

# GUIDANCE NOTE

## **Freedom of Information**

The Guide to the Freedom of Information (Jersey) Law, 2011



# CONTENTS

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<b>What is the Freedom of Information Law?</b>	<b>5</b>
In brief...	5
What is the Freedom of Information Law for?	6
What are the principles behind the Freedom of Information Law?	6
Are we covered by the Freedom of Information Law?	7
When is information covered by the Freedom of Information Law?	7
Who can make a freedom of information request?	8
What are our obligations under the Freedom of Information Law?	8
What do we need to tell people about the Freedom of Information Act?	9
How does the Freedom of Information Law affect data protection?	9
How does the Freedom of Information Law affect copyright and intellectual property?	10
What other laws may we need to take into account when applying the Freedom of Information Law?	10
<b>What should we tell the public?</b>	<b>11</b>
In brief...	11
Do we need to produce our own information index?	11
How should we comply with the Article 7 requirement for an Information Index?	11
Why should we publish the Information Index, rather than simply responding to requests?	12
Does the information index and other information have to be on a website?	12
<b>What should we do when we receive a request?</b>	<b>13</b>
In brief...	13
What makes a request valid?	14



Can a question be a valid request?	14
Should States Questions be treated as requests under the Law?	15
When should we deal with a request as a freedom of information request?	15
What are the timescales for responding to a request for information?	16
What should we do when we receive a request?	16
What if we are unsure what's being asked for?	17
What happens if we don't have the information?	18
It will take us a long time to find the information. Can we have extra time?	18
Do we have to tell them what information we have?	18
Do we have to release the information?	19
What if the information is inaccurate?	19
Can we change or delete information that has been requested?	19
In what format should we give the applicant the information?	19
Can we charge for the information?	20
Is there anything else we should consider before sending the information?	20

## **When can we refuse a request?** 21

In brief...	21
When can we refuse a request on the grounds of cost?	22
How do we work out whether the cost limit would be exceeded?	23
What if we think complying with the request would exceed the cost limit?	23
When can we refuse a request as vexatious?	24
When can we refuse a request because it is repeated?	24
What if we want to refuse a request as vexatious or repeated?	25
When can we withhold information under an exemption?	25
When can we use an exemption to refuse to say whether we have the information?	26
What exemptions are there?	27
What is 'prejudice' and how do we decide whether disclosure would cause this?	27
'Absolute' Exemptions:	28
'Qualified' Exemptions:	31



Can we withhold information about people who have died?	35
Can we have extra time to consider the request?	35
When and how do we apply the public interest test?	36
Is there anything else we need to know about exemptions?	37
If we are relying on an exemption to refuse the request, what do we need to tell the applicant?	37
What do we have to include in a Refusal Notice?	38
What if we are withholding only parts of a document?	38
What if the applicant is unhappy with the outcome?	38

## **What happens when someone complains?** 40

In brief...	40
When might the Information Commissioner receive an appeal about how we have handled a request?	41
What can the Information Commissioner do about a complaint?	41
What should we do if someone complains to the Information Commissioner about how we have handled a request?	41
Can we introduce a new reason for refusing a request at this stage?	42
What should we do if we receive a Decision Notice from the Information Commissioner?	42
What does it cost to appeal against the Information Commissioner's decision?	43
What happens when the Information Commissioner's decision is appealed?	43
What about poor practice that doesn't amount to a breach of the Law?	43
Are there criminal offences in the Freedom of Information Law?	44

## **More information** 45



# WHAT IS THE FREEDOM OF INFORMATION LAW?

## In brief...

The Freedom of Information (Jersey) Law, 2011, (“the **Law**”) provides public access to information held by Scheduled Public Authorities (“**SPAs**”).

It creates a legal basis which entitles members of the public to request information from SPAs.

The Law covers any recorded information that is held by a SPA in Jersey.

SPAs are listed within Schedule 1 of the Law as:

1. The States Assembly including the States Greffe
2. A Minister
3. A committee or other body established by resolution of the States or by or in accordance with standing orders of the States Assembly
4. A department established on behalf of the States
5. The Judicial Greffe
6. The Viscount’s Department
- 6(a). Andium Homes Limited  
(registered as a limited company on 13th May 2014 under Registration number 115713).
7. The States of Jersey Police Force
8. A Parish (effective from 1st September, 2015)

Recorded information includes printed documents, computer files, letters, emails, photographs, and sound or video recordings. It is defined in the law as meaning ‘information recorded in any form.’

The Law does not give people access to their own personal data (information about themselves) such as their health records or credit reference file. If a member of the public wants to see information that a SPA holds about them, they should make a subject access request under the Data Protection (Jersey) Law, 2018 (“the **Data Protection Law**”), and which is outside the scope of this guidance note.



*In more detail...*

## What is the Freedom of Information Law for?

Freedom of Information is not a new concept in Jersey and the development of specific legislation to enshrine the public's rights to information held by SPAs has been under consideration in Jersey for many years. In 1994 a Special Committee was tasked to investigate 'the issues involved in establishing, by law, a general right of access to official information by members of the public' and this led to adoption of the Jersey 'Code of Practice on Public Access to Official Information,' ("the original **Code of Practice**") which came into force in January, 2000.

Whilst the original Code of Practice provided a framework for members of the public to make request to SPAs, over time it was thought desirable to provide the Jersey public with statutory, defined rights of access to official information such as are now enjoyed in more than 50 other jurisdictions.

It followed that the States Strategic Plan for 2009-2014 contained an aim to:

*'Create a responsive government that provides good and efficient services and sound infrastructure and which embraces a progressive culture of openness, transparency and accountability to the public.'*

This aim was further supported by statements within the plan that government would:

*'Work to improve the public trust in government and establish a system of greater transparency, public participation, and collaboration to strengthen our democracy and promote efficiency and effectiveness in government.'*

"Unnecessary secrecy in government leads to arrogance in governance and defective decision-making" - Your Right to Know.

It is a fact that SPAs spend money collected from taxpayers, and make decisions that can significantly affect many people's lives. Access to information held by SPAs by the public assists in making SPAs more accountable for their actions and allows public debate to be better informed and, accordingly, more productive.

Access to official information can also improve public confidence and trust if government and public sector bodies are seen as being open. In a 2011 survey carried out on behalf of the UK Information Commissioner's Office, 81% of public bodies questioned agreed that the Freedom of Information Act 2000 ("the **UK Act**") had increased the public's trust in their organisation.

## What are the principles behind the Freedom of Information Law?

The main principle behind freedom of information legislation is that people have a right to know about the activities of SPAs, unless there is a good reason for them not to. This is sometimes described as a presumption or assumption in favour of disclosure. The Law is also sometimes described as purpose and applicant blind.



This means that:

- Everybody has a right to access official information. Disclosure of information should be the default – in other words, information should be kept private only when there is a good reason and it is permitted by the Law;
- an applicant (requester) does not need to provide a reason for wanting the information. On the contrary, you must justify refusing them information;
- you must treat all requests for information equally, except under some circumstances relating to vexatious requests and personal data. The information someone can get under the Law should not be affected by who they are. You should treat all applicants equally, whether they are journalists, local residents, public authority employees, or foreign researchers; and
- because you should treat all applicants equally, you should only disclose information under the Law if you would disclose it to anyone else who asked. In other words, you should consider any information you release under the Law as if it were being released to the world at large.

This does not prevent you voluntarily giving information to certain people outside the provisions of the Law.

## **Are we covered by the Freedom of Information Law?**

The Law only covers SPAs. Schedule 1 of the Law contains a list of the bodies that are classed as SPAs in this context. Some of these bodies are listed by name, such as the States Assembly including the States Greffe. Others are listed by type, for example an administration of the States and a committee or other body established by resolution of the States.

The ambit of the Law has also been extended by Regulations to include certain private companies of which the States of Jersey are shareholder, for example Andium Homes. It is anticipated that further entities will be included within the ambit of the Law in due course.

## **When is information covered by the Freedom of Information Law?**

The Law covers all recorded information held by a SPA. It is not limited to official documents and it covers, for example, drafts, emails, notes, recordings of telephone conversations and CCTV recordings. Nor is it limited to information you create, so it also covers, for example, letters you receive from members of the public, although there may be a good reason not to release them.

Requests are sometimes made for less obvious sources of recorded information, such as the author and date of drafting, found in the properties of a document (sometimes called meta-data). This information is recorded so is covered by the Law and you must consider it for release in the normal way.

Similarly, you should treat requests for recorded information about the handling of previous freedom of information requests (meta-requests) no differently from any other request for recorded information.

The Law does not cover information that is in someone's head. If a member of the public asks for information, you only have to provide information you already have in recorded form. You do not have to create new information or find the answer to a question from staff who may happen to know it.

The Law covers information that is held on behalf of a SPA even if it is not held on the authority premises. For example, you may keep certain records in off-site storage, or you may send out certain types of work to be processed by a contractor. Similarly, although individual States Members are not SPAs in their own right (save for Ministers), they do sometimes hold information about States' business on behalf of States Departments.



Where you subcontract public services to an external company, that company may then hold information on your behalf, depending on the type of information and your contract with them. Some of the information held by the external company may be covered by the Law if you receive a freedom of information request. The company does not have to answer any requests for information it receives, but it would be good practice for them to forward the requests to you. The same applies where you receive services under a contract, for example, if you consult external consultants.

The Law does not cover information you hold solely on behalf of another person, body or organisation. This means employees' purely private information is not covered, even if it is on a work computer or email account; nor is information you store solely on behalf of a trade union, or an individual politician.

## Who can make a freedom of information request?

Anyone can make a freedom of information request – they do not have to be Jersey citizens, or resident in Jersey. Freedom of information requests can also be made by organisations, for example a newspaper, a campaign group, or a company. Employees of a SPA can make requests to their own employer, although good internal communications and staff relations will normally avoid the need for this.

Applicants should direct their requests for information to the SPA they think will hold the information. The SPA that receives the request is responsible for responding. Requests should not be sent to the Office of the Information Commissioner (“the **OIC**”) except where the applicant wants information held by the Information Commissioner.

## What are our obligations under the Freedom of Information Law?

You have two main obligations under the Law and Code of Practice issued by the Information Commissioner in accordance with Article 44 of the Law (“the **Article 44 Code of Practice**”). You must:

Respond to all requests for information.

AND

Comply with the Article 44 Code of Practice

The Article 44 Code of Practice gives recommendations for SPAs about their handling of requests. It covers the situations in which you should give advice and assistance to those making requests; the complaints procedures you should put in place; and various considerations that may affect your relationships with other public bodies or third parties.

Whilst the Article 44 Code of Practice is not directly legally binding failure to comply with the Code is likely to lead to breaches of the Law. In particular there is a link between following the Article 44 Code of Practice and complying with Article 12 of the Law requiring you to provide applicants with reasonable advice and assistance. This includes advice and assistance to members of the public before they have made their request.





## What do we need to tell people about the Freedom of Information Act?

Making information available is only valuable to the public if they know they can access it, and what is available. You should:

- publicise your commitment to sharing information and provide examples of what is available.
- publicise the fact that people can make freedom of information requests to you;
- provide contact details for making a request, including a named contact and phone number for any enquiries about the Law; and
- tell people who you think may want information that they can make a request, and tell them how to do this.

You should communicate with the public in a range of ways. This is likely to include websites, noticeboards, leaflets, or posters in places where people access your services.

You must also make your staff, contractors, customers or others you have contact with aware of how the Law may affect them. You should make it clear that you cannot guarantee complete confidentiality of information and that as a public body you must consider for release any information you hold if it is requested. You will need to consider each request individually, but it is worthwhile having policies or guidelines for certain types of information, such as information about staff.

## How does the Freedom of Information Law affect data protection?

The Data Protection Law gives rules for handling information about people. It includes the right for people to access their personal data. The Freedom of Information Law and the Data Protection Law come under the heading of information rights and are regulated by the Information Commissioner.

When a person makes a request for their own information, this is a subject access request under the Data Protection Law. However, members of the public often wrongly think it is the Freedom of Information Law that gives them the right to their personal information, so you may need to clarify things when responding to such a request.

The Data Protection Law exists to protect people's right to privacy, whereas the Freedom of Information Law is about getting rid of unnecessary secrecy. These two aims are not necessarily incompatible but there can be a tension between them, and applying them sometimes requires careful judgement.

When someone makes a request for information that includes someone else's personal data, you will need to carefully balance the case for transparency and openness under the Freedom of Information Law against the data subject's right to privacy under the Data Protection Law in deciding whether you can release the information without breaching the data protection principles.



## **How does the Freedom of Information Law affect copyright and intellectual property?**

The Law does not affect copyright and intellectual property rights that give owners the right to protect their original work against commercial exploitation by others. If someone wishes to re-use public sector information for commercial purposes, then this should be discussed with the applicant should they seek permission to do so.

When giving access to information under the Law, you cannot place any conditions or restrictions on that access. For example, you cannot require the applicant to sign any agreement before they are given access to the information. However, you can include a copyright notice with the information you disclose. You may also be able to make a claim in the courts if the applicant or someone else uses the information in breach of copyright.

## **What other laws may we need to take into account when applying the Freedom of Information Law?**

The Freedom of Information Law may work alongside other laws.

Some of the exemptions in the Law that allow SPAs to withhold information use principles from common law, for example the Article 22 exemption refers to the law of confidence.

Also, Article 29 of the Law allows information to be withheld when its disclosure is prohibited under other legislation, and Article 23 can exempt information that is accessible to an applicant using procedures in other legislation.



# WHAT SHOULD WE TELL THE PUBLIC?

## **In brief...**

The Law can, through Regulations, provide a statutory requirement for SPAs to adopt and maintain a publication scheme however such Regulations have not yet been introduced. Therefore there is currently no legal requirement for SPAs to proactively publish information, although many SPAs may find it beneficial to do so.

However, Article 7 of the Law does direct that each SPA 'must prepare and maintain an index of the information that it holds' ("**Information Index**"). This requirement is further reinforced by paragraph 10 of the Code of Practice which links the information index to the Article 12 duty to provide advice and assistance to the public. It is therefore good practice for SPAs to maintain and publish an index of information that it holds as a means of assisting a member of the public to ascertain the 'nature and extent of the information held by a SPA.'

It is also considered good practice for SPAs to proactively publish their preferred means of contact to which members of the public can send requests for information. This is likely to be the address and contact points for the central States of Jersey Freedom of Information Unit ("the **Central FOI Unit**") who will record, reference and log requests prior to directing them to the SPA to whom the request is addressed. In addition SPAs should also publish details and contact points for Freedom of Information staff/advisers within departments who can directly assist members of the public who may have questions relating to information held by the SPA.

## *In more detail...*

## **Do we need to produce our own information index?**

Yes, every SPA, in order to facilitate the implementation of the Law, must prepare and maintain an index of the information that it holds.

The Information Index may consist of a description of the different classes of information held by the SPA and does not necessitate the need for a full individual record of every single document or item of information held. It may therefore be possible for SPAs to utilise and adapt information audits and retention schedules in order to formulate their information index.

## **How should we comply with the Article 7 requirement for an Information Index?**

You should create your own Information Index and you need not tell the Information Commissioner that you have done so. The Information Index needs to be available to the public and therefore it can assist to publish it online.



It is anticipated that the Central FOI Unit will provide a central online webpage where all States run SPAs (not States of Jersey Police, Andium Homes for example) can make their Information Indexes available and if SPAs have their own website then they should provide a link to the relevant page on the Central FOI Unit's website. It will also be considered good practice to retain hard copy versions of the Information Index for examination by the public on request.

You should publicise the fact that information is available to the public under the Law and that an Information Index is available on your website, public notice board, or in any other way you normally communicate with the public to assist with making requests.

## **Why should we publish the Information Index, rather than simply responding to requests?**

The Law is designed to increase transparency. Members of the public should be able to routinely access information that is in the public interest and is safe to disclose. Also, without an Information Index, members of the public may not know what information you have available.

## **Does the information index and other information have to be on a website?**

As it is intended that the States provide a central webpage of each Information Index held by States run SPAs this will be the easiest way for most people to access the Information Index and this may reduce your workload. Whilst there is no legal requirement for SPAs to adopt a formal publication scheme it may be considered useful and timesaving to publish as much information as possible online and which may help to prevent similar requests being made by members of the public.

However some information may not be suitable for uploading to a website, such as information that is held only in hard copy or very large files. The Information Commissioner appreciates that some SPAs may not have the technical resources to support complex or regularly updated websites.

However all information, whether available online or not, must be listed in your Information Index. A SPA should provide appropriate contact details so people can make a request to see a hard copy of the index, as a means of it being available to people who lack access to the internet.

Some information may be available to view in person only, but this should be reserved for those exceptional circumstances where it is the only practicable option. For example, a large or fragile historical map may be difficult to copy. You should provide contact details and promptly arrange an appointment for the requester to view the information they have asked for.

The Information Commissioner recommends that you give the contact details of post holders who are responsible for specific types or pieces of information because they can easily access that information in their normal work and answer any questions about it. Making defined post holders responsible for specific pieces of information helps keep the information you publish up to date.



# WHAT SHOULD WE DO WHEN WE RECEIVE A REQUEST FOR INFORMATION?

## **In brief...**

Anyone has a right to request information from a SPA and an applicant has:

- A general right to be supplied with the information; and
- Except as otherwise provided in the Law, the SPA has a duty to supply the person with the information.

Any request for information under the Law has to be dealt with 'promptly' and, in any event, within a maximum of 20 working days following receipt of the request.

For a request to be valid under the Law it must be in writing, but applicants do not have to mention the Law or direct their request to a designated member of staff. It is good practice to provide the contact details of your freedom of information officer or team, if you have one, but you cannot ignore or refuse a request simply because it is addressed to a different member of staff. Any letter or email to a SPA asking for information is a request for recorded information under the Law.

This doesn't mean you have to treat every enquiry formally as a request under the Law. It will often be most sensible and provide better customer service to deal with it as a normal customer enquiry under your usual customer service procedures, for example, if a member of the public wants to know what date their rubbish will be collected, or whether a school has a space for their child.

The provisions of the Law need to come into force only if:

- you cannot provide the requested information straight away; or
- the applicant makes it clear they expect a response under the Law.

## ***In more detail...***

Anyone can make a request for information, including members of the public, journalists, lawyers, businesses, charities and other organisations.

An information request can also be made to any part of a SPA. You may have a designated information requests team to whom the public can make their requests. However, members of the public will often address their requests to staff they already have contact with, or who seem to know most about the subject of their request.



When you receive a request you have a legal responsibility to identify that a request has been made and handle it accordingly. So staff who receive customer correspondence should be particularly alert to identifying potential requests, even if such correspondence does not specifically say that it is a request under the Law.

You should also be aware of other legislation covering access to information, including the Data Protection Law.

## What makes a request valid?

To be valid under the Law, the request must:

- be in writing. This could be a letter or email. Requests can also be made via the web, or even on social networking sites such as Facebook or Twitter if your public authority proactively use such communication methods. However the SPA should advise any applicant of the preferred means of contact to do so other than through social networking sites;
- The request must state the applicant's name. The Law treats all requesters alike, so you should not normally seek to verify the applicant's identity. However, you may decide to check their identity if it is clear they are using a pseudonym or if there are legitimate grounds for refusing their request and you suspect they are trying to avoid this happening, for example because their request is vexatious or repeated. Remember that a request can be made in the name of an organisation, or by one person on behalf of another, such as a legal representative on behalf of a client;
- include an address for correspondence. This need not be the person's residential or work address – it can be any address at which you can write to them, including a postal address or email address;
- describe the information requested. Any genuine attempt to describe the information will be enough to trigger the Law, even if the description is unclear, or you think it is too broad or unreasonable in some way. The Law covers information not documents, so an applicant does not have to ask for a specific document (although they may do so). They can, for example, ask about a specific topic and expect you to gather the relevant information to answer their enquiry, or they might describe other features of the information (e.g. author, date or type of document).

This is not a hard test to satisfy. Almost anything in writing which asks for information will count as a request under the Law. The Law contains other provisions to deal with requests which are too broad, unclear or unreasonable.

Even if a request is not valid under the Law, this does not necessarily mean you can ignore it. Some requests for information can be made verbally and dealt with as 'business as usual,' however always remember that you also have an obligation to provide advice and assistance to applicants. Where somebody seems to be requesting information but has failed to make a valid freedom of information request, you should draw their attention to their rights under the Law and tell them how to make a valid request.

## Can a question be a valid request?

Yes, a question can be a valid request for information. It is important to be aware of this so that you can identify requests and send them promptly to the correct person.



### Example 1

*“Please send me all the information you have about the application for a 24-hour licence at the Midnite Bar.”*

*“Re. Midnite Bar licence application. Please explain, why have you decided to approve this application?”*

*Both are valid requests for information about the reasons for the decision.*

Under the Law, if you have information in your records that answers the question you should provide it in response to the request. You are not required to answer a question if you do not already have the relevant information in recorded form.

In practice this can be a difficult area for SPAs. Many of those who ask questions just want a simple answer, not all the recorded information you hold. It can be frustrating for applicants to receive a formal response under the Law stating that you hold no recorded information, when this doesn't answer their simple question. However, applicants do have a right to all the relevant recorded information you hold, and some may be equally frustrated if you take a less formal approach and fail to provide recorded information.

The best way round this is usually to speak to the applicant, explain to them how the Law works, and find out what they want. You should also remember that even though the Law requires you to provide recorded information, this doesn't prevent you providing answers or explanations as well, as a matter of normal customer service.

The Information Commissioner recognises that some SPAs may initially respond to questions informally, but we will expect you to consider your obligations under the Law as soon as it becomes clear that the applicant is dissatisfied with this approach. Ultimately, if there is an appeal to the Information Commissioner, he/she will make a decision based on whether recorded information is held and has been provided.

## Should States Questions be treated as requests under the Law?

States Questions are part of States proceedings and must not be treated as requests for information under the Law; to do so would infringe States members' privilege.

## When should we deal with a request as a freedom of information request?

You can deal with many requests by providing the requested information in the normal course of business. If the information is included on a public website, you should give this out automatically, or provide a link to where the information can be accessed.

If you need to deal with a request more formally, it is important to identify the relevant legislation:

- If the person is asking for their own personal data, you should deal with it as a subject access request under the Data Protection Law.

Any other non-routine request for information you hold should be dealt with under the Freedom of Information Law.



## What are the timescales for responding to a request for information?

Your main obligation under the Law is that you must 'deal with a request for information promptly,' with a time limit acting as the longest time you can take. Under the Law, SPAs may take up to 20 working days to respond, counting the first working day after the request is received as the first day.

Working day means any day other than a Saturday, Sunday, or public holidays and bank holidays; this may or may not be the same as the days you are open for business or staff are in work.

The time allowed for complying with a request starts when your organisation receives it, not when it reaches the freedom of information officer or other relevant member of staff to whom such requests are ordinarily delegated.

Regulations made under the Law may allow you extra time in which to respond. The ability to do so is only available when it is considered 'reasonable in all circumstances of the case,' and is not to exceed 65 working days following the day on which the request was received.

If seeking an extension you should still provide a written response to the applicant within the standard time limit. This should include reasons as to why you are seeking the extension and projected time for completion. In all cases where extension is sought it will be necessary to create a written record of why you consider it to be 'reasonable in all circumstances of the case.'

In terms of what is 'reasonable' the Law does not provide any formal definition and much will depend on the individual circumstances of the request. This may be linked to a need to obtain legal advice, recover archived information or school holiday closure making information unavailable. However in all cases it will be necessary for the SPA to justify 'reasonable' use of any extension which may be subject of later review by the Information Commissioner should any Appeal process occur.

However SPAs should always strive to respond 'promptly' and within the statutory 20 day limit, and that the use of any extension to response time, up to the maximum 65 days, should be capable of being fully justified and evidenced as 'reasonable' under the law

For further information, read our more detailed guidance:

- Time limits for compliance under the FOIL

## What should we do when we receive a request?

First, read the request carefully and make sure you know what is being asked for. You must not simply give the applicant information you think may be helpful; you must consider all the information that falls within the scope of the request, so identify this first. Always consider contacting the applicant to check that you have understood their request correctly.

You should read a request objectively. Do not get diverted by the tone of the language the applicant has used, your previous experience of them (unless they explicitly refer you to this) or what you think they would be most interested in.





### Example 2

*“Approving the 24-hour licence at the Midnite Bar - can you provide me the details of this completely ridiculous licence application?”*

*This may still be a valid request, in spite of the language.*

## What if we are unsure what’s being asked for?

Requests are often ambiguous, with many potential interpretations, or no clear meaning at all. If you can’t answer the request because you are not sure what is being requested, you must contact the applicant as soon as possible for clarification.

You do not have to deal with the request until you have received whatever clarification you reasonably need. However, you must consider whether you can give the applicant advice and assistance to enable them to clarify or rephrase their request. For example, you could explain what options may be available to them and ask whether any of these would adequately answer their request.



### Example 3

*“You have asked for all expenses claims submitted by Mrs Jones and dates of all meetings attended by Mrs Jones in June, July or August last year.*

*This could mean:*

- A) all expenses claims Mrs Jones ever submitted, plus dates of meetings she attended in June, July and August; or*
- B) all expenses claims Mrs Jones submitted in June, July or August, and dates of meetings she attended in the same months. Please let us know which you mean.”*



### Example 4

*“You have asked for a copy of our risk assessment policy. We do not have a specific policy relating to risk assessment. However, the following policies include an element of risk assessment:*

- \* Health and Safety at Work policy*
- \* Corporate Risk Strategy*
- \* Security Manual*

*Please let us know whether you would be interested in any of these documents or what risk assessment information you are interested in seeing.*

The time for compliance will not begin until you have received the necessary clarification to allow you to answer the request.



## What happens if we don't have the information?

The Law only covers recorded information you hold. However if someone makes a request for information and you do not hold it then the Law directs that the SPA must 'inform the applicant accordingly.'

When compiling a response to a request for information, you may have to draw from multiple sources of information you hold, but you don't have to make up an answer or find out information from elsewhere if you don't already have the relevant information in recorded form.

Before you decide that you don't hold any recorded information, you should make sure that you have carried out adequate and properly directed searches, and that you have convincing reasons for concluding that no recorded information is held. If an applicant appeals to the Information Commissioner that you haven't identified all the information you hold, we will consider the scope, quality and thoroughness of your searches and test the strength of your reasoning and conclusions.

If you don't have the information the applicant has asked for, you can comply with the request by telling them this, in writing. If you know that the information is held by another SPA, you should advise the applicant to redirect their request. The Article 44 Code of Practice provides advice on good practice in assisting applicants to redirect requests for information.

## It will take us a long time to find the information. Can we have extra time?

The Law does not allow extra time for searching for information. However, if finding the information and drawing it together to answer the request would be an unreasonable burden on your resources and exceed a set costs limit, you may be able to refuse the request. Likewise, you may not have to confirm whether or not you hold the information, if it would exceed the costs limit to determine this.

## Do we have to tell them what information we have?

There is no duty to confirm that you hold the requested information but if a person makes a request for information he/she has a general right to be supplied with the information AND except as provided by the Law, the SPA has a duty to supply the person with the information.

If you are giving out all the information you hold, this will fulfil both the right of an individual to be supplied and the duty of the SPA to provide the information. If you are refusing all or part of the request, you will need to say why you are refusing the request.

If you do not hold the information then you must inform the applicant accordingly.

In some circumstances, you can refuse to confirm or deny whether you hold any information which would normally fall within Part 4 or 5 of the Law, this is known as a "neither confirm nor deny" response ("**NCND**").

For further information, read our more detailed guidance:

- When to refuse to confirm or deny that information is held



## **Do we have to release the information?**

Yes, under the law you must release the information unless there is good reason not to.

## **What if the information is inaccurate?**

The Law covers recorded information, whether or not it is accurate. You cannot refuse a request for information simply because you know the information is out of date, incomplete or inaccurate. To avoid misleading the applicant, you should normally be able to explain to them the nature of the information, or provide extra information to help put the information into context.

When considering complaints against a SPA, the Information Commissioner will normally reject arguments that inaccurate information should not be disclosed. However, in a few cases there may be strong and persuasive arguments for refusing a request on these grounds if these are specifically tied to an exemption in the Law. It will be up to you to identify such arguments.

## **Can we change or delete information that has been requested?**

No. You should normally disclose the information you held at the time of the request. You are allowed to make routine changes to the information while you are dealing with the request as long as these would have been made regardless of the request. However, it would not be good practice to go ahead with a scheduled deletion of information if you know it has been requested.

You must not make any changes or deletions as a result of the request, for example, because you are concerned that some of the information could be embarrassing if it were released. This is a criminal offence.

For further information, read our more detailed guidance:

- Retention and destruction of requested information

## **In what format should we give the applicant the information?**

There are a number of ways you could make information available, including by email, as a printed copy, on a disk, or by arranging for the applicant to view the information. Normally, you should send the information by whatever means is most reasonable. For example, if the applicant has made their request by email, and the information is an electronic document in a standard form, then it would be reasonable for you to reply by email and attach the information.

However, applicants may seek to request and specify their preferred means of communication, in their initial request. So you should check the original request for any preferences before sending out the information bearing in mind that the obligation on SPAs is to supply the “information by any reasonable means”.

You may also want to consider whether you would like to include anything else with the information, such as a copyright notice for third party information, or explanation and background context.



Remember that disclosures under the Law are 'to the world', so anyone may see the information.

Article 11 of the Law states that a scheduled public authority may comply with a request for information by supplying the information by any reasonable means.

## **Can we charge for the information?**

For requests which fall within the cost limit (£500 in the case of all SPAs save for the £200 in respect of the Parishes), no charges or fees can be levied to the applicant.

Where a SPA considers that a request is estimated to be over the cost limit, SPAs will be expected to assist the applicant in redefining a request to bring it within the cost limit. If the request is re-defined in this way then a SPA may not charge any fee.

In circumstances where the request exceeds the cost limit but the SPA exercises its discretion and wishes to provide the information to the applicant, then the whole request may be subject to a fee, calculated at the same hourly rate, and with the ability to charge for disbursements. In this instance, the SPA will retain a discretion to either fully recharge the costs, or to charge a reduced charge, or levy no charge. In such circumstances then you should send the applicant a Fees Notice. You do not have to send the information until you have received the fee. The time limit for complying with the request excludes the time spent waiting for the fee to be paid. In other words, you should issue the Fees Notice within the standard time for compliance. Once you have received the fee, you should then send out the information within the time remaining as soon as possible.

## **Is there anything else we should consider before sending the information?**

You should double check that you have included the correct documents, and that the information you are releasing does not contain unnoticed personal data or other sensitive details which you did not intend to disclose.

This might be a particular issue if you are releasing an electronic document. Electronic documents often contain extra hidden information or 'metadata' in addition to the visible text of the document. For example, metadata might include the name of the author, or details of earlier draft versions. In particular, a spread-sheet displaying information as a table will often also contain the original detailed source data, even if this is not immediately visible at first glance.

You should ensure that staff responsible for answering requests understand how to use common software formats, and how to strip out any sensitive metadata or source data (e.g. data hidden behind pivot tables in spread-sheets).

See the UK National Archives 'Redaction Toolkit' which contains useful advice and further information.



# WHEN CAN WE REFUSE A REQUEST?

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## **In brief...**

An applicant may ask for any information that is held by a SPA. However, this does not mean you are always obliged to provide the information. In some cases, there will be a good reason why you should not make public some or all of the information requested.

You can refuse an entire request under the following circumstances:

- It would cost too much or take too much staff time to deal with the request.
- The request is vexatious.
- The request repeats a previous request from the same person.

In addition, the Law contains a number of exemptions that allow you to withhold information from an applicant. In some cases it will allow you to refuse to confirm or deny whether you hold information.

Some exemptions relate to a particular type of information, for instance, information intended for future publication. Other exemptions are based on the harm that would arise or would be likely arise from disclosure, for example, if disclosure would be likely to prejudice a criminal investigation or prejudice someone's commercial interests.

There is also an exemption for personal data if releasing it would be contrary to the Data Protection Law.

You can automatically withhold information because an exemption applies only if the exemption is 'absolute'. This may be, for example, information supplied in confidence, which is covered by an absolute exemption. However, most exemptions are not absolute but require you to apply a public interest test. This means you must consider the public interest arguments before deciding whether to disclose the information. So you may have to disclose information in spite of an exemption, where it is in the public interest to do so.

If you are refusing all or any part of a request, you must send the applicant a written Refusal Notice. You will need to issue a Refusal Notice if you are either refusing to say whether you hold information at all, or confirming that information is held but refusing to release it.



*In more detail...*

## **When can we refuse a request on the grounds of cost?**

The Law recognises that freedom of information requests are not the only demand on the resources of a SPA. They should not be allowed to cause a drain on your time, energy and finances to the extent that they negatively affect your normal public functions.

Currently, the cost limit for complying with a request or a linked series of requests from the same person or group is set at £500 for all SPAs. You can refuse a request if you estimate that the cost of compliance would exceed this limit. This provision is found at Article 16(1) of the Law and the Freedom of Information (Costs) (Jersey) Regulations 2014 (“the **Costs Regulations**”).

(It should be noted that when the Parishes are included within the Law the cost limit will be £200 or 5 hours @ £40 per hour.)

The Cost Regulations set out the circumstances in which SPAs can refuse to supply information to a request if the costs of doing so would be excessive.

When calculating the costs of complying, you can aggregate (total) the costs of all related requests you receive within 60 consecutive working days from the same person or from people who seem to be working together.

How do we work out whether the cost limit would be exceeded?

You are only required to estimate whether the limit would be exceeded. You do not have to do the work covered by the estimate before deciding to refuse the request. However, the estimate must be reasonable and in accordance with the Costs Regulations.

When estimating whether the limit would be exceeded, you can only take into account the cost of the following activities:

- determining whether you hold the information;
- finding the requested information, or records containing the information;
- retrieving the information or records; and
- extracting the requested information from records.

The biggest cost is likely to be staff time. You should rate staff time at £40 per person per hour, regardless of who does the work, including external contractors. This means a limit of 12.5 staff hours to equate to the £500 limit.

You cannot take into account the time you are likely to need to decide whether exemptions apply, to redact (edit out) exempt information, or to carry out the public interest test.

It may be possible to consider dealing with a request under Articles 21 (Vexatious Requests) and/or Article 22 (Repeated Requests) of the Law and in deciding whether or not information should be provided.

Please see Information Commissioner guidance notes entitled 'Dealing with vexatious requests' and 'Dealing with repeat requests' for further guidance on this point.



Note that although fees and the appropriate limit are both laid down in the same Regulations, the two things must not be confused:

- The cost of compliance and the appropriate limit relate to when a request can be refused.
- The fees are what you can charge when information is disclosed.

## What if we think complying with the request would exceed the cost limit?

If you wish to use Article 16 (1) (cost limit) of the Law as grounds for refusing the request, you should send the applicant a written Refusal Notice. This should state that complying with their request would exceed the appropriate cost limit. However, you should still say whether you hold the information, unless finding this out would in itself incur costs over the limit.

The Code of Practice issued by the Information Commissioner makes it a requirement for you to include an estimate of the costs in the Refusal Notice. This reflects the legal requirement of a SPA to provide the applicant with reasonable advice and assistance to refine (change or narrow) their request. This will generally involve explaining why the limit would be exceeded and what information, if any, may be available within the limits.



### Example 5

*"You have asked for all the details of expenses claims made for food or drink between 1995 and 2010.*

*No forms have been kept for the period before 1999. Between 1999 and 2006, these forms were submitted manually and are not stored separately or sorted by type of expenditure but are filed in date order along with other information Commissioners and bills. We estimate that we have at least 10,000 items in these boxes, and we would have to look at every page to identify the relevant information. Even at 10 seconds an item, this would amount to more than 27 hours of work. However, records since 2007 are kept electronically and we could provide these to you."*

You should not:

- give the applicant part of the information requested, without giving them the chance to say which part they would prefer to receive;
- fail to let the applicant know why you think you cannot provide the information within the cost limit;
- advise the applicant on the wording of a narrower request but then refuse that request on the same basis; or
- tell the applicant to narrow down their request without explaining what parts of their request take your costs over the limit. A more specific request may sometimes take just as long to answer. For instance, in the example above, if the applicant had later asked only for expenses claims relating to hotel room service, this would also have meant searching all the records.

If the applicant refines their request appropriately, you should then deal with this as a new request. The time for you to comply with the new request should start on the working day after the date you receive it.

If the applicant does not want to refine their request, but instead asks you to search for information up to the costs limit, you can do this if you wish, but the Law does not require you to do so.



## When can we refuse a request as vexatious?

As a general rule, you should not take into account the identity or intentions of an applicant when considering whether to comply with a request for information. You cannot refuse a request simply because it does not seem to be of much value. However, a minority of applicants may sometimes abuse their rights under the Law, which can threaten to undermine the credibility of the freedom of information system and divert resources away from more deserving requests and other public business.

You can refuse to comply with a request that is vexatious. If so, you do not have to comply with any part of it, or even confirm or deny whether you hold information. When assessing whether a request is vexatious, the Law permits you to take into account the context and history of a request, including the identity of the applicant and your previous contact with them if it is relevant. The decision to refuse a request often follows a long series of requests and correspondence.

A request may be vexatious if:

- The applicant has no real interest in the information sought; and
- The information is being sought for an illegitimate reason, which may include a desire to cause administrative difficulty or inconvenience.

Under Article 21, a request is not vexatious simply because the intention of the applicant is to:

- (a) To embarrass the SPA/another SPA/some third party; or
- (b) For a political purpose.

It is important to remember that it is the request that is considered vexatious, not the applicant. If after refusing a request as vexatious you receive a subsequent request from the same person, you can refuse it only if it also meets the criteria for being vexatious.

You should be prepared to find a request vexatious in legitimate circumstances, but you should exercise extreme care when refusing someone's rights in this way.

For further information, read our more detailed guidance:

- [Dealing with vexatious requests](#).

## When can we refuse a request because it is repeated?

Under Article 22 of the Law, you can refuse requests if they are repeated, whether or not they are also vexatious. You can normally refuse to comply with a request if it is identical or substantially similar to one you previously complied with from the same applicant. You cannot refuse a request from the same applicant just because it is for information on a related topic. You can do so only when there is a complete or substantial overlap between the two sets of information.

You cannot refuse a request as repeated once a 'reasonable interval' has elapsed between compliance with the previous request and the making of the current request. The 'reasonable interval' is not set down or defined within the Law but depends on the circumstances, including, for example, how often the information you hold changes.





#### Example 6

*"Please could you send me the latest copy of your register of interests? You kindly sent me a copy of this two years ago but I assume it may have been updated since then. Also I no longer have the copy you sent previously."*

This request is not repeated because a reasonable period has elapsed.

## What if we want to refuse a request as vexatious or repeated?

You should send the applicant a written Refusal Notice. If the request is vexatious or repeated, you need only state that this is your decision; you do not need to explain it further. However, you should keep a record of the reasons for your decision so that you can justify it to the Information Commissioner if an appeal is made.

If you are receiving vexatious or repeated requests from the same person, you can send a single Refusal Notice to the applicant, stating that you have found their requests to be vexatious or repeated (as appropriate) and that you will not send a written refusal in response to any further vexatious or repeated requests.

This does not mean you can ignore all future requests from this person. For example, a future request could be about a completely different topic, or have a valid purpose. You must consider whether the request is vexatious or repeated in each case or whether, in fact, it is a legitimate request under the Law.

For further information, read our more detailed guidance:

- Dealing with vexatious requests
- Dealing with repeat requests

## When can we withhold information under an exemption?

Exemptions exist to protect information that should not be disclosed, for example because disclosing it would be harmful to another person or it would be against the public interest.

The exemptions in Part 4 and 5 of the Law apply to information. This may mean that you can only apply an exemption to part of the information requested, or that you may need to apply different exemptions to different sections of a document or the information.

You do not have to apply an exemption. However, you must ensure that in choosing to release information that may be exempt, you do not disclose information in breach of some other law, such as disclosing personal information in breach of the Data Protection Law. Nor do you have to identify all the exemptions that may apply to the same information, if you are content that one applies.

You can automatically withhold information because an exemption applies only if the exemption is 'absolute'. However, most exemptions are not absolute but are 'qualified'. This means that before deciding whether to withhold information under an exemption, you must consider the public interest arguments. This balancing exercise is usually called the public interest test ("**PIT**"). The Law requires you to disclose information unless there is good reason not to, so the exemption can only be maintained (upheld) if the PIT in doing so outweighs the public interest in disclosure.



#### Example 7

*The BBC received a request for two contracts relating to licence fee collection. The UK Information Commissioner accepted that some of the information in the contracts was commercially sensitive and it was likely that it would prejudice the BBC's commercial interests. However, this was not significant enough to outweigh the need for the BBC to be accountable for its use of public money, as well as the importance of informing an on-going consultation about the licence fee and the information was released.*

In this case, even though the information fell within an exemption, the public interest favoured disclosure.

A SPA may claim that it is reasonable to seek extra time to consider the public interest. However, you must still contact the applicant within the standard time for compliance to let them know you are claiming a time extension.

## When can we use an exemption to refuse to say whether we have the information?

In some cases, even confirming that information is or is not held may be sensitive. In these cases, you may be able to give a NCND response by considering Article 10(2) of the Law.

Whether you need to give a NCND response should usually depend on how the request is worded, not on whether you hold the information. You should apply the NCND response consistently, in any case where **either** confirming **or** denying could be harmful.



#### Example 8

*"Please could you send me the investigation file relating to the murder committed at 23 Any Street on 12 January 2011?"*

*In this case, assuming the murder was publicly reported, the police could confirm that they held some information on the topic, without giving the contents.*

*"Please could you send me any information you have linking Mr Joe Bloggs to the murder committed at 23 Any Street on 12 January 2011*

*" In this case the police do not confirm whether they hold any such information. If they do have information, this could tip off a suspect, and may be unfair to Mr Bloggs. If they don't have the information, this could also be valuable information for the murderer. So the police would give the same response, whether or not they hold any such information.*

Unless otherwise specified, all the exemptions below also give you the option to consider the relevance of providing a NCND response as to whether information is held, in appropriate cases.

If it would be damaging to even confirm or deny if information is held, then you must issue a Refusal Notice explaining this to the applicant.

For further information, read our more detailed guidance:

- Duty to confirm or deny



## What exemptions are there?

Some exemptions apply only to a particular category or class of information, such as information which is advice by the Bailiff, Deputy Bailiff etc., or relating to correspondence with the royal family. These are called class-based exemptions.

Some exemptions require you to judge whether disclosure may cause a specific type of harm, for instance, endangering health and safety, prejudicing law enforcement, or prejudicing someone's commercial interests. These are called prejudice-based exemptions.

This distinction between 'class-based' and 'prejudice-based' is not in the wording of the Law but many people find it a useful way of thinking about the exemptions.

The Law also often refers to other legislation or common law principles, such as confidentiality, legal professional privilege, or data protection. In many cases, you may need to apply some kind of legal 'test' - it is not as straightforward as identifying that information fits a specific description. It is important to read the full wording of any exemption before trying to rely on it.

The exemptions can be found in Parts 4 and 5 of the Law, at Articles 23 to 42.

## What is 'prejudice' and how do we decide whether disclosure would cause this?

For the purposes of the Law, 'prejudice' means causing harm in some way. Many of the exemptions listed below apply if disclosing the information you hold would harm the interests covered by the exemption. In the same way, confirming or denying whether you have the information can also cause prejudice. Deciding whether disclosure would cause prejudice is called the "prejudice test".

To decide whether disclosure (or confirmation/denial) would cause prejudice:

- you must be able to identify a negative consequence of the disclosure (or confirmation/denial), and this negative consequence must be significant (more than trivial);
- you must be able to show a link between the disclosure (or confirmation/denial) and the negative consequences, showing how one would cause the other; and
- there must be at least a real possibility of the negative consequences happening, even if you can't say it is more likely than not.

Once the exemption has been engaged on the basis of the prejudice test, it is then necessary to consider the balance of public interest by undertaking a 'public interest test.'

For further information, read our more detailed guidance:

- The Prejudice Test



## **'Absolute' Exemptions:**

### ***Article 23 – information accessible to applicant by other means***

This exemption applies if the information requested is reasonably available to the applicant, otherwise than under the Law, whether or not free of charge. You could apply this if you know that the applicant already has the information, or if it is already in the public domain. For this exemption, you will need to take into account any information the applicant gives you about their circumstances. For example, if information is available to view in a public library in Southampton, it may not be reasonably accessible to a local resident. Similarly, an elderly or infirm requester may tell you they don't have access to the internet at home, so information available only over the internet would not be reasonably accessible to them.

When applying this exemption, you have a duty to provide advice and assistance under Article 12 and this should prompt you to advise the applicant where they can access the information for example, providing them with the internet address for an online link.

This exemption is absolute, so you do not need to apply the public interest test.

### ***Article 24 – Court Information***

This exemption applies to court records held by any SPA.

To claim this exemption, you must hold the information only because it was originally in a document created or used as part of legal proceedings, including an inquiry, inquest or arbitration.

This is an unusual exemption because the type of document is relevant, as well as the content and purpose of the information they hold.

This exemption is absolute, so you do not need to apply the public interest test. You may also decide to neither confirm nor deny whether you hold any information that is or would fall within the definition above.

### ***Article 25(1) – Personal Information***

This exemption confirms that you should treat any request made by an individual for their own personal data as a subject access request under the Data Protection Law. You should apply this to any part of the request that is for the applicant's own personal data. They should not be required to make a second, separate subject access request for these parts of their request.

If the information contains some of the applicant's personal data plus other non-personal information, then you will need to consider releasing some of the information under the Data Protection Law and some under the Freedom of Information Law.

This exemption is absolute, so you do not need to apply the public interest test.



### **Article 25(2) – Personal Information of Third Parties**

This exemption covers the personal data of third parties (anyone other than the applicant) where complying with the request would breach any of the principles in the Data Protection Law.

If you wish to rely on this exemption, you need to refer to the Data Protection Law as the data protection principles are not set out in the Freedom of Information Law. More details can be found in our guide – The Data Protection Principles – on our website.

This exemption can only apply to information about people who are living; you cannot use it to protect information about people who have died.

This exemption is absolute, so you do not need to apply the public interest test.

### **Article 26 Information Supplied in Confidence**

This exemption applies if the following two conditions are satisfied:

- you received the information from someone else, (including another public authority); and
- the disclosure of the information to the public by the scheduled public authority holding it would constitute a breach of confidence actionable by that or another person.

You cannot apply this exemption to information you have generated within your organisation, even if it is marked “confidential”. However, you can claim it for information you originally received from someone else but then included in your own records.

To rely on this exemption, you must apply the legal principles of the common law test of confidence, which is a well-established, though developing area of law.

This exemption is absolute so you do not need to apply the public interest test. However, you will still need to consider the public interest in disclosure, because the law of confidence recognises that a breach of confidence may not be actionable when there is an overriding public interest in disclosure.

You should carefully consider how you use confidentiality clauses in contracts with third parties and set reasonable levels of expectations about what may be disclosed.

### **Article 26A Information supplied by, or relating to, bodies dealing with security matters**

(1) Information is absolutely exempt information if it is held by a scheduled public authority and either or both of the following apply –

- (a) it was directly or indirectly supplied to the scheduled public authority by any of the bodies specified in paragraph (2); or
- (b) it relates to any of those bodies.

This absolute exemption relates to information supplied by certain bodies which are detailed within Article 26A (2) of the Law. This includes bodies such as the Security Services, the Serious Organised Crime Agency and National Criminal Intelligence Service however reference should be made to the article for the full listing.

This exemption is absolute, so you do not need to apply the public interest test.



## **Article 27 – National Security**

Information is absolutely exempt information if exemption from the obligation to disclose it under this law is required to safeguard national security.

The Chief Minister can issue and sign a certificate certifying that the exemption is required to safeguard national security. This is to be taken as conclusive evidence of that fact however a person aggrieved by the decision may appeal to the Royal Court.

The appeal would have to be made on the grounds that the Chief Minister did not have reasonable grounds for issuing the certificate. The decision of the Royal Court on the appeal shall be final.

This exemption is absolute, so you do not need to apply the public interest test.

## **Article 28 – States Assembly Privileges**

You can use this absolutely exempt exemption to avoid an infringement of States Assembly privilege. This protects the independence of the States Assembly.

The Greffier of the States can issue/sign a certificate certifying that exemption is required to avoid an infringement of the States Assembly. The certificate is conclusive evidence of that fact.

A person aggrieved by the decision of the Greffier to issue a certificate may appeal to the Royal Court on the grounds that the Greffier did not have reasonable grounds for doing so.

The decision of the Royal Court on the appeal shall be final

This exemption is absolute, so you do not need to apply the public interest test.

## **Article 29 – Other Prohibitions or Restrictions**

You can apply this exemption if complying with a request for information:

- is prohibited by or under an enactment;
- is incompatible with an E.U. or international obligation that applies to Jersey; or
- would constitute or be punishable as a contempt of court.

This exemption is often used by regulators. For example, the Information Commissioner is prohibited by Article 59 of the Data Protection Law from disclosing certain information he/she has obtained in the course of their duties, except in specified circumstances.

The Freedom of Information Law does not override other laws that prevent disclosure, which we call 'statutory bars'.

This exemption is absolute, so you do not need to apply the public interest test, but bear in mind that some statutory bars may refer to the public interest.



## **‘Qualified’ Exemptions:**

### ***Article 30 Communications with Her Majesty etc. and Honours***

This exemption covers any information relating to communications with the Royal Family and information regarding the granting of honours. This includes communications with the monarch, any other member of the Royal Family or the Royal Household.

All information under the scope of this class-based exemption is qualified, so the public interest test must be applied.

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

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

As this is a class-based qualified exemption, information which consists of this type of advice should be subject of a public interest test. If disclosure is refused, then the applicant may appeal to the Information Commissioner (once any internal review has been carried out by the SPA in the first instance). There is then further opportunity to appeal to the Royal Court for final decision.

### ***Article 32 – Legal Professional Privilege***

This applies whenever complying with a request would reveal information that is subject to ‘legal professional privilege’ (“LPP”). LPP protects information shared between a client and their professional legal advisor (Advocate, legal representative etc.) for the purposes of obtaining legal advice or for on-going or proposed legal action. These long-established rules exist to ensure people are confident they can be completely frank and candid with their legal adviser when obtaining legal advice, without fear of disclosure.

This exemption is qualified by the public interest test.

### ***Article 33 – Commercial Interests***

This exemption covers two areas of information:

- when information constitutes a trade secret (such as the recipe for a branded product); or
- its disclosure would, or would be likely to, prejudice the commercial interests of a person (including the scheduled public authority holding the information.)

The second part of the exemption refers to the question of whether disclosure would, or would be likely to, prejudice the commercial interests of a person and therefore it is necessary to conduct a prejudice test prior to the public interest test.

Both parts of this exemption are qualified by the public interest test.



### **Article 34 – The Economy**

Information is qualified exempt information if its disclosure would, or would be likely to, prejudice

- The economic interests of Jersey: or
- The financial interests of the States of Jersey

Both parts of this exemption are qualified by the need to conduct a ‘prejudice test’ prior to the ‘public interest test.’

### **Article 35 – Formulation and Development of Policies**

Information is qualified exempt information if it relates to the formulation or development of any proposed policy by a public authority.

This exemption is a qualified class-based exemption and therefore there is no need to conduct a prejudice test however the public interest test is applicable.

### **Article 36 – Information intended for future publication**

This exemption applies if, when you receive a request for information, you are preparing the material and definitely intend to publish it and it is reasonable not to disclose it until then. The information has to be held by the SPA with a view to it being published within 12 weeks of the date of the request.

If a SPA refuses an application for such information then it must make reasonable efforts to inform the applicant:

- of the date when it is to be published;
- of the manner in which it will be published; and
- by whom it will be published

‘Published’ means published –

- by a SPA; or
- by any other person

You do not have to confirm whether you hold the information requested if doing so would reveal the content of the information.

This exemption is qualified by the public interest test.

### **Article 37 – Audit functions**

Information held for these purposes is qualified exempt information:

- if it is held by such a scheduled public authority; and
- if its disclosure would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to the above functions ( audit of accounts, examination of economy, efficiency etc.)

This exemption can only be used by bodies with audit functions. These are SPAs having functions in relation to:

- the audit of the accounts of another public authority; or
- the examination of the economy, efficiency and effectiveness with which another public authority uses its resources in discharging its functions





Information is also qualified exempt information if it is:

- held by the Comptroller and Auditor General; and
- if its disclosure would, or would be likely to, prejudice the exercise of any of his or her functions.

This is a prejudice based exemption requiring the need to conduct a prejudice test prior to a public interest test.

#### ***Article 38 – Endangering the Safety or Health of individuals.***

You can apply the Article 38 exemption if complying with the request would or would be likely to endanger the safety of an individual; or endanger the physical or mental health of an individual.

In deciding whether you can apply this exemption, you should use the same test as you would for prejudice when considering whether complying would endanger safety or physical/mental health of an individual.

This exemption is also qualified by the public interest test.

#### ***Article 39 Employment***

Information is qualified exempt information if its disclosure would, or would be likely to, prejudice pay or conditions negotiations that are being held between a SPA and –

- an employee or prospective employee of the authority; or
- representatives of the employees of the authority.

It follows that there is a need to firstly conduct a prejudice test as to whether disclosure would, or would be likely to, prejudice the negotiations. If so, it would then be necessary to conduct a public interest test regarding disclosure.

#### ***Article 40 Defence***

Information is qualified exempt information if its disclosure would, or would be likely to, prejudice

- the defence of the British Islands or any of them; or
- the capability, effectiveness or security of any relevant forces

Relevant Forces means:

- the armed forces of the Crown; or
- a force that is co-operating with those forces or a part of those forces.

There is a need to firstly conduct a prejudice test as to whether disclosure would, or would be likely to, prejudice the defence of the Islands or the capability, effectiveness or security of forces. It is then necessary to conduct a public interest test weighing the benefits of disclosure against the purpose of the exemption.



## **Article 41 International relations**

Under Article 41(1) information is qualified exempt information if its disclosure would, or would be likely to, prejudice relations between Jersey and –

- the United Kingdom;
- a State other than Jersey;
- an international organization; or
- an international court.

Article 41(2) provides that information is qualified exempt information if its disclosure would, or would be likely to, prejudice –

- any Jersey interests abroad; or
- the promotion or protection by Jersey of any such interest.

This article relates to the general interests of Jersey itself rather than simply to the SPA which holds the information. Both Articles 41(1) and (2) are subject to the prejudice test prior to the public interest test.

Article 41(3) also provides that information is qualified exempt information if it is confidential information obtained from –

- a State other than Jersey;
- an international organization; or
- an international court.

The section of the article states that information obtained is confidential while the terms on which it was obtained require it to be held in confidence; or the circumstances in which it was obtained make it reasonable for the State, organization or court to expect it to be held in confidence.

This section therefore extends to when an external State, court or organisation has an expectation of information being held in confidence, including an implied confidence.

There is no requirement that an actionable breach of confidence must occur (as is the case with the Article 26 exemption relating to information supplied in confidence,) for this part of the exemption to apply.

As subsection (3) is not subject of any prejudice test, a SPA only needs to assess whether the information requested is, as a matter of fact, confidential.

Article 41(5) of the Law defines that an international court means an international court that is not an international organization and that was established –

- by a resolution of an international organization of which the United Kingdom is a member; or
- by an international agreement to which the United Kingdom was a party

International organization is one whose members include any two or more States, or any organ of such an organization.

Although Articles 41(1) and (2) are the only sections requiring a prejudice test, all sections of the article require a public interest test to be conducted.



### **Article 42 Law Enforcement**

Information is qualified exempt information if its disclosure would, or would be likely to, prejudice –

- (a) the prevention, detection or investigation of crime, whether in Jersey or elsewhere;
- (b) the apprehension or prosecution of offenders, whether in respect of offences committed in Jersey or elsewhere;
- (c) the administration of justice, whether in Jersey or elsewhere;
- (d) the assessment or collection of a tax or duty or of an imposition of a similar nature;
- (e) the operation of immigration controls, whether in Jersey or elsewhere;
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;
- (g) the proper supervision or regulation of financial services; or
- (h) the exercise, by the Jersey Financial Services Commission, of any function imposed on it by any enactment.

Article 42 applies where complying with the request would prejudice or would be likely to prejudice various law enforcement purposes (as listed above) including preventing crime, administering justice, and collection of a tax or duty. It also includes exemption for information connected to the operation of immigration controls and the maintenance of security and good order in prisons, supervision of financial services and information connected to the statutory functions of the Jersey Financial Services Commission.

In all cases where the exemption is being considered it will firstly be necessary to undertake a prejudice test. Where the test of prejudice supports application of the exemption it will then be further necessary to apply the public interest test to consider disclosure of the information.

## **Can we withhold information about people who have died?**

The Data Protection Law does not cover information about people who have died, so you cannot rely on an Article 25 exemption to withhold this type of information.

This may be a particular issue if you are a SPA that holds sensitive information such as health or social care records. Where you receive a request for this kind of information about someone who has died, the most appropriate exemption is likely to be Article 26 (confidentiality). This is because the information would originally have been provided to a healthcare practitioner or social worker in confidence, and we consider this duty of confidentiality to extend beyond death.

Information about people who have died is likely to be covered by an exemption, because the Freedom of Information Law is about disclosure ‘to the world’ and it would often be inappropriate to make this type of information public. See our guidance on ‘Information about the deceased.’

## **Can we have extra time to consider the request?**

Yes, but only if it is reasonable to do so.

Under Article 13 of the Law, a SPA is obliged to deal with all requests promptly and, in any event, within 20 working days.



However, pursuant to Article 2 of the Freedom of Information (Miscellaneous Provisions) (Jersey) Regulations 2014 a SPA may seek to extend that time limit, such not exceeding 65 days following the day on which the SPA received the original request. Any such departure from the usual 20 working day period must be “reasonable in all the circumstances of the case”.

You should identify any relevant exemptions early on and ensure they can be applied in that particular case; any extra time should be used to consider the PIT and other matters which may lead to a reasonable delay in the SPAs’ ability to respond to a request.

You should also release any information that is not covered by an exemption within the standard time.

The Article 44 Code of Practice sets out the Information Commissioner’s expectation that all cases shall be dealt with promptly and ordinarily within the 20 working day period.

## When and how do we apply the public interest test?

If the exemption you wish to apply is qualified, then you will need to do a public interest test, even if you know the exemption applies.

If you think that you should consider making a NCND response to any request then you will also need to consider the public interest test as applicable to Article 10(2).

For NCND the public interest test involves weighing the public interest in confirming whether or not information is held against the public interest in refusing to do this. The public interest in maintaining the exclusion from confirming or denying that information is held would have to outweigh the public interest in confirming or denying that information is held, in order to justify an NCND response.

Similarly, when considering whether you should disclose information pursuant to Article 9(2), you will need to weigh the public interest in disclosure against the public interest in maintaining the exemption. You must bear in mind that the principle behind the Law is to release information unless there is a good reason not to. To justify withholding information, the public interest in maintaining the exemption would have to outweigh the public interest in disclosure of the information.



### Example 9

*A government department is seeking to rely on Article 35 to withhold information relating to the development of a controversial policy.*

*It argues that disclosure would:*

- a) have a negative impact on the ongoing discussions about this policy;*
- b) discourage ministers and civil servants from openly debating controversial or unpopular options when discussing similar policies in the future ;*
- c) cause stress and upset to the people involved;*
- d) potentially lead to threats or harassment*

*While a) and b) are legitimate public interest considerations for this exemption, c) and d) are not.*

*Instead, they may suggest that Article 38 (health and safety) or Article 25 (data protection) might be relevant.*



You can withhold information only if it is covered by one of the exemptions and, for qualified exemptions, the public interest in maintaining the exemption outweighs the public interest in disclosure. You must follow the steps in this order, so you cannot withhold information because you think it would be against the public interest without first identifying a specific exemption.

For further information, read our more detailed guidance:

- The public interest test

## Is there anything else we need to know about exemptions?

Certain exemptions do not apply to historical records. Article 19 of the Law provides that where a SPA receives a request for information which it would need not otherwise supply by virtue of:-

Article 28 – States Assembly privileges

Article 30 - Communications with Her Majesty etc.

Article 33 – Commercial interests

Article 34 – The Economy

Article 37 – Audit functions; or

Article 39 – Employment

It must supply the information if it has held the information for more than 30 years.

In addition if a request is made to a SPA for other information that it need not supply by virtue of any other provision of Part 4 or 5, it must supply the information if it has held the information for more than 100 years.

When deciding whether or not an exemption applies, you will usually need to consider what information is already in the public domain. If the requested information or similar information is already publicly available, then this may affect:

- whether the requested disclosure will still cause prejudice;
- whether the test for applying a class-based exemption is still met;
- where the balance of the public interest lies.

These will be important considerations in many cases.

## If we are relying on an exemption to refuse the request, what do we need to tell the applicant?

If you are relying on an exemption, you must issue a written Refusal Notice within the standard time for compliance, specifying which exemptions you are relying on and why, and in respect of any PIT carried out, you should explain why you have reached the conclusion that the public interest in maintaining the exemption outweighs the public interest in disclosure.



## What do we have to include in a Refusal Notice?

You must refuse requests in writing promptly or within 20 working days of receiving it.

In the Refusal Notice you should:

- explain what provision of the Law you are relying on to refuse the request and why;
- give details of any internal review (complaints) procedure you have in place; and
- explain the applicant's right to complain to the Information Commissioner, including relevant contact details.

For further information, read our more detailed guidance:

- Refusing a request: writing a Refusal Notice

## What if we are withholding only parts of a document?

Often you can withhold only some of the information requested. In many cases, you can disclose some sections of a document but not others, or you may be able to release documents after having removed certain names, figures or other sensitive details (called 'redaction').

The Law does not lay down any rules about redaction. The following are guidelines for good practice.

- Make sure redaction is not reversible. Words can sometimes be seen through black marker pen or correction fluid. On an electronic document, it is sometimes possible to reverse changes or to recover an earlier version to reveal the withheld information. Ensure that staff responding to requests understand how to use common software formats, and how to strip out any sensitive information. Take advice from IT professionals if necessary.
- In particular, take care when using pivot tables to anonymise data in a spread-sheet. The spread-sheet will usually still contain the detailed source data, even if this is hidden and not immediately visible at first glance. Consider converting the spread-sheet to a plain text format (such as CSV) if necessary.
- Give an indication of how much text you have redacted and where from. If possible, indicate which sections you removed using which exemption.
- Provide as much meaningful information as possible. For example, when redacting names you may still be able to give an indication of the person's role, or which pieces of correspondence came from the same person.
- As far as possible, ensure that what you provide makes sense. If you have redacted so much that the document is unreadable, consider what else you can do to make the information understandable and useful for the applicant.
- Keep a copy of both the redacted and un-redacted versions so that you know what you have released and what you have refused, if the applicant complains.

You may also wish to refer to the 'Redaction Toolkit' produced by the UK National Archives.

## What if the applicant is unhappy with the outcome?

Whilst the Law does not require a SPA to provide a complaints process it is good practice and a requirement (under the Article 44 Code of Practice) for all SPAs to provide a relevant internal process to deal with complaints made by applicants.



Any complaints procedure, also known as an internal review, should:

- ensure the procedure is triggered whenever an applicant expresses dissatisfaction with the outcome;
- make sure it is a straightforward, single-stage process;
- make a fresh decision based on all the available evidence that is relevant to the date of the request, not just a review of the first decision;
- ensure the review is done by someone who did not deal with the initial request and, where possible, by a more senior member of staff; and
- ensure the review takes no longer than 20 working days in most cases, or 40 in exceptional circumstances.

It should also be noted that the time for any appeal under Article 46(2) of the Law shall not start to run until 6 weeks of the date the applicant has exhausted any complaints procedure provided by the SPA.

When issuing a Refusal Notice, you should state whether you have an internal review procedure and how to access it. If an applicant complains even when you have not refused a request, you should carry out an internal review if they:

- disagree with your interpretation of their request;
- believe you hold more information than you have disclosed; or
- are still waiting for a response and are unhappy with the delay.



# WHAT HAPPENS WHEN SOMEONE COMPLAINS?

## **In brief...**

Under Article 46 of the Law any person who is aggrieved by a decision of a SPA in response to their making a request for information may appeal to the Information Commissioner. The appeal has to be made within six weeks of the SPA having given notice of the decision to the applicant or within 6 weeks of having 'exhausted any complaints procedure' provided by the SPA (if so provided).

If someone makes an appeal against a SPA, our complaints handling process gives you an opportunity to reconsider your actions and put right any mistakes without us taking any formal action.

If the complaint is not resolved informally, the Information Commissioner will review the circumstances of the matter and will issue a Decision Notice. If the decision is that a SPA has breached the Law and/or Code of Practice, the Decision Notice may say what you need to do to put things right.

A SPA may be breaching the Law or the Article 44 Code of Practice if it fails to respond adequately to a request for information.

In addition, it is an offence under Article 49(2) for any person to deliberately alter, deface, block, erase, destroy or conceal any record held by the SPA with the intention of preventing the SPA from supplying the information to the applicant.

This last point is the only criminal offence in the Law that individuals can be charged with and if found guilty of an offence, shall be liable to a fine.

Other breaches of the Law are unlawful but not criminal. The Information Commissioner cannot fine you if you fail to comply with the Law, nor can we require you to pay compensation to anyone for breaches of the Law. However, you should correct any mistakes as soon as you are aware of them.





*In more detail...*

## **When might the Information Commissioner receive an appeal about how we have handled a request?**

If someone thinks you have not dealt with their request for information properly, they should start by complaining to you. In accordance with the Article 44 Code of Practice, all SPAs must have an internal complaints procedure. If, after going through your complaints procedure the applicant is still dissatisfied, or if you fail to review your original decision, then the applicant can appeal to the Information Commissioner.

Whenever you refuse a request you must always let people know about their right to appeal to the Information Commissioner.

## **What can the Information Commissioner do about a complaint?**

The Information Commissioner will often resolve complaints informally. You may accept that you have made a mistake, or the applicant may withdraw their complaint once we have explained the Law to them. In many cases, a satisfactory compromise is reached.

The Information Commissioner also has the power to conduct an appeal and to issue legally binding Decision Notices. The Decision Notice will state whether you have complied with the Law, and, if not, what you should do to put things right. Depending on the complexity of the case, a Decision Notice will generally include the arguments and evidence that we have considered in reaching our decision.

A Decision Notice may state that you have dealt with a request correctly. However, if we find that you have breached the Law, we may order you to take steps to put things right, such as disclosing some or all of the requested information. For example, if we find that you have incorrectly applied an exemption, this is a breach of Article 8(b) of the Law and the remedy would be for you to disclose the information. In other cases we may require you to give the applicant further advice and assistance.

The Information Commissioner does not punish SPAs or compensate applicants. We cannot investigate other matters that may lie behind the request. We focus on only whether you have complied with the Law.

## **What should we do if someone complains to the Information Commissioner about how we have handled a request?**

If an applicant makes an appeal to the Information Commissioner, one of our case officers will contact you and explain what we need from you. If you know an appeal has been made, you should make sure you keep all the relevant correspondence, as well as the requested information. If you now realise you should have released more information, you should do this as soon as possible and let us know that you have done so.

In many cases we will need to see the disputed information. Our case officers will not pass this on to the applicant (even if we find in their favour) and will not reveal the contents of the disputed information in any Decision Notice. Staff with higher levels of security clearance will be able to handle very sensitive information.



The case officer dealing with the appeal may ask you to explain your decision more fully or provide further evidence. This guide, and the guidance it links to, should help you work out what you are required to provide. Remember that you are required to disclose requested information unless there is good reason not to. It is your responsibility to show why you should be allowed to refuse a request, so it is in your interests to co-operate fully with our investigation.

You must assist the Information Commissioner with his/her appeal, in accordance with the Article 44 Code of Practice and any failure to do so can result in the Information Commissioner bringing such matters to the attention of the Chief Minister pursuant to the provisions set out in an existing Memorandum of Understanding dated 24 November 2014. The Chief Minister may then direct the Information Commissioner to formally request that you supply the information requested, which must be supplied by you 'as quickly as possible and in any event within 5 working days.' Failure to supply information can also result in the case being decided purely on the information we already have and with the SPA not having availed itself of the opportunity to put its side of the story.

## **Can we introduce a new reason for refusing a request at this stage?**

It is not good practice to introduce new reasons for refusing a request at this late stage and you should avoid doing so. However, if you do decide you need to rely on a new exemption, then we will consider your arguments in the normal way. You will need to inform us and the applicant about your new arguments straight away.

The Information Commissioner can refuse to consider late claims that a request is vexatious or that it exceeds the costs limit. We will not be sympathetic to late claims that the request exceeds the costs limit provision in the Law if you have already collated all the information falling within the scope of the request.

## **What should we do if we receive a Decision Notice from the Information Commissioner?**

A decision notice may find against you or may decide you handled the request correctly. In some cases we may uphold your overall decision but make some findings about delays and other aspects of your request handling. This is an opportunity for you to learn and improve, and perhaps avoid future complaints.

If the Decision Notice requires you to take steps, such as disclosing some information, you should do this within 35 calendar days of the date of the notice, unless you intend to appeal. If you disagree with the decision and wish to appeal, you must lodge your appeal with the Royal Court within 28 calendar days of the Information Commissioner giving notice of his/her decision to the applicant. The applicant also has a right of appeal to the Royal Court.

Failure to comply with a Decision Notice may be considered to be a contempt of court.



## What does it cost to appeal against the Information Commissioner's decision?

Some Court fees are likely to be applicable to any appeal made to the Royal Court and although you do not need to be represented by a lawyer, it is advisable have professional legal representation. Bear in mind that a Royal Court appeal may be time consuming and requires careful preparation.

Your lawyer will be able to advise you as to the costs of those proceedings.

## What happens when the Information Commissioner's decision is appealed?

A SPA, the applicant, or both can appeal against the Information Commissioner's Decision Notice.

If the Royal Court decides that the Information Commissioner decision was not reasonable in all the circumstances of the case, it can:

- a) Allow the appeal
- b) Substitute for the Information Commissioner's decision such other decision that the Information Commissioner could have made; or
- c) Dismiss the appeal.

Like the Information Commissioner, the Royal Court can only consider questions relevant to the Law, not any wider dispute that may arise from the request.

Appeals may be by oral hearing, where witnesses give evidence in person, as well as the provision of documentation to the Court.

If a SPA fails to comply with any Decision Notice issued by the Royal Court then a SPA could be found in contempt of court for failing to comply with that notice. This could lead to a fine or, in theory, jail for a senior officer of the SPA.

## What about poor practice that doesn't amount to a breach of the Law?

The Article 44 Code of Practice lays down good practice that you should follow in fulfilling your freedom of information responsibilities. The Article 44 Code of Practice is not legally binding, but should help you avoid breaching the Law. The Information Commissioner is also responsible for promoting the Article 44 Code of Practice and may take action on poor practice, even if this has not led to a breach of the Law itself.

If you fail to follow good practice as set down in the Article 44 Code of Practice, the Information Commissioner may issue a practice recommendation. For example, this may recommend that you introduce an improved internal review procedure, or improved staff training. The Information Commissioner's recommendations are not legally binding, but the Information Commissioner publishes and publicises all practice recommendations. In addition, if you fail to comply with good practice, you will probably be breaching the Law.



Also, you may be given a practice recommendation if you have been given several negative Decision Notices. Experience in other jurisdictions has shown that public authorities generally comply with practice recommendations.

The Information Commissioner will usually approach you first to discuss any difficulties you may be having in trying to comply with the Law, and giving you a chance to improve.

## **Are there criminal offences in the Freedom of Information Law?**

Yes, Article 49 states that it is a criminal offence for any person to alter, deface, block, erase, destroy or conceal information which has been subject of a request.

Depending on the nature of the incident, individual members of staff could be charged with this offence. The penalty is a fine.

Under Article 52(1) of the Law, the following SPAs are exempt from criminal liability:

- (a) The States Assembly including the States Greffe
- (b) A committee or other body established by the States or by or in accordance with the standing orders of the States Assembly
- (c) An administration of the States
- (d) The Judicial Greffe
- (e) The Viscount's department.

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# MORE INFORMATION

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**Jersey Office of the Information Commissioner**  
**2nd Floor**  
**5 Castle Street**  
**St Helier**  
**Jersey JE2 3BT**

**Telephone number:** +44 (0) 1534 716530

**Email:** [enquiries@jerseyoic.org](mailto:enquiries@jerseyoic.org)

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