining to individuals, should be exempted from disclosure on the basis of article 5(3)(a) of the Act. As a first step, the Commissioner assessed whether the disclosure of these personal data would infringe the data protection provisions held in Regulation (EU) 2016/679. One of the major factors that was taken into account is the nature of the personal data contained in the requested documentation. Accordingly, the Commissioner ascertained that the disclosure of the requested documentation would not reveal any special categories of personal data as set forth in article 9(1) of Regulation (EU) 2016/679 or information which is deemed to be of a sensitive nature, and therefore ought to have higher protection due to the inherent risks attributed to such processing of personal data. Additionally, the Public Authority failed to indicate which potential harm or distress may be caused to the individuals concerned as a result of the disclosure of their names and surnames.

30. Furthermore, the Commissioner considered whether the disclosure of the requested documentation would exceed the expectation of the affected data subject. The expectations of an individual would depend on whether the disclosure of personal data would specifically affect the private life of that individual or not. The Commissioner is of the view that that the individual's reasonable expectation would certainly depend on how senior is the role of the individual within the public authority or if that individual is rendering a service or performing a task or role in his or her professional capacity. Thus, in such instances, there is a reasonable expectation that the personal data pertaining to individuals occupying top management positions of public authorities and other individuals acting in their professional capacity would be subject to greater scrutiny than would be the case in respect of their private lives. In fact, there is a reasonable expectation that the data pertaining to such individuals would be disclosed to the public on the basis that the public should be provided with the opportunity to scrutinise the public expenditure. The Commissioner highlights that the disclosure of information concerning public expenditure leads to increasing accountability and transparency in the

spending of public funds, which is ultimately the main objective of the freedom of information legislation, and thus, there exists substantial public interest in favour of disclosure. Thus, the disclosure of the names and surnames of individuals occupying a top management position at public authorities and other individuals acting in their professional capacity, including the salary packages paid out of public funds, would not cause any unreasonable and unwarranted level of interference with the individuals' fundamental rights and freedoms.

Article 32(1)(b) of the Act

31. The Public Authority cited article 32(1)(b) of the Act as the reason for not disclosing the requested document to the applicant. Article 32(1)(b) of the Act provides that a document is deemed exempt if its disclosure would reveal *"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"*.

32. Whereas the objective of the Act is to confer on the applicants as wide a right of access to information, this right is nonetheless subject to certain limitations based on exemptions as set forth in Part V and Part VI of the Act. Within this context, the law provides for a number of exemptions that enable the public authorities to refuse access to information where its disclosure would or could undermine the protection of one of the interests intended to be protected by Part V and Part VI of the Act. Notwithstanding this, the Commissioner emphasises that the exemptions derogate from the principle of the widest possible access to information, and as a result, the exemptions should be interpreted and applied strictly.

33. The Commissioner considered that article 32(1)(b) of the Act shall only apply after the Public Authority demonstrates that the disclosure of the document would, or could reasonably be expected to cause harm to the protected interest. In this regard, the Commissioner holds that such harm shall be sufficiently specific and concrete, and not merely speculative or remote. This approach is consistent with the settled case-law of the Court of Justice of the European Union concerning the interpretation of Regulation 1049/2001, wherein the Court stated 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 exemption*** *– among those laid down in Article 4 of Regulation 1049/2001 – upon which it is relying. Moreover,* ***the risk of that undermining must be reasonably foreseeable and not purely hypothetical****"*[15] [emphasis has been added].

[15] Case C-506/08 P, *'Kingdom of Sweden v European Commission and MyTravel Group plc'*, judgment of the Court (First Chamber) of 21st July 2011.

34. Furthermore, in another ruling, the CJEU clarified 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 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"*[16].

35. In a recent judgment *'Rebecca Bonello Ghio vs Malta Film Commission'*[17], 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) 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 tipprova 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 tispjega b'mod ċar għafejn hija raġonevolment mistennija li tintlaqat ħażin b'mod mhux raġonevoli, fejn jidħlu l-interessi professjonali u kummerċjali tagħha. Imma dan m'għamlitux, u minflok qalet li ladarba ma ġiet żvelata l-ebda informazzjoni sa issa, ma tistax tgħid b'liema mod l-iżvelar ta' din l-informazzjoni kif sejra tolqot negattivament lill-benefiċjarju. Il-Qorti għalhekk tqis li dan l-aggravju mhuwiex mistħoqq, u tiċħdu."* [emphasis has been added].

36. 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

[16] Case T-471/08, '*Toland vs Parliament',* decided on the 7th June 2011.
[17] Appell Inferjuri Numru 83/2023 LM, *'Rebecca Bonello Ghio vs Malta Film Commission',* decided on the 31st January 2024.

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.

37. 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.

38. 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. This view is supported in *'Allied Newspapers Limited vs Foundation for Medical Services'*[18], wherein 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' impjieg ta' Neville Gafà u Carmen Ciantar mal-fondazzjoni appellanta, entità pubblika ffinanzjata minn fondi pubbliċi, ma jistgħu jitqiesu li huma dokumenti eżentati taħt l-artikolu 31(2) tal-Kap. 496, 'il għaliex huwa fl-interess pubbliku li tiġi żvelata l-informazzjoni mitluba, biex jitħarsu wkoll il-prinċipji tat-trasparenza u tal-kontabilità* ***f'kuntest ta' kuntratti ta' impjieg li ma sarux wara sejħa pubblika, u allura ma kinux magħrufa l-kundizzjonijiet applikabbli għall-impjieg ta' dawn iż-żewġ individwi****."* [emphasis has been added].

39. The Court of Appeal reiterated its position in *'Rebecca Bonello Ghio vs Malta Film Commission'*[19]:

> "*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 jitħarsu l-prinċipji tat-trasparenza u l-kontabilità, hija għandha l-obbligu li tiżvela kif l-flus li tingħata minn fondipubbliċi b'liema mod qegħdin jintefqu. L-informazzjoni li qiegħda tintalab tiżvela l-appellanta hija dwar ħlasijiet għal servizz ipprestat minn***

[18] Appell Inferjuri Numru 11/2020 LM, '*'Allied Newspapers Limited vs Foundation for Medical Services',* decided on the 18th November 2020.
[19] Appell Inferjuri Numru 83/2023 LM , *'Rebecca Bonello Ghio vs Malta Film Commission',* decided on the 31st January 2024.

> ***persuna li ntgħażlet b'mod dirett mill-appellanta mingħajr ma nħarġet sejħa pubblika, u għalhekk aktar u aktar jinkombi fuq l-appellanta li tkun trasparenti f'dawn iċ-ċirkostanzi***." [emphasis has been added].

40. Furthermore, the Court of Appeal in *'Caroline Muscat vs Malta Film Commission'*[20] 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, kif sewwa jirrileva l-Kummissarju, titħallas minn fondi pubbliċi* ***u għalhekk tirriżulta l-aspettattiva li l-pubbliku għandu jkun jaf fejn marru l-flus u għaliex***" [emphasis has been added].

41. 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 documentation provided by the Public Authority during the course of the investigation, the Commissioner could not accept the argument of the Public Authority that the requested documentation has a commercial value. The Commissioner therefore concludes that the exemption cited by the Public Authority in terms of article 32(1)(b) of the Act does not apply.

On the basis of the foregoing considerations, pursuant to article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice, determining that the Public Authority's outright refusal to provide the applicant with a copy of the requested documentation on the basis of article 5(1)(f), article 5(3)(a) and article 32(1)(b) of the Act is not justified.

By virtue of article 23(4)(a) of the Act, the Public Authority is hereby being ordered to provide the applicant with an electronic copy of the requested documentation, after redacting the signatures, Mr David Curmi's identity card number and his residential address.

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: 2025.06.06 13:22:51 +02'00'

Ian Deguara
Information and Data Protection Commissioner

[20] Appell Inferjuri 72/22/LM, *'Caroline Muscat vs Malta Film Commission'*, decided on the 22nd February 2023.

Right of Appeal

In terms of article 26 (1) of the Data Protection Act (Cap 586 of the Laws of Malta), *"any person to whom a legally binding decision of the Commissioner is addressed, shall have the right to appeal in writing to the Tribunal within twenty days from the service of the said decision as provided in article 23".*

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.