Information and Data Protection Commissioner

CDP/FOI/52/2025

Jacob Borg

vs

Office of the Deputy Prime Minister and Ministry for Health

FREEDOM OF INFORMATION REQUEST

1. On the 8th August 2025, Mr Jacob Borg (the "**applicant**") made a freedom of information request pursuant to article 6(1) of the Freedom of Information Act (the "**Act**"), Cap. 496 of the Laws of Malta, requesting the Office of the Deputy Prime Minister and Ministry for Health[1] (the "**Public Authority**") to provide access to the following documents:

   "*a copy of all contracts the ministry or any authority/body falling under its purview has with Merck (or any of its agents) for the purchase of the cancer drug Keytruda (pembrolizumab)*".

2. On the 2nd September 2025, the Public Authority informed the applicant that the time-frame for responding to the freedom of information request had been extended by twenty (20) working days, in accordance with article 11(1)(b) of the Act.

3. On the 16th September 2025, the Public Authority refused the request of the applicant on the basis that "*the contracts requested are subject to strict confidentiality clauses which prohibit their disclosure. Furthermore, the information contained therein is reasonably considered exempt from disclosure under the Freedom of Information Act (Cap. 496), in particular on the grounds of commercial sensitivity and contractual confidentiality*".

4. On the 13th October 2025, the applicant presented a complaint and requested the Public Authority to revise its decision pursuant to its internal complaints' procedure.

[1] At the time of submitting the FOI request, the FOI request was made to the Ministry for Health, which later changed to the Office of the Deputy Prime Minister and Ministry for Health.

5. On the 28th October 2025, the Public Authority reiterated its refusal without adding any further reasoning to its earlier decision.

FREEDOM OF INFORMATION APPLICATION

6. On the 22nd December 2025, 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 handled the freedom of information request pursuant to the requirements of the Act. The applicant submitted the following arguments for the Commissioner to consider:

Contractual Confidentiality

a. that the response of the Public Authority appears to indicate that its refusal is based on the confidentiality clauses contained in its contract with Merck which the Public Authority seems to argue are due to grounds of commercial sensitivity;

b. that the applicant submitted that where a party to a commercial contract is a public entity, making use of public funds and administering public services, then the parties' expectations of confidentiality are curbed by the public authority's obligations of accountability and transparency;

Confidentiality Clauses, Case-Law and Article 31(2) of the Act

c. that the Commissioner and the Court of Appeal have often dealt with confidentiality claims contracted by government authorities with private persons and such clauses have consistently been lifted and recognised as being clauses which arbitrarily seek to trump the values of accountability and transparency;

d. that considering the Public Authority's insistence on commercial sensitivity and contractual confidentiality, it may be a good guess that the legal provision that could frame the Public Authority's decision is that found in article 31(2) of the Act;

e. that the applicant referred to one of the latest judgments of the Court of Appeal '*Rebecca Bonello Ghio vs Malta Film Commission*' that dealt with this legal provision and defined the test that must be undertaken in considering its application;

f. that the Public Authority's portfolio is under an obligation to disclose documents that allow the scrutiny of how public funds are being used. The contracts being sought will serve to indicate how public funds are being used to purchase a drug used in the treatment of cancer;

g. that one is to keep in mind that the treatment of patients with a drug found on the hospital formulary is a matter that raises questions about an issue of public interest, in a context where the role of the person seeking the information is particularly that of a public watchdog;

h. that also of note in this regard, is that the former President of Malta himself raised serious questions of public interest with regard to the cost involved in the acquisition of this drug and in an interview with Newsbook Malta on the 10th July 2022, former President Vella is quoted as questioning the delays in making this drug available for free to patients, and also questioned the cost and pricing of this treatment. President Vella indicated that "*the provision of Keytruda has proven to be one its* (Malta Community Chest Fund Foundation) *greatest present expenses, with some 60-70 patients requiring it at any one time*";

i. that former President Vella held that "*I am not ashamed to say that I had fierce arguments with importers, even though it was not my duty to involve myself in them", Vella said. Through negotiations with the importers of Keytruda, the price of a full course was reduced to €120,000 – a saving of €25,000 per patient per year. The price was eventually reduced to €89,000, a reduction which the President believes is a huge achievement but nevertheless not enough*";

j. that the strong public interest in disclosure of the contracts between government and third parties relating to the acquisition of this treatment is therefore evident not only for transparency in the use of public funds and in the administration of a public service, but also in public debate related to the use of funds being collected from the general public, as well as for the public interest in understanding the extent of the use of this treatment;

Transparency and Negotiated Procurement

k. that the significant challenge to accountability and transparency that is posed by such confidentiality clauses become more apparent when one considers that the purchase of this treatment by government is not carried out following the normal procedure of public procurement;

l. that the contracts being requested reflect the use and extent thereof of negotiated procedures being undertaken by the Public Authority, and also address the public interest concern as to whether this exceptional method of procurement is being applied with strict adherence to the relevant legislation;

m. that the procedure is regulated under the Public Procurement Regulation, Subsidiary Legislation 601.03, which clearly sets out strict criteria for its exceptional use, and in a negotiated procedure, the Public Authority itself chooses the operator it wishes to transact with;

n. that the procedure provides the Public Authority with an exercise of administrative discretion which is in itself subject to accountability and transparency, and negotiated procedure without publication is, at least at European level, a case of extraordinary exception in public procurement and is to be used only insofar as is strictly necessary, often for reasons of extreme urgency brought about by events unforeseeable by the contracting authority or exclusivity of services or goods;

o. that despite the rules of competition that are restricted through the use of this procedure, public procurement law does not exclude elements of publicity. For example, public procurement law allows for a review of the use of this procedure to be requested by competitors through the institution of procedures asking for a Declaration of Ineffectiveness. This therefore means that even where the negotiated procedure is used, the law itself will still favour some level of transparency and accountability;

Malta's International Commitment: Pricing of Medicinal Products

p. that the Public Authority's refusal to disclose the contracts, including the price and cost, also clearly runs counter to Malta's commitment to the World Health Organisation Resolutions and in May 2019, the World Health Assembly unanimously adopted Resolution WHA72.8 titled "*Improving the transparency of markets for medicines, vaccines, and other health products*";

q. that article 1(1) of the Resolution states that "*URGES Member States in accordance with their national and regional legal frameworks and contexts: (1) To take appropriate measures to publicly share information on the net prices of health products*";

r. that the Resolution clarifies that for its purposes, ""*net price*", *"net transaction price" or "manufacturer selling price" are the amount received by manufacturers after subtraction of all rebates, discounts, and other incentives*";

s. that while it is true that the Resolution is not a judicially enforceable legal obligation, it illustrates Malta's high level of commitment towards publicly disclosing the price of health products, and its absolute rejection of the applicant's request manifestly betrays that commitment;

Commercial Sensitivity

t. that in rejecting the request, the Public Authority also refers to "*commercial sensitivity*", however, it does not state which legal provision its decision in this regard is based on;

u. that it is being assumed that the Public Authority's refusal to disclose the requested documents on the basis of commercial sensitivity is based on article 32(1)(b) or article 32(1)(c) of the Act; and

v. that the applicant submitted that the Public Authority has failed to provide justification whatsoever to substantiate its decision, to the extent that it has failed to identify the nature of the commercial value, including the commercial context for such refusal.

INVESTIGATION

Admissibility of the Freedom of Information Application

7. After having considered that the applicant is an eligible person in terms of article 2 of the Act and that the application was lodged by the applicant within the time-limit established within the Timeframes for Lodging Complaints and Requests for Investigation and Review Regulations, Subsidiary Legislation 496.02, and the nature and background of the application, the Commissioner deemed the application as admissible for the purpose of article 23(2) of the Act.

Information Notice

8. By means of an information notice dated the 13th January 2026, issued in terms of article 24(1)(a) of the Act, the Commissioner requested the Public Authority to furnish information in

relation to the freedom of information application made by the applicant. In particular, the Commissioner requested the Public Authority to provide the following information:

a. to provide the reason(s) for the refusal of the freedom of information request in terms of article 14 of the Act, and, if the reason for the refusal is based on article 14(b), to specify the relevant exemption(s) under Part V and, or Part VI of the Act; and

b. to clearly explain which information is deemed to be commercially sensitive and how the disclosure of such information would prejudice the commercial value of the information contained within the contract(s).

Submissions of the Public Authority

9. On the 13th March 2026, the Public Authority provided the following submissions for the Commissioner to consider during the legal analysis of the case:

a. that the Public Authority is legally and contractually obliged to refrain from disclosing any commercially sensitive information and any breach of this obligation would cause substantial prejudice, exposing the signatory to contractual damages, and creating a lasting detrimental impact on the supply chain of these medicinal products which are already exceptionally difficult to procure;

b. that the disclosure of the requested documents could further compromise the acquisition of comparable products that face similarly constrained and fragile supply chains;

c. that Malta's limited market size, combined with significant linguistic barriers, registration procedures and regulation of the medicines, renders these medicinal products particularly challenging to source;

d. that the availability and pricing of the medicines are subject to negotiation, and suppliers commonly insist on strict confidentiality undertakings as a condition of sale; and

e. that any violation of these commitments risks eroding the trust between CPSU as contracting authority of medicinal products and medical devices, and its suppliers, and this may lead suppliers of hard-to-obtain products to terminate future business, refuse

to negotiate, or decline to supply specific items altogether, and that the consequence of such a breakdown would be harm to the patients whose lives depend on these products.

Submissions of the applicant

10. The applicant was provided with the opportunity to rebut the submissions of the Public Authority, and on the 13th May 2026, the applicant submitted its arguments. For the purpose of this section, the arguments already set out in the freedom of information application shall not be reiterated, and only the new arguments advanced by the applicant will be considered. The applicant submitted:

    a. that the Public Authority suggested that the disclosure of information may cause contractors to withdraw treatments from the Maltese markets. However, the applicant argued that the contention improperly portrays patients as "*pawns*" in commercial negotiations; and

    b. that there are two (2) economic operators capable of supplying treatment within this therapeutic class, and therefore, the existence of a competitive market diminishes the Public Authority's claim that an operator would cease supply to Malta in retaliation for transparency.

Final Submissions of the Public Authority

11. On the 12th June 2026, the Public Authority submitted its final arguments in relation to the present case:

    Public Interest

    a. that first and foremost, the applicant appears to argue that he should be granted access to all contracts concluded by the Ministry or any authority under its remit with Merck (or its agents) for the purchase of Keytruda (pembrolizumab) based on public interest;

    b. that the Public Authority further submits that the overriding public interest lies in ensuring that patients continue to have uninterrupted access to essential oncology treatments and the request concerns highly specialised procurement arrangements for a critical cancer medicine, and releasing such documentation would directly affect the

Public Authority's ability to continue securing these treatments on terms that are viable for a small jurisdiction, such as Malta;

c. that the public interest is therefore best served by maintaining the stability and sustainability of the national health system, ensuring that patients receive timely and reliable access to treatment, and preserving the State's ability to negotiate effectively on their behalf;

Article 32(1)(b) of the Act

d. that the requested information falls within the exemption held under article 32(1)(b) of the Act because disclosure would reasonably be expected to cause detriment to the effective performance of the Public Authority's functions, including the procurement and continued supply of essential medicinal products;

e. that furthermore, and for the purposes of demonstrating the specific harm contemplated by article 32(1)(b), the Public Authority submitted that disclosure of the copies of all contracts concluded by the ministry or any authority falling under its purview has with Merck (or any of its agents) for the purchase of the cancer drug Keytruda (pembrolizumab) would place the Public Authority at a significant commercial and market disadvantage;

f. that the commercial value of the information would be compromised including but not limited to, for the following reasons:

i. the procurement of patented oncology medicines takes place within a competitive international environment in which Malta, as a small market, must negotiate terms that are commercially viable. The contractual conditions agreed with suppliers, including but not limited to pricing and supply arrangements are confidential, and their disclosure would confer an undue disadvantage on other operators and weaken Malta's negotiating position because, if such information were placed in the public domain, potential suppliers would be able to anticipate the Public Authority's pricing expectations and negotiation parameters and may adjust their commercial behaviour accordingly, to the detriment of the Maltese market;

ii. that the contractual terms governing the purchase of the medicinal product Keytruda (pembrolizumab) reflect negotiated commercial arrangements that require heightened protection. Disclosure would reveal the Authority's negotiating strategy and commercial terms, placing it at a disadvantage in future dealings with pharmaceutical suppliers, who may adjust their pricing or refuse to offer favourable terms if confidentiality is not respected;

iii. that suppliers of specialised medicinal products would impose stricter confidentiality obligations as a condition of supply, and the Public Authority is contractually bound to protect commercially sensitive information. Breaching these obligations would jeopardise the willingness of suppliers to engage with the Maltese market and would undermine the Public Authority's ability to secure essential medicines for patients;

iv. that releasing commercially sensitive contractual information to a single requester, including a media organisation, would constitute selective disclosure and distort the competitive environment in which the Public Authority must operate. The pharmaceutical sector is characterised by confidential pricing and negotiated supply arrangements, and disclosure outside the established procurement framework would create an undue benefit to third parties and an undue detriment to the Public Authority, falling squarely within the harm contemplated by article 32(1)(b) of the Act.

LEGAL ANALYSIS AND DECISION

12. The Commissioner proceeded to assess whether the Public Authority was justified in relying on the exemption under article 32(1)(b) of the Act to refuse access to a copy of the requested documentation.

13. Article 32(1)(b) of the Act provides that a document is exempt if its disclosure under the Act would disclose "*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*".

14. This exemption is intended to safeguard the commercial interests of the Public Authority and, or any other person. The Act does not define what constitutes a commercial interest. However, it is generally understood to encompass a public authority's, or any other person's ability to engage effectively and competitively in commercial activities. For the exemption to be

engaged, the Public Authority must establish a causal link between disclosure and the alleged prejudice, demonstrating that disclosure would, or could reasonably be expected to, result in specific, identifiable harm to commercial interests.

15. Unlike the exemptions set out under Part VI of the Act, this exemption is absolute in nature and is therefore not subject to a public interest assessment. This reflects the legislator's deliberate choice to afford a higher degree of protection to the interests safeguarded by this exemption. Accordingly, once the requirements of the exemption are satisfied, the requested information is exempt from disclosure.

16. In the present case, the Commissioner notes that the withheld information relates to a commercial activity, namely, the supply of a specific drug, Keytruda (pembrolizumab), for cancer patients in Malta. The Public Authority submitted that the disclosure of the copies of all contracts concluded by the Public Authority for the purchase of such medicinal product would place the Public Authority at a significant commercial and market disadvantage within the highly specialist pharmaceutical market. The Public Authority explained in detail the prejudice it would be expected to suffer and submitted that the commercial value of the information would be compromised for the following reasons: (a) the contractual conditions agreed with suppliers, including but not limited to pricing and supply arrangements, are confidential, and their disclosure would confer an undue advantage on other operators and weaken Malta's negotiating position; (b) the disclosure of the Public Authority's negotiating strategy and commercial terms would place the Public Authority at a disadvantage in future dealings with pharmaceutical companies; and (c) the disclosure of commercially sensitive contractual information would distort the competitive environment in which the Public Authority must operate.

17. In his assessment, the Commissioner considers that a significant function of the Public Authority is to negotiate commercial agreements with suppliers, such as Merck or its agents, to ensure that patients in Malta have access to medicines necessary for their treatment. The Commissioner notes that, having regard to the small size of the market, the limited number of suppliers, the fact that the procurement of patented oncology medicines takes place within a highly competitive international market, and Malta's limited bargaining power, the disclosure of the requested documents would be likely to undermine the Public Authority's negotiating position and create a real and substantial risk of prejudice to its ability to secure favourable commercial terms.

18. In particular, disclosure of the requested documents could reasonably lead the supplier to reconsider existing agreement, seek to renegotiate contractual terms, or refrain from entering into future arrangements. The Commissioner considers that such outcomes are reasonably foreseeable and could significantly undermine the Public Authority's ability to secure favourable terms in procurement and contractual arrangements

19. In such circumstances, the continued procurement of pembrolizumab could be jeopardised, resulting in patients who currently benefit from the treatment losing access to it. The Commissioner therefore considers that the disclosure of the requested documents would extend beyond mere commercial disadvantage and could also adversely affect patients. The resulting prejudice could adversely affect the efficient allocation of medicinal products, place additional financial pressure on the national health system, and undermine the Public Authority's ability to ensure the effective continued provision of healthcare services. Accordingly, the Commissioner is of the view that the disclosure would likely cause significant prejudice both to the commercial interests of the Public Authority and to the wider public interest in safeguarding the effective functioning of the national healthcare system

20. In reaching his assessment, the Commissioner also considered a decision[2] of the Information Commissioner concerning a FOI request made under the UK FOI law for the disclosure of contractual information relating to pembrolizumab, which is the same medicine that is the subject of the present FOI request. In that case, the Information Commissioner accepted that disclosure of such information would be likely to prejudice the commercial interests of both National Health Service (NHS) England and the pharmaceutical supplier, given the confidential and commercially sensitive nature of the pricing and contractual arrangements of this specific medicinal product.

21. The Commissioner notes that the arguments advanced by the NHS England in that case are substantially similar to those put forward by the Public Authority in the present case. In particular, both healthcare authorities contended that the disclosure of confidential pricing information and contractual terms in relation to pembrolizumab would undermine their ability to negotiate favourable terms with pharmaceutical suppliers and could adversely affect existing and future commercial arrangements.

[2] Information Commissioner's Office (UK), Decision Notice FS50727141, NHS England, 24th October 2018, available at https://ico.org.uk/media2/migrated/decision-notices/2260038/fs50727141.pdf, accessed on the 19th June 2026.

22. The Commissioner considers the decision delivered by the UK Information Commissioner to be highly relevant, particularly as it concerns the same medicine and comparable circumstances in relation to the commercial prejudice that such disclosure would cause to the national healthcare system. The reasoning adopted in that case supports the Commissioner's conclusion that the disclosure of commercially sensitive contractual information in relation to a very specific medicinal product would, or could reasonably be expected to, cause real and substantial harm to the commercial interests and negotiating position of the Public Authority and, ultimately, to patients who rely on continued access to the treatment.

On the basis of the foregoing considerations, and in terms of article 23(3)(b) of the Act, the Commissioner is hereby serving a decision notice and deciding that the Public Authority was justified in refusing access to the information requested by the applicant in terms of article 32(1)(b) of the Act.

Dr Reno Borg
Information and Data Protection Commissioner

Decided today, the 8th July 2026

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'.