

# GUIDANCE NOTE

## **Information held by a scheduled public authority for the purposes of the Freedom of Information Law**

The Freedom of Information (Jersey) Law, 2011

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# INTRODUCTION

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1. The Freedom of Information (Jersey) Law, 2011, (“the **Law**”) gives rights of public access to information held by scheduled public authorities (“**SPAs**”).
2. An overview of the main provisions of the Law can be found in The Guide to Freedom of Information. This is part of a series of guidance, which goes into more detail than the Guide, to help SPAs to fully understand their obligations and to promote good practice.
3. This guidance explains the circumstances in which information is considered to be held by a SPA for the purposes of the Law.
4. Guidance issued by the Information Commissioner may include references to cases and decisions linked to operation of the Freedom of Information Act 2004 (“the **U.K. Act**”). Such references are provided as additional context to relevant areas given the lack of case law regarding the interpretation of the Freedom of Information (Jersey) Law 2011 (“the **Law**”). It should be noted, however, that judgments from the Courts of England and Wales (which includes any decisions from the Information Tribunal) are not binding in Jersey (albeit that they may be viewed by the Royal Court as being persuasive). There are, however, differences between the Law and the UK Act and so the judgments which have flowed following an interpretation of the UK Act may not be directly applicable in this jurisdiction.

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# OVERVIEW

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- When a SPA holds information solely on behalf of another person it does not hold the information itself for the purposes of the Law.
- When a SPA holds information principally or partly on behalf of another person but exercises control over the information, it will also hold the information itself.
- When information is held by another person on behalf of a SPA, the information is held by the SPA for the purposes of the Law.

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# WHAT THE FREEDOM OF INFORMATION (JERSEY) LAW, 2011 SAYS

5. Article 3 sets out the two legal principles that establish whether information is held for the purposes of the Law.
  3.
    - (2) For the purposes of this Law, information is held by a public authority if—
      - (a) it is held by the authority, otherwise than on behalf of another person, or
      - (b) it is held by another person on behalf of the authority.



# HELD OTHERWISE THAN ON BEHALF OF ANOTHER PERSON

6. When information is solely held by a SPA on behalf of another person, it is not held for the purposes of the Law. However, the information will be held by the SPA if the authority is holding that information for someone else but also holding it to any extent for its own purposes.
7. Each case needs to be viewed individually to determine whether a SPA holds information for its own purposes or solely on behalf of another person. There are various factors that will assist in determining whether the SPA holds the information for the purposes of the Law. The weight attached to each one will vary from case to case. In some circumstances, one factor may outweigh all the others.
8. Factors that would indicate that the information is held solely on behalf of another person include:
  - a) The SPA has no access to, use for, or interest in the information;
  - b) Access to the information is controlled by the other person;
  - c) The SPA does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
  - d) The SPA is merely providing storage facilities, whether physical or electronic.



## Example 1

*The UK Information Tribunal decision in Digby-Cameron v. Information Commissioner (EA/2008/0010, 16 October 2008) concerned a request to a local authority for a transcript of a Coroner's hearing. Although the Council provided funding and administrative support for the Coroner's Service, the UK Information Tribunal decided that the Council held the information solely on behalf of the Coroner. The Coroner had sole control of the information, having statutory authority (via the Coroner's Rules 1984) to determine who had access to it. The UK Information Tribunal concluded that "the decision whether or not to disclose information was for the Coroner, not the Council." It went on to say that "ownership' of and control over this information lay both in fact and law with the Coroner."*

*In this particular case it was the sole control of the Coroner over the information which, having a statutory basis, was the only factor that needed to be considered.*

9. The example emphasises that it is the circumstances of each case that will determine whether information is held for the purposes of the Law. There will be cases when a SPA may hold information originating from the police in its own right. For example, it is possible that following a road traffic accident a SPA could obtain a copy, or extracts of a police report in order to consider, in its capacity as highways authority, whether any road safety measures are necessary.



10. Factors that would indicate that the information is also held by the SPA include:
- a) The SPA provides clerical and administrative support for the other person, whether legally required to or not;
  - b) The SPA controls access to the information;
  - c) The SPA itself decides what information is retained, altered or deleted;
  - d) The SPA deals with enquiries about the information; or
  - e) Costs arising from holding the information are included in the SPA's overall budget.



### Example 2

*The UK Information Tribunal decision in the case of McBride v. Information Commissioner and Ministry of Justice (EA/2007/0105, 27 May 2008) concerned a request for information from the Privy Council Office about the Visitor of the University of London. The UK Information Tribunal decided that the Privy Council Office held the information on its own behalf. Although the role of the Visitor was carried out by the Lord President of the Privy Council on behalf of the Sovereign, as the Privy Council Office performed all the administrative and management functions for the Visitor from its own budget, it held the information itself.*

11. The UK Information Tribunal in the McBride case stated that “the question of whether a public authority holds information on behalf of another is simply a question of fact, to be determined on the evidence....”
12. It also clarified that this question is not determined by who owns the information, whether there are exclusive rights to the information or whether there is a legal basis for holding the information.
13. It is also important to note that the five factors listed above are only indicative of whether information is held by a SPA for the purposes of the Law. SPAs should not adopt an overly formulaic approach in considering whether information is held for the purposes of the Law by virtue of Article 3. This was addressed by the Information Tribunal in the following example:



### Example 3

*In the UK case of the British Union for the Abolition of Vivisection v Information Commissioner & Newcastle University (EA/2010/0064, 3 March 2010), the public authority argued that it did not hold the information because certain criteria were not met. The Information Tribunal noted that these tests appeared to derive from the decisions in Digby-Cameron and McBride and stated at paragraph 49: “We do not accept this submission. Depending on the particular facts of a case, the features referred to in those cases may be useful matters to consider when looking at whether the public authority holds the information, but they should not be read as if they had been intended as definitive tests of whether information is ‘held’...”*

14. Whilst the suggested ‘tests’ might well indicate that a SPA holds information, they do not provide the whole picture. For example, where a SPA uses information for its own purposes, but there are restrictions on what it can do with the information, it will be deemed to hold the information for the Law.



15. Non-official communications within a SPA are not held for the purposes of the Law, if they are not created by a member of staff in the course of his or her official duties; for example, trade union communications. The SPA has neither created the information, nor does it retain the material for its own purposes, but simply holds it on behalf of, and as a service to, the trade union. Similarly, in most circumstances, private emails sent or received by staff in the workplace via the SPA's email system would not be held by the SPA for the purposes of the Law.
16. If a SPA does not hold the information requested because it is held on behalf of another person, it should tell the applicant that it does not hold the information.
17. If information is held solely on behalf of another SPA, the Article 44 Code of Practice advises that good practice requires the SPA to:
- a) Contact the applicant promptly and inform him or her that they do not hold the information requested but that it may be held by another SPA;
  - b) Suggest that the applicant re-applies to the SPA which the First SPA believes may hold the information; and
  - c) Provide the applicant with contact details for that other SPA.





# HELD BY ANOTHER PERSON ON BEHALF OF THE AUTHORITY

18. There are several circumstances in which information is held by another person on behalf of the SPA and therefore held by the SPA for the purposes of the Law, for example:
19. **Contracted document storage** - this is a relatively common arrangement and includes complex storage and retrieval systems as well as arrangements for the keeping of legal documents by a firm of solicitors. In these situations the stored documents will be held on behalf of the SPA.
20. **Archives and record offices** - SPAs will often store documents in these locations and, as with contracted storage, the information in these documents is held on behalf of the SPA. Even though the records offices are themselves likely to be SPAs, the responsibility for dealing with requests for the information remains with the SPA which holds the information for the purposes of the Law.
21. **Contractual arrangements** - where information is held by a third party as a result of contractual arrangement, the provisions of the contract may indicate whether or not the information is held on behalf of the SPA.



#### Example 4

*“Leeds City Council and its authorised officers will have the right to inspect hard and soft copy data at any time during the contract period. Thereafter, and when the contract is spent, all hard and soft copy data must be given over to the Council, with no copy remaining – electronic or paper – external to the Council. The Council has full ownership of the data...” The UK Information Commissioner decided that data generated by the contractor falling within this provision was held on behalf of the council. Decision Notice FS50118044.*

22. **Information held by Advocates** - in cases where legal advice has been sought by a SPA, the question is whether the file held by the Advocate is held on behalf of the SPA or whether the Advocate holds the information in its own right, in which case it would not be held for the purposes of the Law. In general, documents held by an Advocate in connection with instructions received by them are held on behalf of the SPA as the client.



#### Example 5

*The UK Information Tribunal decision in the case of Francis v. Information Commissioner and South Essex Partnership Foundation NHS Trust (EA/2007/0091, 21 July 2008) concerned requested information relating to the death of the complainant's son, which included legal advice from three firms of solicitors. The UK Information Tribunal found that information held for the solicitor's own administrative purposes as well as the solicitor's own working file of papers, including annotated documents, were not held on behalf of the public authority client. However, the distinction is not always clear-cut and it is likely that client files will contain some information that is held on behalf of the client and some that belongs to the solicitor. For example, clean copies of documents passed to the solicitor by the public authority client are held on behalf of the client.*

23. **Other situations creating an agency arrangement** - these include anyone acting in a professional field who is recognised as acting as their client's agent. This may also extend to situations where another body carries out the functions of a SPA, either through statute or contractual arrangements. When an agency arrangement exists, the situation regarding information held by the agent on behalf of the SPA as a client is similar to that between a lawyer and client.
24. **Information held on behalf of a SPA as a result of partnership or consortia arrangements** - when SPAs work in partnership or in a consortium (i.e. those arrangements which do not have the legal status of a body or organisation separate to the individual partners), they need to be certain what information is held on behalf of each partner or member. This will arise in the public sector when the partners, who are otherwise independent bodies, agree to co-operate to achieve a common goal, create an organisational structure and agreed programme and share information, risks and rewards. Examples include:
- local strategic partnerships
  - road safety partnerships
  - local environment partnerships
  - economic partnerships
25. In general terms, information that is brought to the partnership by one of the partners is regarded as being held by or on behalf of all partners. As there is a variety of partnership arrangements it is not possible to provide guidance that will cover all of them. Much will depend on the individual arrangements of the partnership as to whether or not all information is held by all the partners or whether some is held by the partners solely on behalf of one of them.



## States Members

26. Having discussed the two legal principles set out in the Law at Article 3 (a) and (b), it may be useful to consider the position of States Members in government because information held in relation to them can involve both these principles. This derives from the fact that elected members are likely to have a number of different roles. Some will relate to their function as elected members (for example, corresponding with residents in their electoral district, discussing States' business with fellow members in the context of voting strategy or campaigning on behalf of a political cause) and some will relate to the functions of the SPA (for example, being a Minister and having executive responsibility for a service area, carrying out administrative functions or representing the States Department, such as on a national forum).
27. Information produced or received by States Members may be held on their own computers or in their own homes or offices, or it may be held on SPA premises or computer systems. However, the purpose of the information and the capacity in which it is being held is more helpful when deciding whether information is covered by the Law.
28. Some local public bodies are SPAs for the purposes of the Law, but individual States Members (save for those who are Ministers) are not. Therefore, information held by States Members for their own purposes will not be covered by the Law, but information they hold on behalf of, or as part of, the SPA will be covered (Article 3 (b)).
29. Information created or received by a States Member but held on a SPA's premises or computer system will be covered if it is held by the SPA on its own behalf (section 3 (a)). It will not be covered by the Law if it was produced by the member for private or political purposes and the SPA is just providing storage, office space or computing facilities.

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# PRACTICAL CONSIDERATIONS

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30. In order to comply with the requirements of the Law, SPAs clearly need to know what information they hold for the purposes of the Law. This means they need to be aware of information they are solely holding for another person and information that is being held on their behalf by other persons.
31. With regard to the former, SPAs need to know the basis on which they hold information that is in their possession, and with regard to the latter, SPAs should know what information is held on their behalf by another person and also have arrangements in place which allow them to retrieve the information in the event of a request for information being made for it.
32. Good records management is important in this context.

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# MORE INFORMATION

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33. This guidance has been developed with assistance of the Office of the Information Commissioner in the United Kingdom. The guidance will be reviewed and considered from time to time in line with new decisions of the Jersey Information Commissioner and the Royal Court.
34. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
35. If you need any more information about this or any other aspect of freedom of information, please contact us:

**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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