

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

**DECISION NOTICE**

<b>OIC Reference</b>	CAS-01812
<b>Date of Decision Notice</b>	27 August 2019 2019
<b>Scheduled Public Authority</b>	Growth Housing and Environment (the <b>SPA</b> )
<b>Address</b>	PO Box 412 Beresford House Bellozanne Road St Helier JE4 8UY
<b>Date of Initial Request</b>	3 September 2018
<b>Date of SPA's response</b>	7 November 2018
<b>Date of request for Internal Review</b>	19 November 2018
<b>Date of Internal Review</b>	20 December 2018
<b>Date of Appeal to Information Commissioner</b>	28 January 2019

**Summary/Decision**

1. On 3 September 2018, the Complainant requested certain information from the SPA relating to information held regarding a visit to the Complainant's property and certain other information (the **Requested Information**).
2. The SPA wrote to the complainant on 7 November 2018 stating that the Requested Information was being withheld (the **Withheld Information**) under Arts. 25 and 42 of the Freedom of Information (Jersey) Law 2011 (the **Law**), which the Complainant subsequently contested and requested an internal review.
3. The SPA sent the outcome of its internal review on 20 December 2018 (the **Internal Review**), upholding its original position.
4. The Complainant appealed to the Information Commissioner (the **Commissioner**).
5. The Commissioner's decision is that the SPA withheld the Withheld Information in accordance with the Law.
6. No further steps need be taken by the SPA to comply with the Law.

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

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

## **The Request**

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9. The Complainant requested the following
  - a. A copy of all information relating to a site visit carried out at the Complainant's home (the **Property**) by the SPA (the **First Request**); and
  - b. A copy of all information held by the SPA relating to the Property (the **Second Request**).
10. On 7 November 2018 the SPA responded to the Request in the following terms (the **Initial Response**):

*"Planning and Building Applications: ...*

*Compliance Case References:*

*We have searched our paper and electronic records and copies of the paperwork you have requested in relation to the files referenced above have been prepared and are available for collection from the department.*

*...*

*It is essential that Photo Identification is provided by both parties...upon collection of the information for Data Protection purposes. Please quote the unique reference number...when collecting the data.*

*Personal data has been redacted in accordance with Article 25(2)(a) and (b) of the Freedom of Information (Jersey) Law 2011.*

### **Article 25 Personal Information**

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

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

- a. *It constitutes personal data of which the applicant is not the data subject as defined by the Data Protection (Jersey) Law 2018; and*

- b. *Its supply to a member of the public would contravene any of the data protection principles, as defined in that law.*

**Compliance Case References:** [Redacted]

*Information relating to the above referenced files is exempt under Article 42 of the Freedom of Information (Jersey) Law 2011 as the data contained within them relate to live compliance files, where matters remain outstanding in relation to breaches under the Planning and Building (Jersey) Law 2002.*

**Article 42 Law enforcement**

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

- (a) The prevention, detention or investigation of crime, whether in Jersey or elsewhere;*
- (b) The apprehension of 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 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.”*

11. The Complainant responded to the Initial Response indicating that they were not in agreement with that decision and on 22 November 2018 asked for an internal review. The Complainant made comprehensive submissions in support their application for an Internal Review as follows:

*"Thank you for compiling our FOI documentation. We have sent (sic) some time going through all the documents and have some concerns.*

- 1. Documents relating to internal planning department meeting minutes missing from the FOI request;*
- 2. Photos of the interior of our home, as disclosed in the FOI-information required as to how access to the inside of our property was obtained and permission given – these were taken after occupancy and without our consent. We can clarify which photos these are.*

3. *Planning Officer took photos of the Property at his last visit these have been omitted from the FOI, why? I would also expect minutes/write up from his visit on file but these are as omitted.*
4. *My neighbour...has sent the Planning Department a large number of photos, emails and letters which have been omitted, why?" (the **IR Request**).*

12. The response to the Complainant's request for an internal review was provided on 20 December 2018 (the **Internal Review**), stating that the Initial Response to the Request was partly upheld

"1. ...

*The papers supplied to you constitute all the records held on the planning and building files, except those that were withheld citing Article 42, Law Enforcement, of the FOI Law. I have concluded from this that if any internal meetings did take place these discussions were not recorded and consequently this information is not held for the purposes of the FOI Law.*

2. ...

*Whilst it is clear from our files which photos it is that you are referring to, we neither confirm nor deny we hold information as to how access to the inside your property was obtained.*

3. ...

*It appears that the photos taken by Planning Officer were held in a different area of the system and you are correct that these have been omitted. These images are now attached. We apologise for this oversight*

4. ...

*We neither confirm nor deny that we hold any information from [Neighbour]."*

## **The Investigation**

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### **Scope of the case**

13. On 28 January 2019, the Complainant contacted the Commissioner to complain about the way their Request and the Internal Review had been handled and to appeal the SPA's decision to withhold the Requested Information. The Complainant asked the Commissioner to review the Complainant's request and the responses received from the SPA in order to ascertain whether the response was in accordance with the law. In particular, the Complainant was of the view that the review conducted by the SPA was not "*proper, full, efficient*" and that "*it was very unprofessionally conducted and incomplete*".
14. The Commissioner has set out in this Decision Notice the particular issues that he has had to consider in respect of each exemption cited by the SPA and, where relevant, the public interest test.

## **Chronology**

15. On 5 February 2019, the Commissioner wrote to the SPA to advise that the Complainant had appealed to the Commissioner regarding the SPA's handling of the Initial Request and subsequent Review, pursuant to Art.46 of the Law. The SPA was asked to provide a copy of the requested information and their written submissions in response to the complaint made by the Complainant.
16. The SPA responded to that letter on 21 February 2019 explaining the rationale applied by the SPA in respect of the Withheld Information, together with a copy of the Withheld Information itself. The Commissioner had further correspondence with the SPA and Complainant on various other dates.

## **ANALYSIS**

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17. The IR Request listed four questions, such as are referenced at para.12 above. They are dealt with in turn.

### **Analysis – the First Question**

18. The First Question does not form part of the Complainant's Appeal.

### **Analysis – The Second Question**

19. The Complainant requested information from the SPA as to how access had been effected into the Property and photographs taken of the interior.

#### **Complainant's position**

20. The Complainant (quite properly, in the Commissioner's view) raised concerns as to how the SPA had in its possession photographs of the Property's internal areas.

#### **SPA's position**

21. The SPA contends that the photographs should not, in fact, have been released to the Complainant as part of the Initial Response and ought to have been withheld (the SPA says) pursuant to Art.42 of the FOI Law on the basis that those photographs actually form part of a live planning compliance file.
22. The SPA has provided information relating to how information relating to the Second Question came into the SPA's possession. The Commissioner has reviewed the information submitted.
23. The SPA relies on two exemptions within the FOI Law to justify withholding the information forming part of the Second Question, namely Arts.25 and 42. It had also previously refused to confirm or deny whether the requested information was held. During the appeal process, the SPA confirmed that it no longer wished to rely on Art.8 of the Law and conceded that it held the information requested in the Second Question.
24. Dealing with the relevant articles in turn.

*Art.25 – Personal Information*

25. Without divulging the contents of the Withheld Information, the SPA was of the view that it was not appropriate to release information about who had provided the photographs to the SPA. Various reasons were cited by the SPA in addition to the fact that such information formed part of a live compliance file.
26. Having reviewed the Withheld Information, the Commissioner agrees with the SPA that if this information was provided, then it would likely reveal the identity of the provider. The Commissioner has considered whether it is possible to redact the information in such a way as to protect the identity of the third party but considers that it would be impracticable in these circumstances and particularly bearing in mind that the focus of the request by the Complainant is to understand the source of the photographs.
27. Art.25, once engaged, may provide an absolute exemption to the provision of information but the Law provides that the SPA may still release that information if it considers it appropriate to do so.
28. In any event, the Commissioner considers that this exemption was appropriately engaged by the SPA in that the information would constitute personal data.
29. On that basis, it is not strictly necessary to go on to consider the further exemption cited by the SPA (Art.42) but considers that it may be useful to both parties to provide an analysis of this exemption as, ultimately, the Commissioner also finds that the SPA appropriately applied Art.42 to the withholding of this information.

*Art.42 – Law enforcement*

30. Art.42 is set out at the legal appendix to this Notice. It is a qualified exemption and thus subject to the public interest test.
  31. The relevant applicable interests cited in this exemption are the prevention or detection of crime. The Commissioner accepts that the arguments made by the SPA set out below address the prejudice in relation to the detection of crime and the assertion that disclosure of the information may impact on live enforcement proceedings.
  32. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is “real, actual or of substance” and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
  33. The Commissioner cannot refer in detail to all the arguments provided by the SPA in support of its decision to withhold the requested information at Question 2 as that would, of itself, likely reveal the source of that information. Suffice to say, the Commissioner has comprehensively reviewed those submissions and whether the exemption is engaged. It is.
  34. The SPA explained that there was a direct causal link regarding the disclosure of the information and that the prejudice that would be caused would likely be of substance.
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35. The Commissioner also considers that appropriate weight must be given to the public interest inherent in the exemption; that is, the public interest in avoiding likely prejudice to the prevention or detection of crime by the SPA. The Commissioner considers that it is clear that there is a very substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of maintenance of the exemption. The Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime against the public interest in the openness and transparency of the SPA and the complainant's arguments regarding disclosure. His conclusion is that the public interest in avoiding this prejudice is a strong factor and so considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

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### **Analysis – the Third Question**

36. The Third Question does not form part of the Complainant's Appeal as the photographs have been provided to the Complainant with the Internal Review.

### **Analysis – the Fourth Question**

37. Art.10(2) of the Law provides that the SPA may refuse to inform the applicant whether or not it holds the information if it is satisfied that, in all the circumstances of the case, it is in the public interest to do so. In this case, the SPA refused to confirm or deny whether it held information that had emanated from the Complainant's neighbours.

38. The Commissioner has considered carefully the submissions of the SPA provided in their reliance on this exemption.

39. As noted by the Information Commissioner for England and Wales (the **ICO**) in their guidance note:

*"This exemption is not about the content of the requested information, but concerns the disclosure of personal data by confirming or denying whether or not the requested information is held.*

*You therefore need to consider whether confirming or denying that you hold the requested information would in itself disclose personal data which relates either to the requester or another person.*

*If someone requests their own personal data, you should deal with the request as a subject access request. You are not obliged to confirm or deny whether the information is held if this would disclose personal data relating to the requester.*

*You are not obliged to confirm or deny if you hold another person's personal data if:*

*it would breach the GDPR data protection principles;*

*it would contravene an objection to processing; or*

*the information would be exempt from a subject access request.*

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*In circumstances where confirmation or denial would breach the principles, there is no public interest test.”<sup>1</sup>*

*Would the confirmation or denial that the requested information is held constitute the disclosure of a third party’s personal data?*

40. Art.2(1) of the Data Protection (Jersey) Law 2018 (the **DPJL**) defines personal data as “any data relating to a data subject”. A data subject is defined at Art.2(2) thereof as “an identified or identifiable, natural, living person who can be identified, directly or indirectly, by reference to (but not limited to) an identifier such as (a) a name, an identification number or location data; (b) an online identifier; or (c) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the person.”

41. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus. In this case, as the Complainant clearly refers to a named individual in their request for information, the Commissioner is satisfied that the requested information, if held, would be that individual’s personal data.

42. For the reasons set out above, the Commissioner is satisfied that if the SPA confirmed whether or not it held the requested information this would result in the disclosure of a third party’s personal data. The first criterion set out above is therefore met.

43. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the SPA from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles. The Commissioner agrees that the most relevant data protection principle is principle Art.8(1)(a) of the DPJL, the lawfulness, fairness and transparency principle.

*Would confirming whether or not the requested information is held contravene one of the data protection principles?*

44. Article 8(1)(a) of the DPJL states that: “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data [subject].”<sup>2</sup>

45. In the case of a FOI request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or, as in this case, the SPA can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Art.8 of the DPJL), be fair, and be transparent.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf>

<sup>2</sup> There appears to be a typographical error omitting the word “subject”.



*Lawful processing*

46. Art.9(1) of the DPJL specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one” of the conditions listed in Schedule 2 of the DPJL applies. One of the conditions in Art.9(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

47. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Part 1 of Sched.2 of the DPJL which provides as follows:

**"5 Legitimate interests**

(1) *The processing is necessary for the purposes of legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, unless –*

(a) *the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject, in particular where the subject is a child; or*

(b) *the controller is a public authority.*<sup>3</sup>

48. In considering the application of Art.9(1) of the DPJL in the context of a request for information under the Law it is necessary to consider the following three-part test:

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(i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

(ii) Necessity test: Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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49. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests.*

50. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

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<sup>3</sup> However, Art.25(2)(3) of the Law (as amended by Schedule 6 Paragraph 3 of the DPJL) provides that: In determining for the purposes of this Article whether the lawfulness principle in Article 8(1)(a) of the Data Protection (Jersey) Law 2018 would be contravened by the disclosure of information, paragraph 5(1) of Schedule 2 to that Law (legitimate interests) is to be read as if sub-paragraph (b) (which disapplies the provision where the controller is a public authority) were omitted.

51. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
52. In the Complainant's view, the named individual is not entitled to any privacy as there have been on-going issues between the parties in respect of certain planning matters.
53. The Commissioner recognises that the information is of interest to the Complainant. However, while he is satisfied that the Complainant has demonstrated a legitimate interest in requesting the information, the Commissioner is not aware of any wider public interest in confirming or denying whether the information is held.

*Is confirming whether or not the requested information is held necessary?*

54. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the Law as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
55. The Commissioner cannot envisage how the request can be met without disclosing personal data. This is because the third party is named in the Complainant's request and any confirmation or denial would necessarily say something about the third party personally as they are the focus of the request. As previously stated, the third party is named by the Complainant in the context of the Complainant being engaged with the SPA in relation to planning matters.
56. Regrettably, no explanation at all was given to the Complainant as to why the SPA had concluded to neither confirm or deny whether it held any information on the Third Party. The Commissioner considers that this was unhelpful and that some reasons should have been given by the SPA as to why it could not provide this information, rather than just a blanket refusal. In responding in that way, it deprived the Complainant of the opportunity to understand the rationale behind the decision leaving the only avenue available to them being one of appeal. As much information about the decision making process should be provided (insofar as is possible to do so) as this may go some way to at least assuring the applicant that a proper process has been gone through and they may then come to understand the reasons underlying the eventual decision (even if they are unhappy with the outcome).
57. As the Commissioner considers that public disclosure of whether or not the named individual was engaged in correspondence with the SPA is not the least intrusive method of achieving the legitimate interest, such processing is thus not necessary to satisfy any legitimate interest.
58. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is thus unlawful.
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59. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent.

### **The Decision**

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60. The Commissioner's decision is that the SPA correctly withheld the Withheld Information.

61. The Commissioner does not require the SPA to take any steps in respect of this notice.

## **Right of Appeal**

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62. An aggrieved person has the right to appeal against this Decision Notice to the Royal Court of Jersey.
63. If you wish to appeal against this Decision Notice, you can obtain information on how to do so on <https://www.jerseyoic.org>.
64. Any Notice of Appeal should be served within 28 (calendar) days of the date on which the Decision Notice is issued.

Dated this 27th day of August 2019

Signed



**Mr Paul Vane**  
Deputy Information Commissioner  
Office of the Information Commissioner  
Brunel House  
Old Street  
St Helier  
Jersey

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

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

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

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

(1) A scheduled public authority may refuse to supply information it holds and has been requested to supply if the information is absolutely exempt information.

(2) A scheduled public authority must supply qualified exempt information it has been requested to supply unless it is satisfied that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.

(3) A scheduled public authority may refuse to supply information it holds and has been requested to supply if –

- (a) a provision of Part 3 applies in respect of the request;
- (b) a fee payable under Article 15 or 16 is not paid; or
- (c) Article 16(1) applies.

### **10 Obligation of scheduled public authority to confirm or deny holding information**

(1) Subject to paragraph (2), if –

- (a) a person makes a request for information to a scheduled public authority; and
- (b) the authority does not hold the information,

it must inform the applicant accordingly.

(2) If a person makes a request for information to a scheduled public authority and –

- (a) the information is absolutely exempt information or qualified exempt information; or
- (b) if the authority does not hold the information, the information would be absolutely exempt information or qualified exempt information if it had held it,

the authority may refuse to inform the applicant whether or not it holds the information if it is satisfied that, in all the circumstances of the case, it is in the public interest to do so.

- (3) If a scheduled public authority so refuses –
  - (a) it shall be taken for the purpose of this Law to have refused to supply the information requested on the ground that it is absolutely exempt information; and
  - (b) it need not inform the applicant of the specific ground upon which it is refusing the request or, if the authority does not hold the information, the specific ground upon which it would have refused the request had it held the information.

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

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

## **25 Personal information**

- (1) Information is absolutely exempt information if it constitutes personal data of which the applicant is the data subject as defined in the Data Protection (Jersey) Law 2005.
- (2) Information is absolutely exempt information if –
  - (a) it constitutes personal data of which the applicant is not the data subject as defined in the Data Protection (Jersey) Law 2018<sup>[7]</sup>; and
  - (b) its supply to a member of the public would contravene any of the data protection principles, as defined in that Law.<sup>[8]</sup>
- (3) In determining for the purposes of this Article whether the lawfulness principle in Article 8(1)(a) of the Data Protection (Jersey) Law 2018<sup>[9]</sup> would be contravened by the disclosure of information, paragraph 5(1) of Schedule 2 to that Law (legitimate interests) is to be read as if sub-paragraph (b) (which disapplies the provision where the controller is a public authority) were omitted.<sup>[10]</sup>

## **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.