

**Freedom of Information (Jersey) Law 2011**

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**DECISION NOTICE**

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<b>JOIC Reference</b>	107345662
<b>Date of Decision Notice</b>	18 October 2019
<b>Scheduled Public Authority</b>	Chief Minister's Department (the <b>SPA</b> )
<b>Address</b>	19-21 Broad Street St Helier Jersey JE2 3RR

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**Summary/Decision**

1. In January 2019, the Complainant requested certain information from the SPA relating to legal costs incurred by the States Employment Board (**SEB**) in respect of their defence of an action commenced by the Jersey Fire and Rescue Service Association (**JFRSA**) (the **Initial Request**). A follow up request was sent by the Complainant in February 2019 by which the Complainant sought information about the legal costs of Mr James Goudie QC who appeared in proceedings on behalf of JFRSA (the **Revised Request**). Following further communications between the parties regarding the wording and ambit of the request, a final request was advanced by the Complainant seeking correspondence which might have passed between certain individuals within the Government of Jersey (the **Government**) relating to Mr Goudie's legal costs (the **Final Request**).
2. The SPA wrote to the complainant on 15 April 2019 stating that certain of the Requested Information was being withheld (the **Withheld Information**), applying the exemptions at Arts.25, 31 and 32 of the Freedom of Information (Jersey) Law 2011 (the **Law**). The Complainant subsequently contested this response and requested an internal review.
3. The Commissioner's decision is that the SPA's decision to withhold the Withheld Information was in accordance with the Law.
4. However, the Commissioner also finds that the SPA has inappropriately relied on the Freedom of Information (Costs) (Jersey) Regulations 2014 (the **2014 Regulations**) in respect of finalising some of the searches identified as falling within the scope of the Final Request.

5. Accordingly, the Commissioner partly upholds the appeal and requires the SPA to undertake certain further searches and review/disclose the results of those searches as appropriate.

### **The Role of the Information Commissioner**

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6. It is the duty of the Information Commissioner (the **Commissioner**) to decide whether a request for information made to a SPA has been dealt with in accordance with the requirements of Part 1 of the Law.
7. This Decision Notice (**Notice**) sets out the Commissioner's decision.

### **The Request**

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8. The Complainant's request has been modified substantially since the time they made their first request in December 2018. Whilst each specific iteration of that request is not necessarily relevant for the purposes of this Notice and for the decision the Commissioner is to make (namely, whether the Withheld Information was lawfully withheld), it is relevant regarding the issues raised by the Complainant in terms of how the SPA dealt with the request including, how they dealt with the Complainant in terms of provided advice and assistance.
9. Each of the requests and responses provided are at **Appendix 1** hereof and are not repeated in the main body of this Notice save for the Final Request which was in the following terms:

*"Please could you make available to me any documentation, letter, email or hardcopy correspondence to which the following individuals are party:*

*Jonathan Donovan  
Mark Littler  
Len Norman  
Tracey Vallois*

*Date Range – 01/07/17 to date*

*Key Words – James Goudie QC  
James Goudie  
SJFRS  
Employment Tribunal  
NISA  
Non Impairment of Service Agreement"*

### **The Investigation**

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#### **Scope of the case**

10. On 15 April 2019, the Complainant contacted the Commissioner to complain about the way their requests for information had been handled and to appeal the SPA's decision to withhold the Requested Information pursuant to the Final Response. The Complainant asked the Commissioner to review the Complainant's request and the responses received from the SPA in order to ascertain whether the Final Response was in accordance with the law.

11. The Commissioner considers the scope of his investigation to be to determine whether on the balance of probabilities the SPA holds any further recorded information falling within the scope of the request and, therefore, the Law.
12. The Commissioner has set out in this Notice the particular issues that he has had to consider in respect of each exemption cited by the SPA and, where relevant, the public interest test.
13. As per the recent case from the Upper Tribunal in E&W, "*in relation to information relating to investigations and proceedings conducted by public authorities, competing public interests are to be assessed according to circumstances as they stood when a public authority refused a request for information*"<sup>1</sup>. That is to say, whether the Withheld Information was lawfully withheld is considered as at the date of the Final Review, accordingly matters which existed on 15 April 2019.

### **Chronology**

14. On 25 April 2019, the Commissioner wrote to the SPA to advise that the Complainant had made an appeal pursuant to Art.46 of the Law. The SPA was asked to provide a copy of the Withheld Information and their written submissions in response to the complaint made by the Complainant.
15. The SPA responded to that letter on 24 May 2019 explaining the rationale applied by the SPA in respect of the Withheld Information, together with a copy of the Withheld Information itself. The Commissioner had also received comprehensive submissions from the Complainant, including copies of the correspondence which had passed between the Complainant and the SPA.
16. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both the Complainant and the SPA and is satisfied that no matter of relevance has been overlooked. He has reviewed each part of the Withheld Information and the exemption cited by the SPA.

### **Analysis – The Final Request**

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#### **Art.8 – General right to be supplied with information held by a scheduled public authority**

17. The full text of Art.8 of the Law can be found in the Legal Appendix at the end of this Decision Notice.
18. A SPA must ensure that they have carried out adequate and properly directed searches in response to a request for information. The Commissioner will consider the scope, quality and thoroughness of any searches performed and test the strength of a SPA's reasoning and conclusions if they say that no further information is held that may fall within the ambit of any request.

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<sup>1</sup> <https://www.bailii.org/uk/cases/UKUT/AAC/2019/262.pdf>

19. The SPA has provided copies of the searches carried out in response to the Final Request which the Commissioner has reviewed. The Commissioner is satisfied that, on the balance of probabilities, the SPA does not hold any other information falling within the parameters of the Final Request.

**Art.16 – A scheduled public authority may refuse to supply information if cost excessive**

20. The Freedom of Information (Costs) (Jersey) Regulations 2014 (the **2014 Regulations**) allow a scheduled public authority to refuse to comply with a request for information if the authority estimate that the cost of compliance would exceed the specified amount as set out in those regulations. The 2014 Regulations allow a scheduled public authority to charge the following activities at a flat rate of £40 per hour of staff time.

- a. Determining whether the scheduled public authority holds the information;
- b. Locating the information, or a document which may contain the information;
- c. Retrieving the information, or a document which may contain the information; and
- d. Extracting the information from a document containing it.

21. The Final Response indicates that the work required to finishing processing the Complainant's request (including against the keyword "NISA") would exceed the relevant limit, some 6 hours having already been spent on answering the Final Request.

22. In its submissions, the SPA noted that substantial time had been taken to get to the point of issuing the Final Request, including liaising with the Complainant to refine the scope of his Initial Request. They appear to suggest that any time taken in respect of liaison with the Complainant prior to the Final Request should be taken into account when determining whether the cost threshold has been reached. This is not correct. The Art.16 exemption refers to "*the information requested*" and the 2014 Regulations. The natural interpretation of this article must be that the exemption can only apply to the costs incurred in dealing with the Final Request ignoring the requests that had gone before.

23. The Commissioner notes that the one final search to be undertaken is that relating to the four named individuals and the key word "NISA". The SPA says that the search results returned refer to approx. 400 emails over 900 pages and that a review of over 900 pages for relevancy was considered to place an undue burden on the SPA.

24. However, the Commissioner has reviewed the screenshots of the computer searches which suggest that only some 228 'hits' for the relevant search terms. It is unclear from the search results returned whether this relates to 228 pages or 228 emails, but it is presumed to be the latter. Accordingly, the Commissioner does not consider that finalising the review would likely place an undue burden on the SPA.

25. Accordingly, the Commissioner requires the SPA to carry out a review of the following searches identified by the SPA in their response and, where appropriate and subject to any

exemptions that may apply, disclose to the Complainant any information falling within the scope of the Final Request:

- a. Search 3 = 24 results
- b. Search 11 = 1 result
- c. Search 15 = 9 results
- d. Search 19 = 18 results
- e. Search 43 = 31 results
- f. Search 50 = 145 results

26. This must be done within 28 days of the date of this Decision Notice.

### **Art.25 – Personal Information**

27. The full text of Art.25 of the Law can be found in the Legal Appendix at the end of this Decision Notice.

28. Art.25 specifies that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the relevant data protection legislation in force at the time the decision to withhold the information was made.

29. Art.2 the Data Protection (Jersey) Law 2018 (**DPJL 2018**) defines personal data as follows:

*"(1) Personal data means any data relating to a data subject.*

*(2) A data subject is an identified or identifiable, natural, living person who can be identified, directly or indirectly, by reference to (but not limited to) an identifier such as –*

*(a) a name, an identification number or location data;*

*(b) an online identifier; or*

*(c) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the person.*

*(3) The following matters must be taken into account in deciding whether the person is identified or identifiable –*

*(a) the means reasonably likely to be used by the controller or another person to identify the person, taking into account factors such as the cost and amount of time required for identification in the light of the available technology at the time of processing and technological factors;*

- (b) *whether the personal data, despite pseudonymization, is capable of being attributed to that person by the use of information other than that kept separately for the purposes of pseudonymization."*

#### The SPA's position

30. In its Final Response, the SPA maintained its reliance on Art.25 of the Law for certain of the Withheld Information, and certain of the information provided to the Complainant was redacted citing the Art.25 exemption.

31. In addition to explanations provided in its Final Response, that SPA was invited to provide submissions to this office and asked to provide a copy of the Withheld Information.

32. The SPA contends that certain of the Withheld Information constitutes personal data of certain third parties and to release it would breach Art.8(1)(a) of the DPJL 2018. That article reads as follows:

*"8 Data protection principles*

*(1) A controller must ensure that the processing of personal data in relation to which the controller is the controller complies with the data protection principles, namely that data are*

*(a) processed lawfully, fairly and in a transparent manner in relation to the data ("lawfulness, fairness and transparency")."*

33. In particular, the SPA submits that it is not fair in these particular circumstances to release the Withheld Information and that, in any event, the only information withheld under Art.25 was the limited redaction of personal details of third parties (details of which were provided to the Commissioner).

34. The SPA indicated that when considering whether to withhold certain of the Withheld Information they took into account the following:

1. Whether the third party individuals had explicitly consented to publication of their details;
2. Whether the third party individuals were public facing; and
3. Whether disclosure of the third party information was necessary for the Complainant to pursue a legitimate interest.

35. The SPA noted that certain of the individuals whose details were withheld were of a junior level and indicated that the balancing point of redaction of personal information is usually set at Assistant Director. The SPA also provided information about why certain other personal details ought to be withheld.

36. The SPA also explained the rationale they applied in each of each third party noting that they do not apply a blanket policy to third party personal information, assessing such in the context of each request. The SPA did indicate, however, that they considered that the *"balancing*

point of redaction of personal information is usually set at Assistant Director and above, given that the decision making and spokesperson status are above this level. It is the opinion of the SPA that the comparatively small population of the Island leads to a greater risk of prejudice to individuals due to the release of personal information than in a larger area". The Commissioner has considered these submissions in the context of the exemption relied on by the SPA and has reviewed the Withheld Information accordingly.

### Analysis

37. The definition of "personal data" is as set out at para.28 above.

38. The Commissioner refers to the guidance provided by the UK Information Commissioner (**ICO**) on her website entitled "Determining what is personal data"<sup>2</sup>. Whilst not binding in this jurisdiction, the Commissioner thinks that the guidance is of assistance in assessing whether an address is capable of constituting personal data

#### ***"What is the meaning of 'relates to'?"***

- *Information must 'relate to' the identifiable individual to be personal data.*
- *This means that it does more than simply identifying them – it must concern the individual in some way.*
- *To decide whether or not data relates to an individual, you may need to consider:*
  - *the content of the data – is it directly about the individual or their activities?*
  - *the purpose you will process the data for; and*
  - *the results of or effects on the individual from processing the data.*
- *Data can reference an identifiable individual and not be personal data about that individual, as the information does not relate to them.*
- *There will be circumstances where it may be difficult to determine whether data is personal data. If this is the case, as a matter of good practice, you should treat the information with care, ensure that you have a clear reason for processing the data and, in particular, ensure you hold and dispose of it securely.*
- *Inaccurate information may still be personal data if it relates to an identifiable individual."*

39. The Commissioner agrees with this interpretation.

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<sup>2</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/what-is-personal-data/>

*Reasonable expectations of the data subjects*

40. The Commissioner has had to consider whether to release the Withheld Information would breach one of the principles set out at Art.8 of the DPJL 2018. In this particular case, the SPA considers that it is not fair to release the Withheld Information into the public domain and refers to Art.8(1)(a) of the DPL 2018 in this regard. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the Withheld Information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.

41. In deciding whether disclosure of personal data would be unfair, and thus breach Art.8(1)(a) of the DPJL 2018, the Commissioner takes into account a range of factors including:

a. The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:

- i. What the public authority may have told them about what would happen to their personal data;
- ii. Their general expectations of privacy, including the effect of Art.8 of the European Convention on Human Rights (**ECHR**);
- iii. The nature or content of the information itself;
- iv. The circumstances in which the personal data was obtained;
- v. Any particular circumstances of the case, e.g. established custom or practice within the public authority;
- vi. Whether the individual consented to their personal data being disclosed or, conversely, whether they explicitly refused;
- vii. The consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- viii. The balance between the rights and freedoms of the data subject and the legitimate interest of the public.

42. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

43. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to take a



proportionate approach. The SPA considered that there were several possible consequences of releasing this information:

- a. Exposure of performance information, such as may lead to internal conflict and prejudice;
- b. Exposure of salary information, such as may lead to internal conflict and prejudice;
- c. Formulation of a 'league' table of individuals within band (with negative impressions both at the top and bottom of the table);
- d. Distress to individuals due to media coverage and negative public image;
- e. High potential for harassment of individuals in a small public sphere<sup>3</sup>.

44. In Decision Notice 2018-01<sup>4</sup>, this office considered, in depth, the application of Art.25 of the Law. In respect of information that may be considered to be in the public interest the following is useful in the context of this appeal:

*"53. Ultimately, deciding how to apply article 25 of the FOI Law to cases, such as the present, involves balancing the privacy rights of the individual against the public interest in disclosure. Taking a proportionate approach involves two key considerations. The first is the nature and sensitivity of the information at issue. From the relevant decisions cited above, information about terms and conditions of employment set out at the time of the commencement of employment are arguably less sensitive than the details of a compromise agreement setting out the terms and conditions of an individual's departure of employment.*

*54. The second consideration concerns that nature of the public interest that disclosure of the information would serve. The term 'public interest' or 'interest of the public' appears in many statutes throughout the Commonwealth, but such statutes rarely, if ever, provide a definition of the term or any guidance for evaluating the circumstance of specific cases. This leaves it open to variation in interpretation. I agree with the SPA that the term public interest is more specific than 'what the public finds to be interesting'. It does not refer to interest in the sense of being entertaining. The term public interest concerns the public having a stake or right that is at issue rather than simply mere curiosity. This term applies in circumstances where an event or development is likely to affect tangibly the public in general. The fact that a topic receives media attention does not automatically mean that there is a public interest in disclosing the information that has been requested about it. As the Tribunal held in the case of House of Commons v. Information Commissioner, dealing with a request for ministerial expenses: 'The number of news articles on a particular topic may be an indication of public curiosity but is not a measure of the legitimate public interest'.*

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<sup>3</sup> See Decision Notice 202-03-57259

<sup>4</sup> <https://oicjersey.org/wp-content/uploads/2018/11/Decision-Notice-2018-01-FINAL.pdf>

55. The most illustrative case providing factors to consider in determining the application of the public interest that I have been able to find is an administrative law decision of the former Commissioner for Information and Privacy for the Province of British Columbia, Canada, David Flaherty (Order 154-199710). This case involved a request by an applicant that a public body waive a fee assessed for access to records, in accordance with section 75 of the Freedom of Information and Protection of Privacy Act<sup>11</sup> (FIPPA), on the grounds that the records 'related to a matter of public interest'. Former Commissioner Flaherty suggested that the following factors were relevant:

- a. has the information been the subject of recent public debate?
- b. does the subject matter of the record relate directly to the environment, public health, or safety?
- c. would dissemination of the information yield a public benefit by –
  - I. disclosing an environmental, public health, or safety concern,
  - II. contributing meaningfully to the development or understanding of an important environmental, health, or safety issue, or
  - III. assisting public understanding of an important policy, law, program, or service?
- d. do the records show how the public body is allocating financial or other resources?

*While the relevant provisions of FIPPA are not entirely analogous with the FOI Law, the above factors appear to me to be a sensible list of issues to consider when determining whether disclosure of information is in the public interest. Indeed, they are reflective of some of the issues that I must consider in the instant case."*

45. The Commissioner, having considered the Withheld Information, considers that the Art.25 exemption has been correctly engaged by the SPA in respect of the information that has been withheld pursuant to this article.

### **QUALIFIED EXEMPTIONS**

#### **Art.31 – Advice by Bailiff, Deputy Bailiff or a Law Officer**

46. Art.31 covers information relating to Law Officers'<sup>5</sup> advice. It is qualified by the public interest test and public authorities can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has seen the Withheld Information to which this exemption has been applied. Without divulging the contents thereof, the Commissioner considers that the exemption is engaged in respect

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<sup>5</sup> In addition to the Bailiff and Deputy Bailiff this includes the Attorney General, Solicitor General and other employees of the Law Officers' Department.

of the Final Request. The focus is therefore whether the SPA was correct in concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.

#### *The Complainant's position*

47. The Complainant argues that there is, in essence, an obvious public interest in knowing the how much SEB has spent on legal advice in relation to the Proceedings.

#### *The SPA's position*

48. The Commissioner understands that the Law Officers are the principal legal advisers to the Government of Jersey (the **Government**), including the SEB. The core function of the Law Officers is to advise on legal matters, helping the Government to act lawfully and in accordance with the rule of law. The SPA contends that Art.31 reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of such advice without the Law Officers' consent. The purpose of this confidentiality is to protect fully informed decision making by allowing Government to seek legal advice in private, without fear of adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that Government is neither discouraged from seeking advice in appropriate cases, nor pressurised to seek advice in inappropriate cases. The Commissioner recently considered the operation of Art.31 in his recent decision notice<sup>6</sup> and does not replicate same here.

49. In addition to the standard convention, the SPA considers that prematurely disclosing the withheld information could potentially impact on-going legal proceedings. The Commissioner cannot rehearse those arguments here but having considered the submissions of both parties, the Commissioner does not consider the public interest to be sufficiently strong in these particular circumstances to override the convention at this stage and the exemption from disclosure provided for at Art.31 of the Law.

50. Where the Art.31 exemption has been applied, it has been applied appropriately.

#### **Art.32 – Legal Privilege**

51. Art.32 provides that:

*"Information is qualified exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings."*

52. Legal professional privilege (**LPP**) protects the confidentiality of communications between a lawyer and a client. It has been described by the Information Tribunal in E&W as:

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the*

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<sup>6</sup> <https://jerseyoic.org/news-articles/decision-notice/parish-of-st-lawrence/>

*client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.”<sup>7</sup>*

53. There are two types of privilege<sup>8</sup>: litigation privilege and legal advice privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract legal privilege.
54. For privilege to apply, the communication must have been created for the dominant purpose of litigation or the provision of legal advice.
55. In its response, the SPA has detailed the history and ongoing litigation underpinning the request. It has provided rationale as to why the SPA considers litigation privilege applies to certain of the Withheld Information. In essence, the SPA considers that the messages were in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to litigation. The litigation was on-going at the time of the Final Response. In those circumstances, disclosure of the relevant messages, the SPA says, could prejudice on-going litigation in circumstances where, otherwise, that information would not ordinarily be disclosable.

#### *Public Interest Test*

56. The exemption given at Art.32 is a qualified exemption. This means that even where the exemption is engaged, information is only exempted if the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.
57. The Complainant has argued that it is in the public interest to know how public funds are being utilised, including whether public funds have been used to secure legal advice in circumstances where such have been incurred in defending a legal claim which, thus far, the States of Jersey have not been successful in defending.
58. The SPA has argued that the general public interest in this exemption will always be strong due to the importance of the principle behind LPP and that all communications regarding legal advice are inherently weighted towards non-disclosure. The SPA has also noted that the subject of Mr Goudie’s involvement has already been the subject of scrutiny and speculation in the media which the SPA says has caused a “*chilling effect to the Law Officer’s management of the case*”.

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<sup>7</sup> *Bellamy v. Information Commissioner and DTI* EA/2005/0023 at para.9

<sup>8</sup> See *CMC v. Forster* [2019] JRC 004A

59. Factors which may be relevant in balancing public interest arguments may include whether a large number of people are affected, lack of transparency in the SPA's actions and misrepresentation of any advice given.
60. In this case, the SPA has also indicated that the underlying legal proceedings are still in train and that there is a further appeal pending and that whilst this is so, the relevant messages should not be published.
61. They have also indicated that at the end of those proceedings, there is an intention to publish details of the legal fees incurred.
62. The Commissioner considers that safeguarding openness in communications between client and lawyer is essential to ensure access to full and frank legal advice.
63. The Commissioner has reviewed those items to which the SPA says Art.32 applies and without revealing the contents of the information, considers that the exemption has been appropriately applied by the SPA.

#### **Other issues arising**

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64. As previously indicated, the Commissioner has had sight of all the correspondence passing between the Complainant and the SPA. This includes the first request made by the Complainant to the SPA and the Initial Response, together with accompanying correspondence. The Commissioner notes the Complainant's offer to the SPA asking that he be contacted should clarity be required on the ambit of his requests. Having reviewed the correspondence and the raft of requests and responses as set out at Appendix 1, it may have been preferable to engage the Complainant in a more meaningful discussion at an earlier stage, rather than the Complainant having to suffer three months of correspondence with the Unit in an attempt to reduce the request to what the SPA considered were suitable parameters.
65. Art.12 of the Law sets out the duties of the SPA to supply advice and assistance:
- "A scheduled public authority must make reasonable efforts to ensure that a person who makes, or wishes to make, a request to it for information is supplied with sufficient advice and assistance to enable the person to do so."*
66. Whilst the Complainant's Initial Request asked for the costs of a London based law firm used to represent the States Employment Board, the Complainant did not say that he was making a request of the Law Officers' Department for that information. Indeed, it appears to be the Central Unit who determined which scheduled public authority should deal with the Complainant's request and who concluded that the Complainant was directing his request to the Law Officers' Department.

67. The form available on the Gov.je website<sup>9</sup> does not ask applicants to choose the scheduled public authority from whom they seek information; the relevant box simply asks the inputter to "Enter your FOI question or a description of the information you would like". In this case, it appears that the Unit interpreted the Complainant's request as being directed towards the Law Officers' Department who are not a scheduled public authority for the purposes of the Law. It is possible that if the request had been interpreted as being directed towards the States Employment Board for example (who is a scheduled public authority for the purposes of the Law) or, indeed, the Chief Minister's Department who ultimately provided the Final Response, then the Complainant's request may have been dealt with more appropriately at an earlier stage.

68. It is undesirable for the Unit to suggest or determine that an individual's request should be directed towards a particular entity (particularly one that is not caught by the provisions of the Law) as this has the potential for misinterpretation. For example, an applicant could take the view that steps have been taken to actively thwart their request for information. The Commissioner does not suggest that there was any such intention in this case but individuals have a right under the Law to make a request for information to any scheduled public authority and it may be helpful for the form to be amended to allow individuals to select which authority their request is directed at.

### **The Decision**

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69. The Commissioner's decision is that the SPA correctly applied the relevant exemptions in respect of the Withheld Information.

70. The SPA inappropriately relied on the 2014 Regulations in declining to perform the final search and review in respect of certain search terms identified as being within the scope of the Final Request. The SPA must take the steps identified at paras.20-25 above within 28 days of the date of this Notice.

### **Right of Appeal**

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71. An aggrieved person has the right to appeal against this Decision Notice to the Royal Court of Jersey.

72. If you wish to appeal against this Decision Notice, you can obtain information on how to do so on <https://www.oicjersey.org>.

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<sup>9</sup>[https://one.gov.je/service/Freedom\\_of\\_Information\\_request?\\_ga=2.46885349.378996457.1571037008-2020112742.1571037008](https://one.gov.je/service/Freedom_of_Information_request?_ga=2.46885349.378996457.1571037008-2020112742.1571037008)

73. Any Notice of Appeal should be served within 28 (calendar) days of the date on which the Decision Notice is issued.

Dated this 18<sup>th</sup> day of October 2019

Signed.....

**Mr Paul Vane**  
Deputy Information Commissioner  
Office of the Information Commissioner  
5 Castle Street  
St Helier  
Jersey

**8 General right of access to information held by a scheduled public authority**

If a person makes a request for information held by a scheduled public authority –

- (a) the person has a general right to be supplied with the information by that authority; and
- (b) except as otherwise provided by this Law, the authority has a duty to supply the person with the information.

**9 When a scheduled public authority may refuse to supply information it holds**

- (1) A scheduled public authority may refuse to supply information it holds and has been requested to supply if the information is absolutely exempt information.
- (2) A scheduled public authority must supply qualified exempt information it has been requested to supply unless it is satisfied that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.
- (3) A scheduled public authority may refuse to supply information it holds and has been requested to supply if –
  - (a) a provision of Part 3 applies in respect of the request;
  - (b) a fee payable under Article 15 or 16 is not paid; or
  - (c) Article 16(1) applies.

**18 Where a scheduled public authority refuses a request**

The States may, by Regulations, prescribe the manner in which a scheduled public authority may refuse a request for information.

**25 Personal information**

- (1) Information is absolutely exempt information if it constitutes personal data of which the applicant is the data subject as defined in the Data Protection (Jersey) Law 2005.
- (2) Information is absolutely exempt information if –
  - (a) it constitutes personal data of which the applicant is not the data subject as defined in the Data Protection (Jersey) Law 2018; and
  - (b) its supply to a member of the public would contravene any of the data protection principles, as defined in that Law.
- (3) In determining for the purposes of this Article whether the lawfulness principle in Article 8(1)(a) of the Data Protection (Jersey) Law 2018 would be contravened by the



disclosure of information, paragraph 5(1) of Schedule 2 to that Law (legitimate interests) is to be read as if sub-paragraph (b) (which disapplies the provision where the controller is a public authority) were omitted.

**31 Advice by the Bailiff, Deputy Bailiff or a Law Officer**

Information is qualified exempt information if it is or relates to the provision of advice by the Bailiff, Deputy Bailiff or the Attorney General or the Solicitor General.

**32 Legal professional privilege**

Information is qualified exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

## **Appendix 1**

### **Requests and responses**

1. The Complainant's Initial Request in December 2018 was in the following terms:

*"The States Employment Board has lost a legal case against the firefighters' union for failing to stick to a bargaining agreement designed to prevent the emergency services from going on strike.*

*Can you please confirm the exact total cost of using the London based law firm used to represent the States Employment Board (SEB) in this matter."*

2. On 17 December 2018, the Complainant sought to expand the parameters of his initial request:

*"1) Please ensure that the total cost of legal representation provided by the States of Jersey Law Officers' Department in regard to the SJFRS Employment Tribunal are added to and included with a complete response to the original FOI request. This will be in relation to billable hours of [Lawyer's of the LOD]. This will also presumably included costs related to the engagement and accommodation/travel of James Goudie QC and associated colleagues as per the original FOI request response indicated it might.*

*2) Additionally, in this expansion to the original FOI request, please could you make available to me any referenced documentation, letter and email correspondence, bearing relation to James Goudie QC as key words.*

*As I mention earlier, a cynical mind could draw conclusion that there is some reluctance for this information to be released. However, as it is a matter directly related to the spending of the public purse in a time of such austerity, I feel this information is very much in the public's interest.*

*I hope you will be able to take this complaint forward and issue me with a full and complete response, including my request expansion in scope to the original FOI request in due course.*

*I am looking forward to your prompt response. However, should you require anything further with regard to this matter, I would rather the scope was clearly understood, then please do not hesitate to contact me either by email or phone.*

*I want to be clear that I would rather be contacted for clarity than have selective omission of various costs withheld under the guise of not quite "getting" the request. To summarise; a total cost to the public purse of the legal representation of the States Employment Boards' defence of the SJFRS's Employment Tribunal Case is requested, including all of the elements listed above."*

3. On 18 January 2019, the SPA responded to the Initial Request in the following terms (the **Initial Response**):

*"The engagement of legal services in relation to the recent Fire and Rescue Service Association employment tribunal case lies primarily between the Law Officers' Department and James Goudie QC.*

*The Law Officers' Department is not a scheduled public authority under the Freedom of Information (Jersey) Law 2011 (FOI Law) and therefore there is no right under Article 8 of the FOI Law to request information held by the Law Officers' Department.*

*Article referenced.*

*Article 8 General right to be supplied with information held by a scheduled public authority*

*If a person makes a request for information held by a scheduled public authority –*

*(a) The person has a general right to be supplied with the information by that authority;  
and*

*(b) Except as otherwise provided by this Law, the authority has a duty to supply the person with the information.*

4. The SPA then responded to the Supplemental Request in the following terms:

*"1) The Law Officers' Department is not a scheduled public authority under the Freedom of Information (Jersey) Law 2011 (FOI Law) and therefore there is no right under Article 8 of the FOI Law to request information held by the Law Officers' Department.*

*2) As the Law Officers' Department is not a scheduled public authority under the FOI Law there is no Article 8 right to request information held by them. Therefore correspondence, to the extent it is held by the Law Officers' Department, is not disclosable and only information that is held by a Ministerial Department (because they are scheduled public authorities) will fall within the scope of your request.*

*Any search that we undertake must have clear parameters. This includes the sender/recipient, specific date range and specific keywords. To that end please can you clarify your request by giving us specific search parameters.*

*Article 14 of the FOI Law makes it clear that we can ask for further clarification and that only on receipt of that further information does the timeframe set out in Article 13 of the FOI Law apply (20 working days or such extension as necessary in the circumstances). "*

5. The Complainant made an additional request to the supplemental request:

*"Thank you for your recent response. I must once again express disappointment that it took the full 20 days to request clarification of my search parameters. However, the plus side is that perhaps some invoices have now been received?*

*1)*

*So still outstanding are; the total public monies disbursed to date in relation to the SEB's defence of the FRSA Employment Tribunal Case. Whether it be invoices in relation to legal fees incurred (and related disbursements) or otherwise. Including invoices, travel and accommodation costs regarding James Goudie QC.*

2)

*Regarding Search parameters for documentary disclosure (e-mail and letter), keywords and date parameters are as follows:*

*Date range – 01/07/17 to date.*

*Key Words – James Goudie QC*

*James Goudie*

*QC*

*[LOD Employee]*

*[LOD Employee]*

*SJFRS Employment Tribunal*

*NISA*

*Non Impairment of Service Agreement*

*I am unable to supply the sender or recipient for any documentation as I would not know who these are. Searching for the above referenced key words on a computer system should be a straight forward enough request.*

6. The SPA's additional response to the supplemental request was provided in February 2019:

"1)

*The engagement of legal services in relation to the recent Fire & Rescue Service Association Employment Tribunal Case lies primarily with the Law Officers' Department.*

*The Law Officers' Department is not a scheduled public authority under the [FOI Law] and therefore there is no right under Article 8 of the FOI Law to request information held by the Law Officers' Department.*

*The Law Officer's Department have noted that they intend to release financial data in relation to the Jersey Fire and Rescue Association tribunal case after legal proceedings have concluded.*

2)

*As noted within the response to your supplemental request, the Law Officers' Department is not a scheduled public authority under the FOI Law therefore there is no Article 8 right to request information held by them. Therefore correspondence, to the extent it is held by the Law Officers' Department, is not disclosable and only information that is held by a Ministerial Department (because they are scheduled public authorities) will fall within the scope of your request.*

*We are also unable to undertake a search without recipient/sender details. There are well over 6,000 email accounts within the Government of Jersey and a search on terms alone is not feasible. This request is therefore refused as the terms are far too broad to allow for a response to be provided within the cost limit provisions allowed under article 16 of the [FOI Law] and the 12.5 hours maximum allowed under regulation 2(1) of the Freedom of Information (Costs)(Jersey) Regulations 2014.*

*It should also be noted that any correspondence held by a ministerial department in relation to this case would likely be exempt under Article 32 (Legal professional privilege) of the [FOI Law].*

*Article referenced*

*Article 16 A scheduled public authority may refuse to supply information if cost excessive...*

*Article 32 Legal professional privilege*

*Information is qualified exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.*

7. The Complainant's Revised Request is in the following terms:

*"What was the total cost in legal fees paid to James Goudie QC to represent the States Employment Board in their recent tribunal case against the Jersey Fire and Rescue Association, the findings of which were published (sic) on 4 December 2018?"*

*Who authorised the decision to appoint James Goudie for this case?"*

8. On 19 February 2019 the SPA responded to the Revised Request in the following terms (the **Revised Response**):

*"The engagement of legal services in relation to the recent Fire and Rescue Service Association Employment Tribunal Case lies with the Law Officers' Department.*

*The Law Officers' Department is not a scheduled public authority under the Freedom of Information (Jersey) Law 2011...and therefore there is no right under Article 8 of the FOI Law to request information held by the Law Officers' Department.*

*The Law Officer's (sic) Department have noted that they intend to release financial data in relation to the Jersey Fire and Rescue Association tribunal case after legal proceedings have concluded".*

9. The Complainant's Final Request is in the following terms:

*"Please could you make available to me any documentation, letter, email or hardcopy correspondence to which the following individuals are party:*

*Jonathan Donovan  
Mark Littler  
Len Norman  
Tracey Vallois*

*Date Range – 01/07/17 to date*

*Key Words – James Goudie QC  
James Goudie  
SJFRS  
Employment Tribunal  
NISA  
Non Impairment of Service Agreement"*

10. On 15 April 2019 the SPA responded to the Final Request in the following terms (the **Final Response**):

*"A search was performed using the Government of Jersey's email archiving system for emails sent or received by the four individual names in the request. The search has been performed using the following keywords:*

- *Goudie*
- *SJFRS Employment Tribunal*
- *Non Impairment of Service Agreement*

*Attached are relevant emails retrieved from the Government of Jersey's email archiving system that fall within the above parameters. Emails have been removed where exemptions apply (details below). Redactions have also been applied to the emails provided where required...*

*A search was also undertaken using the keyword "NISA". This search resulted in 575 emails.*

*In excess of six hours had, at the point of search, already been spent processing this request and it was estimated that to complete work on retrieval and review of emails including the keyword NISA would exceed the 12.5 working hour limit of the Freedom of Information (Jersey) Law 2011 and Regulations. This keyword search, therefore, will not be processed further.*

*The named individuals confirmed that they held no hardcopy documentation or correspondence which fell in scope of the request.*

*Exemptions applied*

*Article 25 Personal information*

*(1) Information is absolutely exempt information if it constitutes personal data of which the applicant is the data subject as defined in the Data Protection (Jersey) Law 2018.*

*(2) Information is absolutely exempt information if –*

*(a) it constitutes personal data of which the applicant is not the data subject as defined in the Data Protection (Jersey) Law 2018; and*

*(b) its supply to a member of the public would contravene any of the data protection principles, as defined in that Law.*

*Article 25 is an absolute exemption and has been applied to personal data, including the redaction of details of staff below a certain civil servant grade who therefore have a legitimate expectation of privacy.*

*Article 31 Advice by the Bailiff, Deputy Bailiff or a Law Officer*

*Information is qualified exempt information if it is or relates to the provision of advice by the Bailiff, Deputy Bailiff or the Attorney General or the Solicitor General.*

*Article 32 Legal professional privilege*

*Information is qualified exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.*

*Public Interest Test*

*The Scheduled Public Authority (SPA) is withholding the release of certain emails under Articles 31 and 32. Articles 31 and 32 are qualified exemptions, which means that a public interest test is required to be undertaken by the SPA. It is therefore necessary for the SPA to examine the circumstances of the case. The underlying purpose of the confidentiality inherent within Article 31 and 32 is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from the content of the advice. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.*

*Following assessment the SPA has to decide whether, on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Although there is a need for transparency and accountability by public authorities, the public interest does not outweigh the SPA's requirements to maintain legal professional and Law Officer privilege respectively.*

*Additional article referenced*

*Article 16 A scheduled public authority may refuse to supply information if cost excessive*

*(1) A scheduled public authority that has been requested to supply information may refuse to supply the information if it estimates that the cost of doing so would exceed an amount determined in the manner prescribed by Regulations.*

*Regulation 2 (1) of the Freedom of Information (Costs) (Jersey) Regulations 2014 allows an authority to refuse a request for information where the estimated cost of dealing with the request would exceed the specified amount of the cost limit of £500. This is the estimated cost of one person spending 12.5 working hours in determining whether the department holds the information, locating, retrieving and extracting the information.*

*The work required to finish the processing of your request in order to extract the relevant information includes review of all emails, elimination of duplicates and removal of any/all emails that are not relevant to your request. This would also include work required in the identification of those emails that have attachments and re-locating these from the backup system so they can be extracted and included."*