

PRIVILEGES AND PROCEDURES COMMITTEE

(21st Meeting)

12th June 2009PART A

All members were present, with the exception of Senator B.I. Le Marquand, from whom apologies had been received.

Connétable J. Gallichan of St. Mary
 (Not present for Item No. A1)
 Deputy J.B. Fox
 Deputy J.A. Martin
 Deputy C.H. Egré - Acting Chairman
 Deputy M.R. Higgins
 Deputy M. Tadier
 (Not present for Item No. A1)

In attendance -

C. Borrowman, Assistant Law Draftsman
 Miss L. Romeril, Jersey Archive
 Miss A-C. Heuston, Clerk to the Privileges and Procedures Committee
 P. Monamy, Senior Committee Clerk

Note: The Minutes of this meeting comprise Part A only.

Draft Freedom of
 Information
 (Jersey) Law
 200-:
 Director,
 Campaign for
 Freedom of
 Information UK -
 visit and
 presentation to
 Committee.
 670/1(8)

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A1. The Committee, with reference to its Minute No. A1 of 22nd May 2009, welcomed Mr. M. Frankel, Director, Campaign for Freedom of Information, in connexion with the draft Freedom of Information (Jersey) Law 200-.

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

The Acting Chairman thanked Mr. Frankel for attending and explained that the Committee wished to draw upon the United Kingdom (UK) experience of introducing Freedom of Information (FoI) legislation. Mr. Frankel began by comparing Article 2 of the draft Law with Article 7(4) of the Data Protection (Jersey) Law 2005 and the position in the UK under the Freedom of Information Act. It was noted that, as in the UK, the Jersey position would be of a presumption that written requests for information would be made under FoI legislation, although it was recognised that some requests could be partly FoI and partly Data Protection, with those making the request not always quoting the correct legislation. Consequently, it was suggested that the words “made under this Law” in Article 2(1) of the draft Law could be deleted.

It was noted that under the draft Law, information requested which was in any event “reasonably accessible” to the public would be “absolutely exempt information” in FoI terms, whether or not free of charge. In the UK, the position was that information which was held by a public authority was not to be regarded as reasonably accessible to the applicant merely because the information was available from the public

authority itself on request, unless the information were made available in accordance with the authority's "publication scheme." Mr. Frankel asked whether there was to be a Jersey Publication Scheme under the draft legislation. It had been raised in the UK whether information could be considered to be "reasonably accessible" if it could only be accessed at a high cost. Examples of charges levied in the UK were considered.

As regards "advice and assistance" to be afforded to applicants for information, it was noted that the draft Law provided that a "public authority must make every reasonable effort to ensure that a person who makes, or wishes to make a request to it for information is supplied with sufficient advice and assistance to enable the person to do so." Mr. Frankel outlined the circumstances in which, in the UK, if it proved too costly to provide the information requested, a public authority must provide adequate advice and assistance - for example, as to what could be made available at less cost or what less extensive information could be provided - and, significantly, rephrasing questions asked as necessary. It was recognised that in the UK, the existing cost limits were designed so as to limit the extent of information initially provided. The Committee also noted that under the FoI Act, public authorities were able to group together related requests rather than dealing with them separately. It was evident that, in Jersey, at least one adequately experienced and suitably trained officer would be required in each major department.

Mr. Frankel questioned whether there was a need for the addition of a 'public interest test' in the draft Law. It was noted that there were less specific provisions in Article 42 of the draft Law, which related to "Appeals to the Information Commissioner." Mr. Frankel suggested that in Article 42(3) the words "not reasonable" should be replaced with the words "not in accordance with the provisions of the Law" and that, generally, the inclusion of more general and rather less specific terminology was advised. It was noted that under the draft Law, the notice to be served by the Information Commissioner on the outcome of an appeal was required to specify the decision and the reasons for it, as well as the right of appeal to the Royal Court under Article 43, whereas under the FoI Act the Commissioner was also required to specify the steps which had to be taken.

The Committee, having noted the grounds under which draft Article 19- "Removal of exemptions by effluxion of time" after 30 years would apply, recognised that under the UK FoI Act this also encompassed "Policy formulation", "Court information" and "Legal professional privilege." The Committee further noted that consideration was presently being given in the UK to reducing the '30-Year Rule' for some categories of information to 20 years. Having outlined the terminology used in the UK FoI Act in respect of "Absolute exemptions" and "Qualified exemptions", Mr. Frankel indicated that he would welcome the use of alternative terminology in the draft Law. Meanwhile, it was noted that Article 9 of the draft Law provided that a public authority must supply qualified exempt information it had been requested to supply unless it was satisfied that, in all the circumstances of the case, the public interest in supplying the information was outweighed by the public interest in not doing so. Similarly, Article 20 of the draft Law provided that a public authority need not comply with a request for information if it considered the request to be vexatious. Mr. Frankel highlighted that Regulation 8(3) of the UK Environmental Information Regulations 2004 provided that a charge under paragraph (1) was not to exceed an amount which the public authority was satisfied was a reasonable amount. It was noted that a public interest test was the only test for exemptions on policy formulation, legal professional privilege, and Law Officers' advice; whereas other exemptions were subject to a prejudice test and a public interest test (for example in respect of commercial interests and law enforcement matters, etc.)

The question was raised as to whether there was a need to establish Common Law requirements in Jersey; and also whether 'Breach of Confidence' in Jersey overrode any 'Public Interest' test. It was emphasised that the provision of information to Scrutiny was not made under FoI provisions, although Mr. Frankel suggested that a special provision in respect of Members of the States could be included in the draft Law, if required. With regard to the disclosure of Law Officers' advice, Mr. Frankel confirmed that Government must be able to receive thorough legal advice upon which it could rely without fear of disclosure to third parties.

Overall, Mr. Frankel commented that FoI legislation operated on the basis of a 'presumption of openness' and that in cases where the balance in favour of disclosing information was equal to the arguments for retaining it as confidential, then - certainly in the UK - such information must be disclosed.

The Acting Chairman relayed to the Committee and to Mr. Frankel a request which had been received from Channel Television for permission to film the forthcoming presentation to be made to States Members in the States Chamber, commencing at 1 p.m. The Committee agreed that it would have no objection to the proposal, and Mr. Frankel also confirmed his willingness to participate.

Having received an outline of the arrangements for the forthcoming presentation, the Committee formally thanked Mr. Frankel for his presentation and assistance.

Draft Freedom of Information (Jersey) Law 200-: Director, Campaign for Freedom of Information UK - presentation to States Members. 670/1(8)

A2. The Committee, with reference to its Minute No. A1 of this meeting, recalled that Mr. M. Frankel, Director, Campaign for Freedom of Information, had made a presentation to Members of the States on the Draft Freedom of Information (Jersey) Law 200- following its morning meeting, and continued to discuss the possible introduction of freedom of information (FoI) legislation in Jersey.

Mr. Frankel advised that in the UK no actual exemption had been applied for records of the deceased and any exemption would only protect information about living individuals. This was considered to have been an oversight which could be addressed within the draft Jersey legislation.

The Committee considered the matter of the "public interest test" and noted that, if something was totally exempt the test could not be set. Under qualified exemption, where the public interest test did exist, the Committee felt the application of the test, and trust in the role of the Information Commissioner, were paramount. Consideration was given to whether everything should be subject to a public interest test. Mr. Frankel advised that, in the UK, those involved in FoI recognised a very substantial public interest in identifying layers of innocuous information which could be released to the public, such as staffing levels and budgets, even within areas such as anti-terrorism. The Committee noted that, while there was no right of access to absolutely exempt information, there was nothing to prevent an authority from releasing it.

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Consideration was given to how staff should be educated about the law and concern was expressed that some members of the civil service may not welcome the legislation. Members recalled that the Code of Practice on Public Access to Information had been in place for 9 years and it was suggested that there may be some resistance from those who were not yet subject to the Code. It was agreed that confidence and political support for the Commissioner was essential and the Committee agreed further discussion was required on this aspect. The Committee recalled the appeals process as presently drafted and recognised that some FoI challenges would involve the release of law officer advice, for example.

The Committee considered the matter of States Assembly privilege and whether it should be qualified exempt. It was considered that, if privilege was subject to a public interest test then, under the presently drafted system, the Information Commissioner could, on appeal, decide whether or not to release information which related to Members, and could be in the position of telling a Minister or the Bailiff to release information.

Mrs. L. Romeril, Head of Archives and Collections, Jersey Heritage, notified the Committee of her concern that, under the draft Jersey legislation, information in relation to national security fell under an absolute exemption for 100 years, leaving records from the First World War exempt. Such information was qualified exempt under the UK Act. Mr. Frankel advised that the UK exemption in relation to national security read: "Where exemption is required for the purposes of national security," meaning there was a form of harm test and not everything was exempt.

The Committee considered that the highest level of appeal under the current draft legislation was the Royal Court, rather than the Privy Council. The view was expressed that applicants should not be prevented from taking the matter to the Privy Council.

Discussions returned to the matter of absolute and qualified privilege and Mr. Frankel considered that the terms "absolute" and "qualified" could be abolished, and the legislation could read: "The following exemptions are subject to a public interest test in Articles [...]. The following exemptions are not subject to the public interest test – Articles [...]."

Deputy M.R. Higgins notified the Committee that he would propose appointing Mr. Frankel as an advisor to the Committee at a future meeting.

The Committee noted that there were a number of items outstanding in relation to its consideration of the draft legislation, including whether or not the legislation should include absolute exemptions and where these would apply. The Committee also needed to consider whether the introduction of the legislation should be phased and whether, initially, it should only relate to information from 20th January 2000, when the Code of Practice on Public Access to Information was introduced. The Committee also noted that there were a number of public bodies which had not been subject to the Code and that consideration should be given to the date from which the law would apply to them. It was considered that a suitable lead-in time for the law was necessary, and the Committee agreed that a timetable should be worked out. It was noted that the UK Act did not phase in retrospection. In Jersey, the Public Records Law had been introduced in 2002 but had not been fully complied with yet, and the establishment of an asset register was agreed by the States in 2004, but this had not been kept up-to-date, a matter which was now being followed up by the Chief Minister's Department.

Mrs. Romeril informed the Committee that she would forward notes from Susan Healey at The National Archives regarding exemptions.

It was noted that, in drafting the law, consideration could be given to adding a statement of purpose at the beginning, encapsulating what the law was intended to achieve and emphasising that the presumption was one of openness.

The Committee thanked Mr. Frankel for his attendance, and it was agreed that the meetings, both with Mr. Frankel and Mr. G. Smith, United Kingdom Information Commissioner's Office (Minute No. A1 of 22nd May 2009 refers), had been

extremely valuable.