STATES OF JERSEY

DRAFT FREEDOM OF INFORMATION (JERSEY) LAW 201-

Lodged au Greffe on 19th July 2010
by the Privileges and Procedures Committee

STATES GREFFE

2010 Price code: H P.101

Jersey

DRAFT FREEDOM OF INFORMATION (JERSEY) LAW 201-

REPORT

1. Context

1.1 The Privileges and Procedures Committee was established on 26th March 2002, one of its terms of reference being "to review and keep under review the Code of Practice on Public Access to Official Information ('the Code') adopted by the States on 20th July 1999 (attached at Appendix A) and, if necessary, bring forward proposals to the States for amendments to the Code including, if appropriate the introduction of legislation, taking into account the new system of government".

1.2 The States adopted improvements to the Code on 8th June 2004, and these included the establishment of an Information Asset Register which shows a list of strategic and/or policy reports prepared by departments, and any report deemed to be of public interest, together with the cost of preparation where these were provided by consultants. This list is now simply known as 'States Reports' and can be found at

http://www.gov.je/Government/Pages/StatesReports.aspx.

1.3 On 6th July 2005, the States approved P.72/2005 and agreed that the existing Code of Practice on Public Access to Official Information should be replaced by a Law, to be known as the Freedom of Information (Jersey) Law 200-. The States went on to give the Committee a quite specific instruction to draft a Law based on certain approved parameters, subject to further consultation, and to bring forward for approval the necessary draft legislation to give effect to the decision.

1.4 The Select Committee of the House of Lords appointed to consider the draft Freedom of Information Bill which reported on 27th July 1998[1] set out three fundamental principles for Freedom of Information legislation. This is often referred to as the Freedom of Information model.

[1] http://www.publications.parliament.uk/pa/ld199899/ldselect/ldfoinfo/97/9702.htm

"Freedom of information laws vary in scope and detail, but they share three basic principles.

1. The first is that the right of access to government information is a general right of all people, and does not depend on establishing a "need to know". In many countries the right developed from a right in administrative law to be given access to administrative documents relevant to a dispute with administrative authorities.

2. The second principle is that the right of access is subject to a limited number of exemptions which permit refusal to disclose information if disclosure would cause harm of a specified kind. Although countries differ on the reasons for such exemptions, there is a remarkably similar core of reasons for refusing to disclose, consisting of national security, international relations, law enforcement, personal privacy, commercial confidentiality, and policy advice.

3. The third principle is that there is a right of appeal to an impartial arbiter who decides whether the exemption applies to particular information, and who has the power to rule that the information must be disclosed."

During the development of the Law, the Committee has adhered to the key principles of Freedom of Information ('FOI') legislation.

1.5 In 'The Public's Right to Know – Principles on Freedom of Information Legislation' published by Article 19, London,[2] there is defined a list of international principles to set a standard against which anyone can measure whether domestic laws genuinely permit access to official information. They set out clearly and precisely the ways in which governments can achieve maximum openness, in line with the best international standards and practice. These are as follows –

- Freedom of information legislation should be guided by the principle of maximum disclosure;
- Public bodies should be under an obligation to publish key Information;
- Public bodies must actively promote open government;
- Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests;
- Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available;
- Individuals should not be deterred from making requests for information by excessive costs;
- Meetings of public bodies should be open to the public;

[2] www.article19.org/pdfs/standards/righttoknow.pdf

- Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed;
- Individuals who release information on wrongdoing – whistleblowers – must be protected.

The last of these points is addressed separately by the pre-existing whistleblowers' policy for States employees – "Policy on Reporting Serious Concerns – ('Whistleblowing' Policy)".

1.6 The reports presented to the States and the report and propositions lodged on FOI since 2003 are listed at Appendix B for information.

2. Introduction

2.1 The Privileges and Procedures Committee now presents the Draft Freedom of Information (Jersey) Law 201- as directed by the States.

2.2 The States, in approving P.72/2005, agreed that the Law should broadly based upon the following key policy outcomes ('KPO') –

Key Policy Outcomes

1. All information should be capable of being considered for release. In particular, information created before the Code came into force on 20th January 2000 and which is not yet in the Open Access Period should be released on request unless exempt in accordance with the agreed list of exemptions.

2. There may be circumstances when there is an overriding public interest greater than the purported exemption. Such an interest will be built into the Law but can be appealed against.

3. All legal persons (both individual and corporate) should have a right to apply, regardless of their nationality or residency.

4. Application, especially for readily accessible information, should not be restricted by having to be in writing.

5. Authorities that are emanations of the state or majority owned by the public should be bound to release relevant information.

6. The Law would not apply to States-aided independent bodies.

7. A formal publication scheme is not yet proposed but authorities should be encouraged to publish as much information about themselves and their activities as possible and will be required to use the Information Asset Register.

8. Authorities are to be encouraged to develop records and document management schemes which will facilitate retrieval of requested information.

9. Information should in general be released free of charge and proportionate assistance should be given to a special need, such as an individual's sight impairment.

10. Information should be released as soon as practicable, acknowledgements should be within 5 working days and the 15 working day guide is to be seen normally as a maximum for a decision to release the information or not.

11. Information created before the introduction of the Code (20th January 2000) should be available for release, but because it has not yet been categorised its release may take longer than information created since the Code. This means that where justified by the Commissioner, the 15 working day limit may be exceeded.

12. Existing exemption (v)[3] should be simplified to refer to legal professional privilege alone. Medical confidentiality and legal advice given to an authority are adequately covered elsewhere in the exemptions. The explicit retention of these provides scope for serious undermining of the Law.

13. Existing exemption (xii), concerning the competitive position of an authority, should be amplified to give the same guidance concerning the word 'prejudice' as is given concerning the competitive position of a third party in exemption (xi). This would then be as follows –

> *"prejudice the competitive position of an authority if and so long as its disclosure would, by revealing commercial information, be likely to cause significant damage to the lawful commercial or professional activities of the authority;".*

14. Existing exemption (xiii), concerning employer/employee relations, should give greater guidance concerning the word 'prejudice' as follows –

> *"prejudice employer/employee relationships or the effective conduct of personnel management if and so long as its disclosure would, by revealing the information, be likely to seriously put at risk a fair resolution of a dispute or related matter;".*

15. Existing exemption (xiv) [in the code], concerning the premature release of a draft policy, should be amplified so that its purpose is clearly understood as follows –

> *"constitute a premature release of a draft policy which is in the course of development. This cannot exempt information relating to that policy development once the policy itself has been published, nor is it a blanket exemption for all policy under development;".*

16. Existing exemption (b), concerning information originally given in confidence has no place in a Freedom of Information Law as exemption (i) protects personal information, exemption (v) provides for legal professional privilege and exemption (xi) protects commercial confidentiality.

17. Existing exemption (c), concerning whether an application is frivolous, vexatious or made in bad faith is retained but clarified by the inclusion of the statement as follows –

> *"Only rarely should this exemption be used and an applicant must be told that he retains the right to appeal against the refusal to release the information;".*

[3] *Exemption (v) of the Code of Practice on Public Access to Official Information, updated 2004, see Appendix A*

18. In particular circumstances, if a Law Officer or the police reasonably believes that they should neither confirm nor deny the existence of information then the Law should not require them to do so.

19. Offences and penalties are necessary to make the Law effective and these include the offence of an unreasonable failure to release information that is not exempt.

20. There should be one Information Commissioner combining the role of Data Protection Registrar and oversight of Freedom of Information. This office must be effectively resourced.

21. The existing Data Protection Tribunal and appeals system should be adopted and adapted as necessary to consider Freedom of Information appeals.

22. The combined and independent function of the Information Commissioner should have just one States Committee to oversee it and it is proposed for that Committee to be the Privileges and Procedures Committee.

2.3 The Committee amended its own proposition (P.72/2005) (see Appendix C), at the request of the Policy and Resources Committee, to include the words 'subject to further consultation' and 'be broadly based upon' to allow some flexibility. With the inclusion of these refinements, the Policy and Resources Committee was both supportive in principle that there should be a Freedom of Information Law and that law drafting should commence as soon as practicable. P&R was able to support parts (a) and (c) of the original Proposition, and the flexibility in the amendment allowed for further discussion on certain parts of specific policies as identified in part (b).

2.4 The Committee as currently constituted has considered carefully all of the key policy objectives it was charged to implement, and has delivered all but the last two of these key policy outcomes in the proposed draft, as will be discussed later in this report.

Why a Law rather than Code?

Underlying principles

2.5 The philosophical and political arguments in favour of Freedom of Information 'FOI' Law are well rehearsed. The Committee recognised that, even since the introduction of the Code, Jersey people do not have the statutory, well-defined rights of access to official information enjoyed in more than 50 other jurisdictions. The Privileges and Procedures Committee ('the Committee') considers that the force of law is required to continue the culture change, giving ordinary citizens a legal right of access to government information.

Reinforcing States aims

2.6 In other jurisdictions FOI legislation has been regarded at the outset not as a standalone law but an integral part of reform and as absolutely fundamental to how government develops.

2.7 The Standing Orders of the States of Jersey set out the terms of reference of the Privileges and Procedures Committee, which include –

(h) to keep under review the procedures and enactments relating to public access to official information and the procedures relating to access to information for elected members;

2.8 The Standing Orders therefore envisage that public access to information and access to information for elected members are two different things, and the Freedom of Information Law will not be the vehicle used by members to access information, unless that is their personal choice.

2.9 The States approved the Strategic Plan 2009 to 2014, which contained as an aim –

- *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.*

2.10 In Section 15 entitled "Protect and enhance our unique culture and identity" under "What we will do", it states –

- *We will 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 (CM).*

2.11 Creating legally enforceable FOI rights for the people of Jersey would not only reinforce these aims but is a single, emphatic act that will assist the States to achieve its aims.

2.12 Jersey's low levels of voter turnout were recognised in the previous Strategic Plan – regularly less than 30% – as evidence of a democratic deficit in the Island and disenchantment with government.

2.13 The States approved the Public Sector Reorganisation: Five Year Vision for the Public Sector (P.58/2004) in 2004 – this set out aims for five years and made a commitment to greater transparency and accountability. Similarly, the £9.4 million Visioning Project which arose out of this exercise asserted: 'The need for change in the public sector is being driven by major external changes and a general political unease generated by poor public perception of the States of Jersey and the public sector. There is a disconnection between the electorate, politicians and the public sector in Jersey that is unhealthy and breeds frustration and mistrust throughout the community.'

2.14 From the public perspective, the force of law carries great weight and offers legal protection that cannot be offered in a policy or Code. It would remove once and for all the perception of a culture of secrecy and enshrine in law not only a duty to provide information unless exempt, but also a duty to assist a member of the public in making an application.

Human Rights and Freedom of Information

2.15 The report of the report of the Select Committee appointed to consider the draft [U.K.] Freedom of Information Bill, dated 27th July 1998, stated –

> *" "Freedom of Information" is something of a misnomer. A more accurate term is that to be found in the title to the Canadian Access to Government Information Act 1982. The distinction between*

"freedom" of information, being an absence of restrictions on the voluntary disclosure of information, and a legally enforceable right of access to information, is an important one legally and politically. It is the reason why the European Court of Human Rights has declined to interpret Article 10 of the European Convention on Human Rights (which says that "everyone has the right to receive and impart information") as requiring member states to provide for a right to demand information. "Freedom of Information" has, however become a common term for such legislation, and is used as such in the United States, Australia, Ireland and other countries."

"8. Although the European Court of Human Rights has interpreted Article 10 of the European Convention on Human Rights as not requiring freedom of information legislation, the Parliamentary Assembly and the Committee of Ministers of the Council of Europe have both adopted Recommendations endorsing such measures. The European Community adopted a Code of Conduct and there were Council and Commission Decisions on access to Council of Ministers and Commission documents in 1993, subject only to limited exemptions, together with a right to appeal on merit to the European Court of Justice or the European Community Ombudsman against refusal. This has led to several rulings by the Court of Justice and findings by the Ombudsman."

2.16 The European Parliament adopted Regulation (EC) No. 1049/2001 on 30th May 2001 regarding public access to European Parliament, Council and Commission documents.

Human Rights (Jersey) Law 2000

2.17 Article 10 of the Human Rights (Jersey) Law 2000 states –

"Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

2.18 The Committee considers that the codification of exemptions in the draft Law relating to information otherwise available, restricted information and qualified information, with the counterbalance of the public interest test and

appeals to the Information Commissioner and, if required, to the Royal Court, meets the requirements of the above Law.

Reputation of the Island

2.19 On 27th February 2008, The Telegraph carried the following headline and excerpt –

> *"**Why documents in Jersey remain secret.***
>
> *The Freedom of Information Act gives journalists and members of the public the right to demand access to public documents in mainland Britain. Jersey, however, has its one independent legal system, with no such freedom of information laws.*
>
> *It means the Island's government, the States of Jersey, is under no legal obligation to release details relating to the child abuse scandal or any other matter of public concern…"*[4]

2.20 The draft Law establishes, in the form of the Information Commissioner and the Royal Court in Tribunal mode, impartial bodies that have the power to rule on the application of the Law and whether disclosure is required.

Important principles on which the Law is based

Public access vs. Parliamentary access to information

2.21 This Law is being proposed to enable *public* access to official information, it is not designed to provide parliamentary access to information for States' members, who have an enhanced right of access to information. The Committee is reviewing the current position in relation to parliamentary access to information and hopes to be able to report on this later in 2010.

Law not to curtail existing access

2.22 It is important to grasp the principle that an F.O.I. Law should certainly not place restrictions on information which at the moment would be routinely disclosed. One of the issues regularly faced in the U.K. is the distinction between F.O.I. requests and what might be called 'business as usual' requests. An F.O.I. law ought to be giving additional rights to people for access to information and not making life more difficult for them and blocking disclosures or delaying disclosures which would just occur as a matter of course at the moment.

Publication of information provided

2.23 Mr. Maurice Frankel, Director, Campaign for Freedom of Information, who spoke to States members on 12th June 2009, summed up very clearly that it does not matter who the person is who is seeking information, nor what they want to use it for. In the United Kingdom, he said "It [the law] is applicant blind and purpose blind. That is how the Tribunal and the Commissioner describe it, which means the decision is not 'Can we disclose the information to this person who has asked for it?'. The decision is 'Can we make this

[4] http://www.telegraph.co.uk/news/uknews/1579981/Why-documents-in-Jersey-remain-secret.html

information public?' We take no notice of the identity of the requester. Requesters cannot be made public."

2.24 If we take this to the logical conclusion, once information has been supplied to a requester, it is effectively public information, and may therefore be published, and indeed, many authorities in the U.K. now routinely publish any information that has been supplied under the FOI Act.

2.25 This contrasts with the provision of personal information under the Data Protection (Jersey) Law 2005, where information is treated as confidential to the data subject.

Access to information not documents

2.26 The Law will confirm the provision of the Code that application is made for *information* and not for sight of *documents*. The files will not be opened up for examination to the public, the authority will identify information that is requested, decide whether it may be released, and if necessary, redact the information/mask any exempt information that is next to the requested information. If the information is contained in a document or record that can be made public in its entirety, then it may be more convenient for the authority to release the whole document/record.

2.27 **The Law does not require the authority to prepare a report or other record bringing together the information in a different format, this would be a matter for the applicant. The Law will only require the release of information already held.**

2.28 The Law may also encourage the proper use of retention schedules, regarding information no longer required to be held. This would streamline activity under the FOI Law.

What is the difference between the categories of exemption from disclosure?

2.29 Information otherwise available. This is reasonably clear. The Law cannot be used when information can be found elsewhere, for example on a website or in a publication. The Law does require the authority to provide reasonable assistance to an applicant, so they will be re-directed by an officer to the source of the information.

2.30 Restricted information. This information will not be released under this Law. There are very few exempted areas in this category, and they include information which another Law says cannot be released, a breach of confidence that can be challenged in Court, national security, privileges of the States Assembly and personal information, because this can already be obtained under the Data Protection (Jersey) Law 2005.

2.31 Qualified information. This relates to information which the public authority must supply, unless it is in the public interest not to do so. The focus of this is that the public authority must prove that it is in the public interest not to release, rather than the emphasis being on non-disclosure with the applicant being in the position of having to prove that it is in the public interest to disclose the information.

2.32 However, Article 5 allows an authority to release information, even if it falls within an exempted category, if it is happy to do so.

2.33 The exemptions have been considered at length by the Committee, and the exemptions used in the U.K. Freedom of Information Act 2000 have been followed to an extent, but not slavishly so. For example, there is not an exemption relating to the disclosure of free and frank advice, nor to access (or rather, lack of access) to Cabinet minutes. The Law will provide a much more sophisticated tool than the existing Code of Practice for the disclosure of information, with a differentiation between information that cannot be released, and information that can be assessed alongside the public interest test. Whereas, under the Code, all exempt information could be withheld automatically, with a right of appeal to the States of Jersey Complaints Board (which cannot require disclosure), there will now be a public interest test to be applied to the majority of that information, with the right of appeal to an independent Commissioner and to the Royal Court, which will lead to a more rigorous assessment of the confidentiality of information with the aim of securing greater transparency.

2.34 A comparison of the Code with the provisions available under the draft Law is attached at Appendix D.

Public interest test

2.35 The term "**the public interest**" is not defined in the Law. This is a very important element of the way in which the Law will work, as the way that the public interest test is considered will have a material effect upon the disclosure or otherwise of information that is qualified by that test. Some very interesting studies have been undertaken by The Constitution Unit, School of Public Policy, UCL, for example as described in "Balancing the Public Interest: Applying the public interest test to exemptions in the U.K. Freedom of Information Act 2000" by Meredith Cook (pub. August 2003) which may be downloaded free of charge from the UCL website (http://www.ucl.ac.uk/constitution-unit/publications). This publication is now in its second, and updated, edition, and this reports quotes from that publication, with kind permission of the publisher. The U.K. Information Commissioner's Office website[5] gives guidance on the application of each exemption in the U.K. and the application of the public interest test.

2.36 However, something which is "in the public interest" may be summarised as something which serves the interests of the public. The public interest test entails a public authority deciding whether, in relation to a request for information, it serves the interests of the public either to disclose the information or to maintain an exemption or exception in respect of the information requested. (It does not refer to information which the public may find interesting.) To reach a decision, a public authority must carefully balance opposing factors, based on the particular circumstances of the case. Where a request for information is refused, on appeal to the authority there will be an internal review, when the public interest test will be reconsidered. On appeal, the Information Commissioner will also review the public interest test, as will any further appeals body. Where the factors are equally balanced, in the U.K., the information must be disclosed.

2.37 The majority of exemptions from disclosure refer to 'qualified information' to which a public interest test must be applied. At each stage of the process, the

[5] www.ico.gov.uk

public interest test needs to be applied, that is by (a) the public authority during the original application, and during each stage of the appeals process, namely by (b) the head of that authority/Minister (internal review), (c) the Information Commissioner and (d) the Royal Court as the appeals body. The information will therefore be assessed very carefully, and there are several opportunities for a decision to be taken that the information should be released or not.

Neither Confirm nor Deny clause (NCND)

2.38 The incorporation of a 'neither confirm nor deny' (NCND) clause is included in freedom of information legislation in other jurisdictions, and enables a public authority to neither confirm, nor deny, the existence of the information requested, and is of particular interest in issues touching upon national security and policing.

2.39 This type of provision is useful in relation to information supplied by a foreign government department, for example information from security services relating to crime or terrorism, and which the supplying government would not entrust with a public authority in Jersey if there was a risk of disclosure. As can be seen later in the draft at Article 42, the Committee has also agreed that a 'carve out' to ensure that any information given to a Jersey public authority by a foreign government department would not be considered to be 'held' by Jersey authorities for the purposes of the Law, and therefore there would be no need for an authority to confirm or deny that it had that information.

2.40 There are a number of regular policing activities where an NCND clause would be of value, for example the Customs and Immigration believed that the omission of the NCDC clause could have a detrimental effect in certain cases on the conduct of legal proceedings, and on the investigation of offences, and the department was of the view that there was a strong case for including the NCND clause regarding intelligence held by the Service. To not do so would mean that the service would have to disclose its operational capabilities/limits, what it was investigating, or what information it held or did not hold; an approach which the department doubted would be considered either acceptable or appropriate. The Education, Sport and Culture department believed it was important to retain the NCND clause but would only envisage invoking such a clause in exceptional circumstances, and would be willing to justify withholding of information (on a confidential basis) to an independent third party if this should be necessary. Accordingly an NCND clause has been included at Article 10(2) in relation to restricted or qualified information, and this is subject to the public interest test.

Which public authorities will be covered?

2.41 The Committee believes that all public authorities should be included in time, but that to begin with, those authorities that have been subject to the Code of Practice on Public Access to Official Information since January 2000 should be the first to comply, given that they are accustomed to providing information to the public under the Code during that time and have been preparing documents accordingly, and loading their reports onto the States Reports page of the www.gov.je website. On 11th May 2010, in answer to a written question in the States Assembly, the Chief Minister confirmed that "all

departments keep a record of all information that they hold in either electronic or paper format, in accordance with paragraph 2.1.1(a) of the Code".

2.42 The Draft Freedom of Information Law 'Policy Paper': White Paper October 2009 (R.114/2009) published on 14th October 2009 recommended –

Public authorities

1. Ministers, departments, Scrutiny Panels, Public Accounts Committee, Chairmen's Committee and the Privileges and Procedures Committee, Greffier of the States;
2. Bailiff of Jersey, Attorney General, HM Lieutenant Governor;
3. Parishes, quasi public bodies;
4. Court system and tribunals.

2.43 The Committee recommends that the following bodies be covered, with others being capable of being added in the future by Regulation –

Quasi public bodies

1. Jersey Financial Services Commission
2. Jersey Competition Regulatory Authority
3. Jersey Law Commission
4. Jersey Appointments Commission
5. Waterfront Enterprise Board, or successor.

2.44 The Committee has now decided not to propose that the following more remote public bodies be covered as this would place an additional burden on wholly or partly publicly owned utilities –

1. Jersey Telecom
2. Jersey Post
3. Jersey New Waterworks Company
4. Jersey Electricity Company

2.45 Members might ask – why should the above companies not be covered by the Law? They are owned by the public and the public surely has the right of access to information that they hold, provided that it is not exempt. The answer is that it is in the interest of everyone that all companies of the same type, regardless of their ownership, need to be subject to the same Laws, so that the information about themselves that they are required to disclose to the public is the same.

2.46 The information about themselves that companies are required to disclose, for example, to potential shareholders, to auditors, to shareholders and to the JFSC is mainly set out in the Companies Law. Other Laws, the Banking Law for instance, may impose additional disclosure obligations in respect of companies carrying on certain activities.

2.47 However, no Law imposes additional disclosure obligation on a company just because particular persons own its shares. After all, in the case of most large companies, the ownership of their shares constantly changes.

2.48 Generally speaking, there is a "curtain" between a company and those who are its owners/shareholders. ***Salomon v A Salomon & Co Ltd*** [1897] AC 22: "The company is at law a different person altogether from the subscribers to the Memorandum, and though it may be that after incorporation of the business is precisely the same as it was before and the same persons and managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers or members liable in any shape or form except to the extent and in the manner provided by the act."

2.49 This does not mean, however, that the public can find out nothing about companies owned or controlled by the States. The Minister for Treasury and Resources holds the shares in these companies, on behalf of the public of Jersey. Since the Freedom of Information Law will apply to the Minister, it follows that the Minister can be required to supply any information he or she has about the affairs of the companies. The amount of this information will be substantial.

2.50 Groups of people establish companies so that they may collectively carry on commercial activities in competition with others but with limited personal liability. The competitive position of a company owned or controlled by the States would be seriously compromised if competitors could require it to provide all or any information it holds. This is because it could only refuse to supply this information if it were not in the public interest to do so, albeit it may not be in the company's interest to do so. The two interests are not necessarily the same.

When will the Law come into force?

2.51 In order for the Law to apply to a public authority, that authority must be added to the Schedule to the Law, at which point they are referred to as 'scheduled public authorities' in the text of the Law.

2.52 The Committee proposes that the first authorities to be subject to the Law are as currently set out in the Schedule –

(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 the standing orders of the States Assembly;

(4) An administration of the States;

(5) The Judicial Greffe;

(6) The Viscount's department.

2.53 The Schedule may be amended by Regulation, and other public authorities can be added from time to time following debate by the States, within a framework to ensure the Law is applied to all those authorities within a reasonable period of time. This will allow the quasi-public authorities which

have not been required to comply with the Code a little more time to prepare, and it is anticipated that Regulations should be prepared for debate to include the quasi public bodies within as short a timeframe as possible.

2.54 The Committee is mindful that, due to current financial constraints and the necessary preparations for introducing this Law, that a reasonable lead-in period will be necessary. While it hopes that this period can be kept as brief as possible, and its preference would be a 2 year lead-in period, it recognises that an Appointed Day Act might not be possible in certain cases for a period of up to 5 years.

2.55 The Committee has no jurisdiction over the executive function of the States of Jersey, so implementation will of necessity need to be led by the Chief Minister's Department.

Does the Freedom of Information Law mean that information will be provided free of charge?

2.56 This is a matter for a separate debate, as details relating to the level of information that can be given free of charge and the cost of any additional information will be contained in draft Regulations. The Committee's thinking is described in the section on Financial and manpower implications. Given the current financial constraints facing the Island, the Committee is not minded to recommend a scheme which requires departments to undertake extensive work without any charges being levied.

What will the Information Commissioner be able to do?

2.57 The Information Commissioner role will be combined with the role of Data Protection Commissioner and the Information Commissioner function will be carried out by an additional senior member of staff, who should be supported by an executive officer to provide separation between initial consideration of an appeal and adjudication on it.

2.58 The Information Commissioner will –

(a) have a duty to encourage good practice;

(b) keep the public informed about this Law;

(c) be able to require the production of information;

(d) consider appeals against the decision of scheduled public authorities not to disclose information;

(e) issue a Code of practice in accordance with regulations adopted under the Law.

2.59 The Data Protection Commissioner has successfully pursued mediation as a means of resolving disputes and so far it has not been necessary to convene the Data Protection Tribunal. In fact, the Tribunal has only met once for a preliminary hearing, and co-operation with the other party subsequently meant that no further meetings were necessary. It is hoped that mediation can be employed also under the Freedom of Information Law, which would enable some common-sense discussion with the public authority.

Who will form the Appeals Body?

2.60 There will be a right of appeal against the Information Commissioner's decisions to the Royal Court. The appeal could come from an authority which has been ordered to release information by the Information Commissioner, or from an applicant against a decision of the Information Commissioner to uphold an authority's position not to disclose information.

2.61 The Committee has decided to recommend that the final Appeals Body should be the Royal Court acting in tribunal mode. It was necessary to include a final appeals body which would have the necessary experience to weigh up the public interest in the Jersey context and the authority to require a public body to release information that it had not considered should be released.

2.62 Discussions were held with the previous Bailiff, Sir Philip Bailhache, who indicated that steps could be taken to keep the cost to the applicant low in minor cases, for example by making pre-emptive costs orders against an authority to mitigate against the fear of high costs for the applicant. However, costs don't just go away, they would then need to be borne by the taxpayer.

There follows a description of the contents of the various Parts of the Law.

3. Part 1 – Articles 1–6

Interpretation

Article 1 – Interpretation

3.1 In P.72/2005 the States agreed the following **Key Policy Outcomes** –

"5. Authorities that are emanations of the state or majority owned by the public should be bound to release relevant information.

6. The Law would not apply to States-aided independent bodies."

3.2 The Law provides that a body corporate or a corporation sole established by the States by an enactment will be covered by the Law, although not necessarily immediately.

3.3 The Committee consulted with the bodies that might fall under the Law, and accepted the points raised by the **utility companies** that the obligation to provide access to information would add complexity to their operation that might affect their competitiveness. Much of the information held is commercial and would be unable to be released. On the basis that these companies are subject to review by the Jersey Competition Regulatory Authority and by the Comptroller and Auditor General, the Committee has agreed that the following utility companies will not be covered by the Law –

Jersey Telecom

Jersey Post

Jersey New Waterworks Company

Jersey Electricity Company

3.4 The Committee is satisfied that it is not necessary to include **States-aided independent bodies**, as these may be audited by the Comptroller and Auditor General, and as directed by the States, no such body has been included within the meaning of public authority.

3.5 The above bodies, the **quasi public bodies**, or any additional bodies, may be added in the future by Regulation if this is later seen as desirable.

3.6 The Committee would like to draw attention in particular to the following –

(i) "public authority" means –

(a) the States Assembly including the States Greffe;

(b) a Minister;

(c) a committee or other body established by resolution of the States or by or in accordance with the standing orders of the States Assembly;

(d) an administration of the States;

(e) a Department referred to in Article 1 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965;

(f) a body corporate or a corporation sole established by the States by an enactment;

(g) the States of Jersey Police Force;

(h) the Judicial Greffe;

(i) the Viscount's department;

(j) each parish;

3.7 The above means all of those bodies which will eventually be covered by the Law, only some of which will be included from the start.

(b) "scheduled public authority" means a public authority named in the Schedule.

3.8 Schedule 1 lists the scheduled public authorities as follows –

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 the standing orders of the States Assembly.

4 An administration of the States.

5 The Judicial Greffe.

6 The Viscount's Department.

3.9 The above scheduled public authorities are those bodies that will have to comply with the Law as soon as the Appointed Day Act is approved. The preparation and lodging of the Appointed Day Act will be a matter for either the Chief Minister or the Council of Ministers.

Article 2 – Meaning of "request for information"

What is 'information'? What can be requested? What will the requester receive?

3.10 'Information' means what is actually held at the time of a request by the authority, or by another person on behalf of the authority (for example by the Jersey Archive). It can be in any form – written, photograph, film, or audio recording. Written information will include what is written in letters, reports, handwritten notes on a report, what is written on a 'post it' note, e-mails. Information can appear in a physical copy or in a document held electronically. For ease of reference, the word 'record' will be used to mean any of the forms in which information can be located.

3.11 Access to 'information' does not mean the entire 'document', or access to a 'file'. It is entirely a matter for the authority whether they release an entire record. If an entire record is able to be released, then the authority may find this administratively easier. However, if the information requested amounts to one sentence from one report, and one paragraph and a table from another, then this is what is released.

3.12 The authority is not required to produce a report of any kind to accompany information released, or to copy and reformat it, or to provide an interpretation of the information found. It is simply required to release the sentence, paragraph and table to the applicant, if this is what is found. This may be an entire photocopied page from a report, with masking if necessary, or no masking if all of the information on the page is open, with a simple mark to show the relevant passage. Electronically held documents would allow a 'cut and paste' option for the relevant information. It would be unnecessary work on the part of the authority to prepare a report on the information, given that the authority will not know why the requester wishes the information in the first place, and any report might therefore be unhelpful. Such additional work would place an unnecessary burden on the authority. It is anticipated that there will be a number of standard template letters to be used throughout the application process.

3.13 In P.72/2005 the States agreed the following Key Policy Outcome –

"4. Applications, especially for readily accessible information, should not be restricted by having to be in writing."

3.14 The Committee has accepted that there is a need for a process in relation to Freedom of information, and that the authority requires an address to send information to. The Committee has decided that the only workable route is for applications to be in writing, so as to provide an opportunity for the applicant to explain exactly what information he/she requires. However, an application may be received by e-mail.

Article 3 – Meaning of "information held by a public authority"

3.15 The Police recommended the inclusion of an explicit statement to clarify that information was not deemed to be 'held' by a Jersey public authority when supplied by a foreign government department. It was suggested that this could be similar to clarification within the Freedom of Information (Scotland) Act.

3.16 It is also important that the authority releasing information is the legitimate holder or creator of that information. Requests should be directed to the appropriate department and not to another department that might hold the same information, but who was not the data controller ('owner' or 'holder') of that information. This could lead to confusion, duplication and misunderstanding of the status of the information.

3.17 For these reasons, information held on behalf of another person is not deemed to be information within the meaning of the Law.

3.18 There will be separate provisions in Regulations yet to be prepared to deal with the situation of the Jersey Heritage Trust which provides an archive facility.

Article 4 – Meaning of "information to be supplied by a public authority"

3.19 One respondent commented that the draft Law did not accommodate instances where requested information was updated or came to light subsequent to a request being made and complied with. It was suggested that, in this instance, it would be possible to be deliberately obstructive in denying an otherwise legitimate request. The Committee did not consider it was practicable for all

requests to remain open for amendment after they had been complied with. Article 4 provides that information held at the time the request is received is the information that is taken to have been requested.

Article 5 – Law does not prohibit the supply of information

3.20 Importantly, Article 5 of the Law permits a public authority to release information, even if the information is, or appears to be, exempt from disclosure.

3.21 Clearly, care should be applied in relation to its application to organisations which could be placed at a material competitive disadvantage to their commercial rivals.

3.22 The Judicial Greffe and Viscounts Department pointed out that, in practice, the disclosure of pleadings, for example, would continue to be addressed in the manner set out in the existing guidelines.

4. **Part 2 – Articles 7–20**

Access to information held by a scheduled public authority

4.1 Key policy outcomes 1 and 2, approved in P.72/2005, say –

> *"1. All information should be capable of being considered for release. In particular, information created before the Code came into force on 20th January 2000 and which is not yet in the Open Access Period should be released on request unless exempt in accordance with the agreed list of exemptions.*
>
> *2. There may be circumstances when there is an overriding public interest greater than the purported exemption. Such an interest will be built into the Law but can be appealed against."*

4.2 This is the main basis of the Law. Information may only be refused if it is otherwise available, restricted (where appropriate with a right of appeal), or qualified, but tempered by a public interest test.

Article 8 – When a scheduled public authority may refuse to supply information it holds

4.3 The Committee agrees it is important that the test to be applied in respect of vexatious requests would be workable and certain. The Financial Services Commission pointed out the requirement for a cross-reference to be included to the other circumstances when a scheduled public authority may refuse to supply information, in the case of excessive cost, for example, if a cost limit or cap is included. The following provisions were accordingly added under Article 8(2):

> *"(b) a fee payable under Article 15 or 16 is not paid; or*
>
> *(c) Article 16(1) applies (cost of supplying the information exceeds the prescribed fee)."*

4.4 Following the consultation process, this Article was amended to require payment prior to the information being supplied, or to refuse information, if the cost exceeded the financial cap.

4.5 Regulations will provide for a charging structure, and the States will decide at that time whether there should be a limit to the amount of information that could be provided, whether or not charged for.

Article 10 – Obligation of scheduled public authority to confirm or deny holding information

4.6 A number of consultation responses cited the need for an authority to refuse to inform the applicant as to whether or not it held the information, where it were it in the public interest to do so. In response the Committee's White Paper in 2009 the Committee received correspondence from the Law Officers, Customs and Immigration and Education, Sport and Culture departments which outlined the need for a 'neither confirm nor deny' (NCND) clause within the legislation. Prior to presenting R.114/2009 to the States the Committee agreed that an NCND clause should be inserted into any subsequent draft of the law. The requirement for such a clause was reaffirmed

following the receipt of consultation responses regarding the provision in respect of law enforcement (Article 43 of the present draft legislation).

4.7 The States of Jersey Police supported the Committee's intention to include an NCND clause. The Police and the Law Officers considered such a clause to be an absolute requirement to protect and safeguard their future working relationships with a number of external agencies. Exempt information could otherwise be implicit in the decision of the Department either to provide, or to refuse to provide, the requested information.

4.8 An NCND clause has accordingly been included in the present draft of the legislation. The NCND clause can be applied to policing inquiries, tribunals, investigations by the Comptroller and Auditor General and investigations by the Jersey Financial Services Commission. Where the information sought is restricted or qualified and the authority considers it to be in the public interest to neither confirm nor deny that it has the information, it will be taken to have denied the provision of the information on the grounds that it was restricted information, although it will not need to specify the particular type of restricted information.

Article 12 – Duty of a scheduled public authority to supply advice and assistance

4.9 This Article inserts a duty for a scheduled public authority to assist an applicant in making a request for information. This will include for example, directing an applicant to the right department, or if the cost of complying with a request would be likely to exceed any cost cap, then liaising with the requester to try to refine and reduce the scope of the request so that it can be complied with.

Article 13 – Time within which a scheduled public authority must deal with a request for information

4.10 In relation to timescales for releasing information, the **Key Police Outcomes** said –

> *"10. Information should be released as soon as practicable, acknowledgements should be within 5 working days and the 15 working day guide is to be seen normally as a maximum for a decision to release the information or not."*
>
> *11. Information created before the introduction of the Code (20th January 2000) should be available for release, but because it has not yet been categorised its release may take longer than information created since the Code. This means that where justified by the Commissioner, the 15 working day limit may be exceeded."*

4.11 The period set in the draft Law is 20 days, and unnecessary delays can be appealed against to the Information Commissioner. During this period the clock can stop for periods of time – for example, while the department assesses the amount of work required to comply with the request, and hence whether the cost will exceed any agreed cost limit or cap, to negotiate a reduction in the amount of work requested so as to get it under the cap and therefore able to be complied with. If a fee is to be charged, then the clock will not start until the fee has been received.

4.12 Education, Sport and Culture, the States of Jersey Police, and the Jersey Financial Services Commission all commented that there may be occasions when the period of 20 working days to respond to a request would need to be extended. Education, Sport and Culture advised that it would be difficult to respond to requests during school holidays, as the majority of school administrative staff would not be at work. The States of Jersey Police were concerned that there would be occasions when national policing and United Kingdom government input would be required, which would be likely to impact on the timeliness of a response. The Jersey Financial Services Commission noted that legal advice may need to be sought in some instances, and that this could cause difficulties in respect of complying with the 20 working-day rule. At the Committee's meeting on 9th February 2010 it recalled that it had incorporated a provision in Article 13(2) so that the States might, by Regulations, prescribe different periods for the provision of information for different public authorities or any part of a public authority, such as schools or certain functions of the police.

Article 14 – A scheduled public authority may request additional details

4.13 While an authority is liaising with a requester to clarify what he or she requires, the clock will stop.

Article 15 – A scheduled public authority may request a fee for supplying information

4.14 Article 15 provides for a fee to be charged. The fee structure will be set down in Regulations to be approved by the Assembly.

4.15 The PPC has given consideration to what these charges might be, and this is covered in the section on financial and manpower consequences.

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

4.16 This Article allows a public authority to refuse to supply information if it exceeds an amount to be set by regulations ('cap'). Thereafter a charge may be levied in line with Regulations to be considered by the States.

Article 17 – Where public records transferred to the Jersey Heritage Trust

4.17 The Data Protection Commissioner commented that data which was transferred to Jersey Heritage was likely to remain the legal responsibility of the data controller, and that this needed to be reflected in any Regulations relating to applications for information transferred to Jersey Heritage. How this will work in practice will need to be dealt with in those regulations.

Article 18 – Where a scheduled public authority refuses a request

4.18 This Article is self-explanatory, and the detail will be brought forward in Regulations for approval by the Assembly. The question of how requests for information are handled, and how refusals are dealt with is a matter which must be led by the Executive, rather than have systems and processes thrust upon them. These should be brought forward during the implementation phase.

Article 19 – Publication schemes and index of information held

Publications scheme

4.19 This Article enables the establishment of a publication scheme by Regulation, but there is no current intention to require this to occur. Advocacy of good practice can achieve what publication schemes achieve. This would include maintaining comprehensive websites, the publication of reports on the States Reports section of www.gov.je, regular updating of the public about policy change and initiatives and the publication of information as it is released to requesters under the Law. The Information Commissioner will be able to issue Practice Notices to departments that are found to have inadequate systems. However, the establishment of publications schemes will remain an option of there is a political will to introduce them.

4.20 **Key Policy objective** 7 said –

"A formal publication scheme is not yet proposed but authorities should be encouraged to publish as much information about themselves and their activities as possible and will be required to use the Information Asset Register."

4.21 The States approved in 2004 an Information Asset Register, and the Chief Minister advised the Assembly on 11th May 2010 that: "The gov.je website contains a page called States Reports, previously known as the Information Asset Register (http://www.gov.je/Government/Pages/StatesReports.aspx), which holds a register of strategic and policy reports as well as other reports that are deemed to be of public interest, Departments are aware of the centralised reports section on the website and are therefore responsible for maintaining up-to-date records. Following the development of the new website the Information Services Department is working with departments to ensure all relevant information is uploaded onto the site. Copies of reports are also available in other parts of the gov.je website, including the sections on States departments and Ministerial Decisions."

4.22 There is an exemption in Article 37 relating to information intended for publication within the next 12 weeks, and it may be that, as in the U.K., authorities will get into the habit of publishing certain information on a regular basis.

Index of information

4.23 In March 2010, the Committee agreed that the draft legislation should include **a requirement to manage documents appropriately** and to keep records in good order, sufficient to meet the requirements of the proposed Law. It was accordingly agreed that Article 19(2) and 19(3) would be inserted as follows to include a duty to maintain an index of information held in order to enable improved records management:

"(2) Paragraph (3) –

(a) applies to all public authorities; and

(b) applies to a public authority whether or not Regulations under paragraph (1) require the public authority to adopt and maintain a scheme that requires it to publish information.

(3) Each public authority, in order to facilitate the implementation of this Law, whether immediately or at some future time, must prepare and maintain an index of the information that it holds."

4.24 This is similar to the obligation of an authority in paragraph 2.1.1 of the Code of Practice on Public Access to Official Information to keep a general record of all information it holds. However, the provision in this Article relates to not only those authorities which appear in the Schedule, but also to other authorities which will be added to the schedule at a later date. (See Article 1 for the meaning of 'public authority'.)

4.25 The index will need to identify the location of information required for the authority's operational requirements and also to be able to locate information in response to requests. Such an index will need to contain sufficient key words to satisfy this aim, and should be electronically searchable. There is no evidence to suggest that an electronic document management system would be required. However, processes and procedures may need to develop.

4.26 A preliminary study has begun to identify the challenges for departments in meeting the records management demands of a new Law, under the leadership of the Director of Information Services and the Head of Archives and Collections.

Article 20 – A scheduled public authority must supply information held by it for a long time

4.27 This introduces a provision to release certain information after 30 years. Other information within the 'restricted' or 'qualified exempt' categories must be released after 100 years.

4.28 The Jersey Financial Services Commission considered there to be a conflict between this Article and Article 37 of the Financial Services (Jersey) Law 1998, as it required the supply of information held for over 100 years, while statutorily restricted information was not time-limited under the Financial Services Law.

4.29 The States of Jersey Police recommended that the Article be amended to prevent national security information losing exempt status after the 100 year period. The Police raised concerns regarding the effect of the Article upon information which was exempt under Article 28: National Security. Such information which would lose its exempt status after 100 years, in accordance with Article 20, even if that information was still considered to be damaging. It was therefore suggested that the Article be amended to include an exemption for national security issues under Article 28 and any other national security exemptions that may be subsequently added.

4.30 The Committee concurred that there may be occasions when certain information should not be released even after a long period and it was agreed at the Committee's meeting on 9th February 2010 that some flexibility should be incorporated into this area through the addition of the following paragraph:

"(3) Regulations may exempt any information from the provisions of paragraph (1) or (2)".

4.31 In the unlikely event that it is considered inappropriate to release certain information after 30/100 years, the States may make regulations exempting it from release. In the absence of such regulations, release will be automatic after the specified period.

5. Part 3 – Articles 21–22

Vexatious and repeated requests for information

Article 21 – A scheduled public authority need not comply with vexatious requests

5.1 Key Policy Outcome 17 stated –

"Existing exemption (c), concerning whether an application is frivolous, vexatious or made in bad faith is retained but clarified by the inclusion of the statement as follows –

"Only rarely should this exemption be used and an applicant must be told that he retains the right to `appeal against the refusal to release the information".

5.2 Article 21 makes the meaning of 'vexatious' clear, in that it is not taken to mean any intention simply to embarrass the authority or person, however if there is no real interest in the information being sought, or information is being sought, for example, simply to create work for an authority, then the request may be refused.

Article 22 – A scheduled public authority need not comply with repeated requests

5.3 The Article relating to repeated requests is clear. The interpretation of the phrase 'reasonable interval' between requests will be initially be determined by the authority, but will change over time if challenged and the Information Commissioner and/or the Court become involved. The Article serves to disqualify repeated requests for exactly the same information, or information which is substantially similar.

6. Part 4 – Articles 23–25

Information that is otherwise available

6.1 This provision has been included to ensure that information is accessed under the relevant legal framework. This does not deny access, it merely requires access to be made another way. So, for example, personal information should be requested using the Data Protection (Jersey) Law 2005, and Court information (including for inquests or post-mortems) should be requested under the Rules of Court from the Court administration.

Article 24 – Court information

6.2 The Judicial Greffe and Viscounts Department raised concern that Court information had been included in the section of the draft Law entitled: INFORMATION OTHERWISE AVAILABLE. It was suggested that an alternative would be to provide for Court information to be expressly categorised in the restricted information section in Part 5 of the Law rather than in Part 4. It was noted that Court information as described in Article 24 was exempt and did not, therefore, need to be disclosed, although Article 5 did provide for an overriding right to disclose information. The Committee was advised that, in practice, therefore, there was nothing to prevent either Department from electing to disclose information and on that basis, it would be perfectly proper for the Judicial Greffe to continue its present practice in relation to the disclosure of pleadings and other documentation in actions before the Royal Court. The Committee therefore agreed that the exemption to allow courts and tribunals to decide what information should or should not be released in respect of proceedings should not be amended.

6.3 The Committee agreed at its meeting on 9th February 2010 that the exemption to allow courts and tribunals to decide what information should or should not be released in respect of proceedings before it should not be amended. The Committee felt that the fact that a matter may be death related was not, of itself, relevant.

Article 25 – Personal information of data subject

6.4 The Data Protection Commissioner was not content with the previous draft of this Article, as set out in R.114/2009, as it did not relate to personal data in respect of third parties and did not appropriately interact with the Data Protection (Jersey) Law 2005. The Law Officers also commented that the Article would not properly deal with issues regarding third party personal data, and suggested that the exemption should be amplified to mirror that found in the U.K. The Committee noted these concerns at its meeting on 9th February 2010 and agreed that the Article should be expanded to allow for appropriate interaction with the Data Protection (Jersey) Law 2005. The following provision was accordingly added to state that information would be considered otherwise available if:

"(b) it is not exempt from Article 7(2)(a) of that Law 2005 by virtue of a provision of Part 4 of that Law."

7. Part 5 – Articles 26–30

Restricted information

7.1 Restricted information is not subject to the public interest test, while qualified information is. There is no single reason information is restricted. A first, and obvious one, is that for the information in question secrecy is thought to be so important that it should always be open to the authority to maintain it. An example is the exemption for information whose disclosure is positively prohibited by law (Article 26). But most restricted information is not like this at all. Most of these Articles are designed to carve out from disclosure under the Law information whose availability is governed by some more specialized set of rules. So, personal data of which the applicant is the data subject will be dealt with under the Data Protection (Jersey) Law 2005 (Article 30), and disclosure of information that is subject to a duty of confidence at customary law will be governed by customary law principles (Article 27). In these cases, the information is restricted, not to place it beyond the public gaze, but to prevent uncomfortable interaction between two specialized and potentially incompatible régimes for its disclosure.

7.2 There are relatively few matters that will be restricted, as will be shown below. While there is not a public interest test in relation to restricted information, a requester may appeal to the Information Commissioner where a scheduled public authority refuses to comply with a request on the grounds that it is restricted information. The Information Commissioner will consider any appeal against the refusal, and may take the view that the public authority has incorrectly categorised the information as it should therefore be supplied. In addition, in some cases, there remains a right of appeal to the Royal Court.

7.3 Some information is considered either to be so sensitive (for example relating to national security) or relating to States Assembly privileges, that it should be seen neither by the Information Commissioner nor by the Jurats of the Royal Court. In these cases, proof that the exemption is necessary is provided by the Chief Minister (national security) and the Greffier of the States (States Assembly privileges) respectively. There is a right of appeal direct to the Royal Court, and the Chief Minister/Greffier of the States will describe the information requested in order for an appeal to be heard.

Article 26 – Other prohibitions on disclosure

7.4 One would expect it to be the case that if a Law already approved by the Assembly prohibits the disclosure of information, then the FOI Law could not be used to circumvent that provision, similarly where an EU obligation that applies to Jersey prohibits release or where contempt of court could result. This replicates the position described by the Deputy Information Commissioner for a similar provision in the U.K. –

> *"But then we also have a series of absolute exemptions where disclosure is effectively prohibited because of some other either statutory provision or a rule of law. So one example, for instance, would be information which, if disclosed, would give somebody an actionable right in breach of confidence. Because if that was available under the Freedom of Information the public authority would be in an invidious position because they would be in breach of*

Freedom of Information possibly if they did not disclose it but in fear of an action for breach of confidence if they did. So the Act does not put any public authority in that kind of double jeopardy situation."

Article 27 – Information supplied in confidence

7.5 **Key policy outcome** 16 made it clear that "the existing exemption 3.2.1(b) of the Code, concerning information originally given in confidence had no place in a Freedom of Information Law where there are exemptions relating to personal information (under the Data Protection (Jersey) Law 2005, legal professional privilege and commercial confidentiality". Accordingly it has been removed, except where disclosure would constitute a breach of confidence which is actionable by that or any other person. Information of a personal nature must be applied for under the Data Protection Law.

7.6 A member of the public commented that a public authority should never breach, or be compelled to breach, any confidences, except where it would be against the greater good of the public not to do so, or where it can be demonstrated that such information would otherwise have been known to that authority.

Article 28 – National security

7.7 Information relating to national security may also not be released, but there is a right of appeal to the Royal Court if the applicant feels that there are no reasonable grounds for withholding the information.

7.8 The States of Jersey Police considered that the wording of the Article was suitable, however it was recommended that the definition of 'national security' in the context of the Article be clarified, especially with regard to whether this would be confined to the national security of Jersey or to both that of Jersey and the United Kingdom. The Committee believes that Article 42 contains a provision relating to 'a State other than Jersey' that would satisfy this concern.

Article 29 – States Assembly privileges

7.9 Information that would breach the privileges of the States Assembly may not be released, and again, there is a right of appeal to the Royal Court.

7.10 It is always difficult to imagine what the privileges of the Assembly are – this is not a concept that many people, other than those directly connected with a legislative or parliamentary assembly, have to wrestle with. The kind of matters that would fall in this category are set out in the report 'Parliamentary Privilege in Jersey' (R.79/2009) obtainable from the States Assembly Information Centre or on www.statesassembly.gov.je. A relevant extract follows –

"5.49 Useful examples of circumstances in which parliamentary privilege may apply in the United Kingdom are found in a note issued by the Ministry of Justice in relation to Section 34 of the Freedom of Information Act 2000[6] which relates to an absolute exemption under the Act where disclosure would be an infringement of the privileges of

[6] Freedom on Information Guidance – Exemptions guidance, Section 34 – Parliamentary privilege, Ministry of Justice, 14th May 2008.

either House of Parliament[7]*. The Guidance Note gives the following examples –*

> *The Parliamentary privilege exemption is most likely to be relevant to information contained in documents in the following categories, when they are unpublished –*
>
> - *memoranda submitted to committees;*[8]
> - *internal papers prepared by the officials of either House directly related to the proceedings of the House or committees (including advice of all kinds to the Speaker or other occupants of the Chair in either House, briefs for the chairmen and other members of committees, and informal notes of deliberative meetings of committees);*
> - *papers prepared by the Libraries of either House, or by other House agencies, either for general dissemination to Members or to assist individual Members, which relate to, or anticipate, debates and other proceedings of the relevant House or its committees, and are intended to assist Members in preparation for such proceedings;*
> - *correspondence between Members, officials of either House, Ministers and government officials directly related to House proceedings, including exchanges between Counsel to the Chairman of Committees and those drafting bills and statutory instruments;*
> - *papers relating to investigations by the Parliamentary Commissioner for Standards;*
> - *papers relating to the Registers of Members' Interests;*
> - *bills, amendments and motions, including those in draft, where they originate from Parliament or a Member rather than from Parliamentary counsel or another government department.*
>
> ***Privileged information which is likely to be in departments' hands***
>
> *Information which may be covered by parliamentary privilege may also fall under other exemptions, depending on the subject matter. It is important, however, that privilege is asserted wherever it is applicable. Particular care will therefore need to be taken in relation to requests for information about, or contained in:*

[7] A similar exemption has been inserted in the consultation drafts of the Freedom of Information (Jersey) Law 200- circulated by the Privileges and Procedures Committee.

[8] In this context 'committees' refers only to parliamentary committees and would be interpreted in the Jersey context as PPC, PAC and scrutiny panels. The proceedings of the Council of Ministers are not covered by Article 34 of the States of Jersey Law 2005.

- *any of the unpublished working papers of a select committee of either House, including factual briefs or briefs of suggested questions prepared by the committee staff for the use of committee chairmen and/or other members, and draft reports: these should only be in the possession of a department as a result of a Minister being, or having been, a member of such a committee;*

- *any legal advice submitted in confidence by the Law Officers or by the legal branch of any other department to the Speaker, a committee chairman or a committee, or any official of either House (even if section 42 (legal professional privilege) would be likely to apply);*

- *drafts of motions, bills or amendments, which have not otherwise been published or laid on the Table of either House;*

- *any unpublished correspondence between Ministers (or departmental officials) and any Member or official of either House, relating specifically to proceedings on any Question, draft bill or instrument, motion or amendment, either in the relevant House, or in a committee;*

- *any correspondence with or relating to the Registrar of Lords' Interests, the proceedings of the Parliamentary Commissioner for Standards or the Registrar of Members' Interests in the House of Commons.*

Information relating to matters not regarded as 'proceedings in Parliament'

Other information arising from or related to a wide range of activities within Parliament is not regarded as privileged, although other exemptions may be relevant. The most significant categories are:

- *Papers prepared by the Libraries of either House, or other House agencies, intended to provide general or specific background information on matters not currently under examination, or expected or planned to be considered, in formal proceedings of either House or their committees.*

- *Members' correspondence and other communications not specifically related to proceedings of either House or of one of its formally constituted committees. For example, correspondence between a Member and a Minister about a constituency issue that is not the subject of proceedings is not privileged, but correspondence about a draft motion, amendment or Question is privileged.*

- *The deliberations of parliamentary bodies established by statute (although if they are discussing matters relating to*

the preparation of formal proceedings in Parliament, those deliberations may be privileged).

- *Meetings of political parties and their committees."*

Article 30(1): Personal information

7.11 This Article was revised to amplify the provisions in respect of personal information, bringing it in line with the Data Protection (Jersey) Law 2005.

7.12 During the consultation period, the Committee was invited to include more matters within the scope of restricted information. For example, it was argued that legal professional privilege and advice by a Law Officer should fall into this category.

7.13 In the U.K., the Information Commissioner's view is that in almost every case, the public interest is best served by not disclosing matters covered by legal professional privilege and the exemption relating to advice by a Law Officer. The Deputy Information Commissioner informed the Committee as follows –

> *"The way that we have approached legal professional privilege – and this has been supported by the Information Tribunal which is the appellate body for our decisions and also by the court – is that they recognise that there is an inherently strong public interest in the preservation of legal professional privilege but that you can never say "never". You can never say there will never be a public interest which should override the interest in maintaining legal professional privilege. I think the same question is the issue in relation to the Attorney General's advice. Not only is that information subject to legal professional privilege but it is a very special relationship between the Attorney General and the government. So do you go all the way and give that advice the ultimate protection of making it an absolute exemption or do you say we can never say never and we think that even then with his or her advice the information has to be subject to a public interest test, although the way that we would expect that to be exercised is that at least 99 times out of 100 the public interest in maintaining the confidentiality of the Attorney General's advice would be respected. But there might just be a case where the public interest in an issue … in the disclosure of that advice is so great that it would override it."*

7.14 The Committee decided to confine the section to as small a group of restricted exemptions as possible.

8. Part 6 – Articles 31–43

Qualified information

8.1 This is information that a public authority must supply unless it is in the public interest not to do so. These fall into two categories: "class" exemptions, that depend on the formal classification of the information or the document in which it is contained, and "prejudice-based" exemptions, that are triggered by the fact that disclosure "would or would be likely" to have adverse consequences for some defined interest.

8.2 Examples of "class" exemptions include Article 36 (information relating to the formulation of policy by the States) and Article 31 (communications with the Royal Family or concerning honours). Examples of "prejudice-based" exemptions include Article 41 (defence). Sometimes the harm test is implicit rather than explicit, as in Article 28, which exempts information whose exemption is "required" in order to safeguard national security. Occasionally, the relevant yardstick is something other than prejudice, for example, Article 39: information whose disclosure would or would be likely to "endanger" health.

8.3 The States approved **Key Policy Outcome 2** which states "There may be circumstances when there is an overriding public interest greater than the purported exemption. Such an interest will be built into the Law but can be appealed against."

8.4 The procedure for assessing the public interest is described above. The public interest test is often referred to as the 'public interest override' because the public interest test considerations in favour of disclosure may 'override' the exemption. Deciding in which aspects and to what extent the public interest is relevant involves the exercise of judgement and discretion.[9] Given that the judgement of the Information Commissioner and/or the Appeals Body may collide with that of the Minister or of the Chief Minister, the Committee has agreed that it is very important that –

- The Information Commissioner is an independent post, and does not report through a political body;
- the Appeals Body is comprised of local residents, who fully appreciate the local context, and who are experienced in weighing up all sides and delivering a fair and just ruling which is accepted and respected. For this reason, the Committee has decided that the Royal Court should be the ultimate Appeals Body, sitting in an administrative mode.

8.5 Megan Carter and Andrew Bouris list, in 'Freedom of Information – Balancing the Public Interest', examples where the public interest test has favoured disclosure. These fall under the following headings –

- Matters of public debate and accountability for functions;
- Public participation in political debate;

[9] Freedom of Information – Balancing the Public Interest, by Megan Carter and Andrew Bouris, May 2006.

- Accountability for public funds;
- Public Health and Safety;
- Public interest in justice or fairness to an individual or corporation;
- Public interest in an individual being able to pursue a remedy.

8.6 The Office of the Ombudsmen in New Zealand has issued useful Practice guidelines[10] for weighing the public interest, and these can be found at Appendix E.

8.7 The Law provides a much more robust framework than the Code of Practice on Public Access to Official Information. Whereas a department or Minister has so far been able to cite an exemption from the Code without having to consider the public interest in disclosure, the Law will require them to do so. In fairness, it is important to note that, of the requests for information which have been recorded by departments and sent in a return to the Committee each year, a very low number have been refused, so from those records, the evidence does not show that information is refused on a casual basis. Anecdotal evidence by elected members suggests that it is difficult to obtain information, but it is not clear whether this applies to parliamentary access to information, Scrutiny Panels' access to information, or the public's access to information. Nor is it clear whether the issue is simply one of mistrust. Certainly this Law will enable access to information as it currently exists (subject to exemptions and, where appropriate, the public interest test), but for example, it will not provide for access to files or documents, it will not provide for information to be presented in a new format, it will not provide for new information to be discovered nor will it provide for new comparative studies to be prepared. That work must be undertaken by the requester, once he or she has obtained the raw data.

8.8 The requester may appeal to the Information Commissioner and thereafter to the Royal Court that the refusal to comply with a request for information on the grounds that it is qualified information, and 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 was not a reasonable decision and that the information should be supplied.

Article 31 – Communications with Her Majesty, etc. and honours

8.9 This Article replicates what exists in other Commonwealth countries relating to communications with Her Majesty, members of the Royal Family or with the Royal Household. Information is also qualified it it refers to the conferring of an honour or dignity by the Crown.

Article 32 – Advice by the Bailiff or a Law Officer

8.10 Article 32 provides that advice by the Bailiff or a Law Officer is qualified, and Article 33 states that information is qualified information if it is information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings.

[10] Extract from http://www.ombudsmen.govt.nz/index.php?CID=100109

8.11 **Key Policy Outcome** 12 states:

"Existing exemption (v)[11] [attached at Appendix A] should be simplified to refer to legal professional privilege alone. Medical confidentiality[12] and legal advice given to an authority[13] are adequately covered elsewhere in the exemptions. The explicit retention of these provides scope for serious undermining of the Law."

8.12 The Freedom of Information Manual by Marcus Turle, 2005, advises some caution in relation to legal advice privilege, which exists in relation to information passing between the client and the lawyer only. Legal advice privilege cannot exist between a lawyer and a third party, or between a client and a third party, even if the communication is for the purpose of obtaining information to be submitted to the client's lawyer. This means that the question of who acts or qualifies as 'the client' is critical in any assessment of whether legal advice privilege applies. [14] A client may waive legal advice privilege but great care must be taken in seeking to waive privilege on part of a document.

8.13 What is legal advice? For the purposes of LPP, most, but not all, communication between a lawyer and his or her client will qualify as 'advice' for the purpose of LPP. It is not always clear, and it will depend whether the specialist skills of a lawyer were required. It is possible that where a lawyer, being an articulate person, makes an observation, rather than gives advice based on his interpretation of the law and the facts, then such observation will not be protected by LPP.

8.14 The draft Law does not include an exemption in respect of officers giving free and frank advice during the making of policy. The Committee considered that officers should be accountable for the advice they give. This may therefore limit instances in which a lawyer might give general advice to a Minister or department if there is a wish that such advice should not be disclosable.

8.15 The Committee held detailed discussions in respect of whether advice from the Bailiff or a Law Officer should be classified as restricted information.

8.16 It was noted that the concept of legal professional privilege contains its own built-in public interest test[15].

8.17 Notwithstanding advice received from the United Kingdom (U.K.) Deputy Information Commissioner that in practice, although qualified in the U.K., this information tended not to be released, the Committee agreed to retain this as qualified exempt.

Article 33 – Legal professional privilege

8.18 Noting the longstanding convention in the Island, and in other jurisdictions, that advice provided by Law Officers was not to be disclosed without consent,

[11] *Exemption (v) of the Code of Practice on Public Access to Official Information, updated 2004.*
[12] *Exemptions (i), (xv), (xvi) are more than adequate regarding medical confidentiality.*
[13] *Any one of the other 19 exemptions might be more specifically used, depending on the nature of that advice.*
[14] The Freedom of Information Manual by Marcus Turle, 2005, p.160.
[15] Freedom of Information Act – Awareness Guidance No. 4, p.7.

the Law Officers expressed the belief that such information should be restricted for the purposes of the draft Law.

8.19 It was considered essential that there be no inhibition on Ministers and their departments, both from seeking advice, and from giving the Law Officers all the relevant facts. If such inhibitions were to exist, there was a probability that from time to time no advice will be sought or the wrong advice would be given, with maladministration as a result. The Law Officers considered that there were at least 3 underlying reasons for confidentiality:

(i) to ensure that there would be no damage done to the public interest by the publication of legal advice given by the Law Officers;

(ii) to ensure that there would be no inhibition on the part of Ministers, Scrutiny Panels or the Public Accounts Committee in taking advice;

(iii) to ensure that there would be no inhibition on the part of the Law Officers or lawyers within their Department in giving full and frank advice on all the matters which were raised with the Law Officers or a Departmental lawyer for advice, or which the Law Officers or the advising lawyer considered should reasonably be volunteered to the Minister, the Panel or the Public Accounts Committee for consideration.

8.20 The view was expressed that, if such information were to constitute qualified information, there would be compelling reasons for the public interest bar to be set at a high level and, in any event, no lower than that applied in the United Kingdom. The Department was not convinced that any distinction between the role of the Law Officers in the United Kingdom and in Jersey justified the lowering of that bar.

8.21 The Committee reconsidered whether this should be restricted information, but decided to retain it as qualified information.

Article 34 – Commercial Interests

8.22 **Key Policy Outcome** 16 states "Existing exemption (xii), concerning the competitive position of an authority, should be amplified to give the same guidance concerning the word 'prejudice' as is given concerning the competitive position of a third party in exemption (xi). This would then be as follows –

> *"prejudice the competitive position of an authority if and so long as its disclosure would, by revealing commercial information, be likely to cause significant damage to the lawful commercial or professional activities of the authority;".*

8.23 Article 34 includes as qualified information trade secrets[16], as in the U.K. legislation, without the requirement to assess prejudice, because trade secrets arise precisely because disclosure would be damaging. There is however, a prejudice test relating to the release of information that might damage the commercial interests of a person or a public authority.

[16] A trade secret is specific information used in a trade or business; must not be generally known; and if disclosed to a competitor, would be liable to cause real or significant harm to the owner.

Article 35 – The economy

8.24 Information which would be likely to damage the economic interests of the Island, or the financial interests of the States of Jersey, will be exempt, subject to the public interest test.

8.25 In the United Kingdom, the premature disclosure of budget proposals would fall within this exemption, however, locally, States procedures require the lodging of the budget six weeks before debate. In this respect, the Island is very open about its intentions. It is prudent to maintain this exemption as it relates to the financial interests of any authority and not just budget proposals. For example, the Jersey Financial Services Commission, when it is included within the Law in time, is likely to require this exemption to be in place.

8.26 The Committee noted the comment that there appeared to be a lack of provision to provide protection against reputational damage for the Island, but rejected the insertion of any provision in this respect. The Committee considered that the exemptions relating to commercial interests, the economy, formulation and development of policies and international relations (especially 42(2)) should more than adequately cover this situation.

Article 36 – Formulation and development of policies

8.27 This Article will be used where a policy is in the course of being developed, and where there are either draft versions of the policy, or there is a record of discussions where the draft policy is under consideration. This exemption cannot be used once the policy is agreed, and for example, progress reports on how the policy is going, whether it is effective or is achieving its goals are not covered by the exemption (although others might, for example, commercial confidentiality). As with all qualified exemptions, information requested under this Article will be subject to the public interest test.

8.28 This provision is not quite the same as the U.K. provision, which also covers Ministerial communications, the provision of advice by any of the Law Officers or any request for the provision of such advice, or the operation of any private Ministerial office. The provision also includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet.

8.29 Health and Social Services referred to Section 36 of the United Kingdom Freedom of Information Act which classified as qualified information any information the release of which would prejudice the effective conduct of public affairs. The Department commented that Section 36 appeared to have an important role to play in allowing open and frank discussions among officers and it was felt that a decision not to include this exemption could lead to those discussions not being held for fear of disclosure.

8.30 Another respondent considered that the Article could be construed to prohibit the disclosure of information of any sort that was used to formulate policy. The Committee rejected the possible insertion of a provision in respect of the free and frank provision of advice by officers as in the U.K., having noted that, in certain cases, this would be covered by other provisions, such as formulation and development of policies. The Committee did not feel that there should be a blanket exemption relating to any advice given by an officer.

Article 37 – Information intended for future publication

8.31 In response to a suggestion by the department for Social Security, the Committee agreed in February 2010 to insert a new provision at Article 37 in respect of information intended for future publication. The authority, if refusing to comply with a request under this Article, will have to advise the requester of the date when publication is planned. This Article will give the benefit of encouraging authorities to publish information from time to time, increasing transparency. Alternatively, where the authority knows that another body or person is due to publish information within the next 12 weeks, it will not be obliged to respond to a request, although, under Article 5, it may do so if it wishes.

Article 38 – Audit functions

8.32 Article 38 will allow bodies which either have an audit function, or which scrutinise the actions of other authorities, but which are not responsible for policy formulation, to carry out their work without being used as a conduit to access information provided by another authority.

8.33 Bodies such as the Internal Audit function, the Public Accounts Committee, the Corporate Services Scrutiny Panel and the Comptroller and Auditor General (C&AG) require access to information to undertake their functions. However, those requesters seeking information should go the data controller (owner of the information) (sometimes the 'target' department of a study by those bodies just mentioned) in order to provide information.

8.34 The Committee noted comments received from the C&AG to the effect that certain of the key functions of that role were not covered by the exemption as previously drafted (see Article 34 of R.114/2009). Concern was expressed that the provision would have seriously inhibited the discharge of the C&AG's functions as it would constrain the freedom with which information could be gathered. Moreover, there would be circumstances in which the exposure of the information gathered by the use of those powers would be detrimental to the Island's public interest.

8.35 The Deputy Information Commissioner, U.K. advised the Committee that there is a provision in the Financial Services Management Act which is a statutory bar on the disclosure of information which they receive in the course of the exercise of their functions. The F.O.I. Act does not oblige an authority to disclose information if, in doing so, they will be breaching another statutory bar to disclosure. He advised that the Law would benefit from having something more generic to protect regulators. Effectively this can really impact on the regulators' ability to do their job, whatever it is, if they constantly have to do it in a goldfish bowl. It should, however, be layered with the public interest test so if something is going on which should not be going on then there is the opportunity for that to be publicly disclosed.

8.36 The Committee accordingly agreed in February 2010 that an additional paragraph should be included in the draft legislation to provide that information would be qualified information if it was held by the C&AG and if its disclosure would, or would be likely to, prejudice the exercise of any of the functions of the C&AG.

Article 39 – Endangering the safety or health of individuals

8.37 This Article is self-explanatory.

Article 40 – Employment

8.38 This Article relates to employment, and provides protection relating to pay and conditions negotiations between the authority and employees or employee representatives. Such negotiations require confidentiality so as not to disrupt their conduct, but there remains a public interest test as with all qualified information.

Article 41 – Defence

8.39 This Article makes appropriate reference to 'any relevant forces' which are defined as (a) the armed forces of the Crown; or (b) a force that is co-operating with those forces or a part of those forces.

Article 42 – International relations

8.40 This Article is broadly similar to the U.K. provision, although more simply drafted. However, the U.K. provision allows the U.K. authorities to 'neither confirm nor deny' the existence of the following information –

Article 27, of the Freedom of Information Act 2000 states –

> *"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*
>
> *(a) relations between the United Kingdom and any other State,*
>
> *(b) relations between the United Kingdom and any other international organisation or international court,*
>
> *(c) the interests of the United Kingdom abroad, or*
>
> *(d) the promotion or protection by the United Kingdom of its interests abroad."*

8.41 Jersey has a provision which enables the authorities to "neither confirm nor deny" (NCND clause) the existence of information if it considers that it is in the public interest to do so. Article 10(2) of the draft Freedom of Information (Jersey) Law 201- states –

> *"(2) However, if a person makes a request for information to a scheduled public authority and –*
>
> *(a) the information is restricted or qualified information; or*
>
> *(b) if the authority does not hold the information, the information would be restricted or qualified 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."*

8.42 This will enable the authority to use an NCND clause in the field of international relations.

8.43 The States of Jersey Police wish to ensure that the Law deals adequately with the local problem of the Islands' access to highly sensitive data held in databases in the U.K. for policing purposes, and for this reason Article 42 provides an exemption for information obtained from a State other than Jersey. Where such information relates to national security then Article 28 will apply, that is, the information will be restricted, but with a right of appeal to the Royal Court.

8.44 There is a proposed limited protection for information supplied in confidence (Article 42(4)) and it is recommended that the Chief Minister can exclude disclosure on the grounds of security. It is possible that Security authorities in the U.K. would not see the Jersey Chief Minister as well placed to judge such issues other than in an entirely local context. It was recommended that should be a total and unconditional exemption for any information owned or supplied by a law enforcement or security agency outside the Island. Article 42 provides this 'carve out'.

8.45 Having noted comments received from the Deputy Bailiff and the Jersey Financial Services Commission regarding the definition of "state", the Committee agreed in February 2010 that this should be revised, to read as follows –

> *" 'State' includes the government of a State and any organ of its government, and references to a States other than Jersey include references to a territory for whose external relations the United Kingdom is formally responsible."* (This definition appears in Article 42(5).)

Article 43 – Law enforcement

8.46 This Article makes clear that the exemption relating to law enforcement includes not only policing matters, but also tax, immigration, security and good order in prisons and the supervision and regulation of financial services. It relates to information if its disclosure would, or would be likely to, prejudice these matters whether in Jersey or elsewhere. There are many areas where Jersey must liaise with another jurisdiction, and where inappropriate release of information could place in jeopardy the authorities' intervention in illegal activity.

8.47 For example, it has been made clear that if the Jersey Freedom of Information Law were to be used to access information contained in U.K. criminal databases, then the Ministry of Justice would be obliged to withdraw the Island's access. This would be very damaging to policing in Jersey.

8.48 Comments in respect of this Article focused mainly around the requirement for a 'neither confirm nor deny clause', which has been inserted in the current draft of the Law at Article 10. The Law Officers also commented that it might be useful to consider further the application of the 'prejudice' test in the context of the Article.

9. Part 7 – Articles 44–49

The Information Commissioner and appeals

9.1 The Committee has expressed a preference for a Jersey Information Commissioner, based on the U.K. model with combined responsibility for FOI and Data Protection regulation. The current Data Protection Commissioner believes this would be the most logical and cost-effective option for Jersey because it avoids the need to create a new States body. A Deputy Data Protection Registrar was employed in 2004 and it is proposed that a second Deputy would be required to co-ordinate the implementation and operation of all aspects of an FOI Law. This would ensure there is strong central co-ordination of FOI matters in the department with most relevant expertise and administrative support. The implementation of the Law would be an executive matter, and implementation would pass from the Privileges and Procedures Committee to the executive.

9.2 At States' departmental level, a framework is already in place, with a network of data controllers in each Department. There are also departmental FOI officers but ideally, these two roles should be carried out by the same member of staff to avoid duplication. Data Protection officers in the U.K. assumed this dual role in preparation for January 2005, when the public right of access under the Freedom of Information Act came into force and the U.K. Deputy Information Commissioner indicated that experience there was that this combination of roles was beneficial.

9.3 The Data Protection Commissioner has successfully pursued mediation as a means of resolving disputes and so far it has not been necessary to convene the Data Protection Tribunal. In fact, it has only met once for a preliminary hearing, and co-operation with the other party subsequently meant that no further meetings were necessary. If the experience under a Freedom of Information Law were to be similar, it would suggest that a great burden would not be placed on the Royal Court if this were the appeals route agreed.

9.4 The Information Commissioner will also be involved in preparing for the introduction of the Law, to include awareness raising and the training of officers in departments.

9.5 The process of debating a Law will bring heightened publicity and increased public awareness of the issues involved. Ideally, there should also be a public information campaign to dispel any misconceptions, clarify the aims and objectives of the Law, and explain the scope of information available under it. While the media are likely to be willing partners in disseminating the information, some expenditure will be required.

9.6 The Code has provided a valuable learning experience for the public sector and disproved concerns that it would overburden the administration and divert attention from core government tasks. A system is in place with Information Officers in every department and this will not change significantly if the Law resembles the existing Code. Staff would require some training but would not be starting from the beginning. To benefit from synergy between data protection and freedom of information, there would be merit in combining the role of data protection officer in departments with that of information officer, where these responsibilities are currently held by two different people.

9.7 **Key Policy Outcome** 22 stated –

> *"The combined and independent function of the Information Commissioner should have just one States Committee to oversee it and it is proposed for that Committee to be the Privileges and Procedures Committee."*

9.8 The Committee as previously constituted wished to maintain political oversight over the Information Commissioner, but the current Committee takes a different view. The Data Protection Commissioner is an independent role, and the Commissioner does not take guidance or direction from either a Minister or a States' Committee. For practical purposes, the Data Protection Commission is a States funded body in its own right, but reports to the Assembly are tabled by the Minister for Treasury and Resources, but this does not equate to any direction from the Minister concerned.

9.9 There is no reason why a similar arrangement should not exist for the annual report of the Information Commissioner. The Commissioner needs the strength that such independence brings in order to bring pressure to bear on authorities. True independence of the role also demonstrates faith and confidence which are essential for the post holder to be effective.

9.10 The Committee therefore recommends the independence of the Information Commissioner role, and does not propose that there should be political oversight of this role.

9.11 The Jersey Evening Post commented that the range of exemptions contained within the draft legislation was rather wide. It was considered that the categorising of information the disclosure of which would be likely to prejudice the economic interests of the Island as qualified information would provide 'a worryingly vague potential catch-all likely to be seized upon as a convenient reason not to release information'. It was accordingly felt that the success of the Law needed to be a robust primary appeals procedure, involving a strong and independent Information Commissioner.

Article 44 – General Functions of the Information Commissioner

9.12 The functions of the Information Commissioner have been briefly outlined above, and are –

The Information Commissioner will –

(a) have a duty to encourage good practice;

(b) keep the public informed about this Law;

(c) be able to require the production of information;

(d) consider appeals against the decision of scheduled public authorities not to disclose information;

(e) issue a Code of Practice in accordance with Regulations approved under the Law.

9.13 It is hoped that **mediation** can be employed also under the Freedom of Information Law, which would enable some common-sense discussion with the public authority.

Article 45 – The Information Commissioner may or may be required to issue a Code of Practice

9.14 The Committee agreed that provision should be included within the draft legislation to enable the Information Commissioner to issue codes of practice. This decision was made following the receipt of comments from the Data Protection Commissioner to the effect that similar powers to those provided under the Data Protection (Jersey) Law 2005, enabling the Commissioner to publish codes of practice, would be welcomed under Freedom of Information legislation.

Article 46 – Powers of the Information Commissioner to enter premises, to require the supply of information and to inspect information

9.15 The Data Protection Commissioner drew the Committee's attention to the Information Commissioner's apparent lack of information gathering powers in the Law as drafted in R.114/2009. It was agreed that provision should be included within the draft legislation to enable the Information Commissioner to require the supply of information.

Article 47 – Appeals to the Information Commissioner

9.16 The Committee noted that Section 30 of the U.K. Freedom of Information Act included a qualified exemption for investigations and proceedings conducted by public authorities. It was noted by the Committee that this was covered by Article 47 of the legislation, and therefore no further action was required in this respect.

9.17 The Committee noted the concern raised by the States of Jersey Police in respect of the level of detail required for an appeal, and it was agreed that the Article as drafted in R.114/2009 should be amended. Paragraph (6)(a) of the Article now states that the notice of a decision in respect of an appeal should specify the Commissioner's decision, without revealing the information requested.

Article 48 – Appeals to the Royal Court

9.18 Key Policy Outcome 21 stated –

> *"The existing Data Protection Tribunal and appeals system should be adopted and adapted as necessary to consider Freedom of Information appeals."*

9.19 The Committee has considered at length which should be the appeals body for Jersey, and has only recently reached a conclusion.

9.20 The Committee considered limitations with the Information Tribunal model, whether in the context of quality of justice arguments or where decisions pertinent to Jersey involving questions of public interest were being made by those who had limited involvement or connection with the Island. It was considered essential that the body that reviewed the Jersey public interest had a real and substantial connection to the Island. For this reason, the Committee did not wish to pursue a Tribunal with members from outside the Island. Rather than form a completely new Tribunal, the Committee considered whether the work of the Information Tribunal could be combined with an existing tribunal. The attraction of this approach was that an existing tribunal

would be experienced, and any administrative costs could be shared. Given the proposal that the Data Protection Commissioner should also take on the rôle of Information Commissioner, a logical proposal was for the Data Protection and Information Tribunals to be combined. However the success of the mediation process undertaken by the Data Protection Commissioner has meant that the Data Protection Tribunal has never actually met.

9.21 The Jersey Evening Post commented that the case for the Royal Court being the final arbiter of appeals had not been convincingly made, and there seemed no clear reason why the appeals structure should not mirror that of the Island's court structure in general, with recourse to the Court of Appeal and, conceivably, the Privy Council.

9.22 Having considered the matter at length, the Committee agreed that appeals against the decision of the Information Commissioner should be considered by the Royal Court in tribunal mode, and that a new or combined Tribunal would not be formed. The Committee agreed that it was necessary to include a final appeals body which would have the necessary experience to weigh up the public interest in the Jersey context and the authority to require a public body to release information that it had not considered should be released.

9.23 Concern was expressed in some submissions that the cost of an appeal to the Royal Court could be prohibitive. Discussions were held with the previous Bailiff, Sir Philip Bailhache, who indicated that steps could be taken to keep the cost to the applicant low in minor cases, for example by making pre-emptive costs orders against an authority to mitigate against the fear of high costs for the applicant.

9.24 The Committee wishes to make it clear that there is no such thing as 'free' information or a 'free' appeals process. If the requester does not pay the costs of appeal, then the taxpayer will. It is likely that requests for information will frequently come from commercial organisations, including the media, and from experienced requesters. Experience elsewhere shows that experienced requesters will test the system and place a burden on it. This is as it should be, however the (perhaps uncomfortable) question must be asked, who pays for access to information? The person who wants the information, or should all taxpayers contribute towards all requests and appeals for the general good?

9.25 Costs don't just go away. If they are not met by the requester, then they would need to be borne by the taxpayer, so it might be appropriate for the means of the appellant to be taken into account when determining any pre-emptive cost order. It would be irresponsible of the Committee to recommend, during a period when there is considerable effort going into reducing expenditure, that all requests for information should be completely free, and that all appeals should be handled free of charge. Too many Laws are introduced without due regard to the cost and the Committee does not wish to fall into this trap.

Article 49 – Failure of a scheduled public authority to comply with a notice by the Information Commissioner

9.26 Article 49 provides that where the Commissioner decides that a public authority should supply requested information and the public authority does not appeal to the Royal Court against the decision or, having appealed, loses the appeal, the Commissioner can register the decision with the Royal Court if

the public authority still fails to supply the information. The Royal Court may inquire into the matter and may deal with the public authority as if the public authority had committed a contempt of court. This procedure follows, in general terms, the procedure set out in the U.K. legislation.

9.27 The Department was not convinced that the application of civil penalties would be necessary or appropriate. In addition to human rights and quality of justice arguments, it was noted that any sanctions would be applied against public authorities performing a public function. Political accountability and the prospect of being held in contempt of court were considered to be more suitable drivers for compliance.

10. Part 8 – Articles 50–57

Miscellaneous and supplemental

Article 50 – Offence of altering, etc. records with intent to prevent disclosure

10.1 It will be an offence for a public authority to alter etc records with the intention of preventing disclosure.

10.2 The Committee discussed the concerns raised by the Jersey Financial Services Commission in respect of this Article, as drafted in R.114/2009. The Commission had commented that a punishment level in respect of any offence under the Article had not been specified. The Committee discussed the matter and noted that it would be an offence, punishable by a fine, to destroy information which had been requested and which the requester was entitled to receive. It was accordingly agreed that no amendment was required.

Article 51 – Defamation

10.3 A public authority will not be made liable for defamatory information released under this Law.

Article 52 – Application to the administrations of the States

10.4 Each administration of the States is to be treated as separate.

Article 53 – States exempt from criminal liability

10.5 This Article provides that a public authority cannot be liable to prosecution under the Law. It is not proposed that one department should fine another under this legislation, rather the remedy would be a political one.

10.6 However, under Article 50, an individual who attempts to avoid disclosure by altering, hiding or destroying, etc. that record would be liable to a fine.

10.7 The Committee received one comment in respect of this Article to the effect that only persons with an explicit requirement within their job description to take responsibility for compliance with the Law should be liable to prosecution for any failure to comply. It was proposed that an agreement should be formed with the Information Commissioner to this effect as a form of licentiate and all requests for information should be addressed to a specific office, thereby preventing employees of public authorities unwittingly breaching the Law, and ensuring that requests would be dealt with at an appropriate level. It was also suggested that there should be provision to ensure that officers could not be compromised or 'put under duress' by higher ranking officers, but remained independent in their judgement. These comments were taken into account by the Committee, and no change to the legislation as drafted in R.114/2009 was required.

Article 54 – Regulations

10.8 Regulations will be prepared relating to areas such as –

- fees that may be charged;
- action a scheduled public authority must take when it refuses a request on the grounds that it is a vexatious or repeat request;

- action a scheduled public authority must take when it refuses a request for information on the grounds that the information requested is exempt information;
- applications to the Jersey Heritage Trust for information it holds on behalf of a scheduled public authority where the scheduled public authority has not previously told the Trust that the information may be made available to the public;
- additional public authorities to be covered by the Law, if appropriate;
- the establishment of a publication scheme, if any.

Article 55 – Public Records (Jersey) Law 2002 to be amended

10.9 These are routine and necessary amendments to remove any conflicts between the two Laws.

Article 56 – Citation

10.10 This is simply the name of the Law.

Article 57 – Commencement

10.11 The date of commencement of the legislation is an important issue. The Deputy Information Commissioner, U.K. advised that a suitable lead-in period is necessary for the following reasons –

- To inform the public so that they are aware of their new rights and how to exercise them;
- To provide public authorities with certainty as to when this law is going to come into force and the need to gear up for it, in particular for the purposes of records management, because an access to information law can only work effectively if the public authority knows what information it holds and where to find it.
- The development of the new roles of Information Commissioner and Information Tribunal/Royal Court rules, the introduction of appeals mechanisms and enforcement procedures, awareness raising activity and training modules in advance of implementation.

10.12 The Committee took note of the advice of the Deputy U.K. Information Commissioner Mr Graham Smith that the U.K. lead-in period of 5 years was far too long. Staff turnover and the pressures of other work would mean that some input would be wasted if the lead-in period is too long, and in other cases there might be delay in starting on the work because of competing pressures.

10.13 Notwithstanding the above comments, there are considerable financial pressures, and the Committee has accepted that identifying a suitable budget, recruiting certain key staff, awareness raising and training, and amendments to processes and procedures will be a challenge. This is not, however, a valid reason for not working towards the goal, and it is important to take the first step. The Committee has therefore accepted, albeit reluctantly, that the lead in period may indeed extend to 5 years, although as stated elsewhere, implementation is a matter for the Executive.

Phasing of introduction

10.14 The draft legislation included in R.114/2009 stated that the Law would come into force 28 days after its registration. The Committee discussed this approach further, and it was agreed that the legislation should be brought in by Appointed Day Acts.

10.15 The Deputy U.K. Information Commissioner Mr. Graham Smith was supportive of the suggestion that the Law should start with those bodies that are already subject to the Code of Practice on Public Access to Official Information because they have got some experience of dealing with these requests and one would expect them to be ahead of the game rather than starting from scratch. He also recommended looking carefully at retrospection. The U.K. Act when it came in was fully retrospective, so requests were received about things that happened the previous week and about things that happened 100 years ago, or more in some cases. This placed a huge burden on authorities and it was noted that some jurisdictions have phased retrospection as well.

10.16 It is suggested that public authorities fall under the Freedom of Information Law in the order specified. That is, Ministers, departments, Scrutiny Panels, Public Accounts Committee, Chairmen's Committee and the Privileges and Procedures Committee, Greffier of the States first. All of these bodies have been complying with the Code of Practice on Public Access to Official Information since 20th January 2000 and are best placed to comply with the Law when it first comes into force.

10.17 The remaining public authorities will be permitted longer to prepare, and it is suggested that an amendment to the Schedule be considered by the States in order to bring those public authorities into line in due course.

Retrospection

10.18 Public bodies tend to hold a significant amount of information and the U.K. experience was that it was extremely burdensome to go for the 'big bang' approach and have full retrospection from the date of implementation. The object is to plan for transparency through effective disclosure following a clear timetable which demonstrates clear commitment to the goal.

10.19 The following table shows a possible scheme for access to information created before the date of implementation of the Law.

10.20 The Committee has the option either to decide all those things at the outset, or to leave some of them to regulations to be introduced later by phased commencement orders and see how it goes. The Committee is minded to opt for the following programme –

Public authority	Schedule	As soon as practicable but not more than 5 years after the adoption of the Law	Not more than 5 years after the adoption of the Law
(1) The States Assembly, including the States Greffe; (2) A Minister; (3) A committee or body established by resolution of the States or by or in accordance with the Standing Orders of the States Assembly (except – • Jersey Financial Services Commission, • Jersey Competition Regulatory Authority, • Jersey Law Commission, • Jersey Appointments Commission, • Waterfront Enterprise Board (or successor)); (4) An administration of the States; (5) the Viscount's Department, that is to say, the Viscount and the Deputy Viscount; (6) the Judicial Greffe, that is to say, the Judicial Greffier and the Deputy Judicial Greffier.	Added to Schedule from outset	All information created from 20th January 2000	Full retrospection
(a) the Bailiff's Department, that is to say, the Bailiff and the Deputy Bailiff; (b) the Law Officers Department, that is to say, the Attorney General and the Solicitor General.	Future amendment required to add these authorities to the Schedule		To be determined when added to the Schedule

Each Parish; Quasi public bodies – • Jersey Financial Services Commission, • Jersey Competition Regulatory Authority, • Jersey Law Commission, • Jersey Appointments Commission, • Waterfront Enterprise Board or successor.	Future amendment required to add these authorities to the Schedule		To be determined when added to the Schedule
More remote public authorities – Jersey Telecom, Jersey Post, Jersey New Waterworks Company, Jersey Electricity Company.	PPC does not propose to include these under the Law.		N/A

10.21 **The Schedule** specifies which public authorities are scheduled public authorities to which the Law will first apply when it is brought into force, also outlined in the Table above.

Financial and manpower implications

What does FOI cost in the United Kingdom?

Charging regime

10.22 It is first of all necessary to understand how the U.K. calculates charges before it is possible to understand the costs. The charges in the U.K. are based upon a number of factors –

- There is no 'flat rate' fee to apply to receive information and in many cases the information will be provided free of charge.
- There is a cap of £600 for central government requests and a cap of £450 for local government requests. If the cost of meeting a request will exceed these caps then the authority does not need to provide the information, but it will assist the requester to modify the request so that it can be brought under these levels so that the request can be met.
- Authorities may take account of the costs it reasonably expects to incur determining whether it holds the information, finding and retrieving the information, and extracting the information from a document containing it. The maximum will be the respective caps of £450 and £600, as requests beyond that cost will be refused. It may also pass on photocopying and postage charges.

- Authorities may not include in their estimates of cost the general administration of applications, the amount of time it takes to consider the public interest as to whether to release or refuse to release information, and they may not include the cost of the additional time taken in cases where they need to consult a Minister. Neither can the authority recover the cost of an internal review where the department receives an appeal from a requester and then re-examines the information and the stance it has taken, nor the costs associated with the Information Commissioner or Tribunal.[17]

- An authority can take into account the costs attributable to the time that persons (both the authority's staff and external contractors) are expected to spend on these activities. Such costs are calculated at £25 per hour per person for all authorities regardless of the actual cost or rate of pay, which means that the limit will be exceeded if these activities exceed 24 hours for central government, legislative bodies and the armed forces, and 18 hours for all other authorities. (The figures of £450 and £600 relate only to the appropriate limit; they do not relate to the fees that may be charged.)[18]

10.23 Appendix F was received from the Ministry of Justice describing how fees in the U.K. were determined.

10.24 Although charges for disbursements are permitted in the U.K. for photocopying and postage etc, these tend to be levied only rarely as recovering this cost is often not economically viable.

Cost of FOI-U.K.

10.25 An independent review of the impact of the FOI Act was carried out in 2006[19] at the request of the U.K. Government which was committed to reviewing the fee régime. The executive summary is attached by permission at Appendix G. There follow some key facts –

- The average hourly cost of officials' time was £34 (central government) and £26 (wider public sector) in 2006, not £25;

- The average cost of officials' time for an initial request was £254.

- On average, requests to central government take 7.5 hours to deal with.

- Those requests which involve Ministers and/or senior officials take longer and cost on average £67 more.

- The full costs of dealing with Freedom of information in the U.K. (population 61.5 million) as at 2006 was –

[17] Information extracted from – The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004; Statutory Instrument 2004 No. 3244.
[18] Freedom of Information Act – Using the Fees Regulations. Guidelines produced by the Information Commissioner's Office.
[19] Independent Review of the Impact of the Freedom of Information Act; Frontier Economics, October 2006. For full report, see – www.foi.gov.uk/reference/foi-independent-review.pdf.

- Central government – £24.4 million, for 34,000 requests
- Wider public sector – £11.1 million, for 87,000 requests
- Local authorities – £8 million, for 60,000 requests

- 61% of requests cost less than £100 to deliver and account for less than 10% of the total costs.
- The average cost of an internal review is £1,208, compared to £254 for an initial request.

10.26 Various options were proposed to mitigate the impact of the Law. These were allowing authorities to –

- include in the cost estimates reading, consideration and consultation time;
- aggregate non-similar requests (from the same requester);
- introduce a flat rate fee;
- reduce the appropriate limit threshold (£450/£650).

U.K. Review of charges

10.27 The Government had consistently stated its intention to review the fees regulations within 12–18 months to ensure that a balance was met between public access to information and the delivery of public services. The Government reported that significant evidence existed suggesting that some requests were imposing a disproportionate burden on their resources and this was confirmed by the Independent Review.

10.28 The Constitutional Affairs Select Committee reported on proposed changes to the FOI charging régime[20] and did not support the proposals for change. The Government subsequently decided to make no changes to the existing fees regulations but to introduce a range of measures to improve the way FOI works.[21] These involved more robust use of existing provisions of the law, eg in the case of vexatious requests, being clear on when authorities may refuse requests on cost grounds, releasing information proactively, revising the records management Code of Practice.

10.29 This means that the charge out time for officers remains at the level when the Law was introduced in 2000, the limits set as a threshold are calculated from the base of that out-of-date figure, there are significant areas of work which cannot be included within any of the calculations (and hence the taxpayer must pay for these) and no part of the high cost of internal reviews can be recouped. However, this cost must be measured against the desirability of the Law being used as a tool to ensure governmental transparency and accountability, the value of the Law as a social tool.

10.30 Anecdotal evidence from practitioners at the 2010 Freedom of Information Annual Conference suggests that charges are infrequently or inconsistently being levied.

[20] www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/415/41509.htm
[21] www.justice.gov.uk/publications/docs/response-to-casc.pdf

Jersey – Financial and manpower implications of adopting the FOI Law

10.31 While the draft Law proposes principles and procedures, it does not address charges – these come in later regulations. However, to fully understand the cost of the Law, one must look at both the cost that will arise once the Law is on the statute book, and the charging régime, if any, so as to determine the net cost to the taxpayer.

10.32 To do this, one must look at –

- how the financial and manpower costs might be determined in the local context;
- proposed charges;
- the net cost of the Law to the taxpayer.

What will the Information Commissioner's office cost?

10.33 It is proposed that the Information Commissioner become part of the Data Protection Commissioner's office, and the post should fall within that structure, perhaps as a new Deputy in that department, not necessarily junior to the Data Protection Commissioner. There will also be a need for a case manager to handle cases as they are received and to give initial advice, so as to keep separation between case handling and adjudication.

10.34 There will be office and general costs associated with the new posts, and a need to identify accommodation.

10.35 This work cannot be subsumed into the workload of the Data Protection Commissioner's office, which is fully committed to data protection work, and similarly there is no scope to sub-divide existing offices.

Estimated cost –	
Data Protection Office budget for 4 staff in 2010	£310,800
Data Protection Income	£87,000
Net Revenue cost	***£223,800***
Assuming a pro rata increase to allow for 6 members of staff	£466,200
Data Protection Income	£87,000
Freedom of Information income	£0
Net Revenue cost	***£379,200***
Estimated annual additional net revenue cost	**£155,400**

10.36 The Committee recently received the Information Commissioner of the Cayman Islands[22] who explained that the cost of the bottom line implementation of both the Information Commissioner's Office and the Freedom of Information Unit was £973,000, that is, £486,500 per annum. However, the Cayman Islands do not have a Data Protection Law (the

[22] www.infocomm.ky

Commissioner was in Jersey to examine the Jersey system with a view to introducing a Data Protection Law in Cayman) so the Cayman Law is used for both Freedom of Information and Data Protection requests. Article 23 of the Freedom of Information Law, 2007 of the Cayman Islands[23] provides that persons may apply to see their own information. The costs quoted therefore relate to both Data Protection and to Freedom of Information.

10.37 **The Cayman Islands also decided that departments may not increase their staff to deal with FOI** (or more correctly, for both FOI and for access to personal information). This principle has, in the main, been adhered to, as 88 public authorities have been successful in absorbing the costs associated with FOI from their revenue budget. Of the 88, one or two of the larger public authorities have hired an Information Manager specifically for this role.

10.38 There was also an impact cost on Cayman Islands National Archive of £175,000 over the 2 year period arising from the implementation of FOI.

What will an FOI unit cost?

10.39 The first questions are to ask are 'what is an FOI unit and what will it do? Do we need one? The Cayman Islands FOI Unit describes its role as –

10.40 "The overall purpose of the Freedom of Information (FOI) Unit is to promote open government. The FOI Unit is expected to lead and coordinate the implementation of the FOI Law and Regulations across the whole of the public sector by analysing, formulating and disseminating policies, procedures, benchmarks and guidelines applicable to the Cayman Islands Public Sector.

10.41 The FOI Unit is required to monitor and identify any shortcomings in implementation, make recommendations and report on the implementation of the Law. The Unit is required to promote best practices within public authorities, conduct the extensive training of Information Managers in the public sector and assist in raising the general awareness of the public.

10.42 The FOI Unit works very closely with other key Government entities such as the Portfolio of the Civil Service, the National Archive, Government Information Services and the Legal Department, who have critical roles to play in the successful implementation of the new FOI regime.

10.43 The FOI Unit:

- Provides policy advice on areas of common concern for public authorities regarding Freedom of Information.
- Provides general advice on interpretation of sections of the FOI Law and Regulations and procedural and administrative requirements.
- Monitors and coordinates execution of the FOI Implementation Plan.
- Makes presentations and arranges briefings for public authorities.

23 www.foi.gov.ky/pls/portal/docs/PAGE/FOIHOME/DOCLIBRARY/FOILEGISLATION/FREEDOM%20OF%20INFORMATION%20LAW%2C%202007.PDF

- Conducts comprehensive training of Information Managers from each public authority at basic and advanced levels.
- Prepares guidelines and outlines procedures for processing FOI requests, standard forms, and requirements for giving of reasons, etc.
- Coordinates the creation of a Data Protection Policy for the Cayman Islands.
- Develops guidelines for Whistle-blower Protection.
- Acts as Secretariat for the Freedom of Information Steering Committee.
- Manages an Information Managers' Network which is utilised to share experiences and best practices in implementation of the FOI Law.[24] "

10.44 In the local context, once the Law has been implemented, this would appear to amount to one post. During the implementation phase, it would be prudent to engage a seasoned professional in FOI on a contract basis, who would train a local postholder and hand over the reins to them. By comparison, the Code of Practice on Public Access to Official Information was introduced by a mid-grade enthusiastic amateur working 2 days a week for 6 months. As the Code has been in place for 10 years, staff are not starting out from a position of no knowledge of FOI as the Law will be replacing substantially the same provisions, but with the greater discipline of being legislation with structured processes for administration, determination and any subsequent appeals.

10.45 The cost of an FOI unit depends upon whether it will have permanent staff, or whether it will use one member of staff and use existing officers to form a working group to oversee FOI. The officer will of course have access to the Information Commissioner and support staff for advice. If just one permanent officer is recruited on a permanent basis, say £68,000 (based nominally on Grade 12), with administrative support and office accommodation being provided by an existing department, and there is one contract post during the implementation phase, say £80,000 (based on Grade 13 and expenses but no pension) for, say, one year. There are a number of officers across the States with expertise or experience in FOI, and it would seem possible to draw on their experience using the working group approach.

What will be the cost of upgrading records management in advance of a Law being brought into force?

10.46 A fundamental requirement of goods records management is to know what information a department holds, and where it is. This was of enormous concern to departments in 1999 when the draft Code of Practice was under consideration. Some departments felt they would need to go through all existing information and catalogue it. Given that it was highly unlikely that most of the information would ever be asked for this was seen as impractical. The advice was that as requests for information were made, then that information should be logged, and that with effect from the date of implementation of the Code (20th January 2000) the authority should keep a

[24] Source - www.foi.gov.ky

general record of all information that it holds. The Chief Minister recently confirmed that this occurs in departments, so information that dates from January 2000 should already appear in an index in departments. Those authorities which have not been subject to the Code to-date may require time to put their house in order, and for this reason, it is not planned to add those authorities to the Schedule for implementation in the first tranche.

10.47 Ensuring that the index which exists will serve the purpose of an FOI Law is another matter, and there will be work that needs to be done. This will not necessarily require expensive I.T. programmes but it will require a modification of procedures and a methodical approach. A perfectly adequate index could be maintained using an Excel spreadsheet, although classifications systems do exist which cost considerably less than full electronic document management systems. However there may well be a more basic issue relating to the importance currently attributed to what many people term 'filing'. This is a task has traditionally been given to the most junior and untrained person in an organization, and if this describes the situation in an authority which will be subject to the law, or which, in time, will be subject to the Law, then this aspect needs to change. Article 19(3) of the Draft Law applies to all organizations which will either be subject to the Law from the outset (i.e. one that is named in the Schedule) or which will eventually be subject to the Law (i.e. it is described in Article 1).

10.48 A well organized authority will assess a document, either which is received from another person, or which is created by the authority itself, and will record a series of keywords that describe its content ('classification'), who the author was, the date of creation, and how long the document should be retained. A serial or file number will be attributed, and the document will be filed in a place from which it can be retrieved with relative ease.

10.49 This procedure could be centralised. The Customer Services Centre at Cyril Le Marquand House already acts as 'post box' to a number of departments. The staff opens the letters, to establish whether they contain matters that can be dealt with by the Centre staff. Those matters that they cannot deal with are logged, and then sent to the department concerned, with systems to ensure the right number of items are sent, and then signed for. One of the options open to the Executive to consider is adapting these processes to ensure that proper records management rules are included. Some jurisdictions operate a central 'clearing house' system, such as that operated by the Ministry of Justice on certain 'trigger' issues, such as requests that touch on national security issues, requests that have something to do with the royal household, things that involve papers of a previous administration. Otherwise requests are sent direct to the department that the requester believes deals with the issue, and that department will forward it as necessary if it is not a matter they deal with. In a small jurisdiction such as Jersey, there may be logic in all FOI requests being received at the Customer Services Centre to avoid duplication and repeated requests (i.e. the same or similar requests being sent to one department after another). An electronic monitoring system can be purchased 'off the shelf' for considerably less than the Cayman Islands paid, the Committee was advised. There would be, naturally, some important process re-engineering and training issues.

10.50 A steering group has been established under the aegis of the Director of Information Services and the Head of Archives and Collections to start to identify with department staff the challenges that face them in the introduction of a Freedom of Information Law, what changes need to take place, and how to address them. Given the suggestion that the lead in time could extend to as long as 5 years, departments have time to gradually adapt procedures and improve processes so that they will be ready for the introduction when it occurs. One matter that may need to be considered carefully at a different level is that appropriately qualified, experienced and rewarded Records Managers are an important key to unlocking the vital resource that carefully classified and retrievable information undoubtedly is.

What will be the costs of the Legislation to Jersey Heritage?

10.51 Jersey Heritage currently holds over 250,000 public records. Many of these records do not currently fall under the Code as they date from pre-2000. Once legislation is enacted Jersey Heritage will have 5 years under the proposed phased introduction to ensure that public records in the care of Jersey Archive are catalogued and easily accessible to members of the public. Jersey Archive currently has a 24 year cataloguing backlog and the service's lack of resources to meet the Public Records Law have been highlighted in a 2008 report by Dr. Norman James of The National Archive. Dr. James recommends an additional 3.5 FTE posts at the Archive to ensure that Public Records legislation is met.

10.52 If the 3.5 FTE additional posts required under Public Records legislation are agreed by the States then Jersey Heritage anticipates that no further permanent posts would be required should Freedom of Information legislation be passed. If these posts are not agreed then Jersey Heritage would have to look again at the implications of FOI.

10.53 However in the short-term and as a direct consequence of FOI legislation, in addition to these posts Jersey Heritage would request a 5 year temporary cataloguing contract to ensure that pre-2000 public records were catalogued and ready for consultation 5 years after the Law is adopted by the States. The costs of this would be £45,000 per annum in year one, rising to approximately £50,000 in year five to cover salary, pension, social security, holiday and management costs for one individual employed on a full-time basis. The total cost would be a maximum of £250,000 over 5 years which compares favorably with the Cayman Islands National Archive who received £175,000 over a 2 year period.

What will be the cost of administration and supplying information in departments?

10.54 This is very difficult to quantify with precision. There are options –

- Do we extrapolate from the Jersey experience of the Code? This would give very low figures, although there is always a surge in interest when a law is introduced;
- Do we extrapolate from the experience of a similar jurisdiction, like the Cayman Islands, that passed its Law in 2007, and brought it into force in 2009?

- Do we extrapolate from the U.K. experience? However, there are fixed costs which must be met, and which will skew the figures in a small jurisdiction.

10.55 Some will say that one should exercise extreme caution in extrapolating figures, so what other mechanism is there, apart from trying it out and seeing?

10.56 The following extract from the annual report of the Code of Practice on Public Access to Official Information –

The table below shows the number of applications received and refused under the Code from 2003 to 2009 –

	2003	2004	2005	2006	2007	2008	2009
Requests received	**62**	**80**	**62**	**73**	**20**	**21**	**12**
Requests refused	**2**	**1**	**3**	**9**	**3**	**2**	**2**
Appeals to Minister	**1**	**0**	**0**	**2**	**2**	**0**	**1**
Appeals to States of Jersey Complaints Board	**0**	**0**	**0**	**0**	**0**	**0**	**1**

10.57 The Committee has been concerned for some time about the accuracy of returns made each year on the numbers of requests made which mention the Code, the above numbers cannot reflect the number of requests for information each year, and it is likely that they represent only the most complex requests which cannot be classified as 'business as usual', and where the appeals route then begins. The reason for the fall off during the above series is unclear, but may be explained by the higher profile of data protection following the implementation of the Data Protection (Jersey) Law in 2005, when requests for personal information started to be made under that Law rather than the Code.

10.58 The fact is, no-one can tell us exactly how many requests for information there will be, exactly how easy/complex those requests will be to investigate and fulfill, how many times the public interest test will need to be applied, and how many appeals there will be, so no-one will therefore be able to state an exact £ figure to include within a budget. The cost of the Law will also depend upon the States' appetite to provide information either free of charge, at a low cost, with a less generous subsidy, or on a user-pays basis.

10.59 If authorities are secretive and are reluctant to release information to enable the public to review the work of elected members and the public sector and hold them accountable, then clearly an FOI Law is essential and an investment should be made to implement one.

10.60 If authorities can honestly say that they administer the Code of Practice in a generous way, and information is generally released unless there are clear contra-indications – and the evidence of the Code would actually bear this out – then there is little to fear from an FOI Law.

10.61 The framework for the supply of information from departments currently exists. Each department has a data protection officer. Certainly when the Code of Practice on Public Access to Official Information was introduced, the Guidance Notes for Departments invited them to identify an individual with overall responsibility for FOI, which for ease was referred to as a freedom of information officer. These officers supply the Clerk to the privileges and Procedures Committee with their department's annual returns. (The Data Protection officer and the FOI officer may be one and the same person). Requests for information are currently handled under the Data Protection Law and under the Code of Practice for Public Access to Official Information. An assessment is already made as to whether the information requested is exempt or not, and whether is should be released or not. There is already a mechanism for internal review, that is, where a request is refused the requester will first appeal to the department concerned. As the above extract demonstrates, the annual report prepared on requests made under the Code do not show high activity.

10.62 It may be naïve to say that there would appear to have to be an enormous increase in the amount of requests to upset the current routines. However, there will be the need for a structured and consistent approach, with new challenges, such as the public interest test, internal review, review by the Information Commissioner (who may make practice recommendations) and possible final appeal to the Royal Court.

10.63 The Chief Minister's Department responded to the Draft Freedom of Information Law 'Policy Paper': White Paper October 2009 (R.114/2009) published on 14th October 2009. It referred to the advice it had given to an earlier consultation in 2006, that the additional cost of FOI would be of the order of £500,000. This would be made of the following –

Department	**Resource implication**
Chief Minister's	– 0.5 to 1 FTE to assist with co-ordination and information-gathering. – Cost of implementing a new file management regime, including Livelink c.£20,000. This would be doubled or more if broader records management issues were added, c.£50,000. – Further training costs of c.£25,000.
Information Services Department	– 3 FTE to support finding, extracting and compiling of information. – There is no corporate Information/Records management system fro the States. – A programme to introduce will cost millions in training as well as millions in systems costs. – Estimate we are some 3 years away from the level or organisation maturity to benefit from such systems.

Economic Development	– No resource implications.
Education, Sport and Culture	– 0.2 FTE (one day per week). – Records management would require an additional 1 FTE for 12 months.
Health and Social Services	– 0.5 to 1 FTE
Home Affairs	– 2 FTE – This follows ongoing review, prompted by advice received yesterday from the Head of Review and Compliance for Essex Police, where they are experiencing a 30% year on year growth in FOI requests. – This is further supported by national police reports of 76% growth in requests since introduction of the FOI Act in early 2005. – There is anticipated to be a high volume of FOI requests connected to the recent and current high profile investigations of interest to the public, as well as local and national media.
Housing	– 1 FTE – Set-up costs, and revenue costs for the management, maintenance and support of any document management system.
Planning and Environment	– 0.25 to 0.5 FTE
Social Security	– 0.5 to 1 FTE for 2 years to ensure that policies, guidance and systems to monitor queries and responses are in place. – Potential cost c.£100,000.
Transport and Technical Services	– 0.5 FTE
States Greffe	– No extra resources required as anticipate meeting the costs from within existing resources.

10.64 In the letter dated 25th November 2009 responding to R.114/2009, the Department again suggested that an independent expert should be engaged to determine the exact levels of additional manpower needed:

"The Law as drafted allows departments a period of 3 years for "Full Retrospection". The impact and consequences for departments to review all forms of data and update it to ensure compliance with the new Law will place an additional and very significant burden on staff time. This will be at a time when staff will be heavily committed to reviewing services, delivering efficiencies and modernising the way in which services are provided to the public to meet the financial challenges ahead for the island in the next five years.

If the Law is adopted and the decision is taken to implement a new centralised management information system for data management, unless one of the existing systems operating in the States can be extended to cover all forms of data held by departments, it will be necessary to specify and procure a new system that meets the States overall requirement. This will be a capital project and is not provided for in any budgets. Given the timescale for capital projects to move from inception to delivery, it will not be possible to deliver such a complex system within the timeframe.

A recent report by the Comptroller and Auditor General on Data Security highlighted the complexity and in some cases the inadequacy of systems currently in place. Addressing current issues of data security has resulted in a more centralised approach being taken in terms of compliance which has in turn required a system of compliance to be developed and the appointment of a Data Security Manager. Implementing and maintaining a Management Information System that meets the requirements of the Draft Freedom of Information Law would require an additional layer of compliance to be added to the current system being developed for data security with associated costs.

It has not been possible to establish what level of input would be required from the Law Officers department to check information to be issued under a request covered by the proposed Law but it could be substantial.

This response has tried to provide as low a level of additional manpower that is possible given the significant financial restraint that has to be exercised in all areas of States expenditure. Experience from those who have worked under a Law indicates that a level resource to ensure compliance is far beyond that identified in this response. It is strongly suggested that an independent expert with experience of implementing and working under such a Law should be engaged to determine the exact levels on additional manpower required. This approach would be most welcome."

10.65 Such a review is impracticable from the perspective of the Privileges and Procedures Committee, as a non-executive committee. In the event that a meaningful report can be prepared, this would seem to the Committee to be the responsibility of the executive.

10.66 A delegation of the Committee attended a meeting of the Council of Ministers on 1st April 2010 when the Council again requested that the PPC undertake a review, this time in concert with the Council of Ministers. The Committee was advised that such a review would take 3 months. The Committee considered this at its next meeting, and the Chairman advised the Council on 15th April 2010 of the Committee's decision that it did not feel it should participate in this review, which was a matter for the executive. The Committee had reservations that meaningful figures could be provided as the report would be likely to be prepared by someone unfamiliar with the workings of Jersey government, and would simply include a range of figures which would depend upon the number and complexity of requests for information, the state and usefulness of a variety of classification, storage and retrieval systems in States' departments and other public authorities. There would therefore be a delay of 3 months, and possibly considerably more, to provide information which might not assist the debate.

10.67 It was recognised that implementation of the proposed law would fall to the Executive. The Committee had already conceded that a delay in implementation of the law, once adopted, of up to 5 years might be required, to allow departments to budget, update their classification systems if necessary, and train staff.

What will be the cost associated with appeals to the Royal Court?

10.68 There will be an administrative cost to the Law, and the matter of costs associated with an appeal would be prescribed in Royal Court Rules. Should the States send out the message that it would wish the Court to limit the costs to a requester in certain circumstances, then the Court would have the option of awarding pre-emptive cost orders against the Minister rather than against the requester, in which case those costs would fall to the taxpayer.

What sort of charge could be levied by the States for a request for information?

10.69 The question of charges could be as simple or as complex as the States want. There are a number of permutations which the States could consider when they approve regulations relating to charges. For example –

(a) There could be a standard application fee levied for all requests. This could be set quite low, (and to an extent would therefore be uneconomic in itself) but it would serve to deter requests from requesters who did not seriously want the information.

(b) There could be a threshold, above which the authority could refuse to provide information, set at whatever level the States consider appropriate.

(c) There could be an initial amount or work which an authority would do free of charge.

(d) There could be a charge for all/part of the work undertaken to locate, consider and release information.

(e) The charge could be at full economic rate, or at a subsidized rate.

(f) The cost of administration, photocopying, copying to disc and postage could be charged.

(g) There could be a charge for an internal review, where the initial request for information was refused.

(h) There could be a charge for an appeal to the Information Commissioner.

The difficulty is reconciling between a desire to make information easily accessible and the crucial need to contain costs at the current time. This is very politically sensitive, and will need careful reflection. In 'The Public's Right to Know - Principles on Freedom of Information Legislation' published by Article 19, London,[25] it states –

> "The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants, given that the whole rationale behind freedom of information laws is to promote open access to information. It is well established that the long-term benefits of openness far exceed the costs. In any case, experience in a number of countries suggests that access costs are not an effective means of offsetting the costs of a freedom of information regime.
>
> Differing systems have been employed around the world to ensure that costs do not act as a deterrent to requests for information. In some jurisdictions, a two-tier system has been used, involving flat fees for each request, along with graduated fees depending on the actual cost of retrieving and providing the information. The latter should be waived or significantly reduced for requests for personal information or for requests in the public interest (which should be presumed where the purpose of the request is connected with publication). In some jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests."

10.70 The options are –

- No charges are levied and the cost is prohibitively expensive, so that there will be a long delay in implementing the Law;
- Low charges are levied, with similar consequences;
- A more 'user pays' approach is adopted, with a greater degree of success, to be modified when circumstances allow;
- A significant raft of charges are introduced, which go against the spirit of the Law.

10.71 The Committee feels it would be reckless to introduce a Law completely free of charge (an interesting concept, as someone will have to pay for it), and which will impact upon essential services. In a low tax area, residents cannot expect such a generous regime as can be found in jurisdictions where the rate of income tax is double that levied locally.

10.72 The Committee recalled that the Frontier Economics' review of the impact of FOIA in the U.K. advised that –

[25] www.article19.org/pdfs/standards/righttoknow.pdf

- 61% of requests cost less than £100 to fulfill and account for less than 10% of the total costs;
- the average request takes 7.5 hours;
- internal reviews cost almost 5 times as much as the consideration of the initial request.

10.73 In order to reduce the impact of the FOI Act, the company recommended that –

(1) A flat fee should be charged for responding to an FOI request;

(2) The charge for officer time should be set at a realistic level;

(3) The time spent on reading, consultation and consideration should be charged for;

(4) The cost of non-similar requests of serial users (which account for a substantial proportion of the overall costs of FOI) should be aggregated.

10.74 The Committee is conscious that there will not be a charging régime acceptable to all, and that this will provoke considerable debate. However, the Committee is currently minded to recommend in draft regulations to be debated by the States, and of course capable of amendment, in due course the following, and will be interested to hear all points of view on the subject –

- There should be no flat fee for responding to an FOI request.
- There should be a cost limit of £500 for each request. Any request that would cost more than £500 to respond to would be either re-negotiated with the requester, so that the work can be completed within that limit, or refused.
- The first £50 worth of work will be free of charge for any applicant.
- Thereafter, the user should initially pay the full economic cost given the current financial challenges, to be reviewed in the future in the light of experience and the economic situation.
- The authority retains the discretion to waive a charge in cases of hardship or for charities, for example.
- The cost of determining the public interest test, of internal review, or appeal to the Information Commissioner should not initially be charged for, although this matter should be reviewed in the light of experience.
- Pre-emptive cost orders are a matter for the Court.

10.75 The effect of this will be –

SIZE OF REQUEST	CAP	HOURLY RATE CHARGED	SUM FREE	# hours x Grade 13, £40	% CHARGE OVER FREE SUM	COST TO APPLICANT	LOSS or COST to SOJ
2.5 hours	£500	£40	First £50	£100	100%	£50.00	£50.00
5 hours	£500	£40	First £50	£200	100%	£150.00	£50.00
7.5 hours	£500	£40	First £50	£300	100%	£250.00	£50.00
10 hours	£500	£40	First £50	£400	100%	£350.00	£50.00
12.5 hours	£500	£40	First £50	£500	100%	£450.00	£50.00
15 hours	£500	£40	First £50	£600	Above cost limit therefore request renegotiated to fall within cost limit or refused.		
20 hours	£500	£40	First £50	£800	Above cost limit therefore request renegotiated to fall within cost limit or refused.		
Provide a service with no initial application fee; free assistance for the first £50 of work, thereafter full cost recovery. The table shows an upper cost limit of £500, and work charged at £40 per hour (equivalent to Grade 13). Charging is permissive, so an authority will be able to waive the fee for those with limited means and charities or for any other reason. Separate charge for copying and postal charges. The fees would be introduced by way of Regulations (i.e. a States' decision) and capable of review by Regulation to meet changing circumstances.							

10.76 The States will be able to review the charges levied at any time by amendment to the Regulations, so that when the economic situation improves, and the impact of the Law is known, appropriate adjustments can be made.

Where will the funding come from?

10.77 There will be a need for new money to cover certain elements of FOI. For example –

	Paragraph	**£ estimate – per annum**	**Comment**
FOI Commissioner	10.35	155,400	2 officers, if required, within the Data Protection Commission.
FOI Unit	10.37	68,000	1 FOI officer
		80,000	Seasoned professional – 1 year temporary appointment
Jersey Heritage	10.53	45,000	5 year temporary cataloguing contract

10.78 The costs to departments will be difficult to quantify accurately until the States agree in regulations the final charging scheme. The proposal of the Committee is that the first £50 incurred for each request be free, and thereafter full recovery costs should be incurred, with the proviso that the Minister can waive costs where he or she considers it appropriate to do so. The Cayman Islands, for the most part, have not allowed departments to appoint additional staff for FOI, and if a charging régime is approved in Jersey, then there will be more opportunity to recover the costs from the user. Where there are requests that will cost more than £50 and the user is unwilling to pay for the service, then those requests will fall away.

10.79 Clearly, the Regulations concerning charges to be made, if any, cannot be considered by the Assembly until the Law has been adopted. The evaluation of the costs to departments will need to accompany those Regulations. Similarly, there will be a delay in the States approving an Appointed Day Act for the Law until those Regulations are approved and the necessary preparatory work to implement the Law has been undertaken.

Conclusion

10.80 The terms of reference of the Privileges and Procedures Committee include the charge to keep under review the procedures and enactments relating to public access to official information. With the possible exception of the matter of the Composition and Election of the States, no other topic has been the subject of such comprehensive deliberation, consultation and review and this Proposition represents the culmination of some 11 years' work after the States adopted the Code of Practice. During that debate, the States agreed that the provisions of the Code, amended as appropriate in the light of practical experience, should be incorporated into legislation which would establish a general right of access to official information for members of the public.

10.81 The States re-affirmed that decision on 6th July 2005, when they agreed that the existing Code of Practice on Public Access to Official Information should be replaced by a Law, to be known as the Freedom of Information (Jersey) Law, as amended, by 32 votes to 12, indicating a strong desire to proceed, notwithstanding the note of caution on costs voiced by the Finance and Economics Committee at that time. The draft Law is in its 19th incarnation and in that form the Committee, by majority, feels that it represents a Law tailored to suit the needs and aspirations of a small community, whilst living up to international expectations. The Committee believes that as Jersey continues to develop and enhance its international personality, the public's ability to access official information will become increasingly important, not only in a practical sense to local residents and others seeking information, but also in the way in which the Island is perceived as a well-regulated and forward-looking jurisdiction.

10.82 There are certainly unknown factors – it is impossible to quantify the number of requests that will come forward and so impossible to accurately predict the costs of implementation. It is difficult to know how any further research could provide more detail in these areas. Regulations to be brought at a later date to cover fees will allow for cost recovery to a greater or lesser extent. These draft Regulations are attached at Appendix H. The phased implementation and retrospection discussed in the report will allow Public Authorities time to ensure full compliance. Taken together there is a real chance to balance the importance of bringing in this Law with the difficulties of keeping departmental costs low.

10.83 The Privileges and Procedures Committee is not technically required to present a statement of Human Rights compatibility, but in the interests of good order, intends to do so. Given that there is considerable interest in the freedom of information proposals, the Committee wishes to lodge the Draft Law during the current session, and the HR statement will follow in due course. Should any unforeseen issues arise in this regard, these will be considered and addressed prior to debate, which the Committee will seek on 19th October 2010.

10.84 The PPC believes that this Law is long overdue but also considers that the time spent in bring the draft forward has been well utilised in order to develop the right model for Jersey and urges Members to support this Law.

APPENDIX A

A CODE OF PRACTICE ON PUBLIC ACCESS TO OFFICIAL INFORMATION

(Adopted by Act of the States dated 20th July 1999 as amended by Act of the States dated 8th June 2004)

PART I: Description

1. Purpose

1.1 The purpose of this Code is to establish a minimum standard of openness and accountability by the States of Jersey, its Committees and departments, through –

(a) increasing public access to information;

(b) supplying the reasons for administrative decisions to those affected, except where there is statutory authority to the contrary;

(c) giving individuals the right of access to personal information held about them and to require the correction of inaccurate or misleading information,

while, at the same time –

(i) safeguarding an individual's right to privacy; and

(ii) safeguarding the confidentiality of information classified as exempt under the Code.

1.2 Interpretation and scope

1.2.1 For the purposes of this Code –

(a) "authority" means the States of Jersey, Committees of the States[26], their sub-committees, and their departments;

(b) "information" means any information or official record held by an authority;

(c) "personal information" means information about an identifiable individual.

1.2.2 **In the application of this Code –**

(a) there shall be a presumption of openness;

(b) information shall remain confidential if it is classified as exempt in Part III of this Code;

1.2.3 Nothing contained in this Code shall affect statutory provisions, or the provisions of customary law with respect to confidence.

[26] Under the ministerial system of government, the relevant Minister applies.

1.2.4 This Code applies to information created after the date on which the Code is brought into operation and, in the case of personal information, to information created before that date.

PART II: Operation

2.1 Obligations of an authority

2.1.1 Subject to the exemptions listed in paragraph 3, an authority shall –

(a) keep a general record of all information that it holds;

(b) take all reasonable steps to assist applicants in making applications for information;

(c) acknowledge the receipt of an application for information and endeavour to supply the information requested (unless exempt) within 21 days;

(d) take all reasonable steps to provide requested information that they hold;

(e) notify an applicant if the information requested is not known to the authority or, if the information requested is held by another authority, refer the applicant to that other authority;

(f) make available information free of charge except in the case of a request that is complex, or would require extensive searches of records, when a charge reflecting the reasonable costs of providing the information may be made;

(g) if it refuses to disclose requested information, inform the applicant of its reasons for doing so;

(h) the authority shall correct any personal information held about an individual that is shown to be incomplete, inaccurate or misleading, except that expressions of opinion given conscientiously and without malice will be unaffected;

(i) inform applicants of their rights under this Code;

(j) not deny the existence of information which is not classified as exempt which it knows to exist;

(k) undertake the drafting of documents so as to allow maximum disclosure;

(l) undertake the drafting of Committee and sub-committee agendas, agenda support papers and minutes so as to allow maximum disclosure;

2.1.2 An authority shall –

(a) forward to the States Greffe the names of strategic and/or policy reports prepared by the authority after the date of adoption of this amendment, to be added to a central list to be called the Information Asset Register (‘the Register’);

(b) notwithstanding paragraph 2.1.2 (a), the name of any report deemed to be of public interest shall be included on the Register;

(c) where the cost of third party reports or consultancy documents, which have been prepared for the authority or which are under preparation, exceeds an amount fixed from time to time by the Privileges and Procedures Committee, an authority shall forward to the States Greffe the names of such reports to be added to the Register, together with details of the cost of preparation and details of their status;

(d) subject to the exemptions of the Code, make available to the public all unpublished third party reports or consultancy documents after a period of five years."

2.2 Responsibilities of an applicant

2.2.1 The applicant shall –

(a) apply in writing to the relevant authority having identified himself to the authority's satisfaction;

(b) identify with reasonable clarity the information that he requires;

(c) be responsible and reasonable when exercising his rights under this Code.

2.3 Appeals

2.3.1 If an applicant is aggrieved by an authority's decision to refuse to disclose requested information or to correct personal information in a record, he will have the right of appeal set out in Part IV of this Code.

PART III: Access and exemptions

3.1 Access

3.1.1 Subject to paragraphs 1.2.3 and 2.1(k) and (l) and the exemptions described in paragraph 3.2 –

(a) an authority shall grant access to all information in its possession, and Committees of the States, and their sub-committees, shall make available before each meeting their agendas, and supplementary agendas, and grant access to all supporting papers, ensuring as far as possible that agenda support papers are prepared in a form which excludes exempt information, and shall make available the minutes of their meetings;

(b) an authority shall grant –

(i) applicants over the age of 18 access to personal information held about them; and

(ii) parents or guardians access to personal information held about any of their children under the age of 18.

3.2 Exemptions

3.2.1 Information shall be exempt from disclosure, if –

(a) such disclosure would, or might be liable to –

(i) constitute an unwarranted invasion of the privacy of an individual;

(ii) prejudice the administration of justice, including fair trial, and the enforcement or proper administration of the law;

(iii) prejudice legal proceedings or the proceedings of any tribunal, public enquiry, Board of Administrative Appeal or other formal investigation;

(iv) prejudice the duty of care owed by the Education Committee to a person who is in full-time education;

(v) infringe legal professional privilege or lead to the disclosure of legal advice to an authority, or infringe medical confidentiality;

(vi) prejudice the prevention, investigation or detection of crime, the apprehension or prosecution of offenders, or the security of any property;

(vii) harm the conduct of national or international affairs or the Island's relations with other jurisdictions;

(viii) prejudice the defence of the Island or any of the other British Islands or the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with those forces;

(ix) cause damage to the economic interests of the Island;

(x) prejudice the financial interests of an authority by giving an unreasonable advantage to a third party in relation to a contract or commercial transaction which the third party is seeking to enter into with the authority;

(xi) prejudice the competitive position of a third party, if and so long as its disclosure would, by revealing commercial information supplied by a third party, be likely to cause significant damage to the lawful commercial or professional activities of the third party;

(xii) prejudice the competitive position of an authority;

(xiii) prejudice employer/employee relationships or the effective conduct of personnel management;

(xiv) constitute a premature release of a draft policy which is in the course of development;

(xv) cause harm to the physical or mental health, or emotional condition, of the applicant whose information is held for the purposes of health or social care, including child care;

(xvi) prejudice the provision of health care or carrying out of social work, including child care, by disclosing the identity of a

person (other than a health or social services professional) who has not consented to such disclosure;

(xvii) prejudice the proper supervision or regulation of financial services;

(xviii) prejudice the consideration of any matter relative to immigration, nationality, consular or entry clearance cases;

(b) the information concerned was given to the authority concerned in confidence on the understanding that it would be treated by it as confidential, unless the provider of the information agrees to its disclosure; or

(c) the application is frivolous or vexatious or is made in bad faith.

PART IV: Appeal procedure

4.1 An applicant who is aggrieved by a decision by an officer of a States department under this Code may in the first instance appeal in writing to the President of the Committee[27] concerned.

4.2 An applicant who is aggrieved by the decision of an authority under this Code, or by the President of a Committee under paragraph 4.1, may apply for his complaint[28] to be reviewed under the Administrative Decisions (Review) (Jersey) Law 1982, as amended.

[27] Note: Under ministerial government, this would be the relevant Minister.

[28] An application for a complaint to be heard by the States of Jersey Complaints Panel should be submitted to the Greffier of the States, States Greffe, Morier House, Halkett Place, St. Helier, Jersey JE1 1DD

APPENDIX B

CHRONOLOGY SINCE INTRODUCTION OF THE CODE

1999.07.26 **The States, when adopting the Code of Practice on Public Access to Official Information –**

(e) agreed that the provisions of the Code, amended as appropriate in the light of practical experience, should be incorporated into legislation which would establish a general right of access to official information for members of the public…"

2002.03.26 **The States approved the establishment of the Privileges and Procedures Committee on 26th March 2002 with, inter alia, the following term of reference** –

"(viii) to review and keep under review the Code of Practice on Public Access to Official Information adopted by the States on 20th July 1999 and, **if necessary, bring forward proposals to the States for amendments to the Code including, if appropriate the introduction of legislation, taking into account the new system of government"**

2003.03.25 PPC presented the Freedom of Information consultation paper (R.C.15/2003) to the States

2004.04.27 **PPC lodged the Code of Practice on Public Access to Official Information: Measures to improve implementation (P.80/2004) which was adopted by the States on 8th June 2004**

2004.12.21 PPC presented the Freedom of Information: position paper (R.C.55/2004)

2004.04.19 **PPC lodged Freedom of Information: proposed legislation (P.72/2005) which was adopted on 6th July 2005**

2006.04.21 PPC presented the Freedom of Information (Jersey) Law 200-: consultation document (R.33/2006)

2007.06.18 PPC presented the Freedom of Information (Jersey) Law: second consultation document (R.60/2007)

2009.10.14 PPC presented the Draft Freedom of Information Law 'Policy Paper': White Paper October 2009 (R.114/2009)

2010.07.19 PPC lodged the Draft Freedom of Information (Jersey) Law 201-.

STATES OF JERSEY

FREEDOM OF INFORMATION: PROPOSED LEGISLATION

Lodged au Greffe on 19th April 2005
by the Privileges and Procedures Committee

As adopted as amended by the States on 6th July 2005

STATES GREFFE

2005 Price code: D P.72

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(a) agreed that the existing Code of Practice on Public Access to Official Information should be replaced by a Law, to be known as the Freedom of Information (Jersey) Law 200-;

(b) agreed that, subject to further consultation, the Law should be broadly based upon the key policy outcomes listed at section 17, numbers 1 to 22, of the report of the Privileges and Procedures Committee dated 19th April 2005; and,

(c) requested the Privileges and Procedures Committee to bring forward for approval the necessary draft legislation to give effect to the decision.

PRIVILEGES AND PROCEDURES COMMITTEE

Note: Law drafting time was made available in the 2004 Law Drafting Programme and has been carried forward.

REPORT

Contents

1. Introduction

In presenting this Report, the Committee has quite intentionally incorporated much of the text of the Freedom of Information Position Paper (R.C.55/2004), which was published in December 2004. By so doing, the Committee hopes that Members will find all they need for a thoroughly informed debate.

2. Background

Freedom of Information (FOI) legislation has now been under consideration in Jersey for more than a decade. In March 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 since then a number of Members, amongst them in particular such stalwarts as Senator Syvret, have kept the flame burning.

The Code of Practice on Public Access to Official Information was approved on 20th July 1999 and introduced on 20th January 2000. At that time the States agreed –

> *'that the provisions of the Code, amended as appropriate in the light of practical experience, should be incorporated into legislation which would establish a general right of access to official information for members of the public' (P.38/99).*

In April 2003 Deputy Breckon lodged the projet "Public Right of Access to Information, Financial and Other Records of the States of Jersey." This was eventually debated on 27th April 2004. Commenting on the projet the Policy and Resources Committee said –

> *'The Committee accepts that legislation in this area would be desirable, and provision has been made in the 2004 Legislation Programme for a new law on freedom of information' (P.34/2003 Com.(3)).*

That particular projet was defeated but the message was clear: Members believed in legislation as the way forward and indeed the intention always was that the Code would naturally precede a Law.[29] It was initially considered to be experimental and, because it was limited in scope, the administrative costs were absorbed in existing departmental budgets. The Code was updated in June 2004 after the States unanimously approved a proposition entitled 'Measures to Improve Implementation' (P.80/2004) by 47 votes to 0.

Additional to this unanimous support for the enhanced Code, many Members expressed frustration that a Law had not yet been brought forward and urged the Privileges and Procedures Committee to progress FOI as a matter of urgency. There is

[29] *This statement is made on the basis of –*
F&E's comments on Deputy Troy's proposition P.196/2003;
P&R's comments on Deputy Breckon's proposition P.34/2003 (debated April 2004);
PPC's Terms of Reference in Act of the States 26th March 2002;
1 *Public Access to Official Information: Code of Practice P.38/99, approved 26th July 1999.*

clearly a strong political mandate in favour of legislation. However, this must be weighed against a prevailing climate that presumes against unnecessary new Laws or expenditure.

Over 50 countries worldwide have already established a Law. There is also a Commonwealth model Law for use by small jurisdictions so that they may introduce their own legislation without over-burdensome preparation. Virtually all of what we might call Western modern-style democracies have a Law in place already.

The Code has inherent deficiencies, amongst which the Committee wish to highlight the following –

1. The public at present do not have a legal right of access to government information.

2. The Code does not cover publicly accountable bodies such as the Jersey Competition Regulatory Authority or the recently incorporated utilities. This is in potential conflict with Article 23 of the Public Records (Jersey) Law 2002 where there is provision for access to public records in the control of bodies that were formerly departments of the States.

3. There are inconsistencies of approach between Committees in giving public access to records that are not yet in the open access period (normally 30 years) and this needs to be corrected. Currently, Article 29 of the Public Records (Jersey) Law 2002 allows very wide discretion and guidance is needed.[30]

4. The existing appeals process provides for appeals but it does not provide an enforcement mechanism. This is because any review decision using the Administrative Decisions (Review) (Jersey) Law 1982 cannot be enforced.

5. The Code is managed and monitored as one of many tasks in the responsibility of the States Greffe rather than by an independent office.

6. Under the current Code the exemptions can be applied as absolute exemptions as there is no overriding public interest clause.

7. Certain existing exemptions overlap, lack rigour or are not in accord with a spirit of openness.[31]

8. The Committee believes that Jersey is now out of step with many modern and democratic jurisdictions where the legal right of access to information has been long-established.

[30] *Article 29 states "Nothing ….. prevents a person from making available to a member of the public a public record …, that is not in the open access period or that is exempt from access … if the person does so with the consent of the public records officer …" This could allow uncontrolled open access to exempt records and is not recommended.*

[31] *Proposed changes to these are listed at section 17, **Policy Outcomes,** within this Report.*

9. Jersey has a range of rules embedded in law which directly concern the management and protection of public information but access to that same information is merely governed by a non-legal Code. The Committee is of the opinion that it is inconsistent to leave access to information outside the law.

Notwithstanding the force of the above, in recognition of the change of heart that some Members and Committees may now have had about the need for a Law, the Committee brings this Proposition to the States so that Members may re-state their intention in principle. The draft Law will of course return to the States in due course for debate and final endorsement, if this Proposition is agreed.

3. Administrative arrangements and individual rights

Freedom of Information law may be seen as forming part of a body of Laws designed to give an administrative framework to government. Examples would include the States of Jersey Law, the Public Finances Law, the Public Employees (Retirement) Law, other Pensions enactments and the Administrative Decisions (Review) Law.

However, Freedom of Information also falls naturally into the category of Laws occupied by Human Rights, Public Records and Data Protection in that all of these are part of the concept of balancing individual rights against the increasing pervasiveness of the State and other public bodies.

In both these categories it has been historically accepted in Jersey[32] and elsewhere that a clear framework is best laid down in legislation rather than in a non-enforceable Code. If Freedom of Information remains outside formal legislation it seems as if it is the 'odd one out.' Indeed, on the assumption that the public right of access to information is no less important than these other Laws, this fact may be persuasive in its own right. However, it does not by itself mean that Freedom of Information should become embedded in law.

In introducing a law, governments have signalled to the public that they are making a commitment to openness and that they seek to improve public knowledge of how government works. Public engagement in the political process is seen as a hallmark of the modern democracy. If the choice is made to leave the matter of Freedom of Information to an unenforceable Code it will remain essentially an administrative guideline and no more.

The Committee believes that the force of law is required to precipitate a culture change in the public sector and move the balance in favour of ordinary citizens, giving them a legal right of access to government information. Despite good intentions at the inception of the Code it has not caused a culture change in the States hitherto.

4. The rationalisation process

In other jurisdictions Freedom of Information legislation was regarded at the outset not as a standalone Law but an integral part of reform and as absolutely fundamental to the maturation of democracy.

[32] *This statement is based on the facts of the situation – administrative arrangements and individual rights have historically been put into law and thus have set a precedent.*

In Jersey, the separate development of Data Protection and Public Records Laws inevitably overlaps with, and impinges on, the concept of Freedom of Information. Currently the Committees responsible are Finance and Economics for Data Protection, Education Sport and Culture for Public Records and Privileges and Procedures for Freedom of Information.

Logically the three should be looked at as a coherent whole. The drafting of a Freedom of Information Law presents the Assembly with that opportunity. Very careful consideration has been and continues to be given to all relevant existing legislation to ensure that the new Law occupies a complementary position.

The Public Records (Jersey) Law 2002 came into force on 1st August 2003. The Privileges and Procedures Committee is aware of inconsistencies of approach between Committees in giving public access to information that is not yet in the open access period (normally 30 years) and is not exempt for other reasons. The proposed Law will need to offer more specific guidance and to achieve this, the Committee has taken advice from Jersey Archive.

The Committee has clarified within the draft Law access rules to govern information which was created before the Code came into force but which is not yet in the Open Access period. (Law Drafting Instructions at 3.8)

Furthermore, the Committee has undertaken consultation with a view to whether it should in future be responsible for all 3 Laws. The aim of such an approach would be to ensure rationalisation and coherence are maintained for the future. This would prevent further divergence and unnecessary expansion of legislation and would be very much consistent with the regulatory reform initiative.

As a result of comments received following consultation (R.C.55/2004), the Committee recommends that Data Protection and Freedom of Information should both be funded through the States Greffe annual budget and that the Committee should have oversight for the purpose of taking any future propositions or annual reports to the States, (Law Drafting Instructions 9.1). The role of the archivist and the Public Records Law would remain under the Education Sport and Culture umbrella.

5. Reinforcing States aims

From the above it can be seen that a Law would be consistent with other public policy matters which have already been addressed through legislation. It would create a framework that could be seen to be apolitical. It would also define clear statutory responsibilities, duties and rights and be enforceable in a way a Code can never be.

The States have recently approved 2 high-profile policy documents – the Strategic Plan 2005 to 2010 (P.81/2004) and the Public Sector Reorganisation: Five Year Vision for the Public Sector (P.58/2004) – that set out aims for the next five years and make a commitment to greater transparency and accountability. Creating legally enforceable Freedom of Information rights for the people of Jersey would, in a single emphatic act, explicitly reinforce these aims.

For example, Aim Number Eight of the Strategic Plan approved by the States on 30th June 2004 sought to 'reconnect the public and the States and promote community involvement in Island affairs'. The document recognised Jersey's low levels of voter turnout – regularly less than 30% – as evidence of a democratic deficit in the Island and disenchantment with government.

Aim 6.2.1 sets out to "Promote a better understanding of the issues facing the Island today and encourage debate and aid informed choices." Aim 8.2.4 states that we should "ensure appropriate transparency and openness in Government," whilst Aim 8.3.3 states that we should "develop a more consultative approach to governance and encourage public participation in policy making." All these will be aided directly by the proposed Law.

The £9.4 million Visioning Project asserted: 'The need for change in the public sector is being driven by major external changes and a general political unease generated by poor public perception of the States of Jersey and the public sector. There is a disconnection between the electorate, politicians and the public sector in Jersey that is unhealthy and breeds frustration and mistrust throughout the community.'

The recent publicity surrounding the JCRA Audit Report, which included serious allegations of mismanagement, served to reinforce negative public perceptions.[33] Under this proposed Freedom of Information Law the title of that report would have been included on the Information Asset Register and much, if not all, of it would have been available for release without the public being dependent on a leak.

From the public perspective, the force of law carries great weight and offers a legal right that simply cannot be offered in a policy or Code. Under the current system an individual seeking information relies, to an extent, on goodwill of the officers involved. This can be a deterrent for researchers who assume there is a culture of secrecy. A Law would replace this element of chance with a system where there were a statutory duty to assist.

The success of a culture change will be difficult to quantify but only a Freedom of Information Law provides concrete proof that the States is serious about putting the benefit of the public first and the convenience of politicians and civil servants afterwards.

6. The demand for information

Since the Code came into force, on 20th January 2000, the recorded number of requests for information may seem low. However, recorded requests do not tell the whole story and anecdotal evidence indicates that quite a number of informal and unrecorded requests are being dealt with on a daily basis. Historically, the record of applications where the Code has been specifically mentioned is as follows –

[33] *Jersey Evening Post: Page 1, 28/6/04, Pages 8&9 and Editorial 29/6/04.*

Jersey

Year	*Number of recorded requests*	*Number of initial refusals*
2000	36	5
2001	15	3
2002	37	2
2003	62	2

Comparison with other jurisdictions is not easy and equivalent information from England and Wales was unavailable. However, the Scottish Executive publishes comparable data.

Scotland

Year	*Number of recorded requests*	*Number of initial refusals*
2000	44	7
2001	17	6
2002	253	3
2003	n/a	n/a

Considering the largest of these, a per capita comparison of the 253 requests made in 2002, (in a Scottish population of over five million) would represent just 4.4 requests per annum in Jersey.

7. Deficiencies of the Code

The deficiencies of the existing Code were highlighted by several States Members during the recent debate on the improvements.[34] The rapporteur, Constable Derek Gray, stated: 'This Code established a minimum standard and committees, in accordance with States policies, should meet these standards. Unfortunately in some cases the minimum has also become the maximum, and this was never the intention of the Code.'

As a testing ground, the Jersey Code has served a valuable purpose in dispelling myths that allowing public access to data is unworkable, over burdensome to States Departments or diverts attention from core work.

If we continue with a voluntary Code, politicians and public servants know that they can in effect sidestep the publication of embarrassing or difficult information. Experience in the U.K. has shown that this is not a hypothetical scenario. U.K. Ministers have refused to comply with three rulings of the Parliamentary Ombudsman under the previous Open Government Code,[35] which had been in operation from 1994 until the Freedom of Information Act 2000 came into force on 1st January this year. The Labour government simply ignored the decisions that it did not like, most notably regarding a list of gifts given to Cabinet Ministers. The lack of sanctions means there is always an alternative to compliance. It tells politicians and civil servants they never really have to change.

[34] *See transcript of States Debate of P.80/2004 on 8/6/2004.*
[35] *Maurice Frankel, Director, Campaign for Freedom of Information, July 2003.*

8. Other benefits of a Law

The introduction of a Freedom of Information Law raises the same issues about effective record keeping as under Data Protection, with which there are important parallels. In the long term it will be healthy for politicians, civil servants and the public alike to be able to access documents easily. There is an argument that this will improve the quality of both debates and decision-making.

U.K. experience[36] shows that organisations who manage their data efficiently will find the transition to a Law relatively painless, while those that are less well organised will experience some difficulty and greater manpower implications. The benefits of improved records management should not be underestimated.

In this regard, it should be noted that the Education Sport and Culture Department engaged a records management specialist from the U.K. in order to aspire to best practice with regard to data protection and Freedom of Information. The study has produced a number of recommendations that could be valuable corporately and the department will continue to take the lead.

Within the Law the Committee will propose a power to make Regulations to vary exemptions and to vary which public authorities are covered. There will be a power to introduce a publication scheme[37]. There will also be a power to modify the role of the Commissioner if increased monitoring or enforcement were needed. This makes the Law a flexible instrument capable of evolving with time.

Consistency with other jurisdictions is not just about keeping up with other modern states. It is also about recognising that a considerable part of Jersey's professional workforce is trained at least in part or has worked in other western countries. Proceeding with the Law will prevent a growing disparity of standards between Jersey and other democracies.

The current Code is followed by Committees and departments. Being a Code it cannot be made a requirement for any other group. The draft Law will propose a list of public authorities which can be wider than that narrow definition should the Assembly so wish it. If official information is held by others such as a States owned company or the JCRA for example, it can be argued that, providing the information is not exempt in accordance with the agreed list of exemptions, then it should not be withheld. It is only through enacting a Law that the States will gain the power to put such information into the public domain.

[36] *Publication Schemes: Examples of Good Practice on www.cfoi.org.uk .*
[37] *In the United Kingdom the latter has meant that each authority has had to prepare extensive schemes detailing core information that they would commit to publish. These schemes are mandatory and submitted to the Information Commissioner for formal approval.*

The proposal is for the scope of the draft Law to be wider than the existing Code so as to provide for the release of public information held by other public authorities. The definition of an authority would include the States of Jersey, officials of the States, Committees, Ministers and departments (whether executive or non-executive), the courts, statutory bodies, publicly-controlled corporations and any other organisation established by the States or which exercise functions of a public nature. (1.1 and Appendix 1 of the Law Drafting Instructions)

9. International perspective

As already stated more than 50 countries have some form of Freedom of Information legislation. This, of course, varies in quality and effectiveness. In the U.K., public rights of access under the Freedom of Information Act (2000) came fully into force in January 2005 following a long implementation period designed to enable U.K. authorities to set up publication schemes and comply with the new legal requirements.

The U.K. Freedom of Information Act, in spite of some limitations, has nevertheless now given the British public a right to information enshrined in the statute book. In doing so it has joined Australia, Canada, New Zealand, South Africa and many others in the Commonwealth and elsewhere.

In addition, adoption of a Freedom of Information Law, and more particularly the publication scheme that could follow, could enable Jersey to comply with the Aarhus Convention on Access to Environmental Information and Directive 2003/35/EC of the European Parliament[38], which guarantees public access to environmental information and participation in decision making. The Environment Department has advised that Jersey could not currently meet the criteria, which include free access to government-held data that would be possible under a Freedom of Information Law.

A gap exists in Jersey that is covered in the U.K. by other statutory instruments governing access to information. These include the Environmental Information Regulations 1992, which put into effect EC Directive 90/313/EEC, and the U.K. Local Government (Access to Information) Act 1985. Nothing similar exists in Jersey.

If the States decides not to proceed with a Law, it would be extremely difficult to justify why Jersey residents should be less legally entitled to government information than their counterparts in the U.K. or a range of other countries.

Conversely, the introduction of a sensible, balanced and workable Law could bring public relations advantages for Jersey on the international stage. This could help counter some of the adverse criticism that the Island can attract.

10. Costs and disadvantages of a Law

It has already been established that a Freedom of Information Law, by its very nature, will generate some cost rather than income. It has been argued that a disadvantage of putting the Code into law is that there will be an increase in bureaucracy just at a time when the initiative has been taken to look at ‘red tape’ and reduce it. Bearing this in

[38] *The Aarhus Convention, website* www.unece.org/env/pp/ .

mind, the proposed Law has been designed to keep bureaucracy to an absolute minimum by its 'light touch' approach.

The Committee propose enhancing the role of the Data Protection Registrar to take on Freedom of Information. The intention is to limit the enhancement only to what is absolutely essential. As a result, to fulfil the additional role a reallocation of resources may be needed.

It is claimed that the number of requests for information that may get as far as the Commissioner could create a bureaucratic burden. In fact the number is estimated to be extremely small and most likely will not exceed 2 or 3 cases a year, as illustrated in the table in section 6, above.

If a comprehensive publication scheme were being recommended at this stage then it would be true that new costs and more work were being imposed on individual departments too. It is not. It would also be true that extra work would be involved if all pre-existing data were being opened up to access simultaneously. This process would entail classifying all information and perhaps imposing a standard computer hierarchy of all future and historic data. The Committee proposes that the issue should be reviewed once the Law, if adopted, is in place.

So, the Law will not actually give the public any more 'red tape' whatsoever. It will provide a statutory framework for the individuals who make up the public service and other public authorities to comply with but it will not add to the procedures that the public have to go through at all.

There are concerns amongst some professional bodies within the public service. For example the release of Magistrate's Court records must be carefully considered where they may contain information that is personal. Health and education records would also need to be appropriately protected. However, the issue is certainly not insurmountable and is already covered within the exemption rules and the Data Protection (Jersey) Law 2005.

Another concern is that a Law may encourage evasion techniques such as holding unrecorded meetings. The answer must be to encourage the highest standard of professionalism and openness amongst public authorities and for States Members to lead by example. Furthermore, this very same point was raised in the debate on the introduction of the Code of Practice and the fears expressed then have not been realised.

A further issue is that there may be a cost to the individual who wishes to access information. The Committee's view is that information that would be free should include all agendas, 'A' agenda Minutes, all associated papers and annual business plans. Where a department publishes additional material it should as far as possible be available on the appropriate website or by e-mail, although in some cases it may be necessary to provide hard copies.[39] That would be a decision for the department concerned.

Guidelines for the coming into force of the Freedom of Information Act in England and Wales are that most information should be free. However, this will not apply

[39] *It is already established practice for certain information to be charged for, such as States Propositions, Reports and Laws.*

where retrieval costs may exceed £450 for local government material and £600 for central government material.

The Committee's policy within the draft Law is that requests for information should generally be free of charge. (See Law Drafting Instructions at 9.2)

11. Publication Schemes, the Information Assets Register and Records Management Policy

Under the U.K. Freedom of Information Act, authorities were each required to produce a comprehensive publication scheme describing the range of information they publish. Anecdotal evidence suggests that they have done so with varying degrees of success and reluctance and sometimes at considerable cost.

The smaller scale of public administration in Jersey means that separate schemes for each department may be cumbersome and prohibitively expensive at the outset of the Law. The Information Asset Register (www.gov.je/statesreports) provides the starting point for a more user-friendly option tailored specifically for Jersey. The public already have the ability to download and print copies of many of the non-exempt reports straight from the list.

This is a small-community manageable initiative. It clearly complements other major initiatives underway such as the production of all States departments' Business Plans in a standard format which will then be collated and made available to all. There is also the new Call Centre project and the Regulatory Reform initiative.

It may be that a more comprehensive publication scheme should be developed in the future and in the light of experience. Whilst such a scheme could be introduced under an amended Code, there is a distinct advantage in the formality and authority of using a Law to do this. The proposed Freedom of Information Law would enable the States to introduce this by Regulation if necessary.

The Privileges and Procedures Committee will continue to consider and review the need for a publication scheme. Both records management and publication schemes should be looked at together to ensure a commonsense and manageable process.

Finally, concerning records management, a legal duty to manage pubic records already exists, as clearly stated in Article 38(1) of the Public Records (Jersey) Law 2002. Further provisions can be made formally by States Regulation under Article 38(2). Responsibility for this rests with the Jersey Archive Service and the Committee sees no need to recommend change here.

12. Monitoring

The issue of how to secure effective and low cost monitoring is never easy to resolve but effective monitoring is surely a necessary goal whether Freedom of Information is written in Law or a Code.

The Committee proposes that a 'light touch' process of minimal official monitoring would place such a role in the hands of an independent Information Commissioner who would be given a statutory duty to report annually on the practical working of the Law. There is logic and convenience if that person is also the Data Protection Registrar.

The importance of placing Freedom of Information into a legal framework is that it shifts ownership clearly to the individual member of public and away from a purely administrative procedure. This shift allows the individual to become part of the monitoring of effectiveness, in that once the Code becomes law he or she then has new rights and can insist on them. A Code leaves the onus on the shoulders of the administration alone.

The Committee propose that the process of official monitoring and oversight should be carried out by an independent Commissioner with statutory powers. The recommendation is that the Commissioner should also be the Data Protection Registrar and thus avoid a new bureaucracy being set up. (Law Drafting Instructions at 6)

13. Enforcement

One of the absolutely central reasons for deciding on whether a matter should be left as an administrative Code or a matter of public law is that of enforcement. It is by definition only through law that one can provide statutory enforcement. It is a measure of the importance placed on the subject matter that it should be embodied in law.

The comparison with other Laws is apposite: In the Draft Public Finances Law it has been seen to be necessary to have some penal sanctions to ensure enforcement and it is interesting to quote directly from the projet: "The existing Law is lacking in this area as compared with other jurisdictions, with virtually no sanctions and no penalties for non compliance with its provisions. The new Law has been given "teeth" in that there is set out a number of offences and penalties relating to the Law which have been approved by the Attorney General."

Three examples from the Draft Public Finances Law are of interest: Firstly, "*Article 58* makes it an offence to fail to provide a record or information when required to do so by a person acting in accordance with the Law." *Article 64* provides that a person can claim certain privileges against disclosure of information but cannot refuse to disclose information on the grounds that doing so may tend to incriminate the person ……. In Article 65 the Royal Court is given a specific role to order compliance "to produce a record that is in the person's possession or under the person's control; or … to provide any information that the person is able to provide."

These Articles reveal a desire to legislate with regard to information. The need to do so has been with us for a long time and can of course be found in the Island's Official Secrets (Jersey) Law 1952, where national security makes it essential that we guard sensitive information.

Such Laws show the obverse to the Freedom of Information concept – on one side there is control of information and on the other there is access. For many, just as the duties to protect information are already embedded, it is natural that a mature and confident democracy should want to make rights of access also enforceable in law.

The Privileges and Procedures Committee propose to introduce specific offences and penalties so that enforcement can be legally binding. These are listed in the Law Drafting Instructions at 8.1 and should be read in conjunction with the suggested defences at 8.3.

14. Appeals, the Administrative Appeals (Review) Board and a Tribunal

Currently, because the Code is just that, a Code for officials to follow, and not enforceable in law, the only appropriate mechanism when an applicant has had access to information refused has been the administrative procedure of taking the matter to a Board established under the Administrative Decisions (Review) (Jersey) Law 1982. The Board can investigate and find that the original decision should be reconsidered.

This reconsideration may mean that the same decision is reached again. If the Committee does reach the same decision, any Member may then bring a proposition to the States to ask the Committee concerned to reconsider its decision again but even this is not binding. Furthermore, whilst the Board is entitled to find an administrative decision has been made contrary to law (Article 9(2)(a)) it has no power to enforce the law.

Crucially, it can be seen that such a process is not a legal one and it may well not be resolved satisfactorily.

Furthermore, it is traditional for governments to seek to ensure separation of power between the executive, the courts and the legislature in order achieve a sensible balance and avoid a concentration of power. In Jersey that is achieved in part by the separate and independent functions of the Courts and the States Assembly.

As a solution to this difficulty, the Freedom of Information Law would introduce a legal appeals process whilst not prohibiting the use of the Administrative Decisions (Review) Law if it were found to be appropriate on certain occasions. This process would make full use of the existing Data Protection Tribunal (reincarnated as a new Information Tribunal) and ultimate referral to the Royal Court if necessary.

Apart from other arguments in favour of this route the Court provides an independent and impartial tribunal that fully complies with Article 6 of the European Convention on Human Rights.[40]

The Privileges and Procedures Committee propose to modify the Data Protection Tribunal so that it becomes the Information Tribunal with the Royal Court as final arbiter. The Administrative Decisions process would still be available but this does not need to be written into the law. (See Law Drafting Instructions at 7)

[40] *The route via Information Commissioner, Tribunal and Royal Court does not preclude the Administrative Review Board method but as explained the latter is political. Politics and the enforcement of the law should be kept separate.*

15. Political and public support

Political support has been strong. The Committee published a detailed Freedom of Information Consultation Paper (R.C.15/2003) in March 2003. Following this, Deputy Breckon lodged a Proposition to establish a general right of access to official information by law (P.34/2003) and in its comments the Policy and Resources Committee stated "The Committee accepts that legislation in this area would be desirable, and provision has been made in the 2004 Legislation Programme …." That Proposition was debated as recently as 27th April 2004 and failed largely because neither the Policy and Resources nor Privileges and Procedures Committees believed it offered quite the right way forward. However, the principle of a need to legislate was never in doubt.

On the matter of a Register of Reports (P.196/2003) the Finance and Economics Committee said "the Committee supports the assertion of the Privileges and Procedures Committee that this issue would be better addressed within the overall context of a Freedom of Information Law."

All Committees were written to in August last year and invited to comment on both the adequacy of the exemption list and the principle of a law. Seven gave specific and constructive replies, of which four were confident that a law was needed, one felt it was not a Committee matter and should be left to individual members and one was divided. The seventh, Policy and Resources, appears now to be opposed save for Senator Kinnard, who has asked for her dissent to that opposition be recorded. This opposition seems to stem from a belief that the Code is working well and that a desire to pursue Regulatory Reform and in particular reduce 'red tape' should now take precedence.

The Privileges and Procedures Committee disputes the true effectiveness of the Code. It has no desire to produce a burdensome system and has designed a law that complements the visioning process and Regulatory Reform initiatives of the Policy and Resources Committee.

The Citizens' Advice Bureau is supportive of a law as a matter of policy. Not surprisingly it has been the Media who have been very supportive on philosophical grounds alone. There is a belief that there is a traditional culture of secrecy which needs to be combated. Removing both this perception and the reality where it exists must be based on how best to benefit the public and not how to protect the politician or civil servant.

A key issue raised by the Media has been whether the net of exemptions has been thrown too wide. The Committee shares the concern yet wishes to tread very carefully. It is noted that section 36 of the Commonwealth model law allows disclosure of exempt material in the public interest. However, the Committee are mindful that alongside such a power to release exempt material there must also be the appropriate protection for the individual against a release which was motivated by malice or was not justified by public interest. The celebrated Naomi Campbell case[41] gives useful guidance on the matter as does the United Kingdom Code of Practice of the Press Complaints Committee. Further guidance on what constitutes public interest has recently been given in the European Court of Human Rights[42].

[41] *See Campbell v MGN Ltd [2004] UKHL 22.*
[42] *Von Hannover v. Germany [2004] EMLR 21.*

The Committee propose two ways of addressing public interest: firstly that by Regulation the States will be empowered under the Law to alter the exemption list if it is found to be too restrictive (Law Drafting Instructions at 9.3.1). Secondly it is proposed to create a public interest power to release particular information that would otherwise be exempt (Law Drafting Instructions at 3.9 and 7.2.4).

16. Further consultation

A final Paper was produced in December 2004: "Freedom of Information – Position Paper" (R.C.55/2004). In publishing R.C.55 the Committee invited all States members and the public to respond. The key results of the consultation are as follows –

R.C.55/2004: Responses to Position Paper

	Respondent	**Summary of Response**
1	Archivist	Supports the principle of a law and sees non-enforceable Code as inconsistent with approach to Data Protection and Public Records. Agrees with and supports Report in several specific areas.
2	Attorney General	Concerns similar to those already expressed in 2004 correspondence. Issues concerning exemption categories and need for care as to what can or cannot be released. Consistency of practice across States required. Various practical issues raised which are addressed within the Law Drafting instructions. Concern about cost.
3	Channel Television	Supports principle of Law. Would hope that exemptions will be clarified in Law and some concern over cost of providing information.
4	Comité des Connétables	Requested more information as to type of requests to expect and what should be exempt or should be released. Recalled that it had said Law Drafting might be re-allocated to more pressing matters.
5	Citizens Advice Bureau	Supports principle of Law. Concern regarding increased demand on resources but notes that DP/FOI combined role should overcome this.
6	Chief of SoJ Police	Supports principle of public access but has concerns about the Law. Raises helpful issues concerning need to withhold stating whether or not information requested exists, need for rigour of FOI investigations and security clearance for Commissioner.
7	Data Protection Registrar	Supports principle of Law. Needs re-assurance on issue of resources. Recommends good private sector consultation.

8	Deputy Labey (in her role on ESC Committee regarding archives)	Supports principle of Law. Welcomes co-ordinated approach to record keeping, management and standards. Would want independent oversight.
9	Environment Department	If Jersey were to seek to have the Aarhus Convention on Environmental information ratified on its behalf a FOI Law would help in establishing and embedding principles. More resources would be needed for meaningful access and participation in the Convention thereafter.
10	Jersey Competition Regulatory Authority	Generally supportive of proposed changes. Emphasised need to keep exemptions (ii) and (iii) so as to prevent release of information that might otherwise prejudice compliance investigations. Also would like retention of exemption (xiv) concerning policy development.
11	Jersey Electricity	Opposed. Concerned over cost of getting filing and retrieval systems up to standard.
12	Jersey Evening Post	Supports principle of Law and in particular a Public Interest release policy.
13	Jersey Financial Services Commission	Supports principle of Law. Would wish to ensure similar exemptions to current Code. Supportive of no-fees policy and would make use of Information Asset Register.
14	Jersey Post	No further response but had done so previously (Sept. 04). Supports principle of Law. Would wish to ensure similar exemptions to current Code.
15	Jersey Telecom	Not clear as to what official/public information it holds. Would hope PPC will take the need for a 'level playing field' between private companies and States-controlled companies into account when drafting legislation.
16	Jersey Water	Does not wish to see extension of Law to States-controlled companies. Concern over shareholder confidence and extra resources to manage compliance with the Law.
17	Policy and Resources Committee	Committee does not think sufficient grounds exist for Law. Believes costly and seeks costings. Considers Law is contrary to States approved initiative on Regulatory Reform but not philosophically opposed to Law.

The Commonwealth Human Rights Initiative has provided practical advice and comment on the proposals. Additionally, to ensure wide awareness of the issues involved, the following groups were also specifically contacted at the time of the publication of the Consultation Paper –

BBC Radio Jersey
Chamber of Commerce
Jersey Finance
Institute of Directors
Channel 103

17. Policy outcomes

The Committee has considered very carefully the concerns expressed during consultation. It has also been greatly encouraged by many who have urged that an effective Law should be introduced.

It remains convinced that the Law must have a presumption of openness at its core and that all official information should have the potential to be considered for release. In other words, there should be no blanket absolute exemption for a particular category of information or a particular government agency. Furthermore, whenever possible the information should be available at no charge to the applicant and there should be no restriction as to whom may apply.

Notwithstanding its belief in freedom of information, the Committee is committed to a Law that will recognise the need to keep some information confidential. It is important therefore to recognise that the appeals process works both ways in that it can be used to prevent information being released just as it can be used to ensure information is accessed. Crucially, the appeals process must be on an independent and legally enforceable footing.

It is believed all policy issues are dealt with within the Law Drafting instructions, but Members will perhaps find a summary of key policies useful –

1. All information should be capable of being considered for release. In particular, information created before the Code came into force on 20th January 2000 and which is not yet in the Open Access Period should be released on request unless exempt in accordance with the agreed list of exemptions.

2. There may be circumstances when there is an overriding public interest greater than the purported exemption. Such an interest will be built into the Law but can be appealed against.

3. All legal persons (both individual and corporate) should have a right to apply, regardless of their nationality or residency.

4. Application, especially for readily accessible information, should not be restricted by having to be in writing.

5. Authorities that are emanations of the state or majority owned by the public should be bound to release relevant information.[43]

[43] *The Committee would be very reluctant to restrict the law to government departments, Ministers and Committees alone.*

6. The Law would not apply to States-aided independent bodies.[44]

7. A formal publication scheme is not yet proposed but authorities should be encouraged to publish as much information about themselves and their activities as possible and will be required to use the Information Asset Register.

8. Authorities are to be encouraged to develop records and document management schemes which will facilitate retrieval of requested information.

9. Information should in general be released free of charge[45] and proportionate assistance should be given to a special need, such as an individual's sight impairment.

10. Information should be released as soon as practicable, acknowledgements should be within 5 working days and the 15 working day guide is to be seen normally as a maximum for a decision to release the information or not.[46]

11. Information created before the introduction of the Code (20th January 2000) should be available for release, but because it has not yet been categorised its release may take longer than information created since the Code. This means that where justified by the Commissioner, the 15 working day limit may be exceeded.

12. Existing exemption (v) should be simplified to refer to legal professional privilege alone. Medical confidentiality[47] and legal advice given to an authority[48] are adequately covered elsewhere in the exemptions. The explicit retention of these provide scope for serious undermining of the Law.

13. Existing exemption (xii), concerning the competitive position of an authority, should be amplified to give the same guidance concerning the word 'prejudice' as is given concerning the competitive position of a third party in exemption (xi). This would then be as follows –

> "prejudice the competitive position of an authority if and so long as its disclosure would, by revealing commercial information, be likely to cause significant damage to the lawful commercial or professional activities of the authority;".

[44] *These bodies can be adequately held to account by the Comptroller and Auditor-General under Article 50 of the Draft Public Finances (Jersey) Law 200-.*
[45] *However, in order to manage unreasonable or excessive requests, charges for extensive work will be allowed.*
[46] *The Committee has replaced the 21 day limit applicable in the Code so as to recognise the effect of bank holidays. The change more realistically defines a 3 week maximum period.*
[47] *Exemptions (i), (xv), (xvi) are more than adequate regarding medical confidentiality.*
[48] *Any one of the other 19 exemptions might be more specifically used, depending on the nature of that advice.*

14. Existing exemption (xiii), concerning employer/employee relations, should give greater guidance concerning the word 'prejudice' as follows –

> "prejudice employer/employee relationships or the effective conduct of personnel management if and so long as its disclosure would, by revealing the information, be likely to seriously put at risk a fair resolution of a dispute or related matter;".

15. Existing exemption (xiv), concerning the premature release of a draft policy, should be amplified so that its purpose is clearly understood as follows –

> "constitute a premature release of a draft policy which is in the course of development. This cannot exempt information relating to that policy development once the policy itself has been published, nor is it a blanket exemption for all policy under development;".

16. Existing exemption (b), concerning information originally given in confidence has no place in a Freedom of Information Law as exemption (i) protects personal information, exemption (v) provides for legal professional privilege and exemption (xi) protects commercial confidentiality.

17. Existing exemption (c), concerning whether an application is frivolous, vexatious or made in bad faith is retained but clarified by the inclusion of the statement as follows –

> "Only rarely should this exemption be used and an applicant must be told that he retains the right to appeal against the refusal to release the information;".

18. In particular circumstances, if a Law Officer or the police reasonably believes that they should neither confirm nor deny the existence of information then the Law should not require them to do so.[49]

19. Offences and penalties are necessary to make the Law effective and these include the offence of an unreasonable failure to release information that is not exempt.

20. There should be one Information Commissioner combining the role of Data Protection Registrar and oversight of Freedom of Information. This office must be effectively resourced.

[49] *This is an important issue where on occasions it can be harmful to judicial processes or criminal investigations to indicate whether or not information is held. Like any other refusal to release information, however, it would be open to challenge.*

21. The existing Data Protection Tribunal and appeals system should be adopted and adapted as necessary to consider Freedom of Information appeals.

22. The combined and independent function of the Information Commissioner should have just one States Committee to oversee it and it is proposed for that Committee to be the Privileges and Procedures Committee.

18. Law Drafting time

The Committee is aware that Law Drafting time was allocated for 2004 and it appreciates that the time originally set aside for this work has been carried over into 2005. With this in mind, and whilst still needing to ensure maximum consultation, indicative Law Drafting instructions have been prepared and are included in this Report.

Their inclusion gives Members a chance to look at some of the detail that they would normally have only seen when a draft Law is ready for debate. In this way it is hoped that controversial issues can be ironed out at this stage, giving the Law Draftsman a very clear remit of what Members intend.

19. Human Resource implications and training

It is anticipated that for effective administration and monitoring of the proposed Law the office of the Data Protection Registrar will need one additional member of staff probably at Civil Service Grade 9. If the States approve the Proposition a job description will be drawn up to be formally evaluated. Given that considerable organisational change is underway within the States it is hoped that such an appointment would not result in an actual increase in manpower overall.

The Code has provided a valuable learning experience for the public sector and disproved concerns that it would overburden the administration and divert attention from core government tasks. A system is in place with Information or Public Records Officers in every department and this will not change significantly. Because the States have operated the nascent Freedom of Information regime since 2000, and because it complements other policy initiatives, the move to a Law would be an extension of pre-tested principles, not a leap into the unknown.

Whilst staff would require some training this would not be a start from the beginning. Training costs are included in the Financial Implications section, below.

20. Financial implications

Cost to individual authorities

The Committee is *not* proposing implementation of a new record management system nor a detailed and enforceable publication scheme, both of which are potentially costly. The Committee's understanding is that the Policy and Resources department is now co-ordinating corporate-style Business Plans which are to be made public, they are pursuing a £9.3 million change programme, there is a new Call Centre and the *Livelink*[50] project, along with a Records Management pilot scheme at the Education department. These suggest that the public service has already embarked on sufficient work to address the issue of data and information management.

Regarding the existing Code, individual authorities have not said that they have faced significant costs over the last 5 years nor have the majority indicated any grave concern on the cost implications for their organisation if the Code were to become Law. The proposed Law may result in more people exercising the right to access but this should not in any way overwhelm organisations. The Committee cannot see that this Law will add anything to the organisation costs that should not be incurred naturally by good information management practices.

It is expected that any additional resource requirement, over and above that needed under the existing Code will only arise during a transitional period. It is expected that the Information Commissioner will lend as much support as possible to ensure that such costs are minimal. The United Kingdom experience, based on the launch amid much fanfare of the equivalent legislation on 1st January 2005 has seen a surge in applications for access and a figure of 13,400 has now been officially reported for the first quarter. This is one request for every 4,400 people. Were this to happen proportionally in Jersey, perhaps 20 additional requests across all States departments and other authorities could be received.

Notwithstanding the above, the Committee acknowledges that the Law Officers' Department has resource concerns. The Committee has researched matters and is committed to continue to do so during the Law Drafting process. If these resource fears are founded on fact and are substantial, the Committee will modify its proposals where it can to reduce the administrative impact. This can be done when the substantive Law returns to the States to be debated.

[50] *Livelink is an advanced information filing and retrieval system that has been implemented across a number of States departments including Computer Services, the Law Officers', Health, Treasury and Probation. One recent project is a full Records Management pilot for Education. This will form the basis of a records management strategy for the States and underpin requirements for Freedom of Information. Computer Services have purchased a module that will allow Livelink to be used to support time-based tracking of FOI requests and a specification is being created tailored for States of Jersey requirements. Livelink has extensive ability to allow common records to be shared, controlled and accessed across the States and will use a standard document classification schemes to ensure a consistent method of access across all States information.*

Funding the Information Commissioner's office and Tribunal

Some internal re-organisation of the existing office of the Data Protection Registrar will need to occur and indicative one-off funding of £30,000 may be needed. This may lead to a change in office rental costs. If that were the case then a 25% increase would cost a further £9,000 per year.

The total annual cost due to the appointment of one additional member of staff is estimated not to exceed £46,000 at current rates salary and pension rates. Ancillary expenses and administration costs also rise with any increase in staff and these are estimated at 10% of basic cost, i.e., £4,600.

The Tribunal has not yet met concerning data protection so information as to its cost is difficult to calculate. It is thought very unlikely that it will have to convene more than once or twice a year.

Training costs

The way in which costs have been managed for both the Employment Law and the Data Protection Law is very instructive. A local law firm was used to brief Chief Officers and senior management on the Employment Law across the States whilst a Data Protection induction programme has been run under contract by the Human Resources Training and Development Department. Both of these have been professionally managed and well-received.

The Information Commissioner's office will initiate and give the lead in proactive assistance and the running of workshops. Effective use of the Media and websites also help to spread awareness of the issues.

Experience has shown that none of this has cost a fortune and by and large has occurred within existing budgets. The Committee's best estimate at this stage is that an additional £25,000 per year in initial training may be needed over a 2-year period.

The bottom line

There have been some wild exaggerations of what this new Law might cost. In fact, initially the Committee's proposals could cost a total of £99,600 per year over the first 2-year introductory period. Thereafter **£59,600 per year** will be sufficient.

These figures are a far cry from what some protagonists would have us believe. Furthermore, the Committee has quite deliberately calculated the amounts on the generous side so that Members are not committing themselves to funding something that runs away with itself. The commitment is given that this Law can be made to work effectively within this budget.

21. Conclusions

The case has been spelled out. The issues both for and against a Law have been presented. Rejecting a Freedom of Information Law in favour of a voluntary Code leaves the balance of power regarding access to information firmly with civil servants rather than the public. This could reinforce the impression that, despite high-level

policy pronouncements, Members of the States ultimately value secrecy more than transparency and accountability.

Failure to adopt a Law means that the policy objectives identified in the Strategic Plan and Visioning Project will be undermined and public support for government reforms will suffer.

Attached: Law Drafting Instructions

Law Drafting Instructions: Freedom of Information

Broad Policy Statement

The Law is to be known as the **Freedom of Information (Jersey) Law 200-**

All information that is not otherwise exempt must be in the public domain or released on request.

Information that is exempt from release is only exempt if covered by an exemption within this Law.

Information is a broad term, intended to cover all data and documents. It includes information contained within that data or documentation. Information that may not exist in a single collated form but exists dispersed within or between authorities may nevertheless constitute information that should be released.

The term 'authority' covers any person or organisation that meets the definition of a public institution in Article 5 of the Public Records (Jersey) Law 2002 and any other specifically listed under this Law. No authority covered by this definition is exempt unless specified as exempt within this Law or by Regulations made by the States.

Other jurisdictions

Whilst analysis of Freedom of Information legislation from other jurisdictions has proved useful it is not proposed that the Law should be based solely on any one country's enactments. Those countries from which particular information has been drawn are –

England and Wales	Freedom of Information Act 2000 (Ch 36)
Ireland	Freedom of Information Act 1997
Australia	Freedom of Information Act 1982 (Act No. 3 of 1982 as amended)
New Zealand	Official Information Acts 1982-2003
Commonwealth	Model Act
United States	The Freedom of Information Act, (5 U.S.C as amended in 2002)

Fundamental principles

These are stated in the Purpose statements at 2.1 (a), (b), (c), (i) and (ii) below.

Structure and layout of the Law Drafting instructions

These are not intended to dictate the format of the draft Law itself. The primary purpose of the structure chosen in the draft Law must be to give clarity to the intent of the Law.

Contents

8. Matters concerning offences

8.1 Offences
8.2 Defences and protection against legal action
8.3 Penalties
8.4 Liability for offences

9. General

9.1 Functions of the Committee and the Greffier of the States
9.2 Fees
9.3 Power of the States to make Regulations

9.3.1 There should be powers to make Regulations for anything authorised by this Law
9.3.2 Regulations concerning U.K., E.U. and International Law

9.4 Consequential amendments
9.5 Commencement

Appendix 1: Authorities

Appendix 2: Exempt information

Appendix 3: Obligations of an authority

Appendix 4: Guidance to Officers to facilitate access to information

1. Interpretation and application

1.1 Interpretation

Terms that are likely to need definition are as follows –

Aarhus Convention – means the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters signed at Aarhus on 25th June 1998.

Authority – includes the States of Jersey, officials of the States, Committees, Ministers and departments (whether executive or non-executive), the courts, statutory bodies, publicly-controlled corporations and any other organisation established by the States or which exercise functions of a public nature. All organisations listed at Appendix 1 fall within this definition but the list is not meant to be exhaustive.

Commissioner – meaning the Information Commissioner. The person appointed to carry out such functions as are described in this Law. (If approved by the States this will be the same person as whomsoever is currently appointed as Data Protection Registrar.)

Committee – to be the Privileges and Procedures Committee of the States of Jersey.

Tribunal – this refers to the Data Protection Tribunal, as originally established by Article 2(1)(b) of the Data Protection (Jersey) Law 1987 and continued by Article 6(4) of the Data Protection (Jersey) Law 2005.

Information –includes, *inter alia*, all records, reports, documents, data, advice, press releases, orders and contracts. These may be in electronic or any other form. It includes information relating to a private body which can be accessed by an authority under another enactment. The definition must encompass that of a Public Record (as defined in Article 3 of the Public Records (Jersey) Law 2002. It should include any information or record held by an authority in performance of its functions.

Open access period to have meaning ascribed to it in the Public Records (Jersey) Law 2002, Article 28(1).

Personal data – definition is as per Data Protection (Jersey) Law 2005.

Public institution – to have the meaning ascribed to it in Article 5 of the Public Records (Jersey) Law 2002.

Public Records Officer – this should be as per Article 13 of Public Records (Jersey) Law 2002 but, crucially that person should have the duty to ensure the authority by which he is employed complies with the requirements of this Law.

1.2 Application

There is to be a presumption of openness such that all information that is not otherwise exempt must be in the public domain or released on request.

The Law should apply to all information regardless of its date of creation. (But see Exemptions, below).

The Law should apply to all authorities as listed in Appendix 1 and as from time to time may be extended by States Regulation.

Rights of States Members – Under Article 33 of the States of Jersey Law 200- Members of the States of Jersey have special powers privileges and immunities which include immunity from prosecution regarding anything said or written in States proceedings. They traditionally enjoy access to otherwise exempt material for the purpose of fulfilling their role as States Members. In all other respects they have equal rights with other members of society and this Law, with these provisos, applies to them.

The Law should bind the Crown and the public sector to the same extent as it does in Article 63 of the Data Protection (Jersey) Law 2005.

Nothing contained in this Law shall affect the provisions of customary law unless explicitly stated that it should do so.

2. Purpose and obligations

2.1 Purpose

The purpose of the Law would be to establish a minimum standard of openness and accountability by the States of Jersey, its Ministers, Committees, departments, and other public authorities, through –

(a) establishing a general public and legal right of access to information;

(b) supplying the reasons for decisions to those affected, except where there is statutory authority to the contrary;

(c) establishing an effective appeals procedure.

while, at the same time –

(i) safeguarding an individual's right to privacy; and

(ii) safeguarding the confidentiality of information classified as exempt from release where exemption is in accordance with the Law and is only to the extent necessary in a democratic society.

2.2 Obligations of an authority

An authority has obligations to the public and these are identified in Appendix 3. Authorities should be required to follow these. An obligation in Law that is nevertheless not listed in the appendix is still a legal obligation.

Each authority should appoint a Public Records Officer who shall be the same person as the Public Records Officer as defined in Article 13 of the Public Records (Jersey)

Law 2002. That person should have the duty to ensure the authority by which he is employed complies with the requirements of this Law.

2.3 Obligations of an applicant

An applicant should be expected only to make a request that is neither frivolous or vexation and is made in good faith.

An applicant should follow the due procedure as laid down in the Law (Part 3 below).

3. Gaining access to information

3.1 Access

Subject to the requirements of this Law and in particular to the presumption of openness, the obligations of authorities to which this Law applies and the exemptions listed in Appendix 2 of this Law –

(a) an authority shall grant access to all information it holds or controls;

(b) in particular and without restricting the generality of paragraph (a), the Chief Minister, other Ministers, Committees of the States and their sub-committees shall make available before each meeting their agendas, and supplementary agendas, and grant access to all supporting papers, ensuring as far as possible that agenda support papers are prepared in a form which excludes exempt information, and shall make available the minutes of their meetings; and

3.2 Request process

Application may be made by any person being –

(a) an individual, whether a Jersey resident or otherwise;

(b) a body corporate whether incorporated in Jersey or elsewhere;

(c) a corporation sole (whether incorporated or not); or

(d) An individual acting on behalf of any authority listed in Appendix 1.

An applicant seeking information may make the application by any reasonable means. Where the information is already in the public domain and easily accessible it should be reasonable for that application to be made orally or by e-mail or by other suitable means.

The applicant shall –

(a) apply by any reasonable means to the relevant authority;

(b) identify with reasonable clarity the information that he requires;

(c) provide an address to which the information can be sent, if he so wishes.

The process of gaining access to information should be interpreted under the guidance of the associated flow charts to be found in Appendix 4.

3.3 Requests for personal data

If there is a conflict in the application of this Law and the Data Protection (Jersey) Law 2005 the latter should normally take precedence in that regard. However, this must not prevent a public interest enforcement notice being issued to require the release as a result of an appeal being made to the Information Commissioner.

A request for personal data should be treated as if it is made pursuant to the relevant Articles of the Data Protection (Jersey) Law 2005. Therefore authorities would grant access to personal data, to an applicant who is the data subject, in accordance with that Law and they would not grant access to personal data, to a person who is not the data subject, except in accordance with that Law.

3.4 Forms

Where an application is made in writing it may be done by letter or it may be done on a form designed for the purpose by the authority. Such a form shall not be unreasonably complex and shall only request the identity of the applicant, a contact address, the information requested and the date by which it is required.

3.5 Those empowered to release information

In the case of information already categorised as not exempt, release may be by any officer of an authority who has been authorised to do so.

In the case of information that has not been categorised and which was created on or since 20th January 2000 release should be only by the Public Records Officer or Chief Officer/Chief Executive of the authority concerned.

In the case of information that was created before 20th January 2000 release should be by the Chief Officer/Chief Executive of the authority concerned, or following the direction of the Minister responsible or following the issue of an Enforcement Order.

Where the authority is a department of the States, the Minister responsible for that department has a role in the appeal process (as set out in Part 7, below) and as such may instruct his Chief Officer to release information he believes is not exempt.

3.6 Authority may defer or delay access in certain circumstances

There may be valid reasons why information cannot be released within the 15 working day period required by Appendix 3(c). Where delay or deferment is necessary, the applicant must be told why and the authority must endeavour to release the information as soon as possible after the 15 working day period.

Such a delay must not prevent the applicant exercising his right of appeal to the Information Commissioner, which is to commence immediately after the 15 day period has expired.

A valid reason could be the need to study information that was created before 20th January 2000 and which needs to be classified as exempt or otherwise. Information that is not held in a single location or which needs to be extracted from exempt information may also require more time to prepare.

3.7 Appeal process after failure to gain access

An applicant should have the right of appeal as set out in at 7: Appeals and enforcement procedures.

If an applicant is aggrieved by an authority's decision to fail to correct personal data in a record in accordance with the Data Protection (Jersey) Law 2005, he should have the right of appeal as set out in that Law.

3.8 Public Records (Jersey) Law 2002

In order to give guidance regarding Article 29 of the Public Records Law, the release of any information (including public records) which is not in the open access period as defined in that law (that is, for the most part information created more than 30 years ago) and is information created prior to 20th January 2000 (the date of introduction of the Code) should be released where there is no other appropriate exemption or where the Commissioner issues a public interest enforcement order.

Information that has reached the Open Access period in terms of its age would cease to be exempt, in accordance with the Public Records Law.

3.9 Release of otherwise exempt information on grounds of public interest

The Information Commissioner should have the power to order the release in the public inertest of otherwise exempt information. There must be a legitimate and significant public interest which is of greater importance to society than the reason for exemption. A decision to allow such a release of information would normally follow an application in writing by an individual but this is not exclusive and the Information Commissioner could act without such an application.

The Law Draftsman will wish to refer to the existing powers of the Data Protection Registrar.

Information that is to be released on public interest grounds and that would otherwise be exempt may only be released as a result of an Enforcement Order made by the Commissioner.

4. Publication and Management of Information

4.1 Publication of information

It should be the duty of every authority to make information freely available that relates to any of its public functions. Typically this will include States departmental

Business Plans and policies and an annual Report and Statement of accounts where appropriate. Wherever practicable, access to information should be through electronic form and the States Contact Centre.

Authorities should be required to maintain the existing Information Asset Register under the guidance of the Commissioner.

However, at this stage it is not proposed to introduce a more extensive statutory scheme or statutory guidelines.

In order to allow the States to introduce a formal publication scheme at a later date there should be a power to do so by Regulation.

4.2 Record management policy

Records management is defined in Article 7 of the Public Records (Jersey) Law 2002. Any formal policy should be introduced by States Regulation under Article 38 of that Law.

5. Exemptions

The only information that is exempt from disclosure is as per Appendix 2, below. There should be a power to amend the list by Regulations made by the States.

As long as it is exempt, exempt information is to remain confidential.

Exempt information would also include information that is the subject of an appeal to the Information Commissioner, Tribunal or Royal Court, until a decision has been made.

6. Office, duties and powers of Information Commissioner

The Information Commissioner shall be the Data Protection Registrar (Data Protection Commissioner), who shall have the following duties which are additional to those already prescribed under the Data Protection (Jersey) Law 2005.

6.1 Duties

1. To oversee the proper operation of the Law and in particular to advice and assist both those who wish to access information and those who may be uncertain whether to release the information;

2. To oversee the maintenance of the information asset register.

3. To set the lower limit of the cost of consultancy reports referred to in Appendix 3(3), which are to be listed in the information asset register. This is currently set at £2,000.

4. To hear, investigate and adjudicate on complaints by request.

5. To facilitate appeals to the Tribunal.

6. To make an annual report with input from all authorities as required by this Law. The report will record the number and nature of complaints and how they were resolved. It will also report on the current perceived effectiveness of the Law and make recommendations on any changes to the Committee and the States.

6.2 Powers

1. To issue an enforcement notice to require the release of information.

2. To issue an enforcement notice to require the release of information at a reduced fee.

3. To issue an enforcement notice to require an authority to comply with any of its obligations under this Law.

4. To issue an information notice in order that he may have confidential sight of any information concerning the subject matter so that he can make an informed decision.

5. Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to information under this Law, he may initiate a complaint in connection thereof.

The powers should be kept as simple as possible. Part 5 and Schedule 9 of the Data Protection (Jersey) Law 2005 should be a guide here.

6.3 Expenses incurred by Information Commissioner

The expenses incurred by the Commissioner and the Tribunal in discharging their functions and any expenses of the States or the Committee that relate specifically to the Commissioner or the Tribunal (including expenses relating to salaries, other remuneration, pensions and office accommodation) should be met from the general revenue of the States.

7. Appeals and enforcement procedures

7.1 Appeals

1. Appeals may be made on any of the following grounds –

   (a) The information requested is believed not to be exempt under the Law.

   (b) There has been unreasonable delay in the release of the information.

   (c) The request appears to have been ignored.

   (d) The information requested should be released on the grounds of public interest, even though it would otherwise be exempt.

(e) The charges made for the release of information that would require extensive searches of records were unreasonable and potentially prohibitive.

2. An applicant who is aggrieved by a decision by an officer of an authority under this Law may in the first instance appeal in writing to the Minister or President of the Committee concerned, or where there is no Minister or Committee concerned, the applicant may appeal direct to the Information Commissioner.

3. An applicant who is aggrieved by the decision of the Minister or President of the Committee concerned under this Law, may appeal to the Information Commissioner.

4. Appeals from the decision of the Information Commissioner will be heard by the Information Tribunal and the Data Protection Tribunal will fulfil that role.

5. The Royal Court will consider any appeal to it on a question of law.

6. The process should not expressly exclude or include the use of the Administrative Decisions (Review) (Jersey) Law 1982, as amended.

7. The process should not expressly exclude or include the use of the process known as Judicial Review.

8. Personal data – Where the information requested relates to personal data, as defined in Article 1 of the Data Protection (Jersey) Law 2005, that Law and its due process should apply.

7.2 Detailed process

7.2.1 Departmental, company or institutional level

1. The officer who has refused access or who has set the fee will refer the matter to his Public Records Officer (as defined in Public Records (Jersey) Law 2002, Article 13, hereinafter called the PRO.

2. The PRO will re-assess the grounds for refusal or the fee and if possible, release the information or release it at a reduced fee as appropriate.

3. If the PRO decides not to release the information or to reduce the fee he must tell the applicant the reason and explain the applicant's right of referral to the Minister and Information Commissioner or to the Information Commissioner alone where no Minister is responsible for the authority concerned. (Where the PRO is not also the Chief Executive, the PRO will seek the advice of the Chief Executive prior to making his decision).

7.2.2 Ministerial level (where relevant)

1. If the applicant refers the matter to the Minister, the Minister will re-assess the matter and if possible, direct the PRO to release the information or release it at a reduced fee as appropriate.

2. If the Minister decides not to alter the previous decision he must tell the applicant the reason and explain his right to seek an enforcement notice from the Information Commissioner.

At either stage above, the Commissioner may be requested to give advice before a decision is made.

7.2.3 Information Commissioner

1. On referral, the Commissioner will re-assess the matter in accordance with the Law, including whether there may be an overriding public interest to release the information. If the Commissioner is satisfied that the information should not be exempt from release, or should be released at a reduced fee, he may give that advice to the authority concerned.

2. Where that advice is not accepted the Commissioner may serve an enforcement notice on the PRO requiring him to release the information or release it at a reduced fee as appropriate.

3. On receipt of the enforcement notice, the PRO will either –

   (a) act on the enforcement notice within the prescribed time; or

   (b) also within that time, a decision is made (by the Minister where relevant) to appeal to the Information Tribunal.

4. Where the Commissioner has declined to issue an enforcement notice, the applicant may lodge an appeal to the Information Tribunal.

7.2.4 The Tribunal

The appeals procedure and proceedings should be based a far as possible on those provided in the Data Protection (Jersey) Law 2005.

A. Appeals against a notice to release information or to release it at a reduced fee

The Tribunal would allow an appeal against an enforcement notice if it decides –

(a) that the notice is not in accordance with the Law; or

(b) to the extent that the notice involved an exercise of discretion by the Information Commissioner, that the Commissioner ought to have exercised the discretion differently.

If it does not come to such a decision, the Tribunal would dismiss the appeal.

In allowing such an appeal, the Tribunal would substitute its own decision not to release the information. It would also be expected to review any determination of fact on which the enforcement notice in question was based and in doing so would be expected to consider any change in circumstances.

B. Appeals against a refusal to issue a notice to release information

The Tribunal would allow an appeal against a refusal by the Information Commissioner to issue an enforcement notice if it decides –

(a) that the refusal was not in accordance with the Law; or

(b) that the exercise of discretion by the Information Commissioner in refusing to issue an enforcement notice ought to have been exercised differently.

If it does not come to such a decision, the Tribunal would dismiss the appeal.

In allowing such an appeal, the Tribunal would substitute its own decision and direct the Information Commissioner to issue an enforcement notice. On such an appeal, the Tribunal would be expected to review any determination of fact on which the Information Commissioner's decision was based and in doing so would be expected to consider any change in circumstances.

In determining whether or not an enforcement notice should have been issued, the Tribunal would need to consider, in all the circumstances of the case whether the decision was reasonable. It should also consider whether in allowing the release of information such an action is proportional to the importance of that information relative to a legitimate claim of public interest.

7.2.5 Royal Court

A party to an appeal should be able to appeal from the decision of the Tribunal on a question of law to the Royal Court.

The decision of the Royal Court would be final and a refusal to comply would be taken as contempt of court.

The Court will address any issue of obstruction of the Tribunal as if it were contempt of the court, as per the Data Protection (Jersey) Law 2005, Schedule 6(6)).

7.3 Sanctions under the appeal process

Failure to obey an enforcement or information notice where an appeal has been lost would be punishable, as per Article 61 of the Data Protection (Jersey) Law 2005:

(a) on conviction on indictment – to a fine; or

(b) on summary conviction – to a fine of level 4 on the standard scale.

(These penalties are to be confirmed by the Attorney General at the appropriate time)

Obstruction of the Tribunal should be an offence as per the Data Protection Law, Schedule 6(6).

8. Matters concerning offences

It is recommended that proceedings for an offence would only be initiated by or with the consent of the Attorney General.

8.1 Offences

In addition to sanctions necessary to enforce the appeals process, there is a requirement for additional offences as follows –

1. Unreasonable failure to provide the information requested.

2. Unreasonable failure to provide the information requested within the period specified.

3. Provision of fraudulent or partial information.

4. Unreasonable denial of the existence of information that did in fact exist.

5. Unreasonable refusal to indicate whether or not the information exists.

6. Categorising information as exempt when no exemption could be reasonably applied.

7. Acceptance of a bribe.

8. Unauthorised destruction of exempt material.

9. Failure to obey an enforcement or information notice that has not been appealed against.

10. Failure to obey an enforcement or information notice issued on the directions of the Tribunal.

8.2 Penalties

Persons guilty of offences listed 1 to 10 in 8.1 above should be subject to penalties as follows –

(a) on conviction on indictment – to a fine; or

(b) on summary conviction – to a fine not exceed level 4 on the standard scale.

(These penalties are to be confirmed by the Attorney General at the appropriate time)

8.3 Defences and protection against legal action

1. Where an authority or individual is believed to have committed an offence under 8.1.3, above, it should be a defence that the provision of partial information was unintended providing that reasonable steps were taken to ensure the information was complete.

2. Where an authority or individual is believed to have committed an offence under 8.1.4 or 8.1.5, above, it should be a defence that this was done with the belief that to do otherwise would infringe one or more of the exemptions listed at Appendix 2. It will not be a defence if such a belief is incapable of substantiation.

3. Where information is released in good faith there should be no proceedings, disciplinary, civil or criminal actions commenced against the authority or person responsible. 'Good faith' would include knowing or reasonably believing the information was not exempt. It should also include the release of information without which it was reasonably believed there was a serious risk of harm to health, safety or the environment.

8.4 Liability for offences

Liability may be personal or corporate. Where an offence is committed by an authority listed in Appendix 1 and it is proved to have been committed with the consent of or be attributable to an individual employed by that authority, the person should also be guilty of the offence and liable in the same way as the authority to the penalty so provided.

9. General

9.1 Functions of the Committee and the Greffier of the States

The Committee should oversee the legislation to ensure it remains effective. It will be the function of the Committee to bring forward amendments and Regulations. From time to time it may be that the categories of exemption or the bodies to whom the Law applies will need amendment.

Before the Committee decides that any projet for the making of Regulations or amendments be lodged in the States, it should consider any proposals made by the Commissioner and consult the Commissioner.

The Greffier should oversee and maintain the independent function and duties of the Commissioner by ensuring adequate funding of those duties whether defined in this Law, the Data Protection (Jersey) Law 2005 or any other enactment. Funding should be agreed by the Greffier and the Commissioner as part of the annual process by which the Greffe is resourced under Article 10 of the Public Finances (Jersey) Law 200-.

This will involve a transfer of function and funding whereby the Finance and Economics Committee currently provide the funding from within its budget for the existing Data Protection Registrar.

9.2 Fees

Authorities must normally give access to information free of charge, unless that policy has been amended by 9.3, below.

However, the Law should allow a request which would require extensive searches of records, to attract a fee being a reasonable contribution to the actual cost of providing the information. This is an amplification of what is already stated in the Code and repeated at Appendix 3(f).

Where a charge may be necessary, the U.K. guideline is that public bodies should provide free of charge anything that costs less than £450 to produce and that the figure for central government is £600. Authorities who are faced with the need to set a fee should not automatically charge the full cost and a contributory charge would be deemed as more appropriate.

An applicant must be given an estimate of any fee that is necessary in advance. An authority should waive or reduce the fees on the grounds of hardship.

The Commissioner should bear these guidelines in mind in considering a complaint concerning excessive fees.

The States should be able to vary the no-fee policy applicable to most information, by Regulation.

9.3 Power of the States to Make Regulations

9.3.1 <u>There should be powers for the States to make Regulations so that –</u>

1. A mandatory publication scheme may be introduced;

2. The duties of the Information Commissioner may be extended;

3. The no-fee policy may be amended;

4. The list of authorities appearing in Appendix 1 may be extended;

5. The list of exempt information appearing in Appendix 2 may be reduced;

6. The obligations of an authority appearing in Appendix 3 may be extended;

7. The States can implement provisions of International Conventions and EU Directives and Regulations (see below).

8. The Law should allow for the Regulations to create offences, punishable up to the same levels as indicated at 8.2 above.

9.3.2 Regulations concerning U.K., E.U. and International Law

Provision should be made for the States to be able to implement aspects of U.K. and E.U. law and international conventions that address issues of public access to information. These would include, but should not be exclusive to –

1. E.C. Directive 1990/313/EEC;

2. Environmental Information Regulations 1992 (U.K. SI1992/3420 as amended);

3. The Aarhus Convention on Access to Environmental Information 1998;

4. E.U. Directive 2003/4/E.C., which repeals Directive 1990/313 above;

5. E.U. Directive 2003/35/E.C.;

6. Environmental Information Regulations 200-, which will repeal the 1992 SI above.

9.4 Consequential amendments

It is intended that changes should be kept to the minimum. Laws that have overlapping interests include the Data Protection (Jersey) Law 2005 and Public Records (Jersey) Law 2002. The latter may need amendment at Article 29 in order to comply with the access policy stated at 3.7, above.

The Administrative Decisions (Review) (Jersey) Law 1982, as amended will only need to be amended if there is to be explicit use of the Administrative Decisions Review process. The Law is currently only applicable to Committees and departments, it has no power to enforce and no requirement to make its findings public.

9.5 Commencement

To come into force by Appointed Day Act and different days are to be possible for different Parts or Articles.

APPENDIX 1

Authorities

This Appendix lists those bodies deemed authorities for the purpose of this Law –

The States of Jersey;

Committees of the States, their sub-Committees and Departments;

Ministers of the States and their Departments;

a States funded body;

a non-Ministerial States funded body;

an independently audited States body;

Jersey Archive;

the JCRA;

the JFSC;

any other public institution not included specifically in this list;

any institution or organisation not included specifically in this list but which keeps or has kept public records, (insofar as it possesses those public records or other information);

the 12 parishes.

Definitions

For definitions of types of body, please reprint from Article 1 of the Public Finances (Jersey) Law 200-.

A public institution should have the same meaning as per Article 5 of the Public Records (Jersey) Law 2002.

APPENDIX 2

Exempt Information

Unless there has been a public interest enforcement notice issued for its release, information shall be exempt from disclosure, if –

(a) such disclosure would, or might be liable to –

(i) constitute an unwarranted invasion of the privacy of an individual or which would constitute a breach of the Data Protection (Jersey) Law 2005;

(ii) prejudice the administration of justice, including fair trial, and the enforcement or proper administration of the Law;

(iii) prejudice legal proceedings or the proceedings of any tribunal, public enquiry, Board of Administrative Appeal or other formal investigation;

(iv) prejudice the duty of care owed by the Education Committee to a person who is in full-time education;

(v) infringe legal professional privilege;

(vi) prejudice the prevention, investigation or detection of crime, the apprehension or prosecution of offenders, or the security of any property;

(vii) harm the conduct of national or international affairs or the Island's relations with other jurisdictions;

(viii) prejudice the defence of the Island or any of the other British Islands or the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with those forces;

(ix) cause damage to the economic interests of the Island;

(x) prejudice the financial interests of an authority by giving an unreasonable advantage to a third party in relation to a contract or commercial transaction which the third party is seeking to enter into with the authority;

(xi) prejudice the competitive position of a third party, if and so long as its disclosure would, by revealing commercial information supplied by a third party, be likely to cause significant damage to the lawful commercial or professional activities of the third party;

(xii) prejudice the competitive position of an authority if and so long as its disclosure would, by revealing commercial information, be likely to cause significant damage to the lawful commercial or professional activities of the authority;

(xiii) prejudice employer/employee relationships or the effective conduct of personnel management if and so long as its disclosure would, by revealing the information, be likely to seriously put at risk a fair resolution of a dispute or related matter;

(xiv) constitute a premature release of a draft policy which is in the course of development. This cannot exempt information relating to that policy development once the policy itself has been published, nor is it a blanket exemption for all policy under development;

(xv) cause harm to the physical or mental health, or emotional condition, of the applicant whose information is held for the purposes of health or social care, including child care;

(xvi) prejudice the provision of health care or carrying out of social work, including child care, by disclosing the identity of a person (other than a health or social services professional) who has not consented to such disclosure;

(xvii) prejudice the proper supervision or regulation of financial services;

(xviii) prejudice the consideration of any matter relative to immigration, nationality, consular or entry clearance cases;

(xix) constitute a release of information which was created before the previous Code on Access to Information came into effect (20th January 2000) and which is not yet in the open access period unless the Minister, Chief Officer or Chief Executive responsible reasonably believes there is no other reason in law for it being exempt from release.

(b) the application is frivolous or vexatious or made in bad faith. Only rarely should this exemption be used and an applicant must be told that he retains the right to appeal against the refusal to release the information.

APPENDIX 3

Obligations of an authority

An authority has an obligation under this Law to fulfil the following duties –

(a) keep a general record of all information that it holds;

(b) take all reasonable steps to assist applicants in making applications for information;

(c) acknowledge the receipt of an application for information within 5 working days and supply the information requested (unless exempt) within 15 working days, (readily available information being released in considerably less time) ensuring that any referral to the Chief Executive or Minister concerned does not delay the process;

(d) notify an applicant if the information cannot be prepared within 15 working days, explaining the reasons for delay;

(e) notify an applicant if the information requested is not known to the authority or, if the information requested is held by another authority, refer the applicant to that other authority;

(f) make available information free of charge except in the case of a request that would require extensive searches of records, when a charge being a reasonable contribution to the actual cost of providing the information may be made;

(g) give proportionate assistance to a special need, such as an individual's sight impairment;

(h) give an estimate of any fee that is necessary in advance of collecting the information requested;

(i) if it refuses to disclose requested information, inform the applicant under which exemption it has done so and the name and position of the person so deciding;

(j) the authority shall correct any personal data held about an individual that is shown to be incomplete, inaccurate or misleading, except that expressions of opinion given conscientiously and without malice will be unaffected. This should be in accordance with the requirements of the Data Protection (Jersey) Law 2005;

(k) inform applicants of their rights under this Law, including details of the appeal process;

(l) not deny the existence of information which is not classified as exempt which it knows to exist;

(m) undertake the drafting of documents so as to allow maximum disclosure;

(n) undertake the drafting of Committee and sub-committee agendas, agenda support papers and minutes so as to allow maximum disclosure;

(o) keep under review information categorised as exempt with the purpose of removing that exemption where reasonable. This should happen in particular when an application is made for access to previously exempt information.

Additionally, an authority shall –

(1) forward to the Information Commissioner the names of strategic and/or policy reports prepared by the authority on or after that date of the coming into force of the Law, to be added to a central list to be called the Information Asset Register ('the Register');

(2) notwithstanding paragraph (1), the name of any report deemed to be of public interest shall be included on the Register;

(3) where the cost of third party reports or consultancy documents, which have been prepared for the authority or which are under preparation, exceeds an amount fixed from time to time by the Information Commissioner, an authority shall forward to the Information Commissioner the names of such reports to be added to the Register, together with details of the cost of preparation and details of their status;

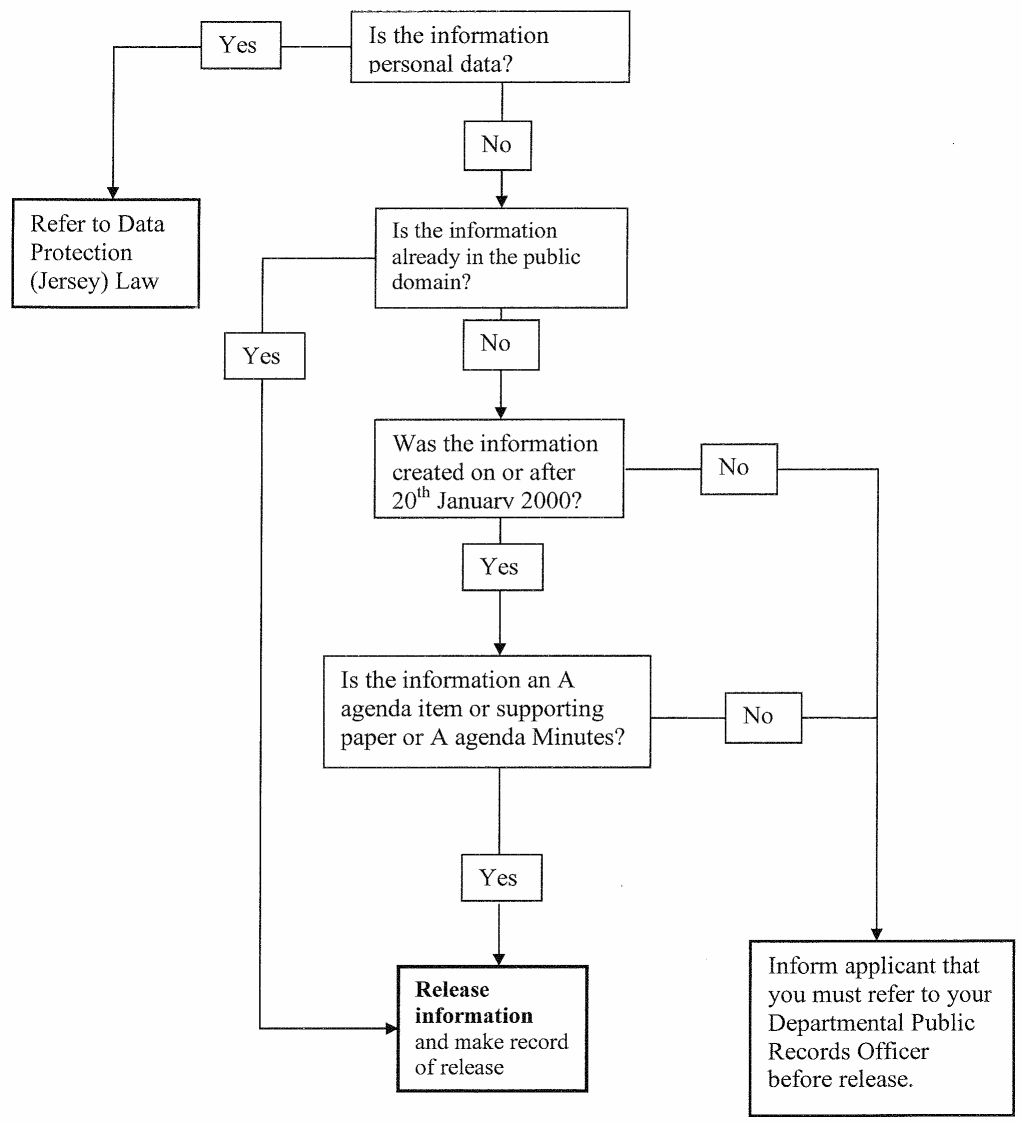
(4) subject to the exemptions specified in this Law, make available to the public all unpublished third party reports or consultancy documents after a period of 5 years;

(5) prepare and forward to the Information Commissioner an annual summary of requests for information, containing details of any requests for exempt information and any other matter the Information Commissioner may reasonably require, the same to be provided not less than 2 months before the Information Commissioner makes his annual report.

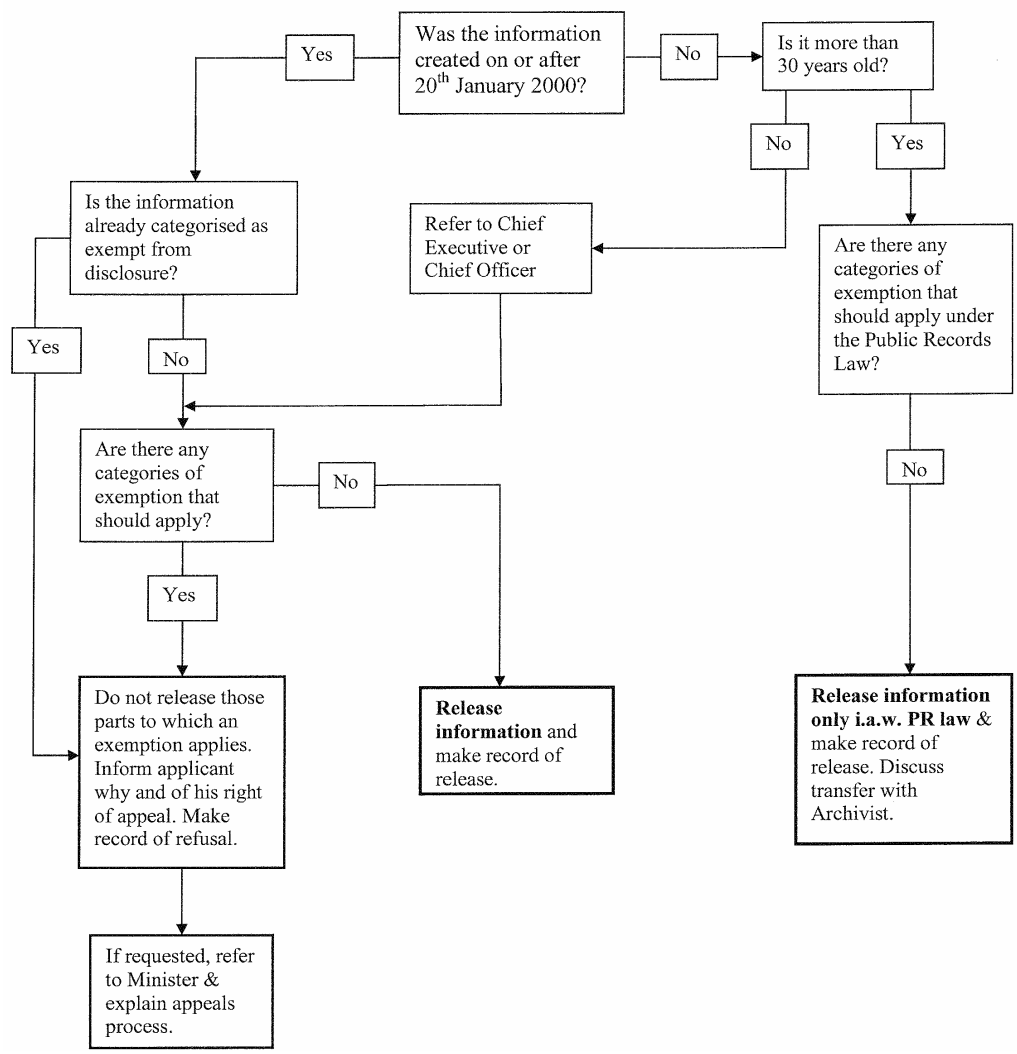
APPENDIX 4

Guidance to Officers to facilitate access to information

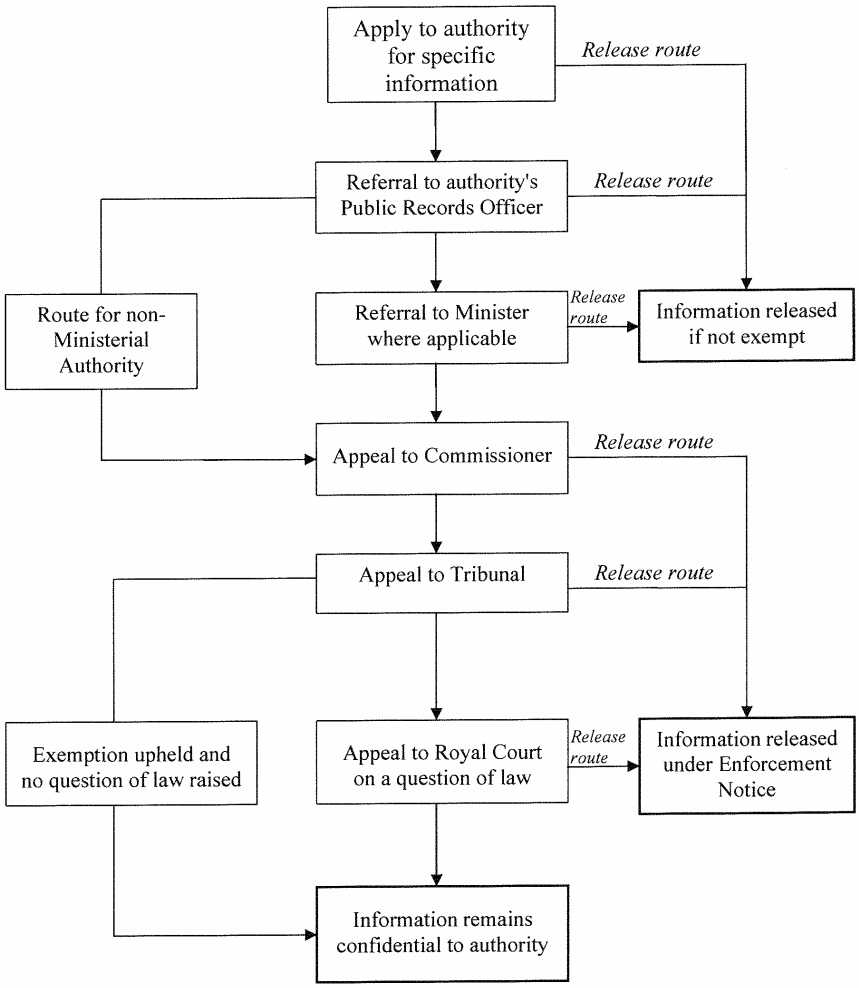
1. Applicant makes request (oral or written) for information



2. Referral to Public Records Officer of an Authority



3. Appeals route from application through to Royal Court



APPENDIX D

CODE OF PRACTICE vs. FREEDOM OF INFORMATION LAW			
Code of Practice for Public Access to Official Information		**Draft Freedom of Information (Jersey) Law 201-**	**Variation**
PART I: Description			
1. Purpose			
1.1 The purpose of this Code is to establish a minimum standard of openness and accountability by the States of Jersey, its Committees and departments, through: (a) increasing public access to information; (b) supplying the reasons for administrative decisions to those affected, except where there is statutory authority to the contrary; (c) giving individuals the right of access to personal information held about them and to require the correction of inaccurate or misleading information.	7	**General right to be supplied with information held by a scheduled public authority** If a person makes a request for information held by a scheduled public authority – (a) the person has a general right to be supplied with the information by that authority; and (b) except as otherwise provided by this Law, the authority has a duty to supply the person with the information.	The purpose remains the same, but the Law establishes a legal right of access to government information. This statutory right is currently available in more than 50 other jurisdictions.
While, at the same time: (i) safeguarding an individual's right to privacy; and (ii) safeguarding the confidentiality of information classified as exempt under the Code.	39	**Endangering the safety or health of individuals** Information is qualified information if its disclosure would, or would be likely to – (a) endanger the safety of an individual; or (b) endanger the physical or mental health of an individual.	The Law continues to safeguard an individual's right to privacy, and is aligned with the provisions of the Data Protection (Jersey) Law 2005. It also establishes a statutory basis for the exemption of information within the parameters of the Law.

1.2	**Interpretation and scope**		
1.2.1	For the purposes of this Code:		
(a)	"authority" means the States of Jersey, Committees of the States, their sub-committees, and their departments;	**1 Interpretation** In this Law, unless a contrary intention appears - "public authority" means – (a) the States Assembly including the States Greffe; (b) a Minister; (c) a committee or other body established by resolution of the States or by or in accordance with the standing orders of the States Assembly; (d) an administration of the States; (e) a Department referred to in Article 1 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965; (f) a body corporate or a corporation sole established by the States by an enactment; (g) the States of Jersey Police Force; (h) the Judicial Greffe; (i) the Viscount's department; (j) each parish; "scheduled public authority" means a public authority named in the Schedule.	The Code of Practice provided only a general definition of "authority". What constitutes a public authority has been better defined within the Law as follows: 1. Ministers, departments, Scrutiny Panels, Public Accounts Committee, Chairmen's Committee and the Privileges and Procedures Committee, Greffier of the States; 2. Bailiff of Jersey, Attorney General, HM Lieutenant Governor; 3. Parishes, quasi public bodies; 4. Court system and tribunals; The following bodies are also covered, and others can be added in the future by Regulation: <u>Quasi public bodies</u> Jersey Financial Services Commission Jersey Competition Regulatory Authority Jersey Law Commission Jersey Appointments Commission Waterfront Enterprise Board, or successor The following more remote public authorities will not be covered due to the additional burden it would place on trading authorities –

			Jersey Telecom Jersey Post Jersey New Waterworks Company Jersey Electricity Company The first authorities to be subject to the Law are – 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 the standing orders of the States Assembly; 4. An administration of the States; 5. The Judicial Greffe; 6. The Viscount's department.
(b)	"information" means any information or official record held by an authority;	1 **Interpretation** In this Law, unless a contrary intention appears – "information" means information recorded in any form; "information that is otherwise available" means information of a type specified in Part 4; "qualified information" means information of a type specified in Part 6; "restricted information" means information of a type specified in Part 5; 3 **Meaning of "information held by a public authority"** In this Law, information is held by a public authority if –	The Law provides a more detailed definition of what constitutes "information", as well as whether or not that information is considered to be "held" by a public authority.

		(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.	
(c) "Personal information" means information about an identifiable individual.	**25**	**Personal information of data subject** Information is information that is otherwise available if – (a) it constitutes personal data of which the applicant is the data subject, as defined in the Data Protection (Jersey) Law 2005; and (b) it is not exempt from Article 7(2)(a) of that Law 2005 by virtue of a provision of Part 4 of that Law.	
1.2.2 In the application of this Code:			
(a) there shall be a presumption of openness;	**5**	**Law does not prohibit the supply of information** Nothing in this Law is to be taken or interpreted as prohibiting a public authority from supplying any information it is requested to supply.	The Code referred to a presumption of openness. The Law would establish a legal right of access to government information. It is not the intention of the Law, in any way, to prohibit the provision of information. In all cases, the public authority is free to supply requested information, whether or not it is covered by an exemption.
(b) information shall remain confidential if it is classified as exempt in Part III of this Code;	**8**	**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 – (a) is information that is otherwise available; (b) is restricted information; or (c) is qualified information. (2) It may also refuse to supply information it holds and has been requested to supply if –	While the Code set out 20 classifications under which information could be considered exempt, the Law establishes varying levels of exemption as well as a right to appeal against a decision not to provide requested information.

		(a) a provision of Part 3 (vexatious or repeated requests) applies in respect of the request; (b) a fee payable under Article 15 or 16 is not paid; or (c) Article 16(1) applies (cost of supplying the information exceeds the prescribed fee). **9 Supply of qualified information** (1) If the information requested is qualified information, a scheduled public authority may refuse to supply the information if 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. (2) It must otherwise supply the information.	
1.2.3 Nothing contained in this Code shall affect statutory provisions, or the provisions of customary law with respect to confidence.	**25 Personal information of data subject** Information is information that is otherwise available if – (a) it constitutes personal data of which the applicant is the data subject, as defined in the Data Protection (Jersey) Law 2005; and (b) it is not exempt from Article 7(2)(a) of that Law 2005 by virtue of a provision of Part 4 of that Law. **26 Other prohibitions on disclosure** Information is restricted information if the disclosure of the information by the scheduled public authority holding it – (a) is prohibited by or under an enactment; (b) is incompatible with a European Community obligation that applies to	Articles 25 (Personal information of data subject) and 26 (Other prohibitions on disclosure) relate to the provisions of the Data Protection (Jersey) Law 2005 and prohibition by another amendment, EU obligation, or where the disclosure could lead to contempt of Court. Article 27 (Information supplied in confidence) relates to the disclosure of the information to the public by the scheduled public authority holding it, but only where this would constitute a breach of confidence actionable by that or any other person.	

	Jersey; or (c) would constitute or be punishable as a contempt of court. **27 Information supplied in confidence** Information is restricted information if – (a) it was obtained by the scheduled public authority from another person (including another public authority); and (b) 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 any other person.	
1.2.4 This Code applies to information created after the date on which the Code is brought into operation and, in the case of personal information, to information created before that date.	The Law does not place restrictions on the information that may be obtained on the basis of its age. No date has been set for the Law to come into force.	The Code applies to information created from 20th January 2000. In respect of the Law, it is intended that the following authorities will be added to the schedule of public authorities from the outset and will be expected to comply in respect of all information created from 20th January 2000, as soon as practicable, but not more than 5 years after the adoption of the Law: 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 the Standing Orders of the States Assembly 4. An administration of the States. A future amendment will be required to add the Bailiff's Department, the Law Officers Department, the Viscount's Department and the Judicial Greffe to the

			schedule of public authorities. A further amendment will also be required to add quasi public bodies – • Jersey Financial Services Commission, • Jersey Competition Regulatory Authority, • Jersey Law Commission, • Jersey Appointments Commission, • Waterfront Enterprise Board or successor. It is not proposed to include more remote public authorities (Jersey Telecom, Jersey Post, Jersey New Waterworks Company, Jersey Electricity Company) under the Law.
PART II: Operation			
2.1 Obligations of an authority:			
2.1.1. Subject to the exemptions listed in paragraph 3, an authority shall:			
(a) keep a general record of all information that it holds;	**19 ... and index of information held** (2) Paragraph (3) – (a) applies to all public authorities; and (b) applies to a public authority whether or not Regulations under paragraph (1) require the public authority to adopt and maintain a scheme that requires it to publish information. (3) Each public authority, in order to facilitate the implementation of this Law, whether immediately or at some future time, must prepare and maintain an index of the information that it holds.		The Code required only a general record of information held, while the Law makes it a statutory requirement for public authorities to prepare and maintain an index of the information that it holds.

(b)	take all reasonable steps to assist applicants in making applications for information;	12	**Duty of a scheduled public authority to supply advice and assistance** A scheduled public authority must make reasonable efforts to ensure that a person who makes, or wishes to make a request to it for information is supplied with sufficient advice and assistance to enable the person to do so.	While the Code advised that all reasonable steps should be taken to help applicants to make a request for information, the Law makes this statutory requirement.
(c)	acknowledge the receipt of an application for information and endeavour to supply the information requested (unless exempt) within 21 days;	13	**Time within which a scheduled public authority must deal with a request for information** (1) A scheduled public authority must deal with a request for information promptly. (2) If it supplies the information it must do so, in any event, no later than – (a) the end of the period of 20 working days following the day on which it received the request; but (b) if another period is prescribed by Regulations, not later than the end of that period. (3) However, the period mentioned in paragraph (2) does not start to run – (a) if the scheduled public authority has sought details of the information requested under Article 14, until the details are supplied; or (b) if the scheduled public authority has informed the	Under the Code, public authorities had to "endeavour to supply" the information requested within 21 days. Under the Law, information must be supplied no later than 20 working days following receipt of the request. If it fails to do so, the applicant can treat the failure as a refusal to provide the information. The start of the 20 day period can be delayed if additional details are required, or if a fee is required, until payment has been received. It is also possible for other periods to be prescribed by Regulations, to take account of requests made to schools during school holidays, for example.

		applicant that a fee is payable under Article 15 or 16, until the fee is paid. (4) If a scheduled public authority fails to comply with a request for information – (a) within the period mentioned in paragraph (2); or (b) within such further period as the applicant may allow, the applicant may treat the failure as a decision by the authority to refuse to supply the information on the ground that it is restricted information. (5) In this Article "working day" means a day other than – (a) a Saturday, a Sunday, Christmas Day, or Good Friday; or (b) a day that is a bank holiday or a public holiday under the Public Holidays and Bank Holidays (Jersey) Law 1951.	
(d)	take all reasonable steps to provide requested information that they hold;	7 **General right to be supplied with information held by a scheduled public authority** If a person makes a request for information held by a scheduled public authority – (a) the person has a general right to be supplied with the information by that authority; and (b) except as otherwise provided by this	Whereas the Code only required that reasonable steps be taken to provide information that authorities hold, the Law includes a duty to provide information, except as otherwise provided by the Law. "As otherwise provided" would include reference to the exemptions from disclosure, and the ability to make a charge.

	Law, the authority has a duty to supply the person with the information.	
(e) notify an applicant if the information requested is not known to the authority or, if the information requested is held by another authority, refer the applicant to that other authority;	**10 Obligation of scheduled public authority to confirm or deny holding information** (1) 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) However, if a person makes a request for information to a scheduled public authority and – (a) the information is restricted or qualified information; or (b) if the authority does not hold the information, the information would be restricted or qualified 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 does so – (a) it shall be taken for the purpose of this Law to have refused to	Both the Code and the Law required the authority to advise the applicant if they do not hold the information. The Law provides for instances where the authority neither needs to confirm nor deny that it holds the information in specified cases. The Law requires the authority to ensure that a person who makes, or wishes to make a request to it for information is supplied with sufficient advice and assistance to enable the person to do so, as mentioned earlier, under Article 12.

		supply the information requested on the ground that it is restricted information; but (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.	
		12 Duty of a scheduled public authority to supply advice and assistance A scheduled public authority must make reasonable efforts to ensure that a person who makes, or wishes to make a request to it for information is supplied with sufficient advice and assistance to enable the person to do so.	
(f)	make available information free of charge except in the case of a request that is complex, or would require extensive searches of records, when a charge reflecting the reasonable costs of providing the information may be made;	**15 A scheduled public authority may request fee for supplying information** (1) A scheduled public authority that has been requested to supply information may request the applicant to pay for the supply of the information a fee determined by the public authority in the manner prescribed by Regulations. (2) The request for the fee must be made within the time allowed to the scheduled public authority to comply with the request for the information.	Under the Code, information was to be provided free of charge, except where a request was complex or required extensive searches of records, in which case a charge reflecting the costs of providing the information could be made. Any charges under the Law are a matter for separate debate, as details relating to the level of information that can be given free of charge and the cost of any additional information will be contained in draft Regulations. Given the current financial constraints facing the Island, the Committee would recommend a scheme under which charges would continue to be levied for extensive work. The Committee has carried out research into charging options, and would suggest that work worth £50 be

	16 A scheduled public authority may refuse to supply information if cost excessive (1) A scheduled public authority that has been requested to supply information may refuse to supply the information if it estimates that the cost of doing so would exceed any amount prescribed for the purpose by Regulations. (2) Despite paragraph (1), a scheduled public authority may still supply the information requested on payment to it of a fee determined by the authority in the manner prescribed by Regulations. (3) Regulations made for the purpose of paragraph (1) may provide that, in such circumstances as the Regulations prescribed, if two or more requests for information are made to a scheduled public authority – (a) by one person; or (b) by different persons who appear to the scheduled public authority to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.	carried out free of charge, and thereafter an economic rate would be charged. This is a matter for separate debate under draft Regulations to be considered by the States in due course. There remains the option under the Law to introduce an upper limit on the amount of time an authority would need to devote to an application before it could be refused. Such a limit exists in the U.K. and is £450 in the case of local authorities, and £600 in the case of central government. Requests which would cost more than this to fulfil may be refused.
(g) if it refuses to disclose requested information, inform the applicant of its reasons for doing so;	**18 Where a scheduled public authority refuses a request** A scheduled public authority that refuses a request for information must do so in the	

		manner prescribed by Regulations.	
(h)	the authority shall correct any personal information held about an individual that is shown to be incomplete, inaccurate or misleading, except that expressions of opinion given conscientiously and without malice will be unaffected;	No provision	Article 14 of the Data Protection (Jersey) Law 2005 provides for the rectification, blocking, erasure and destruction of personal information.
(i)	inform applicants of their rights under this Code;		The Law confers statutory rights. Advice to applicants will be provided in separate published guidance documents when the Law comes into force.
(j)	not deny the existence of information which is not classified as exempt which it knows to exist;	**10 Obligation of scheduled public authority to confirm or deny holding information** (1) 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) However, if a person makes a request for information to a scheduled public authority and – (a) the information is restricted or qualified information; or (b) if the authority does not hold the information, the information would be restricted or qualified 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.	Under the Code, the existence of information which is not exempt cannot be denied. This is also the case under the draft Law, however, a public authority can neither confirm nor deny holding information which is restricted or qualified if it is in the public interest to do so.

	(3) If a scheduled public authority does so – (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 restricted information; but (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.	
(k) undertake the drafting of documents so as to allow maximum disclosure;	Not applicable.	Both the Code and the Law relate to access to *information*, not *documents* or *files*. No matter how documents are framed, the right of access to information remains. Authorities are encouraged to draft documents in such a way as to enable maximum disclosure, and to include reports in the States Reports section of www.gov.je.
(l) undertake the drafting of Committee and sub-committee agendas, agenda support papers and Minutes so as to allow maximum disclosure.		Agendas and minutes are currently divided into Part A (accessible) and Part B (exempt from disclosure) so as to allow maximum disclosure. Once the Law is adopted, applications may be made for information included on agendas, minutes and reports and a public interest test will have to be applied when considering whether to disclose.
2.1.2 An authority shall:		
(a) forward to the States Greffe the names of strategic and/or policy reports prepared by the authority after the date of adoption of this amendment, to be added to a central		Once the Law is adopted the Code will fall away. However, departments of the States have implemented this policy, and reports appear here –

list to be called the Information Asset Register ('the Register'); (b) notwithstanding paragraph 2.1.2(a), the name of any report deemed to be of public interest shall be included on the Register; (c) where the cost of third party reports or consultancy documents, which have been prepared for the authority or which are under preparation, exceeds an amount fixed from time to time by the Privileges and Procedures Committee, an authority shall forward to the States Greffe the names of such reports to be added to the Register, together with details of the cost of preparation and details of their status; (d) subject to the exemptions of the Code, make available to the public all unpublished third party reports or consultancy documents after a period of 5 years.		http://www.gov.je/Government/Pages/StatesReports.aspx
2.2 Responsibilities of an applicant		
2.2.1 The applicant shall:		
(a) apply in writing to the relevant authority having identified himself to the authority's satisfaction;	**2 Meaning of "request for information"** (1) In this Law, "request for information" means a request for information made under this Law that – (a) is in writing; (b) states the name of the applicant; (c) states an address for correspondence; and (d) describes in adequate detail the	Under the Code, applicants need to apply in writing and identify themselves. This remains the case under the draft Law, although it is also specified that applicants must include their name and contact details.

		information requested. (2) In paragraph (1)(a), a request for information in writing includes a request for information transmitted by electronic means if the request – (a) is received in legible form; and (b) is capable of being used for subsequent reference.	
(b)	identify with reasonable clarity the information that he requires;	**14 A scheduled public authority may request additional details** A scheduled public authority that has been requested to supply information may request the applicant to supply it with further details of the information so that the authority may identify and locate the information.	Under the Code applicants were required to identify with reasonable clarity the information required. The draft Law specified that applicants must describe in adequate detail the information requested. A scheduled public authority may then request further details to assist in identifying the information.
(c)	be responsible and reasonable when exercising his rights under this Code.	**21 A scheduled public authority need not comply with vexatious requests** (1) A scheduled public authority need not comply with a request for information if it considers the request to be vexatious. (2) In this Article, a request is not vexatious simply because the intention of the applicant is to obtain information – (a) to embarrass the scheduled public authority or some other public authority or person; or (b) for a political purpose. (3) However, a request may be vexatious if – (a) the applicant has no real interest in the information	There are provisions in the Law regarding vexatious or repetitious requests in Part 3 of the Law.

		sought; and (b) the information is being sought for an illegitimate reason, which may include a desire to cause administrative difficulty or inconvenience. **22 A scheduled public authority need not comply with repeated requests** (1) This Article applies if – (a) an applicant has previously made a request for information to a scheduled public authority that it has complied with; and (b) the applicant makes a request for information that is identical or substantially similar. (2) The scheduled public authority may refuse to comply with the request unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.		
2.3	**Appeals**			
2.3.1	If an applicant is aggrieved by an authority's decision to refuse to disclose requested information or to correct personal information in a record, he will have the right of appeal set out in Part IV of this Code.	**47 Appeals to the Information Commissioner** (1) This Article applies to a decision by a scheduled public authority – (a) as to the amount of a fee payable by virtue of Article 15(1) or 16(2); (b) as to the cost of supplying information for the purpose of		Under the Code, appeals were made to the Minister, then could be reviewed under the Administrative Decisions (Review) (Jersey) Law 1982. The Law introduces a more robust appeals mechanism, initially through the scheduled public authority's complaints procedure, then to the independent office of Information Commissioner, and on to the Royal Court.

	Article 16(1); (c) to refuse to comply with a request for information on a ground specified in Part 3 (vexatious or repeated requests); (d) to refuse to comply with a request for information on the ground that the information is otherwise available; (e) to refuse to comply with a request for information on the ground that it is restricted information; or (f) to refuse to comply with a request for information on the grounds that it is qualified information and 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. (2) A person aggrieved by a decision of a scheduled public authority to which this Article applies, may appeal to the Information Commissioner. (3) The appeal may be made on the grounds that in all the circumstances of the case the decision was not reasonable. (4) The Information Commissioner must decide the appeal as soon as practicable but may decide not to do so if the Commissioner is satisfied that – (a) the applicant has not exhausted	

	any complaints procedure provided by the scheduled public authority; (b) there has been undue delay in making the appeal; (c) the appeal is frivolous or vexatious; or (d) the appeal has been withdrawn, abandoned or previously determined by the Commissioner. (5) The Information Commissioner must serve a notice of his or her decision in respect of the appeal on the applicant and on the scheduled public authority. (6) The notice must specify – (a) the Commissioner's decision and, without revealing the information requested, the reasons for the decision; and (d) the right of appeal to the Royal Court conferred by Article 48.	
	48 Appeals to the Royal Court (1) An aggrieved person may appeal to the Royal Court against a decision of the Information Commissioner under Article 47. (2) The appeal may be made on the grounds that in all the circumstances of the case the decision was not reasonable. (3) The appeal must be made within 28 days of the Information Commissioner giving notice of his or her decision to the applicant. (4) The decision of the Royal Court on the appeal shall be final.	

		(5) Where the appeal was in respect of a decision by the Information Commissioner not to decide an appeal, the Royal Court may direct the Information Commissioner to decide the appeal.	
3.1	**Access**		
3.2.1	Subject to paragraphs 1.2.3 and 2.1(k) and (l) and the exemptions described in paragraph 3.2:		
(a)	an authority shall grant access to all information in its possession, and Committees of the States, and their sub-committees, shall make available before each meeting their agendas, and supplementary agendas, and grant access to all supporting papers, ensuring as far as possible that agenda support papers are prepared in a form which excludes exempt information, and shall make available the Minutes of their meetings;	**23 Information accessible to applicant by other means** (1) Information is information that is otherwise available if it is reasonably available to the applicant, otherwise than under this Law, whether or not free of charge. (2) A scheduled public authority that refuses an application for information on this ground must make reasonable efforts to inform the applicant where the applicant may obtain the information.	Under the Law, rights of access to information become statutory and public authorities become legally obliged to assist applicants in locating information which is otherwise available.
(b)	an authority shall grant – (i) applicants over the age of 18 access to personal information held about them; and (ii) parents of guardians access to personal information held about any of their children under the age of 18.		Access to personal information is dealt with under the Data Protection (Jersey) Law 2005.
3.2	**Exemptions**		
3.2.1	Information shall be exempt from disclosure, if:		
(a)	such disclosure would, or might be liable to -		

	(i)	constitute an unwarranted invasion of the privacy of an individual	**25**	**Personal information of data subject** Information is information that is otherwise available if – (a) it constitutes personal data of which the applicant is the data subject, as defined in the Data Protection (Jersey) Law 2005; and (b) it is not exempt from Article 7(2)(a) of that Law 2005 by virtue of a provision of Part 4 of that Law.	**Information which would constitute an invasion of privacy** Code: Exempt Law: Dealt with under the Data Protection (Jersey) Law 2005
	(ii)	prejudice the administration of justice, including fair trial, and the enforcement or proper administration of the law;	**43**	**Law enforcement** Information is qualified information if its disclosure would, or would be likely to, prejudice – (c) the administration of justice whether in Jersey or elsewhere;	**Information which would be likely to prejudice the administration of justice** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.
	(iii)	prejudice legal proceedings or the proceedings of any tribunal, public enquiry, Board of Administrative Appeal or other formal investigation'	**43**	**Law enforcement** Information is qualified information if its disclosure would, or would be likely to, prejudice – (a) the prevention, detection or investigation of crime, whether in Jersey or elsewhere;	**Information which would be likely to prejudice the prevention, detection or investigation of crime** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.
	(iv)	prejudice the duty of care owed by the Education Committee to a person who is in full-time education;			Personal information is dealt with under the Data Protection (Jersey) Law 2005.
	(v)	infringe legal professional privilege or lead to the disclosure of legal advice to an authority, or	**33**	**Legal professional privilege** Information is qualified information if it is information in respect of which a claim to	**Information which would infringe legal professional privilege**

	infringe medical confidentiality;		legal professional privilege could be maintained in legal proceedings.	Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.
(vi)	prejudice the prevention, investigation or detection of crime, the apprehension or prosecution of offenders, or the security of any property;	**43**	**Law enforcement** Information is qualified 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; (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained; or	**Information which would prejudice the prevention, investigation or detection of crime, the apprehension or prosecution of offenders, or security** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.
(vii)	harm the conduct of national or international affairs or the Island's relations with other jurisdictions;	**42**	**International relations** (1) Information is qualified information if its disclosure would, or would be likely to, prejudice relations between Jersey and – (a) the United Kingdom; (b) a State other than Jersey; (c) an international organisation; or (d) an international court. (2) Information is qualified information if its disclosure would, or would be likely to, prejudice – (a) any Jersey interests abroad; or	**Information which would harm national or international relations** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.

		(b) the promotion or protection by Jersey of any such interest. (3) Information is also qualified information if it is confidential information obtained from – (a) a State other than Jersey; (b) an international organisation; or (c) an international court. (4) In this Article, information obtained from a State, organisation or court is confidential while – (a) the terms on which it was obtained require it to be held in confidence; or (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held. (5) In this Article – "international court" means an international court that is not an international organisation and that was established – (a) by a resolution of an international organization of which the United Kingdom is a member, or (b) by an international agreement to which the United Kingdom was a party; "international organization" means an international organization whose members include any two or more States, or any organ of such an organization;	

	"State" includes the government of a State and any organ of its government, and references to a State other than Jersey include references to a territory for whose external relations the United Kingdom is formally responsible.	
(viii) prejudice the defence of the Island or any of the other British Islands or the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with those forces;	**41 Defence** (1) Information is qualified information if its disclosure would, or would be likely to, prejudice – (a) the defence of the British Islands or any of them; or (b) the capability, effectiveness or security of any relevant forces. (2) In paragraph (1)(b) "relevant forces" means – (a) the armed forces of the Crown; or (b) a force that is co-operating with those forces or a part of those forces. **28 National security** (1) Information is restricted information if exemption from the obligation to disclose it under this Law is required to safeguard national security. (2) Except as provided by paragraph (3), a certificate signed by the Chief Minister certifying that the exemption is required to safeguard national security is conclusive evidence of that fact. (3) A person aggrieved by the decision of the Chief Minister to issue a certificate under paragraph (2) may appeal to the Royal Court on the	**Information which would prejudice defence** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court. **Information which relates to matters of national security** Code: Exempt Law: Restricted information Certificate signed by the Chief Minister certifying that the exemption is required Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.

			grounds that the Chief Minister did not have reasonable grounds for issuing the certificate. (4) The decision of the Royal Court on the appeal shall be final.	
(ix)	cause damage to the economic interests of the Island;	**35**	**The economy** Information is qualified information if its disclosure would, or would be likely to, prejudice – (a) the economic interests of Jersey; or (b) the financial interests of the States of Jersey,	**Information which would cause damage to the Island's economic interests** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner, Royal Court.
(x)	prejudice the financial interests of an authority by giving an unreasonable advantage to a third party in relation to a contract or commercial transaction which the third party is seeking to enter into with the authority;	**34**	**Commercial interests** Information is qualified information if – (a) it constitutes a trade secret; or (b) its disclosure would, or would be likely to prejudice the commercial interests of a person (including the scheduled public authority holding the information).	**Information which would prejudice commercial interests** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner, Royal Court.
(xi)	prejudice the competitive position of a third party, if and so long as its disclosure would, by revealing commercial information supplied by a third party, be likely to cause significant damage to the lawful commercial or professional activities of the third party;	**34**	**Commercial interests** Information is qualified information if – (a) it constitutes a trade secret; or (b) its disclosure would, or would be likely to prejudice the commercial interests of a person (including the scheduled public authority holding the information).	**Information which would prejudice commercial interests** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner, Royal Court.

	(xii)	prejudice the competitive position of an authority;	**34**	**Commercial interests** Information is qualified information if – (a) it constitutes a trade secret; or (b) its disclosure would, or would be likely to prejudice the commercial interests of a person (including the scheduled public authority holding the information).	**Information which would prejudice commercial interests** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.
	(xiii)	prejudice employer/employee relationships or the effective conduct of personnel management;	**40**	**Employment** Information is qualified information if its disclosure would, or would be likely to prejudice pay or conditions negotiations that are being held between a public authority and – (a) an employee or prospective employee of the authority; or (b) representatives of the employees of the authority.	**Information which would prejudice employment relations** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.
	(xiv)	constitute a premature release of a draft policy which is in the course of development;	**36**	**Formulation and development of policies** Information is qualified information if it relates to the formulation or development of any proposed policy by a public authority.	**Information which relates to the development of a proposed policy** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.
	(xv)	cause harm to the physical or mental health, or emotional condition, of the applicant whose information is held for the purposes of health or social care, including child care;	**39**	**Endangering the safety or health of individuals** Information is qualified information if its disclosure would, or would be likely to – (a) endanger the safety of an individual; or (b) endanger the physical or mental	**Information which would endanger the health or safety of an individual** Code: Exempt Law: Qualified information, subject to the public interest

			health of an individual.	test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner, Royal Court.
(xvi)	prejudice the provision of health care or carrying out of social work, including child care, by disclosing the identity of a person (Other than a health or social services professional) who has not consented to such disclosure;	25	**Personal information of data subject** Information is information that is otherwise available if – (a) it constitutes personal data of which the applicant is the data subject, as defined in the Data Protection (Jersey) Law 2005; and (b) it is not exempt from Article 7(2)(a) of that Law 2005 by virtue of a provision of Part 4 of that Law.	**Information which would endanger the health or safety of an individual** Code: Exempt Law: Dealt with under the Data Protection (Jersey) Law 2005 Appeal route: Scheduled public authority complaints procedure; Information Commissioner, Royal Court.
(xvii)	prejudice the proper supervision or regulation of financial services;	43	**Law enforcement** Information is qualified information if its disclosure would, or would be likely to, prejudice – (g) the proper supervision or regulation of financial services.	**Information which would prejudice the proper supervision or regulation of financial services** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner, Royal Court.
(xviii)	prejudice the consideration of any matter relative to immigration, nationality, consular or entry clearance cases;	43	**Law enforcement** Information is qualified information if its disclosure would, or would be likely to, prejudice – (e) the operation of immigration controls whether in Jersey or elsewhere;	**Information which would prejudice immigration controls** Code: Exempt Law: Qualified information, subject to the public interest test. Appeal route: Scheduled public authority complaints procedure; Information Commissioner, Royal Court.

(b)	the information concerned was given to the authority concerned in confidence on the understanding that it would be treated by it as confidential, unless the provider of the information agrees to its disclosure; or	**27**	**Information supplied in confidence** Information is restricted information if – (a) it was obtained by the scheduled public authority from another person (including another public authority); and (b) 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 any other person.	**Information supplied in confidence** Code: Exempt Law: Restricted information. It is worthy of note that, in accordance with Article 52(2) of the draft Law, an administration of the States is not able to claim for the purposes of Article 27(b) that the disclosure of information by it would constitute a breach of confidence actionable by another administration of the States. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.
(c)	the application is frivolous or vexatious or is made in bad faith.	**21**	**A scheduled public authority need not comply with vexatious requests** (1) A scheduled public authority need not comply with a request for information if it considers the request to be vexatious. (2) In this Article, a request is not vexatious simply because the intention of the applicant is to obtain information – (a) to embarrass the scheduled public authority or some other public authority or person; or (b) for a political purpose. (3) However, a request may be vexatious if – (a) the applicant has no real interest in the information sought; and (b) the information is being sought for an illegitimate reason, which may include a desire to	**Vexatious requests** Code: Exempt Law: Authority need not comply with request. The draft Law also provides a scheduled public authority may refuse to comply with a repeated request unless a reasonable interval has elapsed since the previous request. Appeal route: Scheduled public authority complaints procedure; Information Commissioner; Royal Court.

			cause administrative difficulty or inconvenience.	
		22	**A scheduled public authority need not comply with repeated requests** (1) This Article applies if – (a) an applicant has previously made a request for information to a scheduled public authority that it has complied with; and (b) the applicant makes a request for information that is identical or substantially similar. (2) The scheduled public authority may refuse to comply with the request unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.	
	PART IV: Appeal procedure			
1.1	An applicant who is aggrieved by a decision by an officer of a States department under this Code may in the first instance appeal in writing to the President of the Committee concerned.	47	**Appeals to the Information Commissioner** (1) This Article applies to a decision by a scheduled public authority – (a) as to the amount of a fee payable by virtue of Article 15(1) or 16(2); (b) as to the cost of supplying information for the purpose of Article 16(1); (c) to refuse to comply with a request for information on a ground specified in Part 3 (vexatious or repeated requests); (d) to refuse to comply with a request for information on the ground that the information is	Under the Code, appeals were made to the Minister and could then be submitted for review under the Administrative Decisions (Review) (Jersey) Law 1982. The Law introduces an improved appeals mechanism, initially through the scheduled public authority's complaints procedure, then to the Information Commissioner, and on to the Royal Court.

	otherwise available; (e) to refuse to comply with a request for information on the ground that it is restricted information; or (f) to refuse to comply with a request for information on the grounds that it is qualified information and 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. (2) A person aggrieved by a decision of a scheduled public authority to which this Article applies, may appeal to the Information Commissioner. (3) The appeal may be made on the grounds that in all the circumstances of the case the decision was not reasonable. (4) The Information Commissioner must decide the appeal as soon as practicable but may decide not to do so if the Commissioner is satisfied that – (a) the applicant has not exhausted any complaints procedure provided by the scheduled public authority; (b) there has been undue delay in making the appeal; (c) the appeal is frivolous or vexatious; or (d) the appeal has been withdrawn, abandoned or previously	

		determined by the Commissioner. (5) The Information Commissioner must serve a notice of his or her decision in respect of the appeal on the applicant and on the scheduled public authority. (6) The notice must specify – (a) the Commissioner's decision and, without revealing the information requested, the reasons for the decision; and (d) the right of appeal to the Royal Court conferred by Article 48.	
12	An applicant who is aggrieved by the decision of an authority under this Code, or by the President of a Committee under paragraph 4.1, may apply for his complaint to be reviewed under the Administrative Decisions (Review) (Jersey) Law 1982, as amended.	**48 Appeals to the Royal Court** (1) An aggrieved person may appeal to the Royal Court against a decision of the Information Commissioner under Article 47. (2) The appeal may be made on the grounds that in all the circumstances of the case the decision was not reasonable. (3) The appeal must be made within 28 days of the Information Commissioner giving notice of his or her decision to the applicant. (4) The decision of the Royal Court on the appeal shall be final. (5) Where the appeal was in respect of a decision by the Information Commissioner not to decide an appeal, the Royal Court may direct the Information Commissioner to decide the appeal.	Under the Code, appeals were made to the Minister and a decision could then be submitted by the applicant for review under the Administrative Decisions (Review) (Jersey) Law 1982. The Law introduces an improved appeals mechanism, initially through the scheduled public authority's complaints procedure. An applicant can then appeal to the Information Commissioner, and, subsequently, to the Royal Court.

APPENDIX E

New Zealand Ombudsmen Practice Guidelines for Weighing the Public Interest

"Assessing whether the interest in favour of withholding the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available

In order to answer this question, an agency will need to take the following steps:

(i) Identify whether one of the withholding grounds set out in section 9(2) applies to the information at issue.

If it is considered that a particular withholding ground applies, the interest protected by that withholding ground is the relevant interest to weigh against other considerations favouring release.

(ii) Identify the considerations which render it desirable, in the public interest, for the information to be disclosed.

Depending on the circumstances, there can be many considerations which may favour the release of information in the public interest.

Section 4(a)[51] of the Act often provides a useful starting point. It provides that one of the purposes of the Act is:

> *"To increase progressively the availability of official information to the people of New Zealand in order –*
>
> *(i) to enable their **more effective participation** in the making and administration of laws and policies; and*
>
> *(ii) To **promote the accountability** of Ministers of the Crown and officials,*
>
> *and thereby to **enhance respect for the law** and to **promote the good government** of New Zealand."*
>
> [Emphasis added]

Accordingly, when considering whether there are any considerations which render it desirable, in the public interest, to disclose information, one of the factors which an agency should consider is whether the release of information would promote the accountability of Ministers and officials or promote the ability of the public to effectively participate in the making and administration of laws and policies.

However, these are not the only matters which an agency should bear in mind when considering whether it is desirable to make information available in the public interest. Considerations which favour disclosure of the information in the public interest are not limited to promoting accountability or encouraging effective public participation in law making. Otherwise, the provision in section 9(1) would have been specifically limited to the purposes set out in section 4(a) of the Act.

[51] Section 4(a) LGOIMA – in this regard, participation is in terms of the *"actions and decisions of local authorities"* and the accountability is that of *"local authority members and officials"*.

The phrase "*public interest*" is not restricted in any way. Wider concepts, such as an individual's right to fairness and natural justice in respect of the actions of public sector agencies, should also be considered when assessing whether the overall public interest favours disclosure of certain information. This may often reflect the purposes for which the information is initially generated or supplied, the use to which it has been put and other uses to which it may also legitimately be put.

The following factors can often assist an agency in identifying those considerations which favour the release of information:

- The **content** of the information requested

  What does the information requested actually say? Is the content of the information such that its release would, in some way, promote the public interest?

  For example, does the information relate to the expenditure of public money or will it reveal factors taken into account in a decision making process? If so, would the release of such information serve to promote the accountability of Ministers or officials?

- The **context** in which that information was generated

  What is the background to the generation of the information at issue? For example, was the information generated as part of a decision making process? What stage has been reached in that decision making process? Releasing background information, or information which sets out the options under consideration, will often enable the public to participate in the decision making process.

- The **purpose** of the request

  Although a requester is not required to explain his or her purpose in requesting information, knowing why the information is required by the requester is often helpful in identifying the considerations favouring disclosure of the information and assessing whether those considerations outweigh the interest in withholding the information.

  For example, a requester may seek background information from an agency in order to challenge certain allegations which have been made against him or her that the agency is investigating. In such cases, an agency may need to weigh certain considerations, such as promoting that individual's right to fairness or natural justice, against the interests in favour of withholding the information.

(iii) Assess the weight of these competing considerations and decide whether, in the particular circumstances of the case, the desirability of disclosing the information, in the public interest, outweighs the interest in withholding the information.

If an agency, after identifying and weighing these competing interests, finds them to be evenly balanced then the information at issue should be withheld. The test under section 9(1) is not whether there is a public interest in disclosure of the information, but rather, whether the considerations favouring

the release of the information, in the public interest, outweigh the interest in withholding the information.

An agency will need to consider how the public interest is best served. Are the considerations favouring disclosure of the information such, that the public interest would be best served by disclosure of the actual information requested? While there may be a public interest in release of some information about a particular situation, this may not necessarily be met by release of the particular information requested.

There is no easy formula for deciding which interest will be stronger in any particular case. Rather, each case needs to be considered carefully on its own merits.

APPENDIX F

Prepared by Ministry of Justice

How were the appropriate costs limits of £600 for central government and £450 for other public authorities arrived at?

Background

During the passage of the FOI Bill, the government made a number of commitments relating to the operation of the FOI fees regime.

1.) The cost of complying with a request would include only the time taken to locate, sort, redact, edit and send out material (the marginal cost), but not the time taken to consider whether or not information is exempt.

2.) The costs of FOI would be borne in large part by the public purse, with authorities permitted, but not required to charge no more than 10% of the cost of complying with a request.

In accordance with these principles a draft fees policy and draft fees Order were drawn up, but it was felt that those proposals were unworkable because they were overly complex and difficult for public authorities to apply.

Further options were considered in accordance with three guiding principles:

- that there should be consistency with the commitments government had already given on FOI fees (in particular that the 10% commitment should be adhered to);
- that the fees regime should be simple for the public to understand and easy for public authorities to apply;
- that no charges should be made in the future for information that was provided free at that current time.

Having considered various options, in September 2004, it was agreed that all FOI requests up to an upper cost limit of £600 would be free. An upper cost limit of £450 would apply to local authorities.

The appropriate limit

Background

It was concluded that the £600 cost limit was easy to understand and would cut out all the complications and cost of collecting small payments for FOI requests. Most individuals would pay nothing for FOI requests and no-one would face charges for information that previously came free.

It was noted that any requests which would cost more than the upper limit to answer could either be turned down, or be charged at full marginal cost (at the discretion of the public authority).

In order to provide some protection against the cost of answering voluminous requests free of charge, a cost limit lower than the cost limit for PQs (£600) was considered. However, Ministers indicated when the FOI Act was passed that the upper cost limit

for FOI requests would be the same as for PQs. The limits set for public authorities could justifiably be set lower than the limit for central government, because central government has more resources to cope with high volume requests.

Marginal costs

When the Freedom of Information Act was first passed, the original proposal for calculating fees would have allowed authorities to charge 10% of the marginal costs where the cost of answering the request was below the appropriate limit. The Government decided that calculating 10% of the marginal costs of every request would be too complex both for applicants and public authorities. It could also prove more expensive for authorities to administer this system once the cost of estimating the charge, issuing the fees notice and processing payment had been taken into account.

The 'appropriate limit' system which the Government adopted met the Government's commitment that the cost of Freedom of Information requests should largely be met by the public purse.

How was the standard rate of £25 per hour for staff costs calculated?

In calculating the costs of answering an FOI request, public authorities use a standard cost of £25 per hour for staff to research the relevant information and answer the query. Thus, the £600 limit approximately equates to 3.5 days work, and the £450 limit approximately equates to 2.5 days work.

In cases where public authorities decide to charge a fee, their calculations are based on the standard £25 per hour throughout rather than setting their own rate of fees above the relevant upper cost limit.

The figure of £25 was based on the average hourly rates charged by central government departments in response to requests made under the Code of Practice on Access to Government Information.

The standard £25 hourly rate makes the system more transparent and more consistent, as well as making it easier for applicants and authorities to understand. It is recognised that in some cases, the hourly cost of answering requests is higher than this, but equally in other cases, the hourly cost is lower.

APPENDIX G

Independent Review of the impact of the Freedom of Information Act.
A report prepared for the Department of Constitutional Reform.

Frontier Economics | October 2006

Executive summary

Frontier Economics were commissioned by the Department for Constitutional Affairs to carry out a review of the operation of the Freedom of Information Act (FoI). The terms of reference for the review set out two issues to be examined in detail:

- the cost of delivering FoI across central government and the wider public sector, alongside an assessment of the key cost drivers of FoI; and
- an examination of options for changes to the current fee regime for FoI.

This report sets out the key findings from the study in relation to both of these issues.

THE COSTS OF DELIVERING FOI

After the initial surge of requests in 2005 it is anticipated that central government's volumes will settle at around 34,000 FoI requests annually. Of those requests which are resolvable around 35% are likely to involve consideration of the application of exemptions. Annually, requests to central government generate approximately 2,700 internal reviews, 700 appeals to the Information Commissioner and 15 to the Information Tribunal.

The total cost across central government of dealing with FoI requests is £24.4 million per year. £8.6 million of this is the cost of officials' time in dealing with initial FoI requests. The remainder is made up of overhead costs, the cost of processing internal reviews, appeals to the ICO and the Information Tribunal and the annual cost of the FoI work of both the ICO and the Tribunal. Although the ICO and the Tribunal are funded by central government they have cross sector jurisdiction not confined to central government.

The wider public sector receives at least 87,000 FoI requests annually, more than twice the number handled by central government. The total cost of dealing with these requests is estimated to be around £11.1 million per year. Local authorities are estimated to have the highest volume of FoI requests outside central government, receiving around 60,000 per year at a cost of £8 million.

It should be noted that the costs above represent the full costs of dealing with requests for information. They do not reflect the additional costs of implementing the FoI Act. Public bodies incurred costs in responding to information requests prior to the introduction of the Act, and these would need to be subtracted in order to arrive at the true additional costs of the FoI Act. Information was not systematically collected across the public sector on the costs of responding to requests for information prior to the Act's introduction.

Key cost drivers

The average **(hourly)** cost of officials' time in responding to FoI requests within central government is £34, which is substantially higher than the figure of £25 stated in the current fees regulations. For central government, the average cost of officials'

time for an initial FoI request is approximately £254. On average, FoI requests in central government take 7.5 hours to deal with.

The most expensive stage of work for the average central government request is the time spent consulting Ministers or board level officials, which costs an average of £67 per request. The time spent considering the request costs a further £41 on average and searching for information and reading costs a further £34 each. Of these activities, only searching time is currently included in the cost calculation to determine whether the cost of a request is likely to exceed the appropriate cost limit.

The average cost of central government requests that involve a Minister tend to be substantially higher, costing £241 more than the average cost of a request. This is because requests involving Ministers require five and a half more hours work than those that do not involve a Minister.

A key issue in terms of the cost of dealing with FoI is the number of very expensive requests that occur. Approximately 5% of central government requests cost more than £1,000, but account for 45% of the combined costs of officials' and ministers' time in dealing with initial requests. These requests tend to take almost seven times longer than average to complete. They involve 50 hours of work on average relative to 7.5 hours for all central government requests. They tend to involve substantially greater proportions of time spent on reading, consideration and consultation than is the case for all other central government requests. In contrast, 61% of requests cost less than £100 to deliver and account for less than 10% of total costs.

An additional substantial driver of cost is the internal review process and the ICO appeals process. Individuals that request information under the FoI Act are entitled to ask for an internal review if that information is withheld from them (or if they consider that the authority has otherwise failed to comply with the Act). There is no cost to the individual of initiating the review but internal reviews are expensive for government departments. On average, an internal reviews costs £1,208 compared to £254 for an initial request, almost five times as much.

Although this option has not been considered in this report, since it would require primary legislation, it may be worthwhile considering the merits of introducing a charge for the internal review and appeals process. For example, a charge could be introduced which was only payable where the requestor's appeal was unsuccessful.

Types of requestor

The work has identified five key categories of FoI requestor:

- journalists;
- MPs;
- campaign groups;
- researchers; and
- private individuals.

Each of these groups tend to contain a mixture of one-off requestors and serial requestors. Serial requestors are those individuals who tend to be experienced users of the Act. Requests from serial requestors to central government take over three hours longer on average than those made by one-off requestors (mainly private individuals). In particular, they require a higher proportion of time to be spent on consideration and consultation than requests from one-off users.

Journalists make up a significant proportion of the serial requestors identified. Requests from journalists tend to be more complex and consequently more expensive. They account for around 10% of initial FoI requests made to central government and 20% of the costs of officials' time in dealing with the requests. This equates to around £1.6 million in total in any given year. Journalists are also more likely to request an internal review. They account for between 450 and 660 internal reviews at a cost of between £500,000 and £830,000 (16% to 26% of the total cost of internal reviews in central government).

Journalists are also one of the most significant categories of serial requestor in the wider public sector. They account for between 10% and 23% of initial FoI requests and between 20% and 45% of the costs of officials' time depending on the particular wider public sector organisation. Overall, this equates to around £1.4 million per year.

In total, therefore, across central government and the wider public sector, journalists account for at least £3.9 million, or 16% of the total costs of FoI delivery.

Requests that are not "in the spirit of the Act"

A key issue identified by almost all stakeholders was requests received by departments that were not in the spirit of the Act. They are a mixture of frivolous requests, disproportionately burdensome requests and requests that are explicitly designed to test the compliance of the Act. A number of examples are provided below.

- A request for the total amount spent on Ferrero Rocher chocolates in U.K. embassies.
- A request from a vintage lorry spotter to 387 local authorities for the registration numbers of all vintage lorries held in their stock.
- A request for information on a sweater given to President George Bush by No. 10.
- Multiple requests from a long time correspondent of the CPS about allegations of criminality against him, having already been told that the CPS was not the authority to answer such questions.
- A request for the number of eligible bachelors in the Hampshire Constabulary between the ages of 35 and 49, their e-mail addresses, salary details and pension values received from requestor "I like men in uniform".
- A request for the number of statistics of reported sex with sheep and any other animal in Wales for 2003 and, if possible, since records began.
- A request stating "I want to have an affair – how can I make it constitutional?"
- Repeated requests from a commercial company for IT and telephone contracts made across government. The requestor claims the information goes out of date quickly so makes requests every month to most departments.
- A request for all background papers relating to the handling of a specific request.

OPTIONS FOR CHANGE

The review was asked to consider the impact of four options:

- including reading time, consideration time and consultation time in the calculation of whether responding to a request is likely to exceed the 'appropriate limit';
- aggregating non-similar requests made by any legal person (or persons apparently acting in concert) for the purposes of calculating whether responding to a request is likely to exceed the 'appropriate limit';
- reducing the appropriate limit thresholds from their current levels of £600 for central government and Parliament and £450 for other public authorities; and
- introducing a flat rate fee for FoI requests.

The table below sets out the impact of each option (if it were introduced in isolation) on the volumes and delivery costs for both central government and the wider public sector. To understand the economic impact of each option the table sets out the impact the options would have if the cost reflective rates of £34 per hour for central government and £26 per hour for the wider public sector are used to calculate the cost of dealing with requests.

Central Government			**Wider Public Sector**	
Volume reduction	**Reduction in cost of officials' time**		**Volume reduction**	**Reduction in cost of officials' time**
Including reading, consideration and consultation time	2,692 (8%)	£4.7m (54%)	5,492 (6%)	£5.0m (48%)
Aggregating non-similar requests (see footnote below)	3,598 (11%)	£0.9m (11%)	8,414 (10%)	£1.2m (10%)
Introducing a flat rate fee	15,915 (47%)	£3.8m (44%)	34,077 (39%)	£3.9m (38%)
Reducing the appropriate limit threshold to £400 (central) and £300 (wider public sector)	128 (0.4%)	£0.8m (9%)	1,331 (1.5%)	£2.1m (20%)

Table 1: Impact of the options for change on volumes and costs using the actual costs of delivery

(Note the volume and cost impacts in the table relate to the impact of introducing each option on its own. The volume and cost figures are not additive across the options.)

The estimated cost savings related to aggregation are conservative: they have been based on the average cost of all FoI requests rather than the cost of serial requests.

Table 1 shows that allowing reading, consideration and consultation time to count towards the appropriate limit, alongside aggregation, is likely to have the greatest impact on reducing the most expensive requests while at the same time preserving the right of the majority of requestors to information.

Including reading, consideration and consultation time could reduce the cost of officials' time in central government by 54%, and could be anticipated to have a substantial impact on the other costs associated with FoI – particularly the costs of the internal review and appeal process. This option would result in the exclusion of nearly all of the top 5% of most expensive cases.

On its own, a flat rate fee is likely to have the most substantial impact on reducing the volume of requests. However, it is likely that a large proportion of requests deterred by a flat rate fee would be the less costly one-off requests from members of the public. It is highly unlikely that the most expensive cases would be deterred by a flat rate fee. This is demonstrated by the fact that a flat rate fee would have a smaller impact on costs than would counting reading consideration and consultation time, even though a flat rate fee would reduce volumes by 47% (central government) compared to an 8% reduction for reading consideration and consultation time.

Table 2 shows the combined impact of the options on the volumes and delivery costs for both central government and the wider public sector. The estimates of the volume and value of requests that could be excluded under each option are calculated using the hourly rate of £34 for central government and £26 for the wider public sector. This reflects the actual costs of FoI delivery.

	Central Government		**Wider Public Sector**	
	Volume reduction	**Reduction in cost of officials' time**	**Volume reduction**	**Reduction in cost of officials' time**
Requests excluded by including reading, consideration and consultation time and aggregating non-similar requests	13%	60%	11%	54%
Requests excluded on the basis of a flat rate fee	45%	18%	37%	21%
Combined effect of all of the above	**58%**	**78%**	**48%**	**75%**

Table 2: Combined impact of the options for change on volumes and costs using the actual costs of delivery

Table 2 shows that the combined impact of aggregation and including reading, consultation and consideration times would be to reduce volumes of requests by 13% and costs by 60%. If a fee were to be introduced in addition, it would reduce volumes of requests by a further 45%, but costs by just 18%. This illustrates that introducing a fee would largely impact on the low cost one-off requests from the public. If all the

options were introduced, volumes would reduce by 58% and costs would reduce by 78%.

To illustrate the impact of the options were the current rate of £25 per hour to be retained Table 3 sets out the volume impact the options would have if the current rate of £25 per hour is used to calculate whether requests exceed the appropriate limit. The cost impact of each option is calculated using the actual hourly rates of £34 (central government) and £26 (wider public sector).

	Central Government		**Wider Public Sector**	
	Volume reduction	**Reduction in cost of officials' time**	**Volume reduction**	**Reduction in cost of officials' time**
Including reading, consideration and consultation time	1,346 (4%)	£3.2m (37%)	5,991 (7%)	£5.0m (49%)
Aggregating non-similar requests	2,817 (8%)	£0.7m (8%)	7,315 (8%)	£1.0m (8%)
Introducing a flat rate fee	15,915 (47%)	£3.8m (44%)	34,077 (39%)	£3.9m (38%)
Reducing the appropriate limit threshold to £400 (central) and £300 (wider public sector)	385 (1%)	£0.9m (11%)	1,831 (2%)	£2.1m (21%)

Table 3: Impact of the options for change on volumes and costs using £25 per hour

(Note the volume and cost impacts in the table relate to the impact of introducing each option on its own. The volume and cost figures are not additive across the options.)

The table shows that allowing reading, consideration and consultation time to count towards the appropriate limit, alongside aggregation, is likely to have the greatest impact on reducing the most expensive requests while at the same time preserving the right of the majority of requestors to free information.

The hourly rate of £25 per hour is below the actual hourly cost of FoI delivery. This means that in this scenario including reading, consideration and consultation time reduces the cost of officials' time in central government by 37% compared to 54% when an hourly rate of £34 is used. However, this scenario could still result in the exclusion of the majority of the top 5% of most expensive cases.

Each of the options is discussed in greater detail below.

Reading, consultation and consideration

In almost every central government department there are a relatively small volume of requests that contribute disproportionately to the costs of delivering FoI. These requests tend to be driven either by large volumes of reading material, or by the need

for extensive consultation (time spent in consultation outside the public authority to determine the applicability of exemptions and/or the balance of the public interest) or consideration (time spent considering the response to the request under the FoI Act to determine the applicability of exemptions and/or the balance of the public interest).

On average, these activities count for 70% of the cost of central government officials' time in dealing with initial FoI requests. However, the regulations currently do not allow these activities to count towards the cost calculation to determine whether the appropriate limit has been exceeded.

From an economic perspective, there is a clear benefit in including these activities in the calculation, so that the appropriate limit is fully reflective of the costs of officials' time in delivering FoI requests. If reading, consultation and consideration time were to be included this could lead to a substantial reduction in the costs of delivering FoI. Specifically, the cost of officials' time in dealing with FoI requests could be reduced by 54% and the most expensive 5% of cases could be almost entirely excluded.

If this option is to be adopted, a key issue will be determining an appropriate methodology for the calculation of reading, consideration and consultation time that allows for a consistent approach across practitioners. This is important, because estimates of costs will need to be determined prior to the work being undertaken, so that a decision can be reached as to whether the costs of compliance would exceed the appropriate limit. If practitioners do not take a systematic approach, there is likely to be a potentially substantial increase in requests for internal review and appeals to the ICO, with a consequent substantial increase in costs.

Careful consideration will need to be given as to how best to calculate the factors to be counted towards the cost threshold. The measures will need to be administratively simple and should not in effect provide an absolute exemption to practitioners. For reading time, one possible approach is a standard charge per page. It has not been possible to calculate the impact of such an approach quantitatively. This is because information on the numbers of pages per request is not held centrally. However, interviews with practitioners suggest that a charge per page of between £1 and £2 would be appropriate and would, in most cases be reflective of the costs of reading through the material in question.

For consideration and consultation it is more difficult to identify a similar type of ready reckoner, as there is no standard metric to which a charge could be applied. However, one possible option that could balance the competing requirements of consistency, administrative simplicity and fairness is to develop a series of graduated standard charges for consideration and consultation. The charge could only be used to count towards the threshold for those requests deemed likely to require consideration and/or consultation.

Moreover, the charge could be graduated to reflect:

- differences in the type of consultation required; and
- differences in the number of bodies for which consultation is required.

An additional issue is that the average cost per hour of delivering FoI in central government is £34. However, under the current FoI fees regulations all costs must be calculated using the same cost per hour of £25. For consideration and consultation in particular, an average cost of £25 per hour substantially under-estimates the costs of responding to the request. This is because consideration and consultation time

typically involve substantial inputs from senior civil servants and often also require ministerial or board level involvement.

Consequently, the review would recommend that there is a need to consider changing the cost per hour figure used in the calculations to one that is reflective of the actual costs of delivering FoI.

Aggregating non-similar requests

There are a small number of serial users of the Act who account for a substantial proportion of the overall costs of delivering FoI (serial requestors account for 14% of requests by volume and 26% by value.) Requests made by these users tend to cost substantially more than standard requests and take up substantial levels of senior resource. A key issue is that currently non-similar requests from these requestors cannot be aggregated to count towards the appropriate limit.

Table 1 above suggests that aggregating non-similar requests could substantially reduce the costs of delivering FoI. The key issue that has been identified in implementing this option is the concern that requestors will game the system through behavioural changes that substantially reduce the volume and cost impacts set out above. Requestors can currently game the system with respect to aggregating similar requests. This option could potentially increase the susceptibility to gaming, as under the Act, individuals do not have to prove their identities in order to make a request. Consequently, an individual could either change the timing of requests so they fall outside the 60 day period, or make requests from numerous different email accounts in order to circumvent the aggregation requirements.

Fees

Under the FoI Act it is possible to introduce a flat fee for responding to FoI requests. On its own, a flat rate fee is likely to reduce the volume of requests by between 40% and 50%. However, it is likely that a large proportion of requests deterred by a flat rate fee would be the less costly one-off requests from members of the public. It is highly unlikely that the most expensive requestors would be deterred by a flat rate fee.

A key issue raised by stakeholders was how to implement a payment scheme for FoI in organisations that do not otherwise have a requirement to collect small sums of money on a regular basis. This issue has been identified as applying primarily to central government departments, as public bodies in the wider public sector tend to have facilities in place to deal with small payments.

There is no quantitative information available on the costs of collecting a fee. However, discussions with central government stakeholders suggested that the costs are likely to be between £30 and £100 per fee collected. This suggests that if a fee of £15 were implemented, in departments where no system is in place to collect small sums, a loss of between £15 and £85 would be made on every fee collected. This suggests that the primary role of a fee would be in deterring requestors from making FoI requests.

To understand the impact of this deterrent it is necessary to compare the costs and benefits of responding to FoI requests. From an economic perspective efficiency could be improved if a fee deterred a request where the cost of responding to the request outweighed the benefits.

The benefits of FoI can be broken into three elements: the private benefit to an individual of the information they receive; the public benefit of that information being

made available; and the aggregate benefits that derive from a more open and transparent decision making process.

If a fee in the range of £15 leads to substantial reductions in volumes of requests, this suggests that the private value of those information requests may be low relative to their costs. This is because if people fail to pay the fee they may be indicating that they value the information they request at less than the fee required (£15), while each central government request costs approximately £250 on average to provide.

However, this does not necessarily imply that there is an efficiency gain as the public value of the information and the public good value of FoI have not been taken into account. Discussions with stakeholders have also revealed concerns about the fairness of introducing a fee. Some stakeholders have said there may be particular groups of individuals who legitimately wish to access information but who may not be able to afford the fee.

An alternative could be to look to introduce a more targeted fee aimed at recovering the costs of dealing with persistent and experienced requestors. These types of requestors tend in the majority of cases to be requestors who require information for commercial use: either journalists or businesses wishing to gather information about procurement options in order to create a commercial database.

Responding to requests from these requestors tends to costs substantially more than dealing with requests from more casual requestors. A fee for this type of user could overcome some of the concerns expressed above with respect to a flat rate fee for all users. However, this option is potentially susceptible to gaming, as under the Act, individuals do not have to prove their identities or the purpose of their request in order to make a request.

Reducing the appropriate limit threshold

The final option for consideration is a reduction in the appropriate limit from its current level of £600 and £450. The rationale for such a reduction could be a view that the current level does not provide an appropriate balance between the right to access information and the need of public authorities to continue to carry out their other duties.

The impact of this option largely depends upon the level the threshold is set to. Table 1 above is based on a one third reduction in the threshold to £400 (central government) and £300 (wider public sector) respectively. As can be seen, this has a relatively limited impact on volumes, with an extra 128 requests exceeding the central government threshold and an extra 1,331 (1.5%) exceeding the wider public sector threshold.

ENSURING THE ACT WORKS EFFECTIVELY

Discussions with stakeholders have identified a number of practices that could be addressed in order to ensure that the Act is operated as effectively and efficiently as possible.

- **Understanding requirements under the Act.** A theme that emerged from discussions was that practitioners may be responding to requests even in situations where they are not required to do so under the Act. A number of examples were provided where requests were answered even where the appropriate limit had clearly been exceeded. Similarly it is not clear that all

practitioners are making full use of the provisions in relation to aggregation and vexatious requests. If the options for change discussed above are to be implemented and are to be effective, it will be important to ensure that practitioners are aware of the changes in the regulations and implement them.

Simultaneous release. Discussions with stakeholders have indicated that public bodies are expected to operate a policy of simultaneous release, such that information released under the FoI Act is made publicly available through the body's website or other means. There should be greater proactivity and consistency in the approach to FoI publication. This should reduce the costs to public authorities of having to deal with the same requests, and should make it easier for requestors to access the information they require. Moreover, if a driver of demand for commercial requestors is the exclusivity of the information they receive, then implementing such an approach consistently could lessen the value of the information received and lead to a reduction in the volume of requests. Greater proactive release of information should also be encouraged.

Jersey

DRAFT FREEDOM OF INFORMATION (JERSEY) REGULATIONS 201-

REPORT

[to be added when the Draft Regulations are lodged "au Greffe"]

Explanatory Note

These Regulations prescribe certain detailed matters, such as the fees that may be charged, for the purposes of the Freedom of Information (Jersey) Law 201-.

Regulation 1 defines certain terms used in the Regulations.

Regulation 2 specifies what may be taken into account by a scheduled public authority when calculating its costs of complying with a request for information.

Regulation 3 specifies the fees that may be charged. If the cost of complying with a request is £50 or less, no fee is chargeable. After that the projected cost of complying with the request (less £50) is chargeable.

Regulation 4 has the effect of providing that if the cost of complying with a request for information would be more than £500 the request may be refused.

Regulation 5 provides that where a scheduled public authority receives a number of requests and the cost of complying with them may exceed £500, it may, instead of complying with the requests, make the information available to the public generally.

Regulation 6 provides that if a person or a group of people divide up a request in order to avoid the £500 cost limit, a scheduled public authority may nevertheless treat the requests as one request.

Regulation 7 sets out the action a scheduled public authority must take when it refuses a request on the grounds that the cost of complying with it would exceed £500.

Regulation 8 sets out the action a scheduled public authority must take when it refuses a request on the grounds that it is a vexatious or repeat request.

Regulation 9 sets out the action a scheduled public authority must take when it refuses a request for information on the grounds that the information requested is exempt information.

Regulation 10 sets out what must happen when a person applies to The Jersey Heritage Trust for information it holds on behalf of a scheduled public authority where the scheduled public authority has not previously told the Trust that the information may be made available to the public.

Regulation 11 provides how the Regulations may be referred to.

Regulation 12 provides that the Regulations come into force on the same date as the Law.

Jersey

DRAFT FREEDOM OF INFORMATION (JERSEY) REGULATIONS 201-

Arrangement

Regulation

Note: page 4 is not reproduced here as it is a blank page (a feature of the legislation template)

DRAFT FREEDOM OF INFORMATION (JERSEY) REGULATIONS 201-

Made *[date to be inserted]*

Coming into force *[date to be inserted]*

THE STATES, in pursuance of Articles 15, 16, 17, 18, 19 and 54 of the Freedom of Information Act 201-, have made the following Regulations –

Interpretation

1 Interpretation

In these Regulations –

"the Law" means the Freedom of Information (Jersey) Law 201-;

"prescribed excess amount" means the amount prescribed by Regulation 4;

"projected costs" has the meaning given to that expression by Regulation 2;

"Trust" means the Jersey Heritage Trust incorporated by an Act of Incorporation granted by the States by the Loi accordant un acte d'incorporation à l'association dite "The Jersey Heritage Trust" registered on 3rd June 1983;

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day that is a bank holiday or a public holiday under the Public Holidays and Bank Holidays (Jersey) Law 1951.

Fees

2 Projected costs

(1) In these Regulations, "projected costs", in relation to a request for information made to a scheduled public authority, means the total costs, whether direct or indirect, that the authority reasonably estimates it is likely to incur in –

(a) locating;

(b) retrieving; and

(c) providing,

the information.

(2) In estimating projected costs a scheduled public authority –

(a) must not take into account any costs incurred to determine if the authority holds the requested information; and

(b) must estimate the cost of staff time in locating, retrieving or providing the information at [£40] an hour (and so in proportion for part of an hour) for each member of staff so employed regardless of grade.

3 Fee payable

For the purposes of Article 15(1) of the Law, the fee that a scheduled public authority may charge for supplying information is to be determined as follows –

(a) if the projected costs is £50 or less, no fee is to be charged; or

(b) if the projected costs exceed £50, a fee equal to £50 less than the projected costs is to be charged.

4 Prescribed excess amount

The amount prescribed for the purposes of Article 16(1) of the Law (excessive cost of supplying information) is £500.

5 Alternative means of supplying information

If 2 or more requests for information are made to a scheduled public authority by different persons, the authority need not comply with either or any of the requests if –

(a) the information sought in the requests covers the same subject matter or overlaps to a significant extent;

(b) the authority estimates that the total cost of complying with both or all of the requests would exceed the prescribed excess amount;

(c) the authority considers that it would be reasonable to make the information available to the public at large and elects to do so;

(d) within 20 working days of receipt by it of the first of the requests the authority notifies each of the persons making the requests that the information is to be made available in accordance with paragraph (e); and

(e) the authority makes the information available to the public at large within the period specified in paragraph (d).

6 Aggregation of related requests

(1) This Regulation applies where –

(a) the 2 or more requests referred to in paragraph (2) relate, to any extent, to the same or similar information; and

(b) the requests are received by the scheduled public authority within a period of 60 working days.

(2) If 2 or more requests for information are made to a scheduled public authority –

(a) by one person; or

(b) by different persons who appear to the authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the total costs that may be taken into account by the authority, under Regulation 2, of complying with all of them.

Refusal of requests

7 Refusal of request - cost of compliance will exceed prescribed excess amount

(1) This Article applies where a scheduled public authority –

(a) estimates under Article 16(1) of the Law that the cost of complying with a request for information would exceed the prescribed excess amount; and

(b) is not prepared to provide the information requested on payment of a fee determined in accordance with Regulation 3(b).

(2) The scheduled public authority must, within the time provided for compliance with the request by Article 13 of the Law, give the applicant a notice that –

(a) states that it is refusing to comply with the request because it believes that the cost of complying would exceed the prescribed excess amount;

(b) states the reasons for so considering;

(c) contains particulars of any procedure provided by the scheduled public authority for appealing against the decision to refuse to supply the information; and

(d) contains particulars of the right conferred by Article 47 of the Law (appeals to the Information Commissioner).

8 Refusal of request - vexatious or repeated requests

(1) This Article applies where a scheduled public authority considers a request is –

(a) a vexatious request to which Article 21 of the Law applies; or

(b) a repeated request to which Article 22 of the Law applies.

(2) The scheduled public authority must, within the time provided for compliance with the request by Article 13 of the Law, give the applicant a notice that –

(a) states that it is refusing to comply with the request because it considers the request to be a vexatious request to which Article 21 of the Law applies or a repeated request to which Article 22 of the Law applies, as the case may be;

(b) states the reasons for so considering;

(c) contains particulars of any procedure provided by the scheduled public authority for appealing against the decision to refuse to supply the information; and

(d) contains particulars of the right conferred by Article 47 of the Law (appeals to the Information Commissioner).

9 Refusal of request - exempt information

(1) This Regulation applies to a decision by a scheduled public authority to refuse to comply with a request for information on the grounds that the information –

(a) is information that is otherwise available;

(b) is restricted information; or

(c) is qualified information and 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.

(2) The scheduled public authority must, within the time provided for compliance with the request by Article 13 of the Law, give the applicant a notice that –

(a) states that it refuses to provide the information requested;

(b) specifies the exemption it considers applies;

(c) states why the exemption applies, unless doing so would disclose exempt information;

(d) contains particulars of any procedure provided by the scheduled public authority for appealing against the decision to refuse to supply the information;

(e) if Article 23(2) of the Law applies (where published information may be obtained), contains the information required to be provided under that paragraph; and

(f) contains particulars of the right conferred by Article 47 of the Law (appeals to the Information Commissioner).

The Jersey Heritage Trust

10 Special provisions relating to public records transferred to The Jersey Heritage Trust.

(1) This Article applies where –

(a) the Trust receives a request for information that relates to information that is contained in a public record transferred to the Trust by a scheduled public authority; and

(b) the public authority has not indicated to the Trust that the public record should be made available for public inspection.

(2) The Trust shall consult the scheduled public authority on whether the information is information that the Law states is exempt information and, if it is, whether it should be released.

(3) The Trust need not consult the scheduled public authority where it considers Article 21 (vexatious requests) or Article 22 (repeated requests) of the Law applies to the application for the information.

(4) If the scheduled public authority advises the Trust that the information –

(a) is not information that the Law states is exempt information; or

(b) that it is such information but may nevertheless be release,

the Trust shall provide the information requested but shall otherwise refuse to do so.

Closing provisions

11 Citation and commencement

These Regulations may be cited as the Freedom of Information (Jersey) Regulations 201-.

12 Commencement

These Regulations come into force on the same date as the Law.

APPENDIX I

BIBLIOGRAPHY AND USEFUL LINKS

Balancing the Public Interest: Applying the public interest test to exemptions in the U.K. Freedom of Information Act 2000 by Meredith Cook (pub. August 2003) which may be downloaded free of charge from the UCL website (http://www.ucl.ac.uk/constitution-unit/publications)

Freedom of Information Manual. Marcus Turle, 2005

Freedom of Information. A practical Guide to implementing the Act, Kelvin Smith, 2004

Freedom of Information. Balancing the Public Interest, Megan Carter and Andrew Bouris, 2006

Independent Review of the impact of the Freedom of Information Act. A report prepared by Frontier Economics for the Department for Constitutional Affairs, October 2006:

www.foi.gov.uk/reference/foi-independent-review.pdf

Report of the Select Committee appointed to consider the Draft Freedom of Information Bill, 27th July 1998:

www.publications.parliament.uk/pa/ld199899/ldselect/ldfoinfo/97/9702.htm

Information Asset Register (Jersey):

http://www.gov.je/Government/Pages/StatesReports.aspx

United Kingdom Freedom of Information Act 2000:

http://www.opsi.gov.uk/acts/acts2000/ukpga_20000036_en_1

http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen_20000036_en_1

Official Information Act 1982, New Zealand:

http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html

http://www.ombudsmen.parliament.nz

Explanatory Note

With a few exceptions, this Law will give people the right to be supplied with information held by public authorities.

The exceptions are –

(a) it is information that is otherwise available (for example, it is available for downloading from the Web or by purchase from the States' Information Centre);

(b) it is restricted information,(for example, its disclosure is prohibited by another Law) where the public authority may refuse to supply the information; or

(c) it is qualified information, (for example, it concerns the formation and development of policies) where a public authority must supply the information unless it is satisfied that the public interest in supplying the information is outweighed by the public interest in not doing so.

In all cases the public authority is still free to supply the information if it is not otherwise prohibited by law from doing so.

The Law provides that a person may appeal to an Information Commissioner (the person for the time being carrying out the functions of the Data Protection Commissioner) against a decision of a public authority.

An appeal may be made –

(a) against any amount charged by a public authority for supplying information; or

(b) against a decision by a public authority not to supply information.

There is a further right of appeal to the Royal Court. The Court's decision is final.

At first the Law will apply to those public authorities to which the Code on Freedom of Information presently applies (in the Law called scheduled public authorities) However, the Law can subsequently be extended by Regulations to include other public authorities.

Details of the proposed Law follow.

PART 1 deals with interpretation.

Article 1 defines certain words and phrases used in the Law, in particular "public authority" and "scheduled public authority".

Article 2 defines the term "request information" and sets out what is required to make an application for the supply of information under the Law.

Article 3 defines "information held by a public authority" for the purposes of the Law.

Article 4 defines "information to be supplied by a public authority" for the purposes of the Law.

Article 5 makes it clear that it is not the intention of the Law, in any way, to prohibit the provision of information.

If the provision of requested information is not prohibited by some other enactment, a public authority may always supply the requested information albeit the information may be designated by the Law to be "restricted" or "qualified" information.

Article 6 allows the States Assembly to amend specified part of the Law by Regulations.

PART 2 sets out the general right a person has to be supplied with information held by a public authority and how the supply may be obtained.

Article 7 provides the general right of a person to be supplied with information in the possession of a public authority, subject to certain specified exemptions.

Article 8 sets out the circumstances in which a public authority can refuse to supply requested information.

Article 9 sets out the circumstances in which a public authority can refuse to supply qualified information – generally if it is in the public interest to do so.

Article 10 requires a public authority to tell a person who has requested information if the public authority holds the information. However, where it is in the public interest to do so, a public authority can decide neither to confirm nor to deny that it holds the information.

Article 11 allows a public authority to provide information by any reasonable means – by email in many cases.

Article 12 requires a public authority to help a person who wishes to make an application for information to do so.

Article 13 sets out the time limits within which a public authority must deal with a request for information.

Article 14 allows a public authority to seek additional detail about a request for information.

Article 15 allows a public authority to require a fee for supplying information.

Article 16 allows a public authority to refuse to supply information if the cost of doing so is too high.

Article 17 deals with the situation where information has been transferred to The Jersey Heritage Trust.

Article 18 provides for what a public authority must do if it refuses a request for information.

Article 19 allows Regulations to be made requiring a public authority to adopt a publication scheme. However, to facilitate the implementation of the Law and whether or not any such Regulations are made, a public authority must prepare and maintain an index of the information it holds.

Article 20 provides that most information held by public authorities will be available to the public if it has been held by the public authorities for a long time.

PART 3 deals with vexatious and repeated requests for information.

Article 21 allows a public authority not to comply with vexatious requests – normally those designed solely to cause administrative difficulty or inconvenience.

Article 22 allows a public authority not to comply with repeated requests from the same person for the same information.

PART 4 deals with information that is otherwise available to the public.

*Article 2*3 makes it clear that if information is otherwise available to the public, whether or not on the payment of a fee, it may not be obtained under the Law. In most cases the public authority will say where the information may be obtained

Article 24 provides, in effect, that information that a public authority has in respect of a case before a court or tribunal is only available in accordance with the rules of the court or tribunal.

Article 25 exempts from the Law information a person may obtain about himself or herself under the Data Protection (Jersey) Law 2005.

PART 5 deals with restricted information, which a public authority has an absolute right to refuse to supply.

Article 26 makes information restricted information where its disclosure is otherwise prohibited by legislation, a Community obligation or court action.

Article 27 makes information provided in confidence, where its disclosure would be actionable, restricted information.

Article 28 makes information needed to safeguard national security restricted information. The Chief Minister may issue a certificate that is conclusive evidence that this provision applies to specified information. The justification for the issue of the certificate can be challenged in the Royal Court.

Article 29 makes information which, if disclosed, would infringe the privileges of the States Assembly, restricted information.

Article 30 makes personal information restricted information, if under the Data Protection (Jersey) Law 2005 its release would be unlawful.

PART 6 deals with qualified information – information that a public authority must supply unless it is in the public interest not to do so.

Article 31 makes communications with Her Majesty qualified information.

Article 32 makes advice given by the Bailiff or a Law Officer qualified information.

Article 33 makes information that has legal professional privilege qualified information.

Article 34 makes a trade secret qualified information.

Article 35 makes information that could prejudice the economic or financial interests of Jersey qualified information.

Article 36 makes information used to formulate States policy qualified information.

Article 37 provides that where it is intended to publish information within the 12 weeks after the application for the information, the information is qualified information.

Article 38 makes audit and similar information qualified information.

Article 39 makes information qualified information if its disclosure could endanger the physical or mental health of a person or a person's safety.

Article 40 makes information qualified information if its disclosure could prejudice ongoing pay and condition negotiations between a public authority and its employees.

Article 41 makes information qualified exemption if its disclosure would prejudice the defence of the British Islands.

Article 42 makes information qualified exemption if its disclosure would prejudice international relations.

Article 43 makes information qualified exemption if its disclosure would prejudice law enforcement.

PART 7 deals with the Information Commissioner and appeals.

Article 44 sets out the general functions of the Information Commissioner under the Law.

Article 45 provides for the Information Commissioner's power to issue Codes of Practice under the Law.

Article 46 provides for the powers of the Information Commissioner to enter premises.

Article 47 provides a right of appeal to the Information Commissioner and provides how the Commissioner must deal with appeals.

Article 48 allows an applicant to appeal to the Royal Court against a decision of the Information Commissioner.

Article 49 sets out what happens if a public authority fails to comply with a notice issued by the Information Commissioner.

PART 8 provides for miscellaneous and supplemental provisions.

Article 50 makes it an offence to alter information after it has been requested with the intent of preventing its disclosure.

Article 51 provides that defamatory information supplied by a public authority on a request made under the Law does not make the authority liable for any civil action against it.

Article 52 provides that each administration of the States is to be treated as a separate entity.

Article 53 exempts the States Assembly and any associated bodies and each administration of the States from prosecution under the Law.

Article 54 allows the States to make Regulations that the States consider are necessary or convenient for the purposes if the Law.

Article 55 provides for consequential amendment to the Public Records Law.

Article 56 provides for the citation of the Law.

Article 57 provides for the Law to be brought in to force by Act of the States.

The **SCHEDULE** specifies which public authorities are scheduled public authorities to which the Law will first apply when it is brought into force.

Jersey

DRAFT FREEDOM OF INFORMATION (JERSEY) LAW 201-

Arrangement

Article

DRAFT FREEDOM OF INFORMATION (JERSEY) LAW 201-

A LAW to provide for the supply of information held by public authorities; and for connected purposes.

Adopted by the States	*[date to be inserted]*
Sanctioned by Order of Her Majesty in Council	*[date to be inserted]*
Registered by the Royal Court	*[date to be inserted]*

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

PART 1

INTERPRETATION

1 Interpretation

In this Law, unless a contrary intention appears –

"information" means information recorded in any form;

"Information Commissioner" means the person carrying out the functions of the office of Data Protection Commissioner referred to in Article 6 of the Data Protection (Jersey) Law 2005[1];

"information that is otherwise available" means information of a type specified in Part 4;

"function" includes a duty and a power;

"public authority" means –

(a) the States Assembly including the States Greffe;

(b) a Minister;

(c) a committee or other body established by resolution of the States or by or in accordance with the standing orders of the States Assembly;

(d) an administration of the States;

(e) a Department referred to in Article 1 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965[2];

(f) a body corporate or a corporation sole established by the States by an enactment;

(g) the States of Jersey Police Force;

(h) each parish;

"qualified information" means information of a type specified in Part 6;

"Regulations" means Regulations made by the States for the purposes of this Law;

"restricted information" means information of a type specified in Part 5;

"scheduled public authority" means a public authority named in the Schedule.

2 Meaning of "request for information"

(1) In this Law, "request for information" means a request for information made under this Law that –

(a) is in writing;

(b) states the name of the applicant;

(c) states an address for correspondence; and

(d) describes in adequate detail the information requested.

(2) In paragraph (1)(a), a request for information in writing includes a request for information transmitted by electronic means if the request –

(a) is received in legible form; and

(b) is capable of being used for subsequent reference.

3 Meaning of "information held by a public authority"

In 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.

4 Meaning of "information to be supplied by a public authority"

(1) In this Law, the information held by a public authority at the time when a request for the information is received is the information that is to be taken to have been requested.

(2) However, account may be taken of any amendment or deletion made to the information between the time when the request for the information was received and the time when it is supplied if the amendment or

deletion would have been made regardless of the request for the information.

5 Law does not prohibit the supply of information

Nothing in this Law is to be taken or interpreted as prohibiting a public authority from supplying any information it is requested to supply.

6 Parts and Schedule may be amended by Regulations

Parts 1, 4, 5, and 6 of this Law and the Schedule to this Law may be amended by Regulations.

PART 2

ACCESS TO INFORMATION HELD BY A SCHEDULED PUBLIC AUTHORITY

General right of a person to be supplied with information

7 General right to be supplied with information held by a scheduled public authority

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

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

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

8 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 –

(a) is information that is otherwise available;

(b) is restricted information; or

(c) is qualified information.

(2) It may also refuse to supply information it holds and has been requested to supply if –

(a) a provision of Part 3 (vexatious or repeated requests) applies in respect of the request;

(b) a fee payable under Article 15 or 16 is not paid; or

(c) Article 16(1) applies (cost of supplying the information exceeds the prescribed fee).

9 Supply of qualified information

(1) If the information requested is qualified information, a scheduled public authority may refuse to supply the information if 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.

(2) It must otherwise supply the information.

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

(1) 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) However, if a person makes a request for information to a scheduled public authority and –

(a) the information is restricted or qualified information; or

(b) if the authority does not hold the information, the information would be restricted or qualified 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 does so –

(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 restricted information; but

(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.

Supply of information and assistance

11 Means a scheduled public authority may use to supply information

A scheduled public authority may comply with a request for information by supplying the information by any reasonable means.

12 Duty of a scheduled public authority to supply advice and assistance

A scheduled public authority must make reasonable efforts to ensure that a person who makes, or wishes to make a request to it for information is supplied with sufficient advice and assistance to enable the person to do so.

Time for compliance with request for information

13 Time within which a scheduled public authority must deal with a request for information

(1) A scheduled public authority must deal with a request for information promptly.

(2) If it supplies the information it must do so, in any event, no later than –

(a) the end of the period of 20 working days following the day on which it received the request; but

(b) if another period is prescribed by Regulations, not later than the end of that period.

(3) However, the period mentioned in paragraph (2) does not start to run –

(a) if the scheduled public authority has sought details of the information requested under Article 14, until the details are supplied; or

(b) if the scheduled public authority has informed the applicant that a fee is payable under Article 15 or 16, until the fee is paid.

(4) If a scheduled public authority fails to comply with a request for information –

(a) within the period mentioned in paragraph (2); or

(b) within such further period as the applicant may allow,

the applicant may treat the failure as a decision by the authority to refuse to supply the information on the ground that it is restricted information.

(5) In this Article "working day" means a day other than –

(a) a Saturday, a Sunday, Christmas Day, or Good Friday; or

(b) a day that is a bank holiday or a public holiday under the Public Holidays and Bank Holidays (Jersey) Law 1951[3].

14 A scheduled public authority may request additional details

A scheduled public authority that has been requested to supply information may request the applicant to supply it with further details of the information so that the authority may identify and locate the information.

15 A scheduled public authority may request fee for supplying information

(1) A scheduled public authority that has been requested to supply information may request the applicant to pay for the supply of the information a fee determined by the public authority in the manner prescribed by Regulations.

(2) The request for the fee must be made within the time allowed to the scheduled public authority to comply with the request for the information.

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

(1) A scheduled public authority that has been requested to supply information may refuse to supply the information if it estimates that the cost of doing so would exceed any amount prescribed for the purpose by Regulations.

(2) Despite paragraph (1), a scheduled public authority may still supply the information requested on payment to it of a fee determined by the authority in the manner prescribed by Regulations.

(3) Regulations made for the purpose of paragraph (1) may provide that, in such circumstances as the Regulations prescribed, if two or more requests for information are made to a scheduled public authority –

(a) by one person; or

(b) by different persons who appear to the scheduled public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

Information stored with The Jersey Heritage Trust

17 Where public records transferred to The Jersey Heritage Trust

An application for information that has been transferred by a scheduled public authority to The Jersey Heritage Trust is to be dealt with in the manner prescribed by Regulations.

Regulations on refusal of requests

18 Where a scheduled public authority refuses a request

A scheduled public authority that refuses a request for information must do so in the manner prescribed by Regulations.

Regulations on publication schemes, and obligation of a public authority to maintain an index of information it holds

19 Publication schemes and index of information held

(1) Regulations may require a scheduled public authority to adopt and maintain a scheme that requires it to publish information.

(2) Paragraph (3) –

(a) applies to all public authorities; and

(b) applies to a public authority whether or not Regulations under paragraph (1) require the public authority to adopt and maintain a scheme that requires it to publish information.

(3) Each public authority, in order to facilitate the implementation of this Law, whether immediately or at some future time, must prepare and maintain an index of the information that it holds.

Limit on all exceptions

20 A scheduled public authority must supply information held by it for a long time

(1) If a request is made to a scheduled public authority for information that it need not otherwise supply by virtue of –

(a) Article 29 (States Assembly privileges);

(b) Article 31 (communications with Her Majesty);

(c) Article 34 (commercial interests);

(d) Article 35 (the economy);

(e) Article 37 (audit functions); or

(f) Article 40 (employment),

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

(2) If a request is made to a scheduled public authority for other information that it need not otherwise supply by virtue of any other provision of Part 5 or 6, it must supply the information if it has held the information for more than 100 years.

(3) Regulations may exempt any information from the provisions of paragraph (1) or (2).

PART 3

VEXATIOUS AND REPEATED REQUESTS

21 A scheduled public authority need not comply with vexatious requests

(1) A scheduled public authority need not comply with a request for information if it considers the request to be vexatious.

(2) In this Article, a request is not vexatious simply because the intention of the applicant is to obtain information –

(a) to embarrass the scheduled public authority or some other public authority or person; or

(b) for a political purpose.

(3) However, a request may be vexatious if –

(a) the applicant has no real interest in the information sought; and

(b) the information is being sought for an illegitimate reason, which may include a desire to cause administrative difficulty or inconvenience.

22 A scheduled public authority need not comply with repeated requests

(1) This Article applies if –

(a) an applicant has previously made a request for information to a scheduled public authority that it has complied with; and

(b) the applicant makes a request for information that is identical or substantially similar.

(2) The scheduled public authority may refuse to comply with the request unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

PART 4

INFORMATION OTHERWISE AVAILABLE

23 Information accessible to applicant by other means

(1) Information is information that is otherwise available if it is reasonably available to the applicant, otherwise than under this Law, whether or not free of charge.

(2) A scheduled public authority that refuses an application for information on this ground must make reasonable efforts to inform the applicant where the applicant may obtain the information.

24 Court information

(1) Information is information that is otherwise available if it is held by a scheduled public authority only by virtue of being contained in a document –

(a) filed with, or otherwise placed in the custody of, a court; or

(b) served upon, or by, the scheduled public authority,

in proceedings in a particular cause or matter.

(2) Information is information that is otherwise available if it is held by a scheduled public authority only by virtue of being contained in a document created by –

(a) a court; or

(b) a member of the administrative staff of a court,

in proceedings in a particular cause or matter.

(3) Information is information that is otherwise available if it is held by a scheduled public authority only by virtue of being contained in a document –

(a) placed in the custody of; or

(b) created by,

a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(4) In this Article –

"proceedings in a particular cause or matter" includes an inquest or post-mortem examination;

"inquiry" means an inquiry or a hearing held under an enactment;

"arbitration" means arbitration to which Part 2 of the Arbitration (Jersey) Law 1998[4] applies.

25 Personal information of data subject

Information is information that is otherwise available if –

(a) it constitutes personal data of which the applicant is the data subject, as defined in the Data Protection (Jersey) Law 2005[5]; and

(b) it is not exempt from Article 7(2)(a) of that Law by virtue of a provision of Part 4 of that Law.

PART 5

RESTRICTED INFORMATION

26 Other prohibitions on disclosure

Information is restricted information if the disclosure of the information by the scheduled public authority holding it –

(a) is prohibited by or under an enactment;

(b) is incompatible with a European Community obligation that applies to Jersey; or

(c) would constitute or be punishable as a contempt of court.

27 Information supplied in confidence

Information is restricted information if –

(a) it was obtained by the scheduled public authority from another person (including another public authority); and

(b) 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 any other person.

28 National security

(1) Information is restricted information if exemption from the obligation to disclose it under this Law is required to safeguard national security.

(2) Except as provided by paragraph (3), a certificate signed by the Chief Minister certifying that the exemption is required to safeguard national security is conclusive evidence of that fact.

(3) A person aggrieved by the decision of the Chief Minister to issue a certificate under paragraph (2) may appeal to the Royal Court on the grounds that the Chief Minister did not have reasonable grounds for issuing the certificate.

(4) The decision of the Royal Court on the appeal shall be final.

29 States Assembly privileges

(1) Information is restricted information if exemption from the obligation to disclose it under this Law is required to avoid an infringement of the privileges of the States Assembly.

(2) Except as provided by paragraph (3), a certificate signed by the Greffier of the States certifying that exemption is required to avoid an infringement of the privileges of the States Assembly is conclusive evidence of that fact.

(3) A person aggrieved by the decision of the Greffier of the States to issue a certificate under paragraph (2) may appeal to the Royal Court on the grounds that the Greffier did not have reasonable grounds for issuing the certificate.

(4) The decision of the Royal Court on the appeal shall be final.

30 Personal information

(1) Information is restricted information if –

(a) it is data under the Data Protection (Jersey) Law 2005[6]; and

(b) its supply to a member of the public would contravene Article 10 of that Law or a data protection principles, as defined in that Law.

(2) Information is also restricted information if –

(a) it constitutes personal data of which the applicant is the data subject, as defined in the Data Protection (Jersey) Law 2005[7]; and

(b) by virtue of a provision of Part 4 of that Law the information is exempt from Article 7(2)(a) of that Law.

PART 6

QUALIFIED INFORMATION

31 Communications with Her Majesty etc. and honours

Information is qualified information if it relates to –

(a) a communication with Her Majesty, with any other member of the Royal Family or with the Royal Household; or

(b) the conferring of an honour or dignity by the Crown.

32 Advice by the Bailiff or a Law Officer

Information is qualified information if it relates to the provision of advice by the Bailiff or a Law Officer.

33 Legal professional privilege

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

34 Commercial interests

Information is qualified information if –

(a) it constitutes a trade secret; or

(b) its disclosure would, or would be likely to prejudice the commercial interests of a person (including the scheduled public authority holding the information).

35 The economy

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

(a) the economic interests of Jersey; or

(b) the financial interests of the States of Jersey.

36 Formulation and development of policies

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

37 Information intended for future publication

(1) Information is qualified information if at the time when the request for the information is made the information is being held by a public authority with a view to its being published within the next 12 weeks.

(2) A scheduled public authority that refuses an application for information on this ground must make reasonable efforts to inform the applicant –

(a) of the date when the information will be published;

(b) of the manner in which it will be published; and

(c) by whom it will be published.

(3) In this Article, "published" means published –

(a) by a public authority; or

(b) by any other person.

38 Audit functions

(1) Information is qualified information –

(a) if it is held by a scheduled public authority mentioned in paragraph (2); and

(b) if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to a matter mentioned in paragraph (2)(a) or (b).

(2) A scheduled public authority referred to in paragraph (1) is a scheduled public authority that has functions in relation to –

(a) the audit of the accounts of another public authority; or

(b) the examination of the economy, efficiency and effectiveness with which another public authority uses its resources in discharging its functions.

(3) Information is also qualified information –

(a) if it is held by the Comptroller and Auditor General; and

(b) if its disclosure would, or would be likely to, prejudice the exercise of any of his or her functions.

39 Endangering the safety or health of individuals

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

(a) endanger the safety of an individual; or

(b) endanger the physical or mental health of an individual.

40 Employment

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

(a) an employee or prospective employee of the authority; or

(b) representatives of the employees of the authority.

41 Defence

(1) Information is qualified information if its disclosure would, or would be likely to, prejudice –

(a) the defence of the British Islands or any of them; or

(b) the capability, effectiveness or security of any relevant forces.

(2) In paragraph (1)(b) "relevant forces" means –

(a) the armed forces of the Crown; or

(b) a force that is co-operating with those forces or a part of those forces.

42 International relations

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

(a) the United Kingdom;

(b) a State other than Jersey;

(c) an international organisation; or

(d) an international court.

(2) Information is qualified information if its disclosure would, or would be likely to, prejudice –

(a) any Jersey interests abroad; or

(b) the promotion or protection by Jersey of any such interest.

(3) Information is also qualified information if it is confidential information obtained from –

(a) a State other than Jersey;

(b) an international organisation; or

(c) an international court.

(4) In this Article, information obtained from a State, organisation or court is confidential while –

(a) the terms on which it was obtained require it to be held in confidence; or

(b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(5) In this Article –

"international court" means an international court that is not an international organisation and that was established –

(a) by a resolution of an international organization of which the United Kingdom is a member; or

(b) by an international agreement to which the United Kingdom was a party;

"international organization" means an international organization whose members include any two or more States, or any organ of such an organization;

"State" includes the government of a State and any organ of its government, and references to a State other than Jersey include references to a territory for whose external relations the United Kingdom is formally responsible.

43 Law enforcement

Information is qualified 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; or

(g) the proper supervision or regulation of financial services.

PART 7

THE INFORMATION COMMISSIONER AND APPEALS

44 General functions of the Information Commissioner

(1) The Information Commissioner must –

(a) encourage public authorities to follow good practice in their implementation of this Law and the supply of information; and

(b) supply the public with information about this Law.

(2) Each year the Information Commissioner must, prepare a general report on the exercise by the Information Commissioner of his or her functions under this Law during the preceding year.

(3) The report must be laid before the States Assembly as soon as practicable.

45 The Information Commissioner may or may be required to issue a Code of Practice

(1) Regulations may permit or require the Information Commissioner to issue a Code of Practice for the purposes of this Law.

(2) Regulations made under paragraph (1) may, in particular, prescribe –

(a) the subject matter to be addressed by a Code of Practice;

(b) any consultation that must be undertaken or approval that must be obtained before a Code of Practice is issued; and

(c) the effect (if any) of complying or of not complying with a Code of Practice.

46 Powers of Information Commissioner to enter premises, to require the supply of information and to inspect information

(1) For the purpose of carrying out his or her functions under this Law the Information Commissioner shall have such power –

(a) to enter premises;

(b) to require the supply of information; and

(c) to inspect information,

as may be prescribed by Regulations.

(2) Regulations made under this Article may provide for the Commissioner to have access to information the provision of which –

(a) is prohibited or restricted by or under an enactment;

(b) is incompatible with a European Community obligation that applies to Jersey; or

(c) would constitute or be punishable as a contempt of court.

(3) Regulations made under this Article may provide –

(a) for the creation of offences; and

(b) the imposition of fines.

47 Appeals to the Information Commissioner

(1) This Article applies to a decision by a scheduled public authority –

(a) as to the amount of a fee payable by virtue of Article 15(1) or 16(2);

(b) as to the cost of supplying information for the purpose of Article 16(1);

(c) to refuse to comply with a request for information on a ground specified in Part 3 (vexatious or repeated requests);

(d) to refuse to comply with a request for information on the ground that the information is otherwise available;

(e) to refuse to comply with a request for information on the ground that it is restricted information; or

(f) to refuse to comply with a request for information on the grounds that it is qualified information and 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.

(2) A person aggrieved by a decision of a scheduled public authority to which this Article applies, may appeal to the Information Commissioner.

(3) The appeal may be made on the grounds that in all the circumstances of the case the decision was not reasonable.

(4) The Information Commissioner must decide the appeal as soon as practicable but may decide not to do so if the Commissioner is satisfied that –

(a) the applicant has not exhausted any complaints procedure provided by the scheduled public authority;

(b) there has been undue delay in making the appeal;

(c) the appeal is frivolous or vexatious; or

(d) the appeal has been withdrawn, abandoned or previously determined by the Commissioner.

(5) The Information Commissioner must serve a notice of his or her decision in respect of the appeal on the applicant and on the scheduled public authority.

(6) The notice must specify –

(a) the Commissioner's decision and, without revealing the information requested, the reasons for the decision; and

(d) the right of appeal to the Royal Court conferred by Article 48.

48 Appeals to the Royal Court

(1) An aggrieved person may appeal to the Royal Court against a decision of the Information Commissioner under Article 47.

(2) The appeal may be made on the grounds that in all the circumstances of the case the decision was not reasonable.

(3) The appeal must be made within 28 days of the Information Commissioner giving notice of his or her decision to the applicant.

(4) The decision of the Royal Court on the appeal shall be final.

(5) Where the appeal was in respect of a decision by the Information Commissioner not to decide an appeal, the Royal Court may direct the Information Commissioner to decide the appeal.

49 Failure of a scheduled public authority to comply with a notice by the Information Commissioner

(1) This Article applies where, on an appeal under Article 47, the Information Commissioner has served a notice on a scheduled public authority that contains one of the statements set out in paragraph (2) and the authority has not supplied the information in accordance with the notice after –

(a) failing to appeal under Article 48; or

(b) having appealed, having lost the appeal.

(2) The statements mentioned in paragraph (1) are –

(a) that the fee payable by virtue of Article 15(1) or 16(2) should be less than the fee determined by the authority and that the information should be supplied on payment of the fee specified in the notice;

(b) that the cost of supplying information for the purpose of Article 16(1) should be less than the cost determined by the authority and that the information should be supplied on payment of the amount specified in the notice;

(c) that the refusal by the authority to comply with a request for information on a ground specified in Part 3 (vexatious or repeated requests) was not reasonable and that the information should be supplied;

(d) that the refusal by the authority to comply with a request for information on the ground that the information was otherwise

available was incorrect and that the information should be supplied;

(e) that the refusal by the authority to comply with a request for information on the ground that it is restricted information was incorrect and that the information should be supplied;

(f) that the refusal by the authority to comply with a request for information on the grounds that it is qualified information and 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 was not a reasonable decision and that the information should be supplied.

(3) The Information Commissioner may certify in writing to the Royal Court that the scheduled public authority should supply the information requested in accordance with the notice but has failed to do so.

(4) The Court may inquire into the matter and may deal with the scheduled public authority as if it had committed a contempt of court after hearing –

(a) any witness who may be produced against or on behalf of the public authority; and

(b) any statement that may be offered in defence.

PART 8

MISCELLANEOUS AND SUPPLEMENTAL

50 Offence of altering, etc. records with intent to prevent disclosure

(1) This Article applies if –

(a) a request for information has been made to a scheduled public authority; and

(b) under this Law the applicant would have been entitled to be supplied with the information.

(2) A person is guilty of an offence and liable to a fine if the person –

(a) alters;

(b) defaces;

(c) blocks;

(d) erases;

(e) destroys; or

(f) conceals,

a record held by the scheduled public authority, with the intention of preventing the authority from supplying the information to the applicant.

(3) Proceedings for an offence under this Article shall not be instituted except by or with the consent of the Attorney General.

51 Defamation

(1) This Article applies if information supplied by a scheduled public authority to an applicant under this Law was supplied to the scheduled public authority by a third person.

(2) The publication to the applicant of any defamatory matter contained in the information is privileged unless the publication is shown to have been made with malice.

52 Application to the administrations of the States

(1) In this Law each administration of the States is to be treated as a separate person.

(2) However, paragraph (1) does not enable an administration of the States to claim for the purposes of Article 27(b) that the disclosure of information by it would constitute a breach of confidence actionable by another administration of the States.

53 States exempt from criminal liability

(1) This Article applies to the following public authorities –

(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.

(2) A public authority to which this Article applies is not liable to prosecution under this Law but Article 50 applies to a person acting on behalf of or employed by such an authority as it applies to any other person.

54 Regulations

The States may make Regulations the States consider are necessary or convenient for the purposes of this Law.

55 Public Records (Jersey) Law 2002 amended

(1) The Public Records (Jersey) Law 2002[8] is amended as specified in this Article.

(2) In Article 1(1), the definition "open access period" is omitted.

(3) In Article 9(c), for "in accordance with this Law" there is substituted "in accordance with the Freedom of Information (Jersey) Law 201-[9]".

(4) In Article 11(o), "subject to Article 27(5)," is omitted.

(5) In Article 22(3), for everything after "a record that" there is substituted "contains information that is information that, for the purposes of the Freedom of Information (Jersey) Law 201-[10], is information that is otherwise available or is restricted or qualified information.".

(6) Parts 5 and 6 are repealed.

(7) Articles 39 and 40 are repealed.

56 Citation

This Law may be cited as the Freedom of Information (Jersey) Law 201-.

57 Commencement

(1) This Law shall come into force on such day or days as the States may by Act appoint.

(2) Different days may be appointed for different provisions of this Law or for different purposes.

SCHEDULE

(Article 1)

SCHEDULED PUBLIC AUTHORITIES

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 the standing orders of the States Assembly.

4 An administration of the States.

5 The Judicial Greffe.

6 The Viscount's department.

1	*chapter 15.240*
2	*chapter 16.300*
3	*chapter 15.560*
4	*chapter 04.080*
5	*chapter 15.240*
6	*chapter 15.240*
7	*chapter 15.240*
8	*chapter 15.580*
9	*P.101/2010*
10	*P.101/2010*