

STATES OF JERSEY



FREEDOM OF INFORMATION: PROPOSED LEGISLATION

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

STATES GREFFE

PROPOSITION

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

- (a) to agree that the existing Code of Practice on Public Access to Official Information should be replaced by a Law, to be known as the Freedom of Information (Jersey) Law 200-;
- (b) to agree that the Law should incorporate the key policy outcomes listed at section 17, numbers 1 to 22, of the report of the Privileges and Procedures Committee dated 19th April 2005; and
- (c) to request the Privileges and Procedures Committee to bring forward for approval the necessary draft legislation to give effect to the decision.

PRIVILEGES AND PROCEDURES COMMITTEE

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

REPORT

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1. Introduction

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

2. Background

Freedom of Information (FOI) legislation has now been under consideration in Jersey for more than a decade. In March 1994 a Special Committee was tasked ‘to investigate the issues involved in establishing, *by law*, a general right of access to official information by members of the public,’ and since then a number of Members, amongst them in particular such stalwarts as Senator Syvret, have kept the flame burning.

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

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

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

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

That particular projet was defeated but the message was clear: Members believed in legislation as the way forward and indeed the intention always was that the Code would naturally precede a Law.^[1] It was initially considered to be experimental and, because it was limited in scope, the administrative costs were absorbed in existing departmental budgets. The Code was updated in June 2004 after the States unanimously approved a proposition entitled ‘Measures to Improve Implementation’ (P.80/2004) by 47 votes to 0.

Additional to this unanimous support for the enhanced Code, many Members expressed frustration that a Law had not yet been brought forward and urged the Privileges and Procedures Committee to progress FOI as a matter of urgency. There is clearly a strong political mandate in favour of legislation. However, this must be weighed against a prevailing climate that presumes against unnecessary new Laws or expenditure.

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

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

1. The public at present do not have a legal right of access to government information.
2. The Code does not cover publicly accountable bodies such as the Jersey Competition Regulatory Authority or the recently incorporated utilities. This is in potential conflict with Article 23 of the Public Records (Jersey) Law 2002 where there is provision for access to public records in the control of bodies that were formerly departments of the States.
3. There are inconsistencies of approach between Committees in giving public access to records that are not yet in the open access period (normally 30 years) and this needs to be corrected. Currently, Article 29 of the Public Records (Jersey) Law 2002 allows very wide discretion and

guidance is needed.^[2]

4. The existing appeals process provides for appeals but it does not provide an enforcement mechanism. This is because any review decision using the Administrative Decisions (Review) (Jersey) Law 1982 cannot be enforced.
5. The Code is managed and monitored as one of many tasks in the responsibility of the States Greffe rather than by an independent office.
6. Under the current Code the exemptions can be applied as absolute exemptions as there is no overriding public interest clause.
7. Certain existing exemptions overlap, lack rigour or are not in accord with a spirit of openness.^[3]
8. The Committee believes that Jersey is now out of step with many modern and democratic jurisdictions where the legal right of access to information has been long-established.
9. Jersey has a range of rules embedded in law which directly concern the management and protection of public information but access to that same information is merely governed by a non-legal Code. The Committee is of the opinion that it is inconsistent to leave access to information outside the law.

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

3. Administrative arrangements and individual rights

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

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

In both these categories it has been historically accepted in Jersey^[4] and elsewhere that a clear framework is best laid down in legislation rather than in a non-enforceable Code. If Freedom of Information remains outside formal legislation it seems as if it is the 'odd one out.' Indeed, on the assumption that the public right of access to information is no less important than these other Laws, this fact may be persuasive in its own right. However, it does not by itself mean that Freedom of Information should become embedded in law.

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

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

4. The rationalisation process

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

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

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

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

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

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

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

5. Reinforcing States aims

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

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

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

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

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

The recent publicity surrounding the JCRA Audit Report, which included serious allegations of mismanagement, served to reinforce negative public perceptions.^[5] Under this proposed Freedom of Information Law the title of that report would have been included on the Information Asset Register and much, if not all, of it would have been available for release without the public being dependent on a leak.

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

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

6. The demand for information

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

Jersey

<i>Year</i>	<i>Number of recorded requests</i>	<i>Number of initial refusals</i>
2000	36	5
2001	15	3
2002	37	2
2003	62	2

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

Scotland

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

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

7. Deficiencies of the Code

The deficiencies of the existing Code were highlighted by several States Members during the recent debate on the improvements.^[6] The rapporteur, Constable Derek Gray, stated: ‘This Code established a minimum standard and committees, in accordance with States policies, should meet these standards. Unfortunately in some cases the minimum has also become the maximum, and this was never the intention of the Code.’

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

If we continue with a voluntary Code, politicians and public servants know that they can in effect sidestep the publication of embarrassing or difficult information. Experience in the U.K. has shown that this is not a hypothetical scenario. U.K. Ministers have refused to comply with three rulings of the Parliamentary Ombudsman under the previous Open Government Code,^[7] which had been in operation from 1994 until the Freedom of Information Act 2000 came into force on 1st January this year. The Labour government simply ignored the decisions that it did not like, most notably regarding a list of gifts given to Cabinet Ministers. The lack of sanctions means there is always an alternative to compliance. It tells politicians and civil servants they never really have to change.

8. Other benefits of a Law

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

U.K. experience^[8] shows that organisations who manage their data efficiently will find the transition to a Law relatively painless, while those that are less well organised will experience some difficulty and greater manpower implications. The benefits of improved records management should not be underestimated.

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

Within the Law the Committee will propose a power to make Regulations to vary exemptions and to vary which public authorities are covered. There will be a power to introduce a publication scheme^[9]. There will also be a power to modify the role of the Commissioner if increased monitoring or enforcement were needed. This makes the Law a flexible instrument capable of evolving with time.

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

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

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

9. International perspective

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

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

In addition, adoption of a Freedom of Information Law, and more particularly the publication scheme that could follow, could enable Jersey to comply with the Aarhus Convention on Access to Environmental Information and Directive 2003/35/EC of the European Parliament^[10], which guarantees public access to environmental information and participation in decision making. The Environment Department has advised that Jersey could not currently meet the criteria, which include free access to government-held data that would be possible under a Freedom of Information Law.

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

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

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

10. Costs and disadvantages of a Law

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

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

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

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

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

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

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

A further issue is that there may be a cost to the individual who wishes to access information. The Committee's view is that information that would be free should include all agendas, 'A' agenda Minutes, all associated papers and annual business plans. Where a department publishes additional material it should as far as possible be available on the appropriate website or by e-mail, although in some cases it may be necessary to provide hard copies.^[11] That would be a decision for the department concerned.

Guidelines for the coming into force of the Freedom of Information Act in England and Wales are that most information should be free. However, this will not apply where retrieval costs may exceed £450 for local government material and £600 for central government material.

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

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

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

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

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

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

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

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

12. Monitoring

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

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

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

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

13. Enforcement

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

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

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

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

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

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

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

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

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

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

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

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

Apart from other arguments in favour of this route the Court provides an independent and impartial tribunal that fully complies with Article 6 of the European Convention on Human Rights.^[12]

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

15. Political and public support

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

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

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

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

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

A key issue raised by the Media has been whether the net of exemptions has been thrown too wide. The Committee shares the concern yet wishes to tread very carefully. It is noted that section 36 of the Commonwealth model law allows disclosure of exempt material in the public interest. However, the Committee are mindful that alongside such a power to release exempt material there must also be the appropriate protection for the individual against a release which was motivated by malice or was not justified by public interest. The celebrated Naomi Campbell case^[13] gives useful guidance on the matter as does the United Kingdom Code of Practice of the Press Complaints Committee. Further guidance on what constitutes public interest has recently been given in the European Court of Human Rights^[14].

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

16. Further consultation

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

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

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

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

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

BBC Radio Jersey

17. Policy outcomes

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

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

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

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

1. All information should be capable of being considered for release. In particular, information created before the Code came into force on 20th January 2000 and which is not yet in the Open Access Period should be released on request unless exempt in accordance with the agreed list of exemptions.
2. There may be circumstances when there is an overriding public interest greater than the purported exemption. Such an interest will be built into the Law but can be appealed against.
3. All legal persons (both individual and corporate) should have a right to apply, regardless of their nationality or residency.
4. Application, especially for readily accessible information, should not be restricted by having to be in writing.
5. Authorities that are emanations of the state or majority owned by the public should be bound to release relevant information. [\[15\]](#)
6. The Law would not apply to States-aided independent bodies. [\[16\]](#)
7. A formal publication scheme is not yet proposed but authorities should be encouraged to publish as much information about themselves and their activities as possible and will be required to use the Information Asset Register.
8. Authorities are to be encouraged to develop records and document management schemes which will facilitate retrieval of requested information.
9. Information should in general be released free of charge [\[17\]](#) and proportionate assistance should be given to a special need, such as an individual's sight impairment.
10. Information should be released as soon as practicable, acknowledgements should be within

5 working days and the 15 working day guide is to be seen normally as a maximum for a decision to release the information or not.^[18]

11. Information created before the introduction of the Code (20th January 2000) should be available for release, but because it has not yet been categorised its release may take longer than information created since the Code. This means that where justified by the Commissioner, the 15 working day limit may be exceeded.
12. Existing exemption (v) should be simplified to refer to legal professional privilege alone. Medical confidentiality^[19] and legal advice given to an authority^[20] are adequately covered elsewhere in the exemptions. The explicit retention of these provide scope for serious undermining of the Law.
13. Existing exemption (xii), concerning the competitive position of an authority, should be amplified to give the same guidance concerning the word 'prejudice' as is given concerning the competitive position of a third party in exemption (xi). This would then be as follows –

“prejudice the competitive position of an authority if and so long as its disclosure would, by revealing commercial information, be likely to cause significant damage to the lawful commercial or professional activities of the authority;”.
14. Existing exemption (xiii), concerning employer/employee relations, should give greater guidance concerning the word 'prejudice' as follows –

“prejudice employer/employee relationships or the effective conduct of personnel management if and so long as its disclosure would, by revealing the information, be likely to seriously put at risk a fair resolution of a dispute or related matter;”.
15. Existing exemption (xiv), concerning the premature release of a draft policy, should be amplified so that its purpose is clearly understood as follows –

“constitute a premature release of a draft policy which is in the course of development. This cannot exempt information relating to that policy development once the policy itself has been published, nor is it a blanket exemption for all policy under development;”.
16. Existing exemption (b), concerning information originally given in confidence has no place in a Freedom of Information Law as exemption (i) protects personal information, exemption (v) provides for legal professional privilege and exemption (xi) protects commercial confidentiality.
17. Existing exemption (c), concerning whether an application is frivolous, vexatious or made in bad faith is retained but clarified by the inclusion of the statement as follows –

“Only rarely should this exemption be used and an applicant must be told that he retains the right to appeal against the refusal to release the information;”.
18. In particular circumstances, if a Law Officer or the police reasonably believes that they should neither confirm nor deny the existence of information then the Law should not require them to do so.^[21]
19. Offences and penalties are necessary to make the Law effective and these include the offence of an unreasonable failure to release information that is not exempt.
20. There should be one Information Commissioner combining the role of Data Protection Registrar and oversight of Freedom of Information. This office must be effectively resourced.

21. The existing Data Protection Tribunal and appeals system should be adopted and adapted as necessary to consider Freedom of Information appeals.
22. The combined and independent function of the Information Commissioner should have just one States Committee to oversee it and it is proposed for that Committee to be the Privileges and Procedures Committee.

18. Law Drafting time

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

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

19. Human Resource implications and training

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

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

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

20. Financial implications

Cost to individual authorities

The Committee is *not* proposing implementation of a new record management system nor a detailed and enforceable publication scheme, both of which are potentially costly. The Committee's understanding is that the Policy and Resources department is now co-ordinating corporate-style Business Plans which are to be made public, they are pursuing a £9.3 million change programme, there is a new Call Centre and the *Livelink*^[22] project, along with a Records Management pilot scheme at the Education department. These suggest that the public service has already embarked on sufficient work to address the issue of data and information management.

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

It is expected that any additional resource requirement, over and above that needed under the existing Code will only arise during a transitional period. It is expected that the Information Commissioner will lend as much support as possible to ensure that such costs are minimal. The United Kingdom experience, based on the launch amid much fanfare of the equivalent legislation on 1st January 2005 has seen a surge in applications for access and a

figure of 40,000 has been quoted. Were this to happen proportionally in Jersey, perhaps 60 requests across all States departments and other authorities could be received. Averaged across these organisations this is a figure of 2 or 3 additional requests per organisation.

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

Funding the Information Commissioner's office and Tribunal

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

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

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

Training costs

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

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

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

The bottom line

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

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

21. Conclusions

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

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

Attached: Law Drafting Instructions

Law Drafting Instructions: Freedom of Information

Broad Policy Statement

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

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

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

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

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

Other jurisdictions

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

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

Fundamental principles

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

Structure and layout of the Law Drafting instructions

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

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Appendix 3: Obligations of an authority

Appendix 4: Guidance to Officers to facilitate access to information

1. Interpretation and application

1.1 Interpretation

Terms that are likely to need definition are as follows –

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

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

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

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

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

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

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

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

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

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

1.2 Application

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

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

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

Rights of States Members – Under Article 33 of the States of Jersey Law 2000 Members of the States of Jersey have special powers privileges and immunities which include immunity from prosecution regarding anything said or written in States proceedings. They traditionally enjoy access to otherwise exempt material for the purpose of fulfilling their role as States Members. In all other respects they have equal rights with other members of society and this Law, with these provisos, applies to them.

The Law should bind the Crown and the public sector to the same extent as it does in Article 63 of the Data

Protection (Jersey) Law 2005.

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

2. Purpose and obligations

2.1 Purpose

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

- (a) establishing a general public and legal right of access to information;
- (b) supplying the reasons for decisions to those affected, except where there is statutory authority to the contrary;
- (c) establishing an effective appeals procedure.

while, at the same time –

- (i) safeguarding an individual's right to privacy; and
- (ii) safeguarding the confidentiality of information classified as exempt from release where exemption is in accordance with the Law and is only to the extent necessary in a democratic society.

2.2 Obligations of an authority

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

Each authority should appoint a Public Records Officer who shall be the same person as the Public Records Officer as defined in Article 13 of the Public Records (Jersey) Law 2002. That person should have the duty to ensure the authority by which he is employed complies with the requirements of this Law.

2.3 Obligations of an applicant

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

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

3. Gaining access to information

3.1 Access

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

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

exempt information, and shall make available the minutes of their meetings; and

3.2 Request process

Application may be made by any person being –

- (a) an individual, whether a Jersey resident or otherwise;
- (b) a body corporate whether incorporated in Jersey or elsewhere;
- (c) a corporation sole (whether incorporated or not); or
- (d) An individual acting on behalf of any authority listed in Appendix 1.

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

The applicant shall –

- (a) apply by any reasonable means to the relevant authority;
- (b) identify with reasonable clarity the information that he requires;
- (c) provide an address to which the information can be sent, if he so wishes.

The process of gaining access to information should be interpreted under the guidance of the associated flow charts to be found in Appendix 4.

3.3 Requests for personal data

If there is a conflict in the application of this Law and the Data Protection (Jersey) Law 2005 the latter should normally take precedence in that regard. However, this must not prevent a public interest enforcement notice being issued to require the release as a result of an appeal being made to the Information Commissioner.

A request for personal data should be treated as if it is made pursuant to the relevant Articles of the Data Protection (Jersey) Law 2005. Therefore authorities would grant access to personal data, to an applicant who is the data subject, in accordance with that Law and they would not grant access to personal data, to a person who is not the data subject, except in accordance with that Law.

3.4 Forms

Where an application is made in writing it may be done by letter or it may be done on a form designed for the purpose by the authority. Such a form shall not be unreasonably complex and shall only request the identity of the applicant, a contact address, the information requested and the date by which it is required.

3.5 Those empowered to release information

In the case of information already categorised as not exempt, release may be by any officer of an authority who has been authorised to do so.

In the case of information that has not been categorised and which was created on or since 20th January 2000 release should be only by the Public Records Officer or Chief Officer/Chief Executive of the authority concerned.

In the case of information that was created before 20th January 2000 release should be by the Chief Officer/Chief Executive of the authority concerned, or following the direction of the Minister responsible or following the issue

of an Enforcement Order.

Where the authority is a department of the States, the Minister responsible for that department has a role in the appeal process (as set out in Part 7, below) and as such may instruct his Chief Officer to release information he believes is not exempt.

3.6 Authority may defer or delay access in certain circumstances

There may be valid reasons why information cannot be released within the 15 working day period required by Appendix 3(c). Where delay or deferment is necessary, the applicant must be told why and the authority must endeavour to release the information as soon as possible after the 15 working day period.

Such a delay must not prevent the applicant exercising his right of appeal, which is to commence immediately after the fifteen day period has expired.

A valid reason could be the need to study information that was created before 20th January 2000 and which needs to be classified as exempt or otherwise. Information that is not held in a single location or which needs to be extracted from exempt information may also require more time to prepare.

3.7 Appeal process after failure to gain access

An applicant should have the right of appeal as set out in at 7: Appeals and enforcement procedures.

If an applicant is aggrieved by an authority's decision to fail to correct personal data in a record in accordance with the Data Protection (Jersey) Law 2005, he should have the right of appeal as set out in that Law.

3.8 Public Records (Jersey) Law 2002

In order to give guidance regarding Article 29 of the Public Records Law, the release of any information (including public records) which is not in the open access period as defined in that law (that is, for the most part information created more than 30 years ago) and is information created prior to 20th January 2000 (the date of introduction of the Code) should be released where there is no other appropriate exemption or where the Commissioner issues a public interest enforcement order.

Information that has reached the Open Access period in terms of its age would cease to be exempt, in accordance with the Public Records Law.

3.9 Release of otherwise exempt information on grounds of public interest

The Information Commissioner should have the power to order the release in the public interest of otherwise exempt information. There must be a legitimate and significant public interest which is of greater importance to society than the reason for exemption. A decision to allow such a release of information would normally follow an application in writing by an individual but this is not exclusive and the Information Commissioner could act without such an application.

The Law Draftsman will wish to refer to the existing powers of the Data Protection Registrar.

Information that is to be released on public interest grounds and that would otherwise be exempt may only be released as a result of an Enforcement Order made by the Commissioner.

4. Publication and Management of Information

4.1 Publication of information

It should be the duty of every authority to make information freely available that relates to any of its public functions. Typically this will include States departmental Business Plans and policies and an annual Report and

Statement of accounts where appropriate. Wherever practicable, access to information should be through electronic form and the States Contact Centre.

Authorities should be required to maintain the existing Information Asset Register under the guidance of the Commissioner.

However, at this stage it is not proposed to introduce a more extensive statutory scheme or statutory guidelines.

In order to allow the States to introduce a formal publication scheme at a later date there should be a power to do so by Regulation.

4.2 Record management policy

Records management is defined in Article 7 of the Public Records (Jersey) Law 2002. Any formal policy should be introduced by States Regulation under Article 38 of that Law.

5. Exemptions

The only information that is exempt from disclosure is as per Appendix 2, below. There should be a power to amend the list by Regulations made by the States.

As long as it is exempt, exempt information is to remain confidential.

Exempt information would also include information that is the subject of an appeal to the Information Commissioner, Tribunal or Royal Court, until a decision has been made.

6. Office, duties and powers of Information Commissioner

The Information Commissioner shall be the Data Protection Registrar (Data Protection Commissioner), who shall have the following duties which are additional to those already prescribed under the Data Protection (Jersey) Law 2005.

6.1 Duties

1. To oversee the proper operation of the Law and in particular to advise and assist both those who wish to access information and those who may be uncertain whether to release the information;
2. To oversee the maintenance of the information asset register.
3. To set the lower limit of the cost of consultancy reports referred to in Appendix 3(3), which are to be listed in the information asset register. This is currently set at £2,000.
4. To hear, investigate and adjudicate on complaints by request.
5. To facilitate appeals to the Tribunal.
6. To make an annual report with input from all authorities as required by this Law. The report will record the number and nature of complaints and how they were resolved. It will also report on the current perceived effectiveness of the Law and make recommendations on any changes to the Committee and the States.

6.2 Powers

1. To issue an enforcement notice to require the release of information.

2. To issue an enforcement notice to require the release of information at a reduced fee.
3. To issue an enforcement notice to require an authority to comply with any of its obligations under this Law.
4. To issue an information notice in order that he may have confidential sight of any information concerning the subject matter so that he can make an informed decision.
5. Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to information under this Law, he may initiate a complaint in connection thereof.

The powers should be kept as simple as possible. Part 5 and Schedule 9 of the Data Protection (Jersey) Law 200 should be a guide here.

6.3 Expenses incurred by Information Commissioner

The expenses incurred by the Commissioner and the Tribunal in discharging their functions and any expenses of the States or the Committee that relate specifically to the Commissioner or the Tribunal (including expenses relating to salaries, other remuneration, pensions and office accommodation) should be met from the general revenue of the States.

7. Appeals and enforcement procedures

7.1 Appeals

1. Appeals may be made on any of the following grounds –
 - (a) The information requested is believed not to be exempt under the Law.
 - (b) There has been unreasonable delay in the release of the information.
 - (c) The request appears to have been ignored.
 - (d) The information requested should be released on the grounds of public interest, even though it would otherwise be exempt.
 - (e) The charges made for the release of information that would require extensive searches of records were unreasonable and potentially prohibitive.
2. An applicant who is aggrieved by a decision by an officer of an authority under this Law may in the first instance appeal in writing to the Minister or President of the Committee concerned, or where there is no Minister or Committee concerned, the applicant may appeal direct to the Information Commissioner.
3. An applicant who is aggrieved by the decision of the Minister or President of the Committee concerned under this Law, may appeal to the Information Commissioner.
4. Appeals from the decision of the Information Commissioner will be heard by the Information Tribunal and the Data Protection Tribunal will fulfil that role.
5. The Royal Court will consider any appeal to it on a question of law.
6. The process should not expressly exclude or include the use of the Administrative Decisions (Review) (Jersey) Law 1982, as amended.

7. The process should not expressly exclude or include the use of the process known as Judicial Review.
8. Personal data – Where the information requested relates to personal data, as defined in Article 1 of the Data Protection (Jersey) Law 2005, that Law and its due process should apply.

7.2 Detailed process

7.2.1 Departmental, company or institutional level

1. The officer who has refused access or who has set the fee will refer the matter to his Public Records Officer (as defined in Public Records (Jersey) Law 2002, Article 13, hereinafter called the PRO).
2. The PRO will re-assess the grounds for refusal or the fee and if possible, release the information or release it at a reduced fee as appropriate.
3. If the PRO decides not to release the information or to reduce the fee he must tell the applicant the reason and explain the applicant's right of referral to the Minister and Information Commissioner or to the Information Commissioner alone where no Minister is responsible for the authority concerned. (Where the PRO is not also the Chief Executive, the PRO will seek the advice of the Chief Executive prior to making his decision).

7.2.2 Ministerial level (where relevant)

1. If the applicant refers the matter to the Minister, the Minister will re-assess the matter and if possible, direct the PRO to release the information or release it at a reduced fee as appropriate.
2. If the Minister decides not to alter the previous decision he must tell the applicant the reason and explain his right to seek an enforcement notice from the Information Commissioner.

At either stage above, the Commissioner may be requested to give advice before a decision is made.

7.2.3 Information Commissioner

1. On referral, the Commissioner will re-assess the matter in accordance with the Law, including whether there may be an overriding public interest to release the information. If the Commissioner is satisfied that the information should not be exempt from release, or should be released at a reduced fee, he may give that advice to the authority concerned.
2. Where that advice is not accepted the Commissioner may serve an enforcement notice on the PRO requiring him to release the information or release it at a reduced fee as appropriate.
3. On receipt of the enforcement notice, the PRO will either –
 - (a) act on the enforcement notice within the prescribed time; or
 - (b) also within that time, a decision is made (by the Minister where relevant) to appeal to the Information Tribunal.
4. Where the Commissioner has declined to issue an enforcement notice, the applicant may lodge an appeal to the Information Tribunal.

7.2.4 The Tribunal

The appeals procedure and proceedings should be based as far as possible on those provided in the Data Protection

(Jersey) Law 2005.

A. Appeals against a notice to release information or to release it at a reduced fee

The Tribunal would allow an appeal against an enforcement notice if it decides –

- (a) that the notice is not in accordance with the Law; or
- (b) to the extent that the notice involved an exercise of discretion by the Information Commissioner, that the Commissioner ought to have exercised the discretion differently.

If it does not come to such a decision, the Tribunal would dismiss the appeal.

In allowing such an appeal, the Tribunal would substitute its own decision not to release the information. It would also be expected to review any determination of fact on which the enforcement notice in question was based and in doing so would be expected to consider any change in circumstances.

B. Appeals against a refusal to issue a notice to release information

The Tribunal would allow an appeal against a refusal by the Information Commissioner to issue an enforcement notice if it decides –

- (a) that the refusal was not in accordance with the Law; or
- (b) that the exercise of discretion by the Information Commissioner in refusing to issue an enforcement notice ought to have been exercised differently.

If it does not come to such a decision, the Tribunal would dismiss the appeal.

In allowing such an appeal, the Tribunal would substitute its own decision and direct the Information Commissioner to issue an enforcement notice. On such an appeal, the Tribunal would be expected to review any determination of fact on which the Information Commissioner's decision was based and in doing so would be expected to consider any change in circumstances.

In determining whether or not an enforcement notice should have been issued, the Tribunal would need to consider, in all the circumstances of the case whether the decision was reasonable. It should also consider whether in allowing the release of information such an action is proportional to the importance of that information relative to a legitimate claim of public interest.

7.2.5 Royal Court

A party to an appeal should be able to appeal from the decision of the Tribunal on a question of law to the Royal Court.

The decision of the Royal Court would be final and a refusal to comply would be taken as contempt of court.

The Court will address any issue of obstruction of the Tribunal as if it were contempt of the court, as per the Data Protection (Jersey) Law 2005, Schedule 6(6)).

7.3 Sanctions under the appeal process

Failure to obey an enforcement or information notice where an appeal has been lost would be punishable, as per Article 61 of the Data Protection (Jersey) Law 2005:

- (a) on conviction on indictment – to a fine; or

- (b) on summary conviction – to a fine of level 4 on the standard scale.

(These penalties are to be confirmed by the Attorney General at the appropriate time)

Obstruction of the Tribunal should be an offence as per the Data Protection Law, Schedule 6(6).

8. Matters concerning offences

It is recommended that proceedings for an offence would only be initiated by or with the consent of the Attorney General.

8.1 Offences

In addition to sanctions necessary to enforce the appeals process, there is a requirement for additional offences as follows –

1. Unreasonable failure to provide the information requested.
2. Unreasonable failure to provide the information requested within the period specified.
3. Provision of fraudulent or partial information.
4. Unreasonable denial of the existence of information that did in fact exist.
5. Unreasonable refusal to indicate whether or not the information exists.
6. Categorising information as exempt when no exemption could be reasonably applied.
7. Acceptance of a bribe.
8. Unauthorised destruction of exempt material.
9. Failure to obey an enforcement or information notice that has not been appealed against.
10. Failure to obey an enforcement or information notice issued on the directions of the Tribunal.

8.2 Penalties

Persons guilty of offences listed 1 to 10 in 8.1 above should be subject to penalties as follows –

- (a) on conviction on indictment – to a fine; or
- (b) on summary conviction – to a fine not exceed level 4 on the standard scale.

(These penalties are to be confirmed by the Attorney General at the appropriate time)

8.3 Defences and protection against legal action

1. Where an authority or individual is believed to have committed an offence under 8.1.3, above, it should be a defence that the provision of partial information was unintended providing that reasonable steps were taken to ensure the information was complete.
2. Where an authority or individual is believed to have committed an offence under 8.1.4 or 8.1.5, above, it should be a defence that this was done with the belief that to do otherwise would infringe one or more of the exemptions listed at Appendix 2. It will not be a defence if such a belief is incapable of substantiation.

3. Where information is released in good faith there should be no proceedings, disciplinary, civil or criminal actions commenced against the authority or person responsible. 'Good faith' would include knowing or reasonably believing the information was not exempt. It should also include the release of information without which it was reasonably believed there was a serious risk of harm to health, safety or the environment.

8.4 Liability for offences

Liability may be personal or corporate. Where an offence is committed by an authority listed in Appendix 1 and it is proved to have been committed with the consent of or be attributable to an individual employed by that authority, the person should also be guilty of the offence and liable in the same way as the authority to the penalty so provided.

9. General

9.1 Functions of the Committee and the Greffier of the States

The Committee should oversee the legislation to ensure it remains effective. It will be the function of the Committee to bring forward amendments and Regulations. From time to time it may be that the categories of exemption or the bodies to whom the Law applies will need amendment.

Before the Committee decides that any project for the making of Regulations or amendments be lodged in the States, it should consider any proposals made by the Commissioner and consult the Commissioner.

The Greffier should oversee and maintain the independent function and duties of the Commissioner by ensuring adequate funding of those duties whether defined in this Law, the Data Protection (Jersey) Law 2005 or any other enactment. Funding should be agreed by the Greffier and the Commissioner as part of the annual process by which the Greffe is resourced under Article 10 of the Public Finances (Jersey) Law 200.

This will involve a transfer of function and funding whereby the Finance and Economics Committee currently provide the funding from within its budget for the existing Data Protection Registrar.

9.2 Fees

Authorities must normally give access to information free of charge, unless that policy has been amended by 9.3, below.

However, the Law should allow a request which would require extensive searches of records, to attract a fee being a reasonable contribution to the actual cost of providing the information. This is an amplification of what is already stated in the Code and repeated at Appendix 3(f).

Where a charge may be necessary, the U.K. guideline is that public bodies should provide free of charge anything that costs less than £450 to produce and that the figure for central government is £600. Authorities who are faced with the need to set a fee should not automatically charge the full cost and a contributory charge would be deemed as more appropriate.

An applicant must be given an estimate of any fee that is necessary in advance. An authority should waive or reduce the fees on the grounds of hardship.

The Commissioner should bear these guidelines in mind in considering a complaint concerning excessive fees.

The States should be able to vary the no-fee policy applicable to most information, by Regulation.

9.3 Power of the States to Make Regulations

9.3.1 There should be powers for the States to make Regulations so that –

1. A mandatory publication scheme may be introduced;
2. The duties of the Information Commissioner may be extended;
3. The no-fee policy may be amended;
4. The list of authorities appearing in Appendix 1 may be extended;
5. The list of exempt information appearing in Appendix 2 may be reduced;
6. The obligations of an authority appearing in Appendix 3 may be extended;
7. The States can implement provisions of International Conventions and EU Directives and Regulations (see below).
8. The Law should allow for the Regulations to create offences, punishable up to the same levels as indicated at 8.2 above.

9.3.2 Regulations concerning U.K., E.U. and International Law

Provision should be made for the States to be able to implement aspects of U.K. and E.U. law and international conventions that address issues of public access to information. These would include, but should not be exclusive to –

1. E.C. Directive 1990/313/EEC;
2. Environmental Information Regulations 1992 (U.K. SI1992/3420 as amended);
3. The Aarhus Convention on Access to Environmental Information 1998;
4. E.U. Directive 2003/4/E.C., which repeals Directive 1990/313 above;
5. E.U. Directive 2003/35/E.C.;
6. Environmental Information Regulations 200-, which will repeal the 1992 SI above.

9.4 Consequential amendments

It is intended that changes should be kept to the minimum. Laws that have overlapping interests include the Data Protection (Jersey) Law 2005 and Public Records (Jersey) Law 2002. The latter may need amendment at Article 29 in order to comply with the access policy stated at 3.7, above.

The Administrative Decisions (Review) (Jersey) Law 1982, as amended will only need to be amended if there is to be explicit use of the Administrative Decisions Review process. The Law is currently only applicable to Committees and departments, it has no power to enforce and no requirement to make its findings public.

9.5 Commencement

To come into force by Appointed Day Act and different days are to be possible for different Parts or Articles.

Authorities

This Appendix lists those bodies deemed authorities for the purpose of this Law –

The States of Jersey;

Committees of the States, their sub-Committees and Departments;

Ministers of the States and their Departments;

a States funded body;

a non-Ministerial States funded body;

an independently audited States body;

Jersey Archive;

the JCRA;

the JFSC;

any other public institution not included specifically in this list;

any institution or organisation not included specifically in this list but which keeps or has kept public records, (insofar as it possesses those public records or other information);

the 12 parishes.

Definitions

For definitions of types of body, please reprint from Article 1 of the Public Finances (Jersey) Law 200.

A public institution should have the same meaning as per Article 5 of the Public Records (Jersey) Law 2002.

Exempt Information

Unless there has been a public interest enforcement notice issued for its release, information shall be exempt from disclosure, if –

- (a) such disclosure would, or might be liable to –
 - (i) constitute an unwarranted invasion of the privacy of an individual or which would constitute a breach of the Data Protection (Jersey) Law 2005;
 - (ii) prejudice the administration of justice, including fair trial, and the enforcement or proper administration of the Law;
 - (iii) prejudice legal proceedings or the proceedings of any tribunal, public enquiry, Board of Administrative Appeal or other formal investigation;
 - (iv) prejudice the duty of care owed by the Education Committee to a person who is in full-time education;
 - (v) infringe legal professional privilege;
 - (vi) prejudice the prevention, investigation or detection of crime, the apprehension or prosecution of offenders, or the security of any property;
 - (vii) harm the conduct of national or international affairs or the Island's relations with other jurisdictions;
 - (viii) prejudice the defence of the Island or any of the other British Islands or the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with those forces;
 - (ix) cause damage to the economic interests of the Island;
 - (x) prejudice the financial interests of an authority by giving an unreasonable advantage to a third party in relation to a contract or commercial transaction which the third party is seeking to enter into with the authority;
 - (xi) prejudice the competitive position of a third party, if and so long as its disclosure would, by revealing commercial information supplied by a third party, be likely to cause significant damage to the lawful commercial or professional activities of the third party;
 - (xii) prejudice the competitive position of an authority if and so long as its disclosure would, by revealing commercial information, be likely to cause significant damage to the lawful commercial or professional activities of the authority;
 - (xiii) prejudice employer/employee relationships or the effective conduct of personnel management if and so long as its disclosure would, by revealing the information, be likely to seriously put at risk a fair resolution of a dispute or related matter;
 - (xiv) constitute a premature release of a draft policy which is in the course of development. This cannot exempt information relating to that policy development once the policy itself has been published, nor is it a blanket exemption for all policy under development;

- (xv) cause harm to the physical or mental health, or emotional condition, of the applicant whose information is held for the purposes of health or social care, including child care;
 - (xvi) prejudice the provision of health care or carrying out of social work, including child care, by disclosing the identity of a person (other than a health or social services professional) who has not consented to such disclosure;
 - (xvii) prejudice the proper supervision or regulation of financial services;
 - (xviii) prejudice the consideration of any matter relative to immigration, nationality, consular or entry clearance cases;
 - (xix) constitute a release of information which was created before the previous Code on Access to Information came into effect (20th January 2000) and which is not yet in the open access period unless the Minister, Chief Officer or Chief Executive responsible reasonably believes there is no other reason in law for it being exempt from release.
- (b) the application is frivolous or vexatious or made in bad faith. Only rarely should this exemption be used and an applicant must be told that he retains the right to appeal against the refusal to release the information.

Obligations of an authority

An authority has an obligation under this Law to fulfil the following duties –

- (a) keep a general record of all information that it holds;
- (b) take all reasonable steps to assist applicants in making applications for information;
- (c) acknowledge the receipt of an application for information within 5 working days and supply the information requested (unless exempt) within 15 working days, (readily available information being released in considerably less time) ensuring that any referral to the Chief Executive or Minister concerned does not delay the process;
- (d) notify an applicant if the information cannot be prepared within 15 working days, explaining the reasons for delay;
- (e) notify an applicant if the information requested is not known to the authority or, if the information requested is held by another authority, refer the applicant to that other authority;
- (f) make available information free of charge except in the case of a request that would require extensive searches of records, when a charge being a reasonable contribution to the actual cost of providing the information may be made;
- (g) give proportionate assistance to a special need, such as an individual's sight impairment;
- (h) give an estimate of any fee that is necessary in advance of collecting the information requested;
- (i) if it refuses to disclose requested information, inform the applicant under which exemption it has done so and the name and position of the person so deciding;
- (j) the authority shall correct any personal data held about an individual that is shown to be incomplete, inaccurate or misleading, except that expressions of opinion given conscientiously and without malice will be unaffected. This should be in accordance with the requirements of the Data Protection (Jersey) Law 2005;
- (k) inform applicants of their rights under this Law, including details of the appeal process;
- (l) not deny the existence of information which is not classified as exempt which it knows to exist;
- (m) undertake the drafting of documents so as to allow maximum disclosure;
- (n) undertake the drafting of Committee and sub-committee agendas, agenda support papers and minutes so as to allow maximum disclosure;
- (o) keep under review information categorised as exempt with the purpose of removing that exemption where reasonable. This should happen in particular when an application is made for access to previously exempt information.

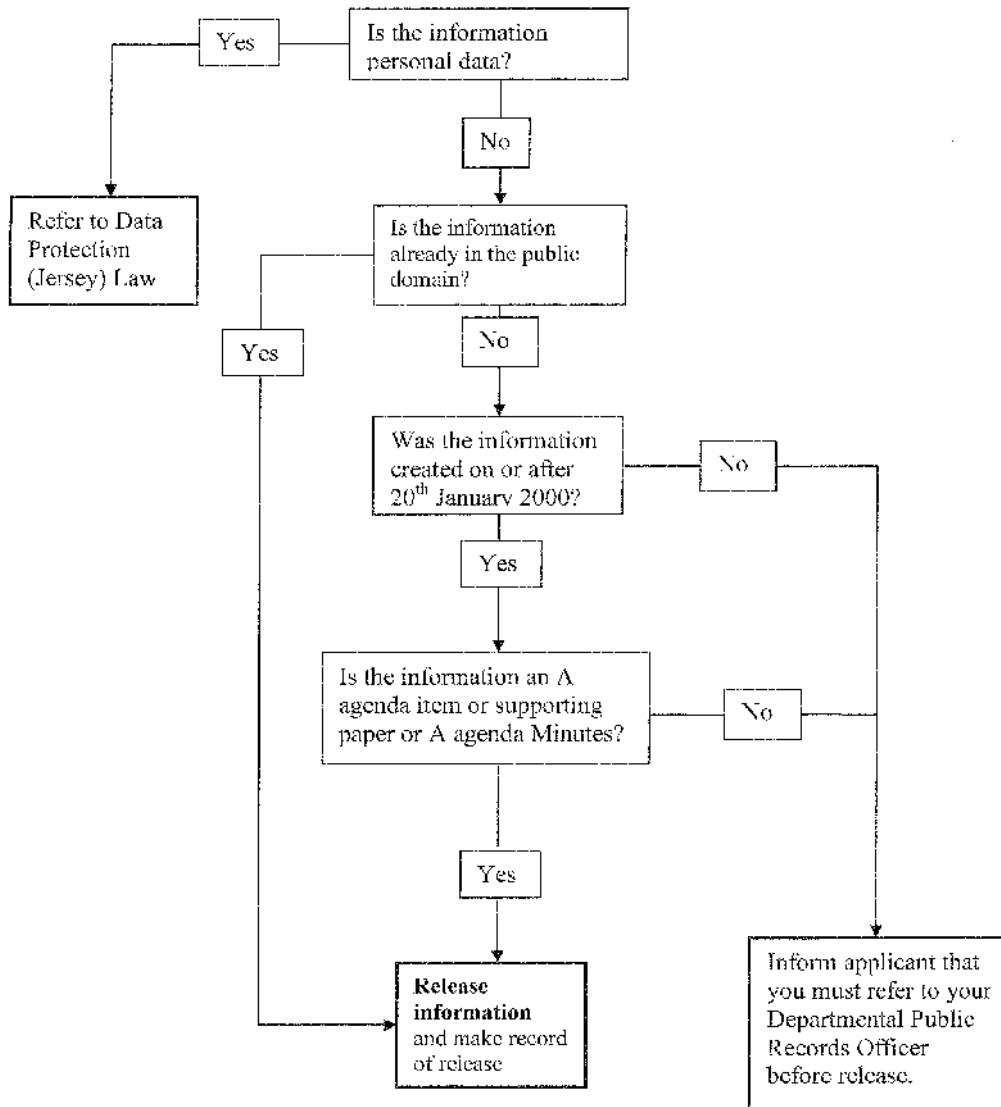
Additionally, an authority shall –

- (1) forward to the Information Commissioner the names of strategic and/or policy reports prepared by the authority on or after that date of the coming into force of the Law, to be added to a central list to be called the Information Asset Register ('the Register');

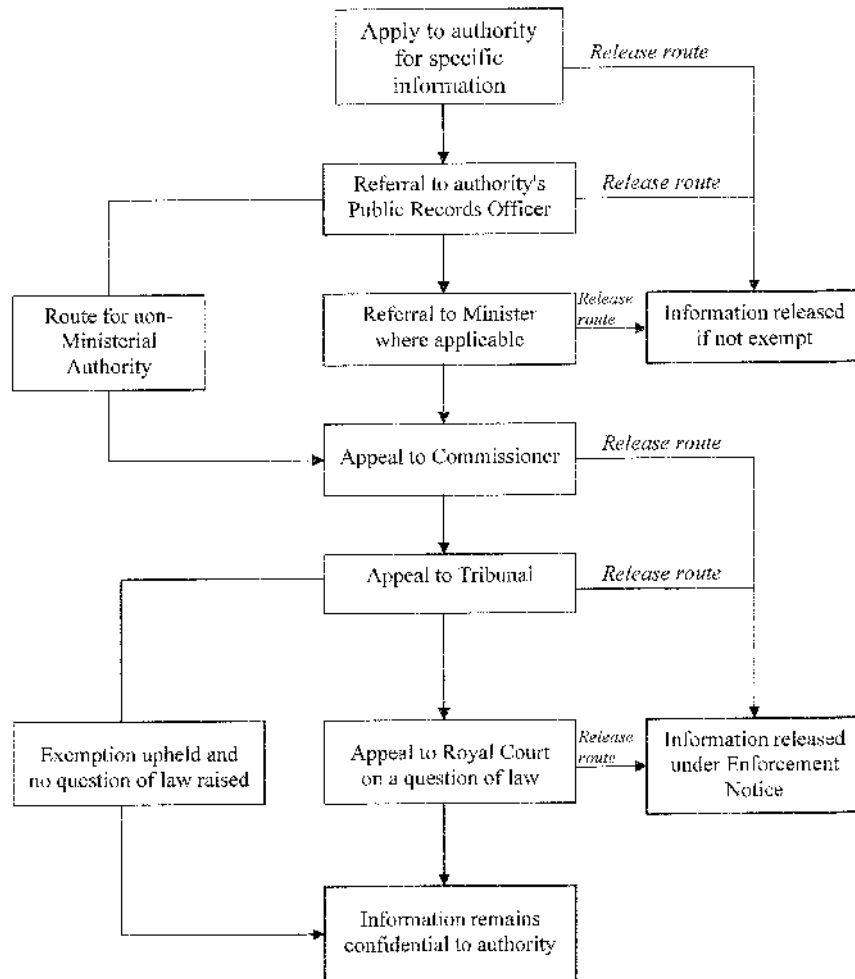
- (2) notwithstanding paragraph (1), the name of any report deemed to be of public interest shall be included on the Register;
- (3) where the cost of third party reports or consultancy documents, which have been prepared for the authority or which are under preparation, exceeds an amount fixed from time to time by the Information Commissioner, an authority shall forward to the Information Commissioner the names of such reports to be added to the Register, together with details of the cost of preparation and details of their status;
- (4) subject to the exemptions specified in this Law, make available to the public all unpublished third party reports or consultancy documents after a period of 5 years;
- (5) prepare and forward to the Information Commissioner an annual summary of requests for information, containing details of any requests for exempt information and any other matter the Information Commissioner may reasonably require, the same to be provided not less than 2 months before the Information Commissioner makes his annual report.

Guidance to Officers to facilitate access to information

1. Applicant makes request (oral or written) for information



3. Appeals route from application through to Royal Court



- [1] This statement is made on the basis of –
F&E's comments on Deputy Troy's proposition P.196/2003;
P&R's comments on Deputy Breckon's proposition P.34/2003 (debated April 2004);
PPC's Terms of Reference in Act of the States 26th March 2002;
Public Access to Official Information: Code of Practice P.38/99, approved 26th July 1999.
- [2] Article 29 states "Nothing prevents a person from making available to a member of the public a public record ..., that is not in the open access period or that is exempt from access ... if the person does so with the consent of the public records officer ...". This could allow uncontrolled open access to exempt records and is not recommended.
- [3] Proposed changes to these are listed at section 17, **Policy Outcomes**, within this Report.
- [4] This statement is based on the facts of the situation – administrative arrangements and individual rights have historically been put into law and thus have set a precedent.
- [5] Jersey Evening Post: Page 1, 28/6/04, Pages 8&9 and Editorial 29/6/04.
- [6] See transcript of States Debate of P.80/2004 on 8/6/2004.
- [7] Maurice Frankel, Director, Campaign for Freedom of Information, July 2003.
- [8] Publication Schemes: Examples of Good Practice on www.cfoi.org.uk.
- [9] In the United Kingdom the latter has meant that each authority has had to prepare extensive schemes detailing core information that they would commit to publish. These schemes are mandatory and submitted to the Information Commissioner for formal approval.
- [10] The Aarhus Convention, website www.unece.org/env/pp/.
- [11] It is already established practice for certain information to be charged for, such as States Propositions, Reports and Laws.
- [12] The route via Information Commissioner, Tribunal and Royal Court does not preclude the Administrative Review Board method but as explained the latter is political. Politics and the enforcement of the law should be kept separate.
- [13] See *Campbell v MGN Ltd* [2004] UKHL 22.
- [14] *Von Hannover v. Germany* [2004] EMLR 21.
- [15] The Committee would be very reluctant to restrict the law to government departments, Ministers and Committees alone.
- [16] These bodies can be adequately held to account by the Comptroller and Auditor-General under Article 50 of the Draft Public Finances (Jersey) Law 200-.
- [17] However, in order to manage unreasonable or excessive requests, charges for extensive work will be allowed.
- [18] The Committee has replaced the 21 day limit applicable in the Code so as to recognise the effect of bank holidays. The change more realistically defines a 3 week maximum period.
- [19] Exemptions (i), (xv), (xvi) are more than adequate regarding medical confidentiality.
- [20] Any one of the other 19 exemptions might be more specifically used, depending on the nature of that advice.
- [21] This is an important issue where on occasions it can be harmful to judicial processes or criminal investigations to indicate whether or not information is held. Like any other refusal to release information, however, it would be open to challenge.
- [22] Livelink is an advanced information filing and retrieval system that has been implemented across a number of States departments including Computer Services, the Law Officers', Health, Treasury and Probation. One recent project is a full Records Management pilot for Education. This will form the basis of a records management strategy for the States and underpin requirements for Freedom of Information. Computer Services have purchased a module that will allow Livelink to be used to support time-based tracking of FOI requests and a specification is being created tailored for States of Jersey requirements. Livelink has extensive ability to allow common records to be shared, controlled and accessed across the States and will use a standard document classification schemes to ensure a consistent method of access across all States information.