

STATES OF JERSEY



DRAFT FREEDOM OF INFORMATION (JERSEY) LAW 201- (P.101/2010): COMMENTS

**Presented to the States on 6th October 2010
by the Council of Ministers**

STATES GREFFE

COMMENTS

Whilst the Council of Ministers is firmly committed to the principles of openness and transparency within government, it continues to have fundamental concerns about the likely resource implications of the proposed legislation. In these challenging times, any proposal which places significant additional costs on government must be debated with a clear understanding of the resource requirements. It is for this reason that the Council has consistently expressed the view that an independent review of resources should accompany this debate.

Though the Council believes that the current Code of Practice works well and serves to facilitate open government, it is clear from experience elsewhere that the implementation of a new Law will lead to a significant increase in the volume of requests, which is likely to be maintained over time. In addition, the Law places legal obligations on departments which will demand the allocation of appropriate resources to implementation and ongoing management.

In its report, the Committee presents some of the resource implications of the Law. Responses from departments and experience elsewhere indicate what the Council believes to be a fuller picture of the likely resource implications.

The more detailed comment at **Appendix A** sets out the Council's view of the resource implications across government associated with implementation, ongoing management, archiving and the office of the Information Commissioner. This suggests costs in the early years in the order of £1,400,000 per annum, which may reduce slightly in the post-implementation period. These figures *exclude* the work that departments will need to undertake to complete necessary improvements to records management processes and systems, which is likely to be substantial.

The Council firmly believes that if the Privileges and Procedures Committee's proposed legislation is to strengthen openness and transparency in government, it will require a comprehensive and professional implementation programme. Whilst in full support of a Freedom of Information Law, the Council will only support the approval of its Appointed Day Act once it has secured adequate resources to ensure departments can comply with its provisions.

Detailed Comment

The Council of Ministers is firmly committed to the principles of openness and transparency within government, a commitment that is clearly expressed within its 2009–2014 Strategic Plan. The Council therefore welcomes the Privileges and Procedures Committee's proposals to strengthen public access to information.

It is, however, important to remember that a mechanism to deliver openness is already in existence through the Code of Practice on Public Access to Information. The Council has seen no evidence to suggest anything other than the Code is working satisfactorily. States Departments routinely service requests for information without reference to the Code, with a number dealing with virtually all requests in this way. As the Committee points out, this has made assessing the number of requests difficult as perhaps only the most complex are recorded. This suggests that departments are already providing the public with access to information as part of normal business. It should be noted that, in strengthening these arrangements, a Freedom of Information (FOI) Law will place legal obligations on public authorities which must be complied with to avoid sanction. Ensuring compliance with such obligations will demand that the implementation and ongoing management of the Law is appropriately resourced.

With departments committed to finding £65 million in savings over the next 3 years, any proposal which places significant additional costs on government must be debated with a clear understanding of the resource requirements. For this reason, the Council has consistently expressed concern that such an important and far-reaching proposition should be debated with a clear understanding of the resource implications, which is why it believes this should be subject to independent review in advance of debate. The Council believes that the onus is on those lodging a proposition to make members fully aware of its financial and manpower implications.

The Committee's report identifies resource requirements in some areas but not in others, and would appear to lack a firm basis for some of the figures. Whilst the Council agrees with the main cost areas identified by the Committee, the following sets out what the Council believes to be a more realistic picture of the likely resource implications of the Law.

Implementation

As identified by the Committee, implementation will need to be led by an FOI Unit, established by the Executive. Such a Unit would be responsible for –

- developing implementation plans and project-managing the change;
- co-ordinating the work of departments;
- raising awareness amongst departments and the general public;
- developing robust policies, procedures and guidelines for departments;
- implementing systems for managing and tracking requests;
- providing and co-ordinating training; and
- delivering culture change.

These activities will require a broad range of skills and expertise as well as the right level of resources to deliver them. The Draft Law suggests that an FOI Unit of one

full-time officer at Grade 12 (£68,000) supported by one external expert for a year (£80,000) will be sufficient for the provision of an FOI Unit. The rationale for this is not clear and would appear to be light when compared to what the Unit is required to achieve, the range of skills needed and experience of implementation elsewhere. For example, the Cayman Islands had an FOI Unit of 5 people for 2 years during implementation in order to prepare a public sector of 3,500 people; and the Welsh Assembly Government had 5 people dedicated to FOI in a central team during an 18-month implementation period.

The Committee's report does not include any indication of a budget beyond staff costs for this Unit. Drawing again on the experience of the Cayman Islands, total budget allocations for the FOI Unit during the 2-year implementation period were \$490,000 (c. £387,000) in the first year and \$548,000 (c. £433,000) in the second year. Of the first year's budget, \$100,000 (c. £79,000) was allocated to development of an FOI website and web marketing, with a further \$100,000 (c. £79,000) allocated for professional fees to assist with development of materials and educational activities.

Jersey will need to effectively implement FOI across a public sector workforce of almost double the size of the Cayman Islands and possibly over a longer implementation period. Even taking a minimal approach, it could be argued that a more realistic FOI Unit would comprise of – one permanent FOI Officer (£68,000 per annum), one seasoned professional (£80,000 per annum) and one supporting officer (£50,000 per annum), for a 3-year implementation period. Other implementation costs such as training, awareness-raising and a public information campaign could easily be an additional £100,000 over 3 years.

Along with the FOI Unit's involvement in implementation, departments will also need to commit resources to work on their own procedures and ensure that all staff are appropriately trained. For some departments, such as Education, Sport and Culture and Health and Social Services, this will require the allocation of staff on a full-time basis for a given period of time. Whilst the type of the support required will depend on the nature of any central FOI Unit, it is clear that there would be additional costs within departments to ensure the Law is implemented effectively.

Ongoing Management of an FOI Law

Beyond implementation, the Law will need to be managed and supported on an ongoing basis. The FOI Unit will continue to have a significant role once the Law is in force: in particular it will be required to –

- provide central advice, guidance and support to departments;
- monitor how departments are managing FOI and produce statistics relating to request handling;
- provide ongoing training and development;
- assist departments with more complex cases;
- maintain a network of Information Managers;
- deal with complaints and queries; and
- liaise with the Information Commissioner's Office.

The Cayman Islands maintains an FOI Unit of 2½ people to continue to provide ongoing support to Departments, whilst the Welsh Assembly Government's central team retains 4 full-time staff dealing with FOI. In comparison, the Committee's

suggested model of a one-person FOI unit would appear to be light. Again, taking a minimal stance, it could be argued that an FOI Unit of 2 people (e.g. one FOI officer and one support officer) to support departments on an ongoing basis would not be unrealistic.

The Council notes the Committee's view that the current Code has not proved to be too burdensome upon Departments, and therefore it does not expect the Law to be any more so. The Council would seek to challenge this. Experience elsewhere is that the new Law will bring about a surge of requests as a consequence of raised public awareness, and the fact that individuals, organisations and the media will wish to test the Law. This was proven to be the case at the Welsh Assembly Government, where, like Jersey, a Code of Practice was already in place before the FOI Law was introduced. In Wales, the first year of the Law's operation saw 900 requests being received, 200 in the first month, compared to an average of 1–2 requests per month under its Code. Evidence from the UK also shows that the Police and Health services have received disproportionate volumes of FOI requests with the introduction of FOI legislation, and these volumes have been maintained over time. There is no reason to believe that this would be any different in Jersey.

The report suggests that each States Department should have in place an Information Officer and that these posts can be absorbed into the work of Departments. With a minimal FOI Unit, departments will be required to carry out the majority of the work in dealing with a request. Within the Welsh Assembly Government for example, a substantial part of one person's time in each department is taken up dealing with FOI requests. In an effort to assess the likely resource implications of FOI legislation, departments have reviewed their initial 2006 assessments. This can be found in **Appendix B**, which suggests that the additional costs to departments could easily be of the order of £450,000 per annum. It is possible that these costs could be reduced if the central FOI had further resource.

Law Officers' Department

The Council is aware that UK public authorities, such as the Welsh Assembly Government, expend considerable resources on providing legal advice to Departments dealing with FOI issues. With the range of activities the States is engaged in being equivalent to that of both a national government and a local authority, the Law Officers' Department has highlighted the significant impact the FOI legislation is likely to have on its Civil Division.

Not only will the Department have to deal with requests made to it under the Law, but it will also need to provide advice on requests to the rest of the States administration and the other public authorities to which the Law is applied, and to which it normally provides legal advice. In addition to this, the Department will also have to provide legal representation for appeals, both first-tier appeals to the Information Commissioner and further appeals to the Royal Court. If the Department is unable to provide this, then public authorities will need to instruct private sector lawyers, at considerable cost.

The Department anticipates that it would need to establish a specialist unit with FOI matters as its only or main remit, as the timetable for responding to requests mean that legal advice will have to be dealt with as a priority. The estimated manpower implications on the Department are identified in **Appendix B**. This sets out a requirement for an additional 3.5 FTE at an estimated cost of £400,000 which the

Department believes to be an essential requirement in order to comply with the Law and provide appropriate support to public authorities.

Jersey Heritage

The Committee rightly identified that the FOI costs to Jersey Heritage are predicated on the recruitment of an additional 3.5 FTE staff to meet Public Records legislation. This in itself would cost in the order of an additional £150,000 per annum.

It is important to note that without this additional funding, the Jersey Heritage Trust would not be able to support FOI within the £50,000 allocation proposed by the Committee.

Records management

The Council believes that Committee has understated both the importance of, and the effort required to, deliver an appropriate records management regime to support the proposed Law.

The Council is firmly of the view that an effective records management regime is a critical pre-requisite to the efficient and effective delivery of FOI. Jersey has adopted a mechanism to allow for good records management via the Public Records (Jersey) Law 2000. However, full compliance with this Law has been considerably constrained due to the resource implications not being properly identified when the Law was passed. The result is that, whilst some progress has been made in developing more effective records management systems in departments, a lack of dedicated resource to this process means that this work will be extended over a considerable period of time.

As part of assessing the records management challenges that may face the States, Socitm Consulting has recently undertaken a gap analysis of records management practices, together with an action plan for improvement. This will be published in due course.

This work has confirmed that the creation of an effective and sustainable records management system is fundamental to ensuring the successful handling of access request under FOI legislation. This work has also identified that delivering the undoubted benefits of an improved records management regime will require a dedicated Records Management Programme that will require sponsorship, governance, dedicated functional responsibility, policy, procedures, communication and training.

Whilst this work is at a preliminary stage and will require further development, early indications are that completing the work to improve records management will incur substantial costs, possibly millions, in implementation, systems development, communication and accommodation.

With effective compliance with the Public Records Law yet to be achieved and work to improve records management considerably constrained, careful thought should be given to introducing a FOI Law before ensuring that States Departments are in a position to comply with it.

Summary of resource implications

The Committee identifies the need for ‘new money’ to cover ‘certain elements’ of FOI. Based on the above analysis, it could be argued that FOI will require, as a minimum, the following new money:

Area	Resource implications	Possible costs
Information Commissioner	Two additional staff	£155,000 p.a.
Implementation	FOI Unit of 3 FTE for 3 years Training, awareness raising and public information campaigns	£200,000 p.a. (total £600,000) £100,000 (over 3 years)
Jersey Archive	3.5 FTEs for Public Records Law One FTE for 5 years to support FOI Law	£150,000 p.a. £50,000 p.a. for 5 years (total: £250,000)
Ongoing administration and supply of information	Ongoing Departmental costs Ongoing role of FOI Unit (2 FTE)	£450,000 p.a. £120,000 p.a.
Law Officers’ Department	Law Officers (3.5 FTEs to support internal requirements and Departments; appeals process; and external legal advice required by the Information Commissioner)	£400,000 p.a.

In the early years, this suggests an additional cost of c. £1,400,000 per annum across government. This is likely to reduce slightly post-implementation as the resources required by the FOI Unit and the archive are reduced.

The potentially substantial costs of improving records management would be in addition to this.

Charging

The Council recognises that Regulations with regard to charging will be brought forward for debate in due course, so provides a brief comment on this issue.

The ability to charge for dealing with FOI requests would appear to be sensible in the current economic climate. In particular, the proposal of full cost recovery could be beneficial as a way of offsetting some of the costs of administering the Law.

According to information collated within the Welsh Assembly Government, in 2009 the average time taken in dealing with a request was 8 hours 9 minutes. Applying the Committee’s charging proposal, an average request would cost a member of the public in Jersey approximately £270, after the £50 waiver.

Conclusion

The Council of Ministers firmly believes in the principles of Freedom of Information and recognises that this is an important piece of legislation for the Island. The Council does, however, have fundamental concerns about the likely resource implications of this Law and believes them to be more onerous than suggested in the Committee's report.

As stated in the Committee's report, it will be the responsibility of the executive to enact the Freedom of Information Law. Whilst in full support of the Law, the Council will only support the approval of its Appointed Day Act once it has secured adequate resources to ensure departments can comply with its provisions.

APPENDIX B

Updated Departmental Responses

Department	Additional Resource Implications	
	Administering and responding to requests	Support to Implementation
Chief Minister's	0.5 to 1 FTE	
Information Services	3 FTE spread across the Business Support Group for Departments to support finding, extracting and compiling of information	
Economic Development	No resource implications	No resource implications
Education, Sport and Culture	0.5 FTE	1 FTE for 3 months for new procedures and training
Health and Social Services	0.5–1 FTE (more if central specialist advice not available)	0.5 FTE for new procedures and to co-ordinate training
Home Affairs	2 FTE	Will need to provide training across organisation, probably through a central point
Housing	1 FTE	Will need to support training and development of procedures
Planning and Environment	0.5 FTE (due to the formal obligations of the Law)	
Social Security	0.5 FTE	Significant effort required to develop new procedures and train staff: 1 FTE for up to 2 years
Transport and Technical Services	0.5 FTE	Need to develop new procedures and train staff across the organisation
Treasury and Resources	1 FTE	0.5 FTE resource will be required for the implementation period in order to support departmental processes and develop and maintain filing structures

States departments have identified additional resource requirements of between 10 and 11 FTEs to administer and respond to the requests. It is likely that a reasonably senior resource will be required due to the complexity of this work. If costed on the basis of an average Grade 9 (total costs of c. £45,000 per annum), this would represent an annual additional staff cost of c. £450,000 per annum across the States.

Whilst not costed, it is clear from the responses that departments will also need to commit resources to work on their own procedures and ensure that all staff are appropriately trained. For some departments this will require the allocation of staff on a full-time basis for a given period of time.

Law Officers' Department	Additional Resource Implications
Support internal requirements and Departments; appeals process; and external legal advice required by the Information Commissioner	1.0 FTE Legal Adviser (or Senior Legal Adviser) to support internal requirements and advise Departments, etc. 1.0 FTE Assistant Legal Adviser (or Senior Assistant Legal Adviser) to support the above. 0.5 FTE Advocate to advise on and conduct appeals. 1.0 FTE secretarial/administrative support for the above. External legal advice (due to conflict) required by Information Commissioner.

The Law Officers' Department has identified an additional 3.5 FTEs, including a Senior Legal Adviser and associated support, Advocate support for the appeals process; and the need for external legal advice. Taking into account the likely costs of the roles identified, this represents an additional cost of c. £400,000 per annum.