

PRIVILEGES AND PROCEDURES COMMITTEE

(16th Meeting)

22nd May 2009**PART A**

All members were present, with the exception of Senator B.I. Le Marquand and Deputy J.B. Fox.

Connétable J Gallichan of St Mary, Chairman
 Deputy J.A. Martin
 Deputy C.H. Egré (for a time)
 Deputy M. Tadier (for a time)
 Deputy M.R. Higgins

In attendance -

Mrs. A.H. Harris, Deputy Greffier of the States
 C. Borrowman, Assistant Law Draftsman
 Mrs. E. Martins, Data Protection Commissioner (morning session only)
 P. Vane, Deputy Data Protection Commissioner (morning session only)
 Mrs. K.M. LARBALÉSTIER, Acting Clerk to the Privileges and Procedures Committee (morning session)
 P. Monamy, Acting Clerk to the Privileges and Procedures Committee (afternoon session)

Note: The Minutes of this meeting comprise Part A.

Draft Freedom of Information (Jersey) Law 200-: Deputy Information Commissioner visit.
 670/1(8)

A1. The Committee, with reference to its Minute No. B1 of 8th May 2009 welcomed Mr. G. Smith, Deputy Information Commissioner, United Kingdom (UK) Information Commissioner's Office, in connexion with the draft Freedom of Information (Jersey) Law 200-.

It was noted that an audio recording of the meeting was being made and that a full transcript would be available in due course.

The Chairman thanked Mr. Smith for attending and explained that the Committee wished to draw upon the UK experience of introducing freedom of information legislation. Mr. Smith began by outlining the background to the introduction of the UK legislation and the creation of his post. It was noted that Mr. Smith had been appointed Deputy Information Commissioner in 2001, when the functions of the Data Protection Commissioner had been extended to cover freedom of information. Whilst the Freedom of Information Act had been passed in 2000 it had not come into force in full until 2005. Mr. Smith had not been involved with the drafting of the legislation but had participated in its implementation and enforcement. He advised members that he was more than happy to share his thoughts and experiences with the Committee but that it should be borne in mind that these were his own personal views as he was not a representative of the UK government. The Committee noted that whilst a government review of the 30 year rule relating to the retention of documents had been undertaken more general reform was not on the agenda at the present time.

The Committee asked Mr. Smith a series of questions relating to freedom of information legislation as follows -

The Chairman asked advice on how the States could introduce freedom of information legislation which was both simple and effective. She also asked whether releasing documents of a certain nature (like those which had been bound by the 30 year rule) could ever be appropriate in a small jurisdiction like Jersey. She also felt that it might be useful to discuss absolute and qualified exemptions.

Mr. Smith pointed out that it was important to ensure that any freedom of information legislation did not place restrictions on information which was presently routinely disclosed. He gave the example of information pertaining to the UK security services which was categorised as an absolute exemption. However, if a request for the address of Government Communications Headquarters (GCHQ) were to be received then this information would obviously not be withheld as a result of the absolute exemption as it was already in the public domain. In other words a common sense approach had to be adopted. There was a clear distinction between FOI requests and "business as usual" requests. The Chairman pointed out that it was imperative that the access to information which parliamentarians currently enjoyed was not limited as a result of the introduction of the legislation. Mr. Smith advised that the UK FOI act was complementary to rights of members of parliament in terms of the access to information they currently enjoyed. However, he highlighted the fact that such rights were extended to members to enable them to do their job within a constitutional framework and it did not always follow that information should be released into the public domain.

Mr. C. Borrowman, Assistant Law Draftsman reminded the Committee that Jersey was starting from a different basis in that under the existing Code of Practice individuals were entitled to make requests for information. Mr. Borrowman went on to ask Mr. Smith to discuss the issue of the cost of implementing the legislation and the likelihood of frivolous requests. Mr. Smith noted that the draft legislation followed the UK approach in relation to the measures which had been designed to prevent abuse of the legislation. These included consideration of the impact of complying with a request and the approach to dealing with vexatious requests. Mr. Smith explained that in the UK it had initially been felt that every request for information had to be complied with and, whilst there was a judgement to make in terms of justifying withholding information, this had to be balanced against the impact of compliance. He informed the Committee that some regimes applied a flat fee in terms of accessing information but he pointed out that this might result in certain sections of the community being prevented from exercising their rights. The Deputy Greffier of the States reminded the Committee that the States had already agreed to the general principle of providing information free of charge.

The Assistant Law Draftsman stated that applications for the release of information might be received from the national media and that the release of such information could, potentially, be used to the Island's disadvantage. The Chairman foresaw significant difficulties with limiting applications to Jersey based applicants and Mr. Smith felt that it would be unrealistic to think that this could be achieved with advances in technology. He pointed out that it would be quite simple to circumvent any jurisdictional restrictions by, for example, appointing an agent resident on island to submit an application.

Deputy M.R. Higgins discussed the issue of exemptions and, in particular, the release of information appertaining to policy advice. He felt that there was a tendency for government departments to keep such things secret and he asked how this issue had been dealt with in the UK. Mr. Smith advised that his involvement in matters of this

nature usually occurred when things went wrong, that is when information had been withheld. He stated that the basic approach was to look carefully at the wording contained within the particular exemption used to justify withholding the information and determine how it applied to that information. Questions like “was the information requested really about policy formulation or was it about how the policy had been implemented” had to be asked. However, the issue often boiled down to one of public interest and the standard argument was whether or not disclosure would have an adverse impact on future policy making. Disclosing information relating to policy development could potentially restrict creativity of thinking as individuals might not wish details of more unconventional ideas/concepts to be released. Conversely, and in favour of disclosure, was the public’s right to know how a policy had been arrived at. Deputy C.H. Egré suggested that such decisions required a judgement call on the part of the Commissioner. Mr. Smith confirmed that each case had to be dealt with on its individual merits. One of the issues to take into account was timing as the UK FOI Act was fully retrospective.

Deputy Egré commented that independence was crucial to the success of the role of the Commissioner and he asked who the Commissioner reported to. Mr. Smith advised that the Commissioner was answerable to parliament and not to a particular government Minister. The Office of the Information Commissioner was funded via the Ministry of Justice.

Deputy M. Tadier asked about the disclosure of legal advice and referred to the opinion of HM Attorney General that such advice should be absolutely exempt and not qualified exempt, as was the case in the United Kingdom. Mr. Smith stated that all of the absolute exemptions within the UK legislation applied to information which was either obtainable by another means (for example, via data protection legislation) or where disclosing such information would result in a public authority falling foul of some other legal provision/statutory bar. Mr. Smith also referred to legal professional privilege and the special relationship which existed between HM Attorney General and the government. Legal advice given by HM Attorney General was subject to a public interest test in the UK and, whilst it was likely that in 99 cases out of 100 the public interest was in maintaining the confidentiality of that advice, the potential always existed for an issue to arise which might lead to the disclosure of certain advice. Deputy Higgins referred to the disclosure of legal advice which had been given to parliament in respect of the legality of the Iraq war and Mr. Smith discussed the issues which had arisen in relation to this particular issue. He explained that the Commissioner had, in this particular case, ordered a disclosure statement which had resulted in most of the advice regarding the legality of the war being released.

The Deputy Greffier of the States asked whether Mr. Smith’s stance had changed over the years in relation to dealing with the various issues he came across. Mr. Smith confirmed that this had certainly been the case as the whole process had been a huge learning curve. Obviously issues of scale had to be considered, with the number of government departments being much greater in the UK. Since the introduction of the legislation a body of jurisprudence had built up and this had helped. Consistency was the biggest challenge and maintaining the principle that each case had to be dealt with on its own merits.

The Assistant Law Draftsman asked whether companies in which the UK government owned shares were covered by the FOI Act. Mr. Smith advised that only companies which were wholly owned by a public authority were covered by the legislation. However, he pointed out that with private companies now delivering many public services it was just as important for such bodies to be transparent. It was, however, likely that information relating to the delivery of public services would be held by the public authority, even if that information was created in the first

place by a private company.

The Deputy Greffier referred to earlier discussions regarding retrospection and advised that at an officer meeting held on 21st May 2009, it had been suggested that January 2000, when the Code of Practice had come into being, would be an appropriate starting point for the FOI legislation. Mr. Smith pointed out that records had to be in good order for departments to be able to comply with FOI requests. He discussed a situation in the UK whereby the Commissioner had issued a practice recommendation against the Department of Health because their records in relation to a particular issue had not been in order. It was confirmed that whilst this particular tool was a statutory power it was not legally enforceable. Mrs. E. Martins, Data Protection Registrar felt that the inclusion of such a statutory power within the Jersey legislation was vital. She also discussed the concept of transitional relief and advised that this had been a positive experience in the context of the implementation of data protection legislation in the Island. The Deputy Greffier of the States commented that it was likely that a 3 year transitional period would be required in order to give departments and the regulator an appropriate timescale within which to “gear up”. Mrs. Martins went on to advise the meeting that the implementation of the data protection legislation meant that a framework/foundation for the FOI legislation already existed and she stated that she felt very comfortable with how government departments currently handled information. She informed the Committee that the States employed very professional data protection officers in its departments and these officers, with support, could play a key role in the implementation of the FOI legislation. Mr. Smith advocated the benefits of extending the role of the Data Protection Commissioner to encompass that of Information Commissioner. He explained that in jurisdictions where this had not happened significant difficulties had occurred.

Mrs. Martins discussed the appeals process, the potential resource implications and the impact this could have on working relations between the Commissioner and States departments. She suggested that the appeal should be against the original decision in the same way as the data protection appeals process operated. It was agreed that the Committee would need to re-visit the appeals process element of the legislation. Mr. Smith advised that the UK experience was that 3 or 4 percent of decisions end up going to a tribunal but, significantly, in only 12 - 13 percent of cases a formal decision was issued. 1 in 3 of these went to tribunal.

Deputy Higgins raised the issue of exemptions and, in particular, the question of the disclosure of legal advice and whether it might be considered that certain advice could be released at a future date. Mr. Smith discussed the principle of government being able to obtain confidential legal advice and the provision of neither confirming nor denying that information was held on a particular subject. The Deputy Greffier of the States recalled that the States had supported the inclusion of the “confirm or deny” provision within the Jersey legislation. However, the Assistant Law Draftman advised that HM Attorney General had issues with this. With regard to the question of whether it was appropriate to release legal advice at some point in the future, Mr. Smith pointed out that requests were adjudicated upon as and when they were received so the question would not arise unless a future request was made. He stated that he could not envisage the release of legal advice ever falling into a class of information which should be routinely released. Deputy Higgins compared the role of the Island’s Attorney General to that of the UK Director of Public Prosecutions and he asked whether information relating to this aspect of his role could ever be considered appropriate for release. Mr. Smith advised that information relating to criminal investigations was exempt in the UK (but subject to a public interest test) and he informed the Committee that he could recall very few cases where such information had been released.

Deputy Higgins asked how information relating to the royal family and issues like the conferring of honours were dealt within the UK. He was particularly interested to learn whether information pertaining to the running of Government House would be exempt. Mr. Smith stated that any information relating to communications with the royal family were exempt (but subject to a public interest test) as was any information relating to the conferring of honours.

The Assistant Law Draftsman asked what parliamentary privilege covered in the context of FOI. Mr. Smith advised that, in consultation with the House authorities, guidance had been developed in the UK to define parliamentary privilege. However, parliament was self-regulating.

Deputy Higgins discussed the issue of commercial confidentiality and explained to Mr. Smith that States members had been denied the opportunity of seeing the contract for the Island's new energy from waste plant. Mr. Smith advised that it was important to remember that there was a right to obtain information and not a right to obtain a document so it was often the case that vast amounts of the information contained within a contract could be disclosed without any prejudice to commercial confidentiality. It was agreed that the subject of members' access to information would have to be discussed at a separate meeting of the Committee and it might be necessary to consider this matter prior to lodging "au Greffe" the draft legislation.

The Deputy Greffier of the States commented that there appeared to be a gap in the law enforcement section of the legislation in terms of activity established by statute. Mr. Smith felt there was also a need to think about the Information Commissioner in this context as he advised that in the UK a number of requests were actually received from individuals wishing to ascertain how the Information Commissioner had dealt with particular FOI applications. He suggested the inclusion of a provision pertaining to prejudicing the exercise of regulatory functions. Deputy Higgins asked whether a body like the Jersey Financial Services Commission would be required to disclose information. Mr. Smith advised that in the UK the Financial Services Authority Management Act contained a bar on the disclosure of information received in the course of the Authority exercising its functions.

The Chairman invited members and officers to ask any final questions before the Committee adjourned to the States Chamber for a meeting to which all States member's had been invited to discuss the UK FOI legislation with Mr. Smith.

Mrs. Martins asked Mr. Smith what, if anything, he would do differently with the benefit of hindsight. Mr. Smith advised that he felt that there should have been more focus on practical issues and preparation.

Deputies Higgins and Tadier expressed reservations with regard to the proposed appeals process, with particular emphasis being placed upon the roles of the Bailiff and H.M. Attorney General. Deputy Higgins asked about the UK experience of the tribunal system. Mr. Smith explained that the tribunal comprised a legally qualified chairman who was selected from a pool of legal professionals, 2 lay members (usually ex civil servants) and another individual who represented the interests of applicants. It was normal practice for the Chairman to write up the decision report and the Committee noted that, in all but one case, the decisions of the tribunal had been unanimous. With regard to the reservations expressed by the Deputies in relation to the roles of the Bailiff and H.M. Attorney General, Mr. Smith stated that this appeared to be a constitutional matter rather than one pertaining to the appeals process. He went on to discuss the systems operated in Scotland and the Republic of Ireland where there was no right of appeal, save for on a point of law.

Deputy Higgins asked about start up costs and whether the benefits outweighed the cost. Mr. Smith stated that significant start up costs could be anticipated and it was not that it had been estimated that £35.4 million per annum was spent on FOI. With regard to the benefits outweighing the costs, Mr. Smith asked how one would assess the cost of democracy.

Deputy Tadier felt that Mr. Smith had been quite diplomatic in responding to questions regarding the disclosure of legal advice and he asked what had lead the UK to categorise such advice as qualified exempt. Mr. Smith informed the meeting that he had not been involved at the point when this decision had been taken. However, he stressed that such a decision was a political one.

The Assistant Law Draftsman commented that some members appeared to be pushing for as much laxity as possible, having the view that they would always be in opposition. Whilst he supported more qualified exemptions than absolute he suggested that members' views might change if, at some point in the future, they were in government.

The Deputy Greffier compared the UK tribunal system to that of the Island's Complaints Board and stressed the need to ensure that enough legal professionals would be available to participate in the appeals process, if the Committee felt that persons with a legal background should chair any Tribunal. The Assistant Law Draftsman foresaw some difficulties with the appeals process in terms of the ability to argue a case without releasing information.

The Committee adjourned to the States Chamber to join States members. It was noted that an audio recording of this session would be made and that a full transcript would be available in due course.

The Committee reconvened at 2.45 pm to discuss the points raised by States members during the session with Mr. Smith.

The Chairman commented that the meeting held with Members of the States had proved to be very useful, with positive feedback having been obtained following earlier consultations on the draft Freedom of Information (Jersey) Law 200-. It was apparent that some room for manoeuvre remained in relation to the appeals process envisaged under the draft legislation.

Deputy Higgins indicated his desire to bring to the Island for discussion Mr. Maurice Frankel, Director, Campaign for Freedom of Information.

The Chairman suggested that the Committee was almost ready to make a decision, now that full information was available. Deputy Egré outlined the need for consideration to be given to appeals and to the Regulations which would support the proposed Information Commissioner. The Assistant Law Draftsman indicated that the draft Regulations, which had not yet been presented to the Committee, had been prepared such that they mirrored the position in the United Kingdom.

Deputy Martin asked whether, at a tribunal hearing on a Freedom of Information issue, it would be the decision of the Information Commissioner that would be appealed against. Mr. Smith indicated that provision could be made in the rules to allow for the Commissioner not to be involved. He further explained that in the United Kingdom, the appellant could either be the original complainant or the public authority concerned, enabling the Information Commissioner to withdraw. The position was slightly different where an ordinary citizen had asked for information

but had been turned down. In such a case it would not then be appropriate for the Information Commissioner to withdraw.

In response to a question posed by the Assistant Law Draftsman regarding costs associated with an appeal, Mr. Smith indicated that a Tribunal in the United Kingdom did have the power to award costs. The Committee was reminded by the Deputy Greffier of the States that it had already given consideration to this point in respect of 'pre-emptive costs orders.' Mr. Smith confirmed that on occasion the Tribunal had conducted a Hearing on the basis of papers presented to it, rather than by means of an oral hearing.

It was recognised that the Information/Data Protection Commissioner's concern had been the potentially onerous time commitment involved in preparing cases for court, and the deleterious effect this would inevitably have on her normal workload. It was suggested that there should not be a large number of appeals under the Jersey system. Mr. Smith indicated that in the United Kingdom there had been 400 appeals in just over 4 years, with extra resources having been applied as necessary. Mr. Smith confirmed that he personally did not appear in court to defend decisions, given that there were 4 lawyers on staff for that purpose. The Committee noted that in the United Kingdom, approximately 10 per cent (£500,000) of the budget was allocated to appeals.

The Assistant Law Draftsman asked whether the Committee envisaged an honorary or a paid Tribunal for Jersey, and it was agreed that this was a matter for further discussion. It was accepted that Jurats would need to consider case papers which - at present - they were reluctant to do. Having recalled that there were presently 3 lawyers on the Administrative Appeals (Complaints) Board, the Committee considered whether that Board could be utilised for the purposes of Freedom of Information appeals, possibly undertaking that work in parallel with the current Complaints Board work.

The Chairman outlined the desirability of producing something tangible without undue delay, and suggested that there was a need for the Committee to consider a draft 'Green Paper' in due course, with a view to presenting it to the States in July 2009 for lodging 'au Greffe' in the autumn, to be taken into consideration by the States prior to the year-end. Deputy Higgins reiterated his wish for the Committee to have further input - from Mr. M. Frankel - prior to finalising the draft 'Green Paper.'

The Committee agreed that it would also wish to give preliminary consideration to the draft Regulations at its next meeting, subject to any necessary revision or updating to be undertaken by the Assistant Law Draftsman.

The Chairman thanked Mr. Smith for providing assistance to the Committee and wished him a safe return home.