

STATES OF JERSEY



CODE OF PRACTICE ON PUBLIC ACCESS TO OFFICIAL INFORMATION: MEASURES TO IMPROVE IMPLEMENTATION

**Lodged au Greffe on 18th November 2003
by the Privileges and Procedures Committee**

STATES GREFFE

PROPOSITION

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

to refer to their Act dated 26th July 1999 in which they adopted a Code of Practice on Public Access to Official information, and –

- (a) commencing three months after adoption by the States, to amend the Code of Practice on Public Access to Official Information as follows –
 - (i) in Part II, paragraph 2.1, after subparagraph (k) add the following subparagraph –

“(l) undertake the drafting of Committee and sub-committee agendas and agenda support papers so as to allow maximum disclosure;
 - (ii) in Part III, paragraph 3.1, after the number ‘1.2.3’ add the words ‘*and 2.1(k) and (l)*’;
 - (iii) In Part III, for paragraph 3.1(a) substitute the following paragraph–

“(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) to request the Greffier of the States to take the necessary steps to ensure that all matters recorded in Part B of the minutes are properly exempt from disclosure in accordance with the provisions of the Code.

PRIVILEGES AND PROCEDURES COMMITTEE

Note: The Finance and Economics Committee notes the proposed amendments to the Code of Practice on Public Access to Official Information and the impact that they may have to Committees’ procedures, and considers that any financial or manpower implications which arise from the proposition must be met from within Committees’ existing cash limits.

REPORT

Background

The Code of Practice on Public Access to Official Information was adopted, as amended, on 26th July 1999 and introduced on 20th January 2000. The purpose of the Code was to allow access, wherever reasonably possible, to information held by the States, Committees and departments of the States. The draft Code was the subject of amendment during the debate, and an amended Code was published after the conclusion of the debate.

The Code established a *minimum* standard, and Committees, in accordance with States' policy, are bound to meet those standards. Access to information occurs at several levels. Firstly, by application to a department for general, specific or personal information (regarding the applicant) that it holds. Secondly, the public is able to gain access to Committee agendas. Thirdly, the public may access Committee minutes to establish what decisions have been made.

The States, as part of the above decision, also 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, and charged the House Committee to take the necessary steps to enable the legislation to be assessed for priority for inclusion in the States legislation programme".

The functions of the House Committee were transferred to the Privileges and Procedures Committee which has the following term of reference in relation to public access to official information –

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.

The Privileges and Procedures Committee, having regard to other developments relating to the holding of information, established a Working Party with the following terms of reference –

to review the Code of Practice on Public Access to official information, the existing and proposed Official Secrets and Data Protection legislation, the Public Records (Jersey) Law 2002, and the existing arrangements for access to official information by members of the States and to make such recommendations for change including legislative change to any of the foregoing as the Working Party may think fit.

As a first stage, the Working Party reviewed the implementation of the Code of Practice, and recommended improvements pending an integrated review of the above legislation and the drafting of a law on public access to official information.

Additional information may be found about access to information in the Freedom of Information Consultation Paper (R.C.15/2003) presented to the States on 25th March 2003 by the Privileges and Procedures Committee, and in the projet 'Public Access to Official Information: Code of Practice' (P.183/99) which was not debated (and later superseded), but contained relevant information. The Committee has also commented on the proposition of Deputy Alan Breckon of St. Saviour, "Public Right of Access to Information, Financial and other records of the States of Jersey" (P.34/2003 lodged 'au Greffe' on 1st April 2003).

Progress

Guidelines were introduced for departments to follow in relation to the direct release of information to the public as a result of an application. These guidelines were circulated to departments and retained on the intranet. These applications have been monitored, initially 6-monthly, and now annually, to establish the use made of the Code in this way. Monitoring was introduced to review how the Code was being applied at the level of public access to information held in departments. Successive annual reports have shown that uptake has been generally low, with few instances of dissatisfaction being reported and virtually no use of the appeals procedure being made. There

have been no instances of frivolous or vexatious use or applications made in bad faith.

The situation relating to the preparation and publication of Committee agendas and minutes is less satisfactory. It may be helpful to reflect that the House Committee of the day decided that it would be inappropriate to be prescriptive about the implementation of the Code and decided that this should be left to the discretion of individual Committees. Therefore the decision as to whether an item is placed on the A or B agenda currently rests with each Committee President. This has led to an inconsistent system across Committees and in some cases it has been far from clear as to why some items have been classified as exempt from disclosure.

Discussion

In formulating this proposition and during discussion, the Committee considered the following matters –

1. During the original debate, Senator Stuart Syvret proposed an amendment that –

“Committees of the States shall grant access to –

- (i) their agendas;*
- (ii) support papers;*
- (iii) minutes.”*

The States adopted the proposal that agendas and minutes shall be made available, but not the proposal that agenda support papers shall be made available. The word ‘shall’ confers an obligation to release, and the States rejected the proposal that this obligation should exist in relation to agenda support papers. When the Code was re-drafted to include amendments adopted, this decision was interpreted as follows –

“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, except that Committees of the States, and their sub-committees, shall grant access to the agendas and minutes of their meetings, but not to agenda support papers;”*

It would appear that some have interpreted this article to mean that the States considered that Committees ‘shall not’ make agenda support papers available, however, there is nothing to prevent Committees from releasing agenda support papers if they do not contain exempt material.

2. Authorities are obliged, under Article 2.1(k), to undertake the drafting of documents so as to allow maximum disclosure. In order to comply with this obligation, papers would have to be restructured so as to contain exempt material in one part or certain exempt parts would have to be masked. Currently Committees have tended to prefer not to release agenda support papers rather than restructure them.
3. Every Committee decides how its own agenda items are classified but when a Part B minute is received by other Committees this classification is often respected. In some cases, the recipient Committee has been at a loss to see why certain matters have been considered to be exempt at all, but has felt obliged to honour the classification given.
4. There has been a tendency to ensure that politically sensitive decisions or difficult decisions remain on the Part B minutes, and this has been justified as being exempt because “it would constitute the premature release of a draft policy which is in the course of development”. If a decision has been taken, albeit a difficult one, which does not contain any other reason under the exemptions to the Code for it to be exempt other than that it was ‘difficult’ or possibly contentious, then it should appear in Part A of the minutes.
5. Where Committees have received progress reports on the implementation of policy, these have sometimes appeared on Part B of the agenda and in Part B of the minutes, again with the reason that “it would

constitute the premature release of a draft policy which is in the course of development”. But the policy decision has already been taken, and its progress is being monitored, and this cannot be seen to be confidential unless other exemptions are breached.

6. There remains the option, during consideration of a Part A item, for part of an issue to be recorded in Part B of the minutes if confidential information arises. This would comply with the obligation to prepare documents so as to allow maximum disclosure. Similarly, matters on Part B of the agenda which are found to be non-contentious can be recorded in Part A of the minutes. This should also apply to matters that were correctly placed on Part B of the Agenda because they were draft policy but which, following the Committee meeting and decision, can no longer be regarded as ‘draft’ policy and should be recorded as Part A minutes.
7. The more discursive structure of Committee minutes in Jersey has arisen for a number of reasons. In contrast with the United Kingdom, supporting papers to an agenda are not made available, nor is there a ‘Hansard’ style official report of meetings. Therefore the minutes have served as a record of how the Committee arrived at its decision, incorporating arguments from reports that have not been published, and also from oral contributions made during the course of a meeting not open to the public or recorded in any other way. This has proved to be an important feature of how decisions have been recorded in Jersey and has been strengthened by the advice of the Royal Court which finds consulting these records crucial when considering appeals against Committee decisions.
8. Departments are inconsistent in the way in which exemptions, provided for within the Code, are used on Part B items of the agenda. For example, either an exemption code is absent or exemption 3.2(a)(xiv) [because “it would constitute the premature release of a draft policy which is in the course of development] has figured prominently without due consideration to its relevance.
9. Minutes can be accessed at the States Bookshop and from departments once the minutes have been signed by the President of the Committee at a subsequent meeting as a true record. Some minutes may be available after 2 weeks where a Committee meets fortnightly and routinely signs its minutes at the next meeting. More often, a longer period elapses, and in the case of complex minutes, such as those of the Environment and Public Services Committee, there may be a lengthy delay in the disclosure of information which is an unacceptable delay unless a press release has been given either in writing or orally.

It is fair to say that some Committees have made strenuous efforts to allow access to the decision-making process to be available. They have concentrated items onto the Part A agenda, very rarely seeing the need for either a Part B agenda or minutes. It is the Committee’s hope, that through guidance, all States Committees will achieve this standard of openness.

Improvements to implementation of the Code to increase access

Improvements to the Code in respect of Committee work would be temporary, pending the proposed ministerial form of government with a strong scrutiny function which will enable in-depth study of decisions and how they are implemented.

When the States approved the Code of Practice on Public Access to Official Information on 20th July 1999, they agreed that the provisions of the Code, amended as appropriate in the light of practical experience, should be incorporated into legislation. They charged the House Committee (now the Privileges and Procedures Committee) to take the necessary steps to enable the legislation to be assessed for priority for inclusion in the States Legislation Programme. As such a Working Party, made up of members of both the Legislation and Privileges and Procedures Committees, was created to make amendments to the Code in the light of experience and work towards appropriate legislation.

The Working Party is currently preparing a draft Freedom of Information (Jersey) Law with the intention, subject to approval of the States, to implement this Law in time for the new ministerial system of government. The preparation of this draft is being viewed alongside the requirements of the Data Protection (Jersey) Law 1987, as

amended (and with future amendments), the Official Secrets Act and States members' access to information.

The existing Code has no impact on members' right of access to information, which is determined under the ruling of H.M. Attorney General given in June 1987.

The Code provides access to *information*, not to files or documents, and departments need not be wary about allowing access to files – this was never envisaged, unless it is acceptable and more convenient for departments to provide the files or documents.

Range of options available relating to Committee business

When Committees originally considered how to implement the Code in relation to their Committee business, they had a number of options, certain of which were prescribed by the States (**marked ***) –

- (a) **To make Part A agendas available (that is, the front sheet of the agenda without supporting papers) showing the matters to be discussed*;**
- (b) To publish Part A agendas either in paper form or on the internet;
- (c) To make all/some agenda support papers for Part A items available, or to amend or mask agenda support papers so as to enable them to be released;
- (d) To publish agenda support papers for Part A items, amended if appropriate, either in paper form or on the internet;
- (e) To prepare a separate summary of the decisions taken during Part A of the agenda for release to the media;
- (f) **To make Part A minutes available*;**
- (g) To make the front sheet of Part B agendas available, showing the exempt matters to be discussed;
- (h) **To draft documents in such a way as to ensure maximum disclosure, splitting them into two parts if necessary so that access to as much information as possible can be enabled*;**
- (i) To draft Part B minutes in such a way as to enable a list of the decisions to be made available, by referring to information in agenda support papers or parts of such papers not accessible by the public, and by preserving anonymity where required;
- (j) To draft minutes generally in a more concise fashion, referring, as appropriate, to agenda support papers which include reasoned recommendations, and which may form part of the record where a fuller record is required, perhaps for the purposes of the Royal Court;
- (k) To prepare a separate summary of the decisions taken during Part B of the agenda, and which are capable of release in a particular form, for release to the media;
- (l) **To publicise the discussion of items raised as 'Any Other Business' or at short notice, in order to make the public aware that such matters have been discussed*.**

The States required compliance with (a), (f), (h) and (l) above, and Committees across the board comply with the first two of these. There is very little evidence that any Committee complies frequently with (h) or (l). The remaining options, which are used in other jurisdictions, are not generally adopted.

Recommendations

The 2002 Annual Report on the Code of Practice to Official Information (R.C.25/2003) shows that during that year a total of 170 requests were made for information. Thirty-seven of these requests mentioned the Code, two of them were refused, one having regard to an exemption, and one because the information was too old and was not archived.

With regard to Committee agendas, agenda support papers and minutes, one application from the public for information was received for routine access to Part A agenda support papers, which was denied. However, the Committee concerned agreed that access to such papers would be considered on a case-by-case basis. There has been an improvement in access to information through increased consultation with the public in a managed way; however there is a desire on the part of the media and members of the public to have access to raw data, rather than pre-prepared consultation material.

Since the Code has been in operation, Committees have become more comfortable with splitting their agendas into Parts A and B, and more items have appeared on Part A of the agenda, resulting in improvements in the release of Committee information. The Code is a minimum standard only and Committees are encouraged to exceed its provisions. The Committee recognises that it has a role in issuing guidance to Committees in order to ensure consistency across Committees and departments. This role will be met by increasing the availability of information to the public, the media, pressure groups and to States members undertaking research, relating to matters discussed at Committee meetings.

The Privileges and Procedures Committee considers that there should be increased access to information to meet aspirations for greater transparency in decision-making and accountability, and that this can be achieved by –

- ensuring that as much information as possible appears in Part A of Committee agendas and/o minutes;
- making Part A agenda support papers available.

1. **Ensuring that as much information as possible appears in Part A of Committee agendas and/o minutes**

The first of the above objectives can be achieved by the Greffier of the States and other officers of the States Greffe having a more direct dialogue with Chief Officers on the incorporation of as many items on Part A of Committee agendas as possible, rather than this being only at the discretion of the President and/or Chief Officer concerned.

Article 2(7) of the Standing Orders of the States of Jersey requires that *'The Greffier shall be responsible for providing every Committee of the States with a secretary (Committee Clerk)'* and this duty includes direction of those Committee Clerks in the conduct of their duties. This includes the manner in which minutes are recorded, and the Greffier has so far not insisted on the transfer of minutes to the Part A of the minutes, as he has felt obliged to observe the decision of the House Committee that it should not be prescriptive where the implementation of the Code was concerned, and he has taken care not to overrule that decision. However it could be viewed as part of the Greffier's responsibilities to determine whether a minute falls within any of the exemptions in the Code, and therefore to direct that certain matters are incorporated into Part A of the minutes.

2. **Making available Part A agenda support papers available**

The second point relates to the availability of agenda support papers to the public. In the case of items included on Part A of the Agenda, there should be no reason why, in the majority of cases, the contents of the agenda support papers should not be made public, unless to do so would contravene any requirement of confidentiality. This would arise, for example, where an individual had written to an authority in the expectation that his letter formed part of correspondence between the two parties and would not be published more widely. An example of this might be a letter of representation from a private individual against a planning application which had been placed on Part A of the relevant agenda. Even if the word 'Confidential' does not appear on a letter, there can be implied confidentiality, and the author might not authorise the release of the contents of such a letter, which would therefore be exempt under Article 3.2 (b) of the Code.

In general, the release of agenda support papers prepared by officers should be possible. The Committee does not believe that the volume of paperwork involved would justify the levying of any copy charge, although the Code allows for this if the request is 'complex'. Such papers may contain advice of departmental officers based on their experience and expertise, together with recommendations, and the Committee believes that staff will adapt to preparing agenda support papers in an appropriate manner. In the past, there may have been a reluctance to release agenda support papers as it was felt to be more beneficial to manage the release of information, usually after a decision has been reached. Members of the public may feel more engaged in political life if they are able to access agenda support papers.

3. Ensuring that the public are promptly briefed on the decisions that have been taken at meetings

When first considering these amendments the Committee considered whether it would be appropriate to amend the Code to require Committees to prepare a summary of decisions taken after each Committee meeting and release this to the media within, say, 3 days.

After discussions with representatives of the local media the Committee has concluded that it would not be useful to make this an actual requirement of the Code. If agendas and agenda support papers are made available in advance of meetings the news media will, in practice, contact the President or Chief Officer to discuss the outcome of the discussions. This will normally be done very shortly after the meeting and will enable the media to report the decisions immediately. This will, in practice, be better than requiring the media to wait for a news release to be issued.

4. Summary of proposals

The Committee therefore proposes that the States –

- (1) should approve certain amendments to the Code so as to require Committees to make available agenda support papers for Part A items, amended or masked where necessary to avoid infringement of the exemptions to the Code so as to enable them to be released, either in paper form or on the internet;
- (2) request the Greffier of the States to be more proactive in ensuring that Part B of minutes contains only those matters that are properly exempt from the Code;

and the Committee proposes to issue the following guidelines on access to information –

- (a) that agendas should be made available four days before a Committee meeting;
- (b) supplementary agendas should be made available not later than the day of the meeting;
- (c) discussion of items raised as ‘Any Other Business’ or at short notice should be publicised in order to make the public aware that such matters have been discussed;
- (d) that copies of agenda support papers should be made available not later than the day of the meeting, with copies being made available to the media prior to the meeting day subject to the strict observance of an embargo;
- (e) to remind Committees of their obligation (in accordance with Article 2.1(k) of the Code approved on 26th July 1999) to draft all documents in such a way as to ensure maximum disclosure, splitting them into two parts if necessary so that access to as much information as possible can be enabled.

The Code, showing proposed revisions in italics, is attached at the Appendix to this Report.

Financial and manpower implications

The preparation of agendas and agenda support papers so as to allow maximum disclosure does not go beyond the original intention of Part 2.1(k) of the existing Code of Practice, but is merely being added as a separate item for absolute clarity. Those departments that already comply with the Code will not have any additional manpower or financial implications arising from this item.

Making agenda support papers from Part A items available will have a small cost attached as there may be multiple requests for these papers, particularly from the media and pressure groups, and photocopying and postage charges may be incurred. Nevertheless the Committee does not believe it is unreasonable to expect Committees to meet this small cost from their existing budgets in the interests of promoting more open

government. It should be noted that the Code allows for charges to be levied in the case of a complex request for information. There are therefore no additional financial and manpower implications arising out of this proposition.

**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 20th July 1999)**

Proposed amendments are in italics

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, 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.

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. 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 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 and agenda support papers so as to allow maximum disclosure.*

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 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

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

- 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.
- 1.2 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.