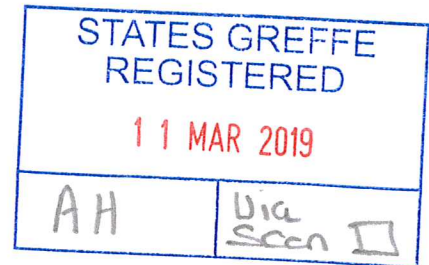


Deputy R. Ward Chairman,
Care of Children in Jersey Review Panel
Scrutiny Office
States Greffe
Morier House
St Helier
Jersey JE1 1DD



8 March 2019

Re: Draft Commissioner for Children and Young People (Jersey) Law 201-

Dear Deputy Ward:

I would like to thank the Care of Children in Jersey Review Panel for inviting me to comment on Article 8 of the Draft Commissioner for Children and Young People (Jersey) Law 201- (Draft Law). The Review Panel is interested to hear my views on whether the current drafting of Article 8 would limit the ability of the Commissioner to obtain information she needs to perform her duties, and any thoughts I might have as to the Terms of Reference for the review.

I should note that I lack the subject matter expertise necessary to speak definitively on precisely what information the Commissioner needs to perform her duties. Nevertheless, I am able to comment, as a fellow independent officer, generally on the subject of the importance of having access without delay to information necessary to conduct investigations and reviews. As the current drafting includes reference to my office, I can also comment on the impact that my staff and I might experience.

Unfettered Access to Information

As an independent officer with responsibility for investigating complaints and breaches under the Data Protection Law (Jersey) 2018 (Data Protection Law) and conducting reviews of responses to requests under the Freedom of Information (Jersey) Law 2011 (FOI Law), it is essential that I have without delay virtually unfettered access to the information that is necessary for me to perform those functions. I recognise that information subject to legal advice privilege should remain exempt from my review, in most cases. To make findings of fact and law, it is necessary for me to have all of the relevant information.

However, I recognise that I should be accountable to justify why the information is relevant. Were parties under investigation or review able to deny me access on other grounds (such as the information being exempt if requested under the FOI Law), it would obstruct my ability to conduct a thorough investigation and issue findings.

It appears self-evident that independent officers, like other law enforcement officials, should have access to information beyond that which would be made available to a member of the general public under an FOI request.

No Data Protection Issues

As a data protection advocate and regulator, I have no concerns about the Children's Commissioner being able to access relevant personal information that she requires to perform her duties. Protecting children is in the public interest and an appropriate justification for processing personal data under the Data Protection Law. I also note that Article 29 of the Draft Law prevents the disclosure of information that the Commissioner or members of her staff collect in the course of performing their duties, except where authorised by law. This imposes a legal requirement for the Commissioner to process the minimum amount of personal data necessary to perform her duties. Therefore, I believe that the exemptions in Article 8 of the Draft Law are unnecessary for the purposes of the protection of personal data, or other data for that matter.

Adjudication Disputes

I am also concerned about the prospect of adjudicating disputes between the Commissioner and public authorities refusing to disclose information to her. The timelines included in the FOI Law could lead to delays that put children at risk, particularly if a public agency were to challenge my decision in the Courts. Given that my decisions must follow the terms and conditions of the FOI Law, I would likely face situations where there is a dispute as to whether it would be in the public interest to release the requested information to the Commissioner.

In some circumstances I may adjudicate that the information should be released; in others I may conclude that it would not be in the public interest for the Children's Commissioner to have access to that information which could lead me to uphold a decision to deny her access. That would, in my view, likely result in a loss of public confidence in the FOI Law. The FOI Law should be an avenue of last resort for the public to obtain information that it cannot obtain by other means. There should be other processes in place for independent offices and law enforcement agencies to perform their statutory functions.

Terms of Reference

With respect to the Terms of Reference for the review, they appear appropriate to me. I note that similar legislation in Scotland and Ireland grant their Commissioners the power to require 'any person' to produce documents that are relevant to an investigation, but I do not have any direct experience in those jurisdictions. I have experience dealing with an equivalent official in British Columbia, where I was Deputy Information and Privacy Commissioner.

The right of access to information for the Representative for Children and Youth is stipulated as follows:

Right to information

- 10** (1) In this section, "**officer of the Legislature**" has the same meaning as in the *Freedom of Information and Protection of Privacy Act*, but does not include the representative.
- (2) The representative has the right to any information that
- (a) is in the custody or control of
 - (i) a public body other than an officer of the Legislature, or
 - (ii) a director, and
 - (b) is necessary to enable the representative to exercise his or her powers or perform his or her functions or duties under this Act.
- (3) The public body or director must disclose to the representative the information to which the representative is entitled under subsection (2).
- (4) This section applies despite
- (a) any claim of confidentiality or privilege, other than a claim based on solicitor-client privilege, and
 - (b) any other enactment, other than a restriction in section 51 of the *Evidence Act*.

I offer this example as being relevant to your terms of reference. I can attest that, during my term in British Columbia, there were no issues with respect to the Representative collecting personal data of others during the course of her duties.

In closing, I believe this to be an important issue, and I hope your review will consider my concerns seriously. I support the publication of my comments and would request an opportunity to speak directly to the review Panel.

Yours Sincerely



Jay Fedorak
Information Commissioner