

**WRITTEN QUESTION TO THE CHAIRMAN OF THE PRIVILEGES AND PROCEDURES
COMMITTEE BY DEPUTY R.G. LE HÉRISSEIER OF ST. SAVIOUR**

ANSWER TO BE TABLED ON MONDAY 16th JULY 2007

Question

Would the Chairman specify in what ways the revised draft of the proposed Freedom of Information Law differs from the previous draft and confirm that the simplification will not lead to a dilution of the key principles of the Law?

In what ways does the simplification reduce the need for resources in implementing the Law?

Answer

Members will be aware that the Privileges and Procedures Committee has prepared two versions of the draft Freedom of information (Jersey) Law 200-. These are both available from the States Bookshop, Morier House, or on www.statesassembly.gov.je, and their full titles are –

Freedom of Information (Jersey) Law 200-: consultation document, Presented to the States on 21st April 2006 by the Privileges and Procedures Committee - R.33/2006 ('Previous draft')

Freedom of Information (Jersey) Law: second consultation Presented to the States on 18th June 2007 by the Privileges and Procedures Committee - R.60/2007 ('Revised draft')

These drafts were both prepared based upon 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 supporting the Committee's proposition entitled Freedom of Information: proposed legislation (P.72/2005) The key policy outcomes were approved by the States on 6th July 2005. These are -

“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.^[1]
6. The Law would not apply to States-aided independent bodies.^[2]
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^[3] 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.^[4]
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 revised to refer to legal professional privilege alone. Medical confidentiality^[5] and legal advice given to an authority^[6] 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 sc

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. ^[7]
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.”

Comparison of the previous draft and the revised draft

Version 1 of the draft Freedom of Information (Jersey) Law 200- ('previous draft') was more closely based on the UK Freedom of Information Law. The reason for this was that it needs to work well with the Data Protection (Jersey) Law, which is based on the UK DP Law. This was necessary because data protection has international ramifications that would disadvantage Jersey's finance industry were the legislation not to be comprehensive.

Consultation showed that departments and others felt the previous draft was unnecessarily long and complex for the Island, and queried whether the exemptions were too numerous and wide, and the cost would be prohibitive – and the Committee (which included Senator S. Syvret at the time) decided to request a simpler version - Version 2 of the draft Freedom of Information Law ('the revised draft').

The Law Draftsman has pointed out that far from weakening the Law, in the sense of 'Does it give the people less rights to obtain information from public authorities?' the revised version of the Law does exactly the opposite.

The previous draft of the Law, based on the UK Act, included quite a number of exemptions. It was produced as a discussion document and was accompanied by a number of questions from the Law Draftsman asking whether all the exemptions were necessary and, if they were, to what extent. As an instance, the Law Draftsman asked if a public authority should have the ability to neither confirm nor deny if it had the information requested and was told by the Committee that this should be limited to "national security" cases. Other exemptions were omitted as not being appropriate to the Jersey way of doing things or made much narrower in their application.

Also a lot of detail contained in the previous draft becomes the subject of Regulations under the revised draft. For example, the action a public authority must take and the information it has to give when it denies a request will now be set out in Regulations. Apart from making the Law shorter and easier to understand, this arrangement also builds in a greater degree of flexibility.

All this is the direct result of the public consultation process that was undertaken.

In the revised draft, the English has been revised to make it much more accessible, and with any cross referencing to other articles minimised. The previous draft had repeated cross references to Article 8, for example, which were not very accessible for the layman. Articles were reviewed to try and strengthen the right of access in the revised draft.

Given the comments that the previous draft was too complex, the Committee revisited two fundamental questions

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1. Should a public authority be allowed to refuse to say whether it has the information requested or should it only be allowed to refuse to disclose the information?

The Committee decided that a public authority should not be allowed to do this, except in the case of detection of crime (national security). This was in the previous draft of the Law, but removed in the revised draft.

2. Should information be disclosed?

This is the whole purpose of the Law. Therefore the answer is 'Yes'. The next question is - are there any exemptions? Are those exemptions absolute? (that is, the information is not intended to be released but Article 14 does not stop an authority from releasing it if it wishes to), or qualified? (public interest test required)

Part 2 - General right of access etc. - in the revised draft is very similar to the provision in the previous draft. The definition of 'absolute' and 'qualified' exemptions was not clear to the Privileges and Procedures Committee in the previous draft, and this has now been split between Part 3 and Part 4 in the revised draft.

Article 13 puts a time limit on all exemptions. This is a new provision and provides that certain matters exempt for maximum of 30 years only

PART 4 deals with information that is qualified exempt information. The primary duty to supply information has been made explicit and clear in a separate short article. Previously this was buried in a long article about refusing requests (cf former article 24)

Article 37 requires the Information Commissioner, in consultation with the Privileges and Procedures Committee, to prepare an annual report, which the Committee will lay before the States Assembly. The Information Commissioner will be an officer, and it was considered more appropriate for the report to be prepared in consultation with elected representatives.

Environmental information - The previous draft included provisions relating to access to environmental information, and included reference to the Aarhus Convention, to which the Island is not a signatory. It was considered that reference to this was not necessary, as environmental information would be treated in the same way as any other information, and if the Island signed up to the Aarhus Convention in the future, we would cross that bridge when we came to it.

In what ways does the simplification reduce the need for resources in implementing the Law?

As the Privileges and Procedures Committee stated in its report 'Freedom of Information (Jersey) Law: second consultation' (R.60/2007)

"The Committee agreed to pursue the request of the Council of Ministers that the full resource implications be investigated. The Deputy of St. Peter, as a member of PPC and of the Panel, referred the Committee's request to a Panel meeting for consideration. There was initial concern that the Panel was fully committed and unable to undertake a review at this time, but following further consultation the Panel agreed on 7th June 2007 that it would be in the public interest to undertake a focussed review of the resource implications of the draft Law with a view to informing the States' decision on this matter. The Panel agreed to advise the Committee that this matter would be covered in the first quarter of 2008.

The Committee is of the view that it is important to obtain the information which the Council of Ministers and members require in relation to the financial and manpower consequences of the Law prior to debate, and although the Committee would welcome an earlier start on this work, it fully appreciates that the Panel has a significant programme of work and is unable to include this in its programme at this time. It is therefore prepared to wait for the report of the Panel in the early part of 2008."

It is intended that information required for States' consideration of the draft ('revised') Law will be available in advance of the debate. The Law Draftsman has advised that the revised draft would be far easier for public authorities to administer, and this indicates reduced cost. However, it would be wasteful of resources to carry out a full financial and manpower consequence study in relation to the previous draft that has now been withdrawn.

[1] *The Committee would be very reluctant to restrict the law to government departments, Ministers and Committees alone.*

[2] *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-.*

[3] *However, in order to manage unreasonable or excessive requests, charges for extensive work will be allowed.*

[4] *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.*

[5] *Exemptions (i), (xv), (xvi) are more than adequate regarding medical confidentiality.*

[6] *Any one of the other 19 exemptions might be more specifically used, depending on the nature of that advice.*

[7] *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.*