

**PUBLIC ACCESS TO OFFICIAL INFORMATION:
CODE OF PRACTICE**

**Lodged au Greffe on 16th March 1999
by the Special Committee on Freedom of Information**



STATES OF JERSEY

STATES GREFFE

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PROPOSITION

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

to refer to their Act dated 15th March 1994 appointing a Special Committee to investigate the issues involved in establishing, by law, a general right of access to official information for members of the public, having regard to the practice and experience of other countries and the particular circumstances of the Island, and to report back to the States with recommendations, and -

(a) to approve the principle that the public should have access, wherever reasonably possible, to information held by the States, Committees and Departments of the States in accordance with a Code of Practice approved by the States;

(b) to approve the draft Code of Practice on Access to Information held by the States, Committees and Departments of the States as set out in Appendix A of the Special Committee's report dated 11th March 1999;

(c) to agree that the Code should be brought into operation not later than 6 months after the date of its approval by the States, and with respect to information created after that date;

(d) to charge the House Committee to prepare for the introduction of the Code, to monitor its implementation, and to keep it under review and to report to the States 12 months after it has been brought into operation, and annually thereafter;

(e) to agree 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, and to charge the House Committee to take the necessary steps to enable the legislation to be assessed for priority for inclusion in the States Legislation Programme;

(f) to agree, upon the approval of the present proposition, to dissolve the Special Committee on Freedom of Information.

SPECIAL COMMITTEE ON FREEDOM OF INFORMATION

- NOTES:
1. The Finance and Economics Committee supports the proposal to transfer the balance of funds remaining in the budget of the Special Committee on Freedom of Information to the House Committee to enable it to assume responsibility for the introduction of a Code of Practice on Access to Information held by the States, in the event that the States adopt this proposition.
 2. The Establishment Committee's comments will follow.
 3. The House Committee's comments will follow.

REPORT

1. Background

1.1 The States appointed the Special Committee on Freedom of Information on 15th March 1994, with the following terms of reference -

“to investigate the issues involved in establishing, by law, a general right of access to official information for members of the public, having regard to the practice and experience of other countries and the particular circumstances of the Island, and to report back to the States with recommendations.”

1.2 On 11th July 1995, the States referred a proposition of Deputy A.J. Layzell regarding “Committees of the States: access to information” (P.98/95) to the Special Committee, so widening the Committee’s terms of reference to include the examination of the issues involved in permitting the attendance of the general public at Committee meetings.

1.3 The Special Committee, under the presidency of Senator S. Syvret, lodged “au Greffe” a report and proposition together with a draft Code of Practice on Access to Information held by Public Authorities on 22nd October 1996. The States commenced consideration of the report and proposition (P.183/96) on 19th November 1996, (together with a number of amendments) but this was referred back to the Special Committee after discussion, principally because the Special Committee had not given sufficient importance to the comments raised by the Health and Social Services Committee following consultation with that Committee.

1.4 Following the resignation on 9th September 1997 of the then President of the Special Committee, Senator N.L. Quérée (who had been elected President in December 1996), the revised membership of the Special Committee included the Presidents of the Health and Social Services and Education Committees, which had previously expressed concerns about the Code as first drafted. It also included as its Vice-President the late Senator V.A. Tomes, a member of both of the previous Special Committees, to whom the Special Committee owes a debt of gratitude for the work he undertook in revising the Code.

1.5 The Code is based on a presumption of openness and, if the Code is adopted, Committees will be expected to organise their business in such a way as to be as open as possible. The Special Committee considers this to be an important step forward. If the States support the proposal, it will mean that they are signing up to greater transparency, and the conduct of business will be on that basis. The Code presented is intended to start that process in a way which is practicable and sustainable, and which departments will be able to accommodate within normal working practices.

2. Revisions to the Code presented with P.183/96

2.1 It should be recalled that the Code of Practice refers only to paper documents. Records held on computer are handled in accordance with the provisions of the Data Protection (Jersey) Law 1987.

2.2 The Special Committee on Freedom of Information has considered all of the material presented with the report and proposition on Access to Information held by Public Authorities (P.183/96), including *inter alia* the United Kingdom and Tynwald, Isle of Man, Codes of Practice, which were appended to that document and circulated to all States Members. As thinking has developed on the issues, the Special Committee does not see the need to recirculate all of these here. The Special Committee has also considered all earlier amendments to, and comments made on, the previous proposition.

2.3 The Special Committee reviewed the recommendations of that report (P.183/96), as follows -

RECOMMENDATION A

The public should have access, wherever reasonably possible, to information held by public authorities. The Special Committee maintains this view.

RECOMMENDATION B

The Special Committee accordingly commends to the States what it believes to be a robust, yet practicable, Code on Access to Information held by public authorities. The Special Committee as presently constituted proposes a draft Code which it considers fulfils that recommendation while at the same time including exemptions to reflect genuine concerns of States' Committees on matters such as health, education and personnel issues.

RECOMMENDATION C

The Special Committee recommends that the Code of Practice on Access to Information Held by Public Authorities should be brought into force not later than 1st June 1997. This has now been amended to six months after the date on which the Code is approved, to allow sufficient time for departments to prepare for its introduction.

RECOMMENDATION D

The Special Committee recommends that it be charged to prepare for the introduction of the Code, monitor its implementation, and keep it under review, and to report to the States after 1st June 1997 and annually thereafter. The Special Committee now believes that it should cease to exist once the report and proposition have been considered, and that the Code, once approved, should be monitored and kept under review by the House Committee.

RECOMMENDATION E

The Special Committee recommends 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, subject to the prioritisation process for law drafting requests. The Special Committee re-presents this proposal to the States for consideration.

RECOMMENDATION F

The Special Committee recommends that States Members should have a right of attendance, as an observer, at any meeting of a States' Committee, Sub-Committee, or working party. The Special Committee notes that the Special Committee as previously constituted did not support the inclusion of this proposal, and it was agreed that this was not appropriate, and should be removed.

2.4 The revised Code accordingly represents an updated version of that which was previously proposed, following consultation with the Law Officers, with revisions the Special Committee has made, and the suggestions of those Committees of the States to which it was referred, in particular the Health and Social Services, Education and Establishment Committees.

2.5 Consultation with these Committees has resulted in -

(a) the Code being brought more closely in line with the Data Protection (Jersey) Law 1987 and subordinate legislation with regard to the disclosure of information which would be likely to -

‘cause harm to the physical or mental health, or emotional condition, of the subject whose information is held for the purposes of health or social care, including child care;

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.’

One of the reasons for this change was to protect patients from the disclosure of clinical information that was likely to be harmful to their physical or mental health, for example, where there were recognised contra-indications.

In addition, it had already been recognised in subordinate Data Protection legislation that certain exemptions were necessary in regard to social work, including child care, and this has been included in the Code;

(b) there had been some concern in consultation that the provision that “the authority shall inform third parties that information received from them may be made public under this Code” meant that any information received which had not been defined as confidential in advance could be released to a third party. There was a concern that what was in fact sensitive ‘whistle blowing’ information, possibly based on opinion rather than fact, but which might give rise to investigation by the authorities, could be released on demand.

The Law Officers Department has advised that customary law recognises and will enforce a duty not to disclose information held in confidence. Such a duty might arise in a number of ways, either expressly (i.e. where information was given on an express agreement or undertaking that it would not be disclosed) or by necessary implication, where it was given in circumstances which the supplier of it might reasonably have been entitled to assume that it would be held in confidence, such as personal references;

(c) the Code has been modified to define more clearly the definition of a child to ensure that those matters which relate to school pupils are appropriate.

3. Law of confidence; personal information

3.1 Consultation with the Law Officers' Department has resulted in the recognition of the customary law relating to confidence, and a number of minor amendments relating to terminology and definitions have been made, as stated above.

3.2 The Special Committee discussed with the Law Officers Department a proposal not to go beyond the provisions of the United Kingdom Freedom of Information Code and proposed Act relating to the disclosure of personal information, while maintaining that an individual should have the ability and the right to correct misleading information about them, and this could only occur following receipt of that information. The Code has been amended to reflect the change in emphasis from 'access to personal files' to 'access to personal information'. However, the Special Committee agreed that employment references should be excluded from this as it could prejudice frankness in an important area.

4. Salient points of revised Code

4.1 The salient points of the revised Code put forward for the States' consideration are -

(a) the Code of Practice as now proposed will apply only to the States, States Committees and Departments of the States. The definition of "authority", at this stage, would exclude parishes. It would be for the House Committee, on behalf of the States, to enter into discussion and negotiation with the Comité des Connétables and to make recommendations as to the extent to which the Code should apply to the parishes and the method of implementation;

(b) the definition of an "authority" does not include the Courts and departments of the judiciary, including the Law Officers' Department, as these are not part of the government of the Island. The Judicial Greffe has very clear internal rules and guidelines in relation to access to information, some of which are set out in statute, some of which are set out in Rules of Court, some of which are matters of Royal Court policy, and some of which are matters of Judicial Greffe internal policy. The operation of these is far more precise, practical and effective than a Code of Practice would be for that department. The independence of the judiciary from political or governmental supervision should be safeguarded, and it is entirely inappropriate to include the Courts and the departments that support them within the operation of the Code. Given the independence of the Courts, it is a matter for them whether to release information;

(c) the Code does not require the disclosure of information by incorporated bodies, whether the States are the sole or the majority shareholder or not. They will be "third parties" for the purpose of the Code. For example, an authority will not be required to disclose information which could prejudice the competitive position of such a body, for example by revealing commercially sensitive information such as that relating to competitive tendering;

(d) the Code will come into effect six months after its approval by the States, to allow departments time to prepare for its introduction. It is recognised that departments will need to equip themselves to deliver an appropriate service, and to develop policies and/or guidelines to underline their approach;

(e) the Code will apply to material created from the date of its introduction in order to reduce the burden on departments, but it may be reasonable for the House Committee to review the application of the Code to material held previously when it monitors the effectiveness of the Code. Guidance notes will be available to the public on how the Code will operate;

(f) the Special Committee, as now constituted, does not support the proposal to admit to Committee and Sub-Committee meetings, even as observers, members of the States who are not members of the Committee;

(g) the Special Committee, as now constituted, does not support a general right of admission of the general public to attend Committee and Sub-Committee meetings;

(h) the Special Committee, as now constituted, does not support the proposal that the minutes of

all Committees should be published and made available to members of the public;

(i) in all three above cases it would be necessary to create an editing process of Committee agendas and minutes in order that confidential matters should not be made public, a system that would be both expensive and time-consuming. In the case of those Committees which already publish agendas, e.g. the Public Services and Tourism Committees, the President or his representative is always ready to talk with the media after meetings and, indeed, to the extent that it is appropriate to do so, to address matters which are in papers supporting an agenda. In a small community such as Jersey no more elaborate system is necessary;

(j) future responsibility for the introduction of the Code, to monitor its implementation, to keep it under review, to report to the States and, in due course, to incorporate the Code into legislation in the light of experience should be transferred to the House Committee;

(k) consequently, the Special Committee on Freedom of Information would be dissolved;

(l) in the view of the Special Committee the administrative and cost implications of a simple Code of Practice as proposed would not be such as to render it prohibitive. It is not easy to make forward cost estimates, but because the scope of the Code is relatively limited, without minutes, for example, being edited and published in two forms, the Special Committee considers that administrative costs would be carried within existing budgets.

5. Appeal procedure

5.1 For clarity, the Code includes provisions relating to the ability to use the Administrative Decisions (Review) (Jersey) Law 1982, as amended, to pursue complaints. The purpose of this Law is to enable any person who feels aggrieved at anything done by or on behalf of a States' Committee, a Department of the States or a Departmental officer to apply to have the decision reviewed by a Board of Administrative Appeal. The right to use this Law already exists, and complaints are automatically subject to review in accordance with that Law.

5.2 In reviewing any complaint made under the Code, the Board of Administrative Appeal would have regard to the States' decision to create greater openness, and the Code approved by the States. The Code would be seen as a statement of good practice, to which Committees must have regard in making decisions.

5.3 In the first instance, it is recommended that in the event that an applicant is not satisfied with the response to a request he has made, then he should contact the President of the Committee concerned, who may be able to resolve the issue quickly and without recourse to the Administrative Appeals system.

6. Conclusion and recommendation

6.1 The States decided by their Act dated 15th March 1994 "to appoint a Special Committee to investigate the issues involved in establishing, by law, a general right of access to official information for members of the public, having regard to the practice and experience of other countries and the particular circumstances of the Island, and to report back to the States with recommendations".

- 6.2 As stated in the Code, its purpose is to establish a minimum standard of openness and accountability by the States and Committees and Departments of the States, that properly balances the public interest in access to information with the legitimate requirements of confidentiality for some governmental processes, and for private information. The Special Committee's expectation is that the States and States' departments will wish to do better than the minimum, and the Code provides a practical way forward for achieving that.
- 6.3 Taken alongside the greater openness currently being demonstrated by Committees through public consultation exercises on matters of importance and public interest, the Code's existence will lead to the development of a culture of transparency within the Island's public administration.
- 6.4 The Special Committee's terms of reference included the charge to investigate the issues involved in establishing by law a right of access to official information. The Committee, in line with all its predecessors, concluded that the case for the immediate enactment of legislation was not proven. Indeed, the United Kingdom government, which has committed itself to the introduction of legislation on freedom of information to replace its Code of Practice on Access to Government Information, has encountered difficulties and there are delays in bringing it forward. Accordingly the Special Committee proposes the adoption of this Code of Practice, which initially will be experimental and will evolve in the light of experience on the recommendation of the House Committee which will monitor and review it.
- 6.5 The operation and effectiveness of the Code will be monitored by the House Committee, which will make annual reports to the States. It should be seen as an evolutionary Code, which will be developed in the light of experience. It is already known that the data protection laws currently covering computer-held records will in time be extended to cover paper records, and the House Committee will need to keep this matter under review. If appropriate, the House Committee could propose the introduction of legislation in due course after a period of implementation. In the meantime, the Code is a document of intent and not formally enforceable and cannot override the provisions of existing laws, nor the customary law relating to confidence.
- 6.6 Therefore, the Special Committee recommends the adoption of the Code of Practice as a first practical and cost-effective step towards a more transparent system of government.

A CODE OF PRACTICE ON ACCESS TO INFORMATION
HELD BY THE STATES, COMMITTEES OF THE
STATES AND DEPARTMENTS OF THE STATES
(Adopted by Act of the States dated)

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 or established convention 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, and their departments;
- (b) "information" means any information or official record held by an authority;
- (c) "personal information" means information about an identifiable individual that would, in the ordinary course of events, be known only to the individual or members of the family or friends of the individual.

1.2.2 In the application of this Code -

- (a) "publish" means to make available at the States department concerned;
- (b) there shall be a presumption of openness;
- (c) 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.

1.2.4 This Code applies to information created after the date on which the Code is brought into operation.

Part II: Operation

2. Obligations of an authority

2.1 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 which 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 an authority refuses to disclose requested information, it shall 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) the authority shall inform applicants of their rights under this Code.

2.2 Responsibilities of an applicant

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

Subject to paragraph 1.2.3 and the exemptions described in paragraph 3.2 -

- (a) an authority shall grant access to all information in its possession;

- (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 who are in full-time education.

3.2 Exemptions

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) cause damage to the economic interests of the Island;
 - (ix) 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;
 - (x) 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;
 - (xi) prejudice the competitive position of an authority;

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

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

(xiv) 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;

(xv) 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;

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

(xvii) 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 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 to be reviewed under the Administrative Decisions (Review) (Jersey) Law 1982, as amended.