STATES OF JERSEY

FREEDOM OF INFORMATION: CONSULTATION PAPER

Presented to the States on 25th March 2003
by the Privileges and Procedures Committee

STATES GREFFE

Foreword

The Privileges and Procedures Committee is pleased to present to the States this consultation document on Freedom of Information which, as set out in more detail in Section 1 of the report, is a matter on which it is required to bring forward proposals.

The Committee considers that issues related to access to information are a vital part of the whole government reform process. The decision to move towards a ministerial system of government will lead to a concentration of executive power and it is important that this is counterbalanced by appropriate access to official information about the activities of the Council of Ministers by members of the States and by the public.

The Committee's initial recommendations are set out in Section 10 of this report. As can be seen the Committee is minded to propose the introduction of legislation similar to that in place in New Zealand which the Committee believes would be more effective than the U.K. legislation. In order for the legislation to operate effectively the Committee is also of the view that it would be necessary to appoint an Information Commissioner to oversee and adjudicate on access to information issues. The Committee's thinking will also be guided by the findings of a Working Party which has recently been set up by the Privileges and Procedures and Legislation Committees to consider issues relating to Access to Information, Data Protection and Official Secrets which the Committee's research has shown are closely interlinked.

The Committee would be grateful to receive comments on the attached report before it finalises its proposals. Comments can be sent by the end of May 2003 to the Privileges and Procedures Commiteee, Morier House, St. Helier, Jersey, JE1 1DD or by e-mail to ppc@gov.je or by contacting Deputy Jennifer-Anne Bridge, Vice-President, who has responsibility for this issue on behalf of the Committee.

Freedom of Information

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

Article 19, UN Universal Declaration of Human Rights 1948

"The right to information has become one of the fundamental rights of the citizen. All citizens must be in a position where they can understand and assess the policies followed by governments."

Lionel Jospin, former Prime Minister of France

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APPENDIX

1. The role of the Privileges and Procedures Committee

1.1 In accordance with the Act of 26th March 2002, Privileges and Procedures Committee is required –

(i) "to review the practices and procedures of the States Assembly, including access to official information by States members, and to bring forward, for approval by the States following consultation with the Bailiff as President of the States, amendments to, or the redrafting of, the States of Jersey Law 1966, as amended, and the Standing Orders of the States of Jersey to facilitate the introduction and successful operation of the new system of government, and thenceforth to keep the States of Jersey Law 1966, as amended, (or any new legislation replacing the Law) and the Standing Orders under review;" and

(ii) "to review and keep under review the Code of Practice on Public Access to Official Information adopted by the States on 20th July 1999 and, if necessary, bring forward proposals to the States for amendments to the Code including, if appropriate the introduction of legislation, taking into account the new system of government".

2. Freedom of Information vs The Right to Know

2.1 A distinction should be drawn between the accepted term 'Freedom of Information', which is an absence of restrictions on the voluntary disclosure of information, as opposed to 'access to information', which is a legally enforceable right of access.

This distinction has important legal and political repercussions. For example, Article 10 of the European Convention on Human Rights, to be incorporated into Jersey law when the Human Rights (Jersey) Law 2000 is brought into force, provides "everyone has the right to receive and impart information and ideas without interference by public authority and regardless of frontiers" but Member States are not required to provide for a right of access to information.[1]

2.2 Nevertheless, Freedom of Information has become a common generic term for such legislation and is used as such in the United States, Australia, Ireland and other countries.

3. Basic principles

3.1 Globally, Freedom of Information legislation varies in scope and detail, but all share three basic principles –

(i) The right of access to government information is a general right of all people and does not depend on establishing 'a need to know'.

(ii) The right of access is subject to a limited number of exemptions which permit refusal to disclose information if that disclosure would cause harm of a specified kind. Although countries differ on the number and degree for such exemptions, there is a remarkably similar core of reasons for refusing to disclose, including national security, international relations, law enforcement, personal privacy, commercial confidentiality, and policy advice.

(iii) There is a right of appeal to an impartial arbiter who decides whether the exemption applies to particular information, and who has the power to rule on disclosure.

3.2 A review of Freedom of Information legislation from around the world identifies the following key factors that tend to influence the level of openness.

The following factors tend to *limit* openness –

(i) Excessive number, scope or complexity of exemptions, particularly where these are mandatory

and cover extensive classes of records.

(ii) Special provisions, such as Ministerial vetoes, which allow information to be classified as exempt with limited right of appeal.

(iii) A lack of administrative follow-through within Government to support the legislation and change the official culture towards greater openness.

(iv) High charges for information provided, and difficulty of access to an appeals mechanism.

The following factors tend to *encourage* openness –

(i) An independent review mechanism that is accessible (i.e. cheap for the appellant), easy to use and pro-active, e.g. in New Zealand the Ombudsman has made use of provision in the Act that has allowed exemptions to be more narrowly interpreted over time.

(ii) The incorporation of "harm" tests into exemptions, which allow disclosure where it is in the public interest.

4. The situation in Jersey

4.1 The Code of Practice on Public Access to Official Information was adopted by the States in July 1999 and came into force 6 months later on20th January 2000.

4.2 The major drawback of the current Code is that it does not carry the force of law, requiring only voluntary compliance on the part of the information holder. Furthermore it appears that the appeals procedure is weak although as an appeal has never been brought the procedure has never been tested in practice.

4.3 The first route of appeal for an applicant who is aggrieved by a decision of a States Committee to withhold information is to the President of the Committee concerned. If the applicant remains unsatisfied by the response, he or she may apply for the complaint to be reviewed under the Administrative Decisions (Review) (Jersey) Law 1982. The process of decision making is examined by the Board of Administrative Appeal (Review Board) which does not necessarily rule on the content of the dispute or on the outcome of the decision itself. Also, the findings of the Board are non-binding, so even if disclosure is recommended, the Committee concerned can continue to withhold information. Nevertheless, if the members of the Board are unhappy that their recommendation has been ignored, they can report the matter to the Privileges and Procedures Committee which, in turn, must report to the States. It would then be up to any States member to lodge a proposition seeking the views of the Assembly on the matter, but even then this would not necessarily force the Committee concerned to disclose the information.

4.4 Investigation carried out during the research for this paper revealed that an apparent culture of secrecy exists in Jersey. There is also a lack of awareness that an appeals procedure exists and a perception that any appeals procedure would be too lengthy to pursue. The latter has particular poignancy for members of the media, who have also said, in relation to access to official information, "A culture of secrecy in governments and among civil servants is no new phenomenon as far as Island journalists are concerned". [2]

4.5 Clearly, the people of Jersey do not currently enjoy extensive, accessible or well-defined rights of access to official information. The Privileges and Procedures Committee therefore recommends that rights need to be enshrined in law. The new ministerial system of government will undoubtedly streamline the executive process, but the Committee considers it will also render the current Code inadequate for the purposes of scrutiny and accountability, both by Members and by the Public.

5. The issue of access to information for States Members

5.1 Members of the States were advised on this topic by the Attorney General, Mr. Philip Bailhache Q.C., (as he then was) in 1987. He was commenting on an opinion of the then Crown Advocate Michael St. John Birt, on access to committee minutes and other papers in the custody of the Greffier of the States. The so-called "Birt Ruling" addressed two closely-related questions.

Firstly, do members have a right to information?
Secondly, if so, can they enforce this right in the Royal Court?

After reviewing the history of the committee system and its development within Jersey government, the Attorney General advised that –

> *"a Member has a clear right of access to committee minutes and papers in the custody of the Greffier, and a right of access to other information in the possession of a Committee, unless there are good grounds for denying access."*[3]

5.2 In the United Kingdom, so far as Parliament is concerned, the Courts will not intervene. It is considered a fundamental aspect of parliamentary sovereignty that the House of Commons has the exclusive right to determine its own proceedings. A similar situation exists in Jersey.[4]

5.3 However at a local government level, in England and Wales, the Courts will intervene if a local authority has acted unreasonably. For example where a councillor –

> *"who was not a member of a particular committee was [held to be] entitled to have access to the confidential files of that committee provided that there was good reason for such access.*[5]*"*

5.4 The situation of the States Assembly is more akin to Parliament than to a local authority in England and Wales. The States Assembly exercises legislative powers which are far more extensive than the limited delegated powers enjoyed by a local authority.

5.5 In his advice the Attorney General concluded that the Royal Court would not intervene to set aside a decision of the States relating to the regulation of its own internal proceedings. The decision was based on three factors. Firstly, Members understand that under the terms of the States of Jersey Law 1966 the regulation of States business is a matter for the Members themselves and not for any outside agency. Secondly, the same Law also gives the States the power to prevent minutes from being used as evidence. If the States refused to grant access to the minutes in the first place, then they are hardly likely to allow them to be used in a court case. Thirdly, given the effective separation of judicial from legislative and executive power which was achieved by the constitutional reforms of 1948, it is considered that the Royal Court would try to avoid the collision which would occur if it ordered a committee to do something the States had instructed that committee not to do.

5.6 A consequence of the Attorney General's advice is that members of the States have access to information which may include sensitive or confidential/personal materials in the custody of the Greffier. As a matter of practice the Greffier of the States expects Members of the States to give an undertaking not to disclose such information. In relation to information in the possession of a committee, however, access should be given unless there is good reason for denying it.

5.7 The present Attorney General has stressed that the issue of access by Members of the States to committee minutes and other papers in the custody of the Greffier of the States is essentially a political one and not a legal one. For this reason the matter has been referred to the Privileges and Procedures Committee. Hence the Committee believes it appropriate to consider access to information for Members, as well as access to information for the wider public. The potential impact of developments since 1987 in areas such as privacy, Data Protection and Human Rights means a review by this Committee of the Attorney General's 1987 advice is timely.

6. Freedom of Information and Records Management

6.1 A record is any piece of recorded information created, received or maintained by a person, or organisation, which provides evidence of their day-to-day activities. Records include correspondence, minutes, invoices, personnel records, health and safety registers, accounts, agendas, reports, contracts, purchase orders, building plans, project documentation and many other types of information. In the Island a wide range of records are held concerning the work of the States Assembly, Committees of the States, States Departments and other public authorities [6].

6.2 Records management is the organisational function of managing records to meet operational needs and public expectations of accountability and transparency.

Good records management –

- ensures that civil servants and other public sector employees have easy access to the information they need at the time they need it;
- supports decision-making;
- provides evidence of government's activities; and
- ensures that legal requirements relating to record-keeping are met.

Without good records management, officers working for the government could –

- have problems finding the information that they needed;
- not be able to prove that they had carried out their duties;
- struggle to comply with legal requirements; and
- keep records for too long, leading to storage problems and inefficient use of space, or throw away those that they should be keeping.

6.3 The operation of Freedom of Information legislation, and the attitude of the Government and bureaucracy to it, are perhaps as important determinants of openness as the actual legislation itself. The quality of training and guidance given to staff operating the legislation is particularly important. In the U.K. the Lord Chancellor said that –

> "*the records management function should be recognised as a specific corporate programme within an authority and should receive the necessary levels of organisational support to ensure effectiveness.*"

7. Data Protection

7.1 Revised Data Protection legislation for Jersey is currently at the consultation phase, and will be presented to the States by the Finance and Economics Committee late in 2003. The Privileges and Procedures Committee is of the view that this matter needs to be considered alongside the issue of Freedom of Information and Official Secrets and will be proposing to the Finance and Economics Committee that the new Data Protection legislation should be promoted by the Legislation Committee in consultation with the Privileges and Procedures Committee.

7.2 Data Protection and Freedom of Information are usually seen as complementary rights in modern democracies. At the same time the protection of privacy may limit access to information unless there is an overriding public interest in disclosure. However, the access rights of individuals who have personal data stored under Data Protection law go beyond the general access rights, and perhaps significantly the list of exemptions appears considerably shorter in the Committee's review of Data Protection legislation than in Freedom of Information legislation.

7.3 If there is to be concurring Data Protection and Freedom of Information legislation in force, much will depend on the clear delineation and linkage between the 2 Laws.

7.4 Neither Data Protection nor Freedom of Information prevail as a matter of principle, they have to be carefully balanced on a case by case basis. This task is probably best performed by a single agency with a combined remit. In the U.K., Data Protection and Freedom of Information are regarded as complimentary and as such are combined under the office of the Information Commissioner. Preliminary discussions between the Privileges and Procedures Committee and the States' Office of the Data Protection Registrar suggest this model could be applied to Jersey if adequate resources are committed.

8. Implementation Plan

8.1 If Jersey adopts Freedom of Information legislation, the Privileges and Procedures Committee would intend to produce a timetable for implementation. All States Departments would be required to adopt, maintain and review a publication scheme setting out the information that they will release to the public. The scheme would need the approval of the Information Commissioner (or whatever Jersey chooses to call its counterpart) and must specify the classes of information which the public authority intends to publish, the manner of publication and whether the information is available free of charge or on payment of a fee.

8.2 As a rough guide to the timescale involved, the U.K. Act was passed in 2000 and the following bodies were to become fully subject to the Act by the following times –

November 2002	Central Government (except the Crown Prosecution Service and Serious Fraud Office) Parliament, National Assembly for Wales and Non-departmental Public Bodies currently subject to the Code of Practice on Access to Government Information
February 2003	Local Authorities (except police authorities)
June 2003	Police, police authorities, CPS, Serious Fraud Office, Armed Forces
October 2003	Health Service
February 2004	Schools, Universities
June 2004	all remaining non-departmental Public Bodies

9. Conclusion

9.1 Though tensions amongst competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula that encompasses, balances and appropriately protects all interests, while placing primary emphasis on the most responsible disclosure possible.

9.2 At the same time, achieving an informed citizenry is a goal often counterpoised against other vital societal aims. Society's strong interest in an open government can conflict with other important interests such as the preservation of confidentiality of sensitive personal, commercial and governmental information and indeed information of a constitutional nature.

It is this accommodation of competing public concerns, with disclosure as the animating principle, that legislation for Jersey would seek to achieve.

10. Initial Recommendations

Access to Information Working Party

10.1 It has become clear to the Committee since beginning its investigations into this issue that it would be

both difficult and unwise to separate proposals on Freedom of Information from proposals coming forward on Data Protection and Official Secrets. For that reason a joint Working Party with the Legislation Committee has been established to look at the three issues with the assistance of the Attorney General.

10.2 The Working Party will consider the legislation that is appropriate in all three areas and will also make recommendations on the matter of the creation of the post of Information Commissioner to oversee the operation of the legislation and to act as an independent adjudicator. The Working Party will also consider the matter of access to information by members of the States.

Freedom of Information

10.3 Subject to the outcome of the consultation period and of the work of the Working Party with the Legislation Committee, the Committee is minded to recommend the introduction of legislation for the following reasons –

- The people of Jersey do not enjoy extensive, accessible or well-defined rights of access to official information.

- Clear legal guidelines would remove the perception that a "culture of secrecy" may exist in Jersey.

10.4 The Committee considers that there are a number of guiding principles that should shape our legislation –

- That the number, scope or complexity of exemptions should be limited.

- Ministerial vetoes, which allow information to be classified as exempt with limited right of appeal, should be very limited or have no special provisions.

- There should be a firm, structured administrative follow-through within Government, to support the Law and change the official culture towards greater openness.

- Any financial charges should be low and access uncomplicated, whether to the provision of information or to an appeals mechanism.

- An independent review mechanism should be available that is accessible (i.e. cheap for the appellant), easy to use and pro-active.

- Harm tests should be incorporated into exemptions which allow disclosure where it is in the public interest.

10.5 The Committee favours the New Zealand model because it recognises open government through the principle that official information is to be made available unless there is a good reason for withholding it.

(a) To increase progressively the availability of official information to the people of New Zealand in order –

(i) to enable their more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials and thereby to enhance respect for the law and to promote the good government of New Zealand;

(b) To provide for proper access by each person to official information relating to that person.

(c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.

Access to information by Members of the States

10.6 The Committee is conscious of the need to put in place new rules on access to information by Member of the States and, as stated above, this issue will also be addressed by the Working Party. After the introduction of the ministerial system of government there will no longer be Committee Minutes and it is important that new mechanisms are introduced to enable all members, and particularly those who are not part of the Executive, to be informed about the activities and the decisions of the Council of Ministers and of individual Ministers. It will also be vital to ensure that Scrutiny Committees are able to given adequate access to information about the work of the Executive to enable them to perform their task adequately.

11. References

Freedom of Information Act 2000 (Her Majesty's Stationery Office)

Report from the Select Committee appointed to consider the draft Freedom of Information bill (House of Commons, 27th July 1998)

Your Right to Know The Government's Proposals for a Freedom of Information Act (December 1997)

Background Material Relating to the White Paper, Lord Chancellor's Department (website www.lcd.gov.uk/foi/bkgrndact)

Records Management Policy Guidelines, Houses of Parliament Record Office, May 2000 (www.parliament.uk/archives/strategy)

Model Action Plan for Developing Records Management Compliant With The Lord Chancellor's Code Of Practice Under Section 46 Of The Freedom Of Information Act 2000 [1] Central Government

Model Action Plan for Developing Records Management Compliant With The Lord Chancellor's Code Of Practice Under Section 46 Of The Freedom Of Information Act 2000 [2] Local Government

"Freedom of Information Act 2000" A briefing paper by Rosemary Jay of Sweet & Maxwell

"The Freedom of Information Act – Some Things to Think About" a briefing note by Bernadette Livesey of Walker Morris Solicitors

"A little bit of singing and a little bit of dancing" by Graham Arnold, Inns of Court School of Law in *Student Law Review* (Volume 16, 2002)

"Is Data Protection a threat to Freedom of Information (or vice versa)?" by Dr. Alexander Dix presented to the 24th International Conference of Data Protection and Privacy Commissioners (Cardiff, 11th September 2002)

"Freedom of Information" by Cinzia Biondi in *Privacy and Data Protection* (Volume 2, Issue 1)

Code of Practice on Public Access to Official Information, adopted by the States of Jersey on 20 July 1999

Guide to Administrative Decisions (Review) (Jersey) Law 1982

Making New Laws – A Handbook for Instructing Officers (States of Jersey 1997)

A Brief History of Freedom of Information in the United Kingdom, The Campaign for Freedom of Information (website www.cfoi.org.uk)

Access to Policy Advice under a Freedom of Information Act – A Discussion Paper, The Campaign for Freedom of Information (April 1997)

Open letter from Lord Irvine of Laird, Lord Chancellor, to the Newspaper Society

Letter from Mr. Chris Bright, Editor *Jersey Evening Post*, to Senator Christopher Lakeman

"Production of information by Committees to individual members of the States" by H.M. Attorney General Philip M. Bailhache QC (States Minutes, 2nd June 1987)

"Access to Committee Minutes by members of the States" Memorandum to President and members of Privileges and Procedures Committee from Michael N. de la Haye, Deputy Greffier of the States (14th May 2002)

U.S. Department of Justice Freedom of Information Act (enacted 1966)

U.S. Department of Justice Freedom of Information Reference Guide

New Zealand Official Information Act 1982

Review of the Official Information Act 1982 (Report 40 of the New Zealand Law Commission, Wellington 1997)

APPENDIX

I. The international perspective

A number of countries have already adopted Freedom of Information legislation. None are likely to offer an exact blueprint, but they can provide a useful reference point for the consideration of access to information in Jersey.

The first law establishing a right to Freedom of Information became effective in Sweden in 1809. Other countries began to adopt legislation in the latter part of the twentieth century. Similar laws had been established earlier in many States of the U.S.A. before the U.S. federal Freedom of Information Act of 1966. Finland adopted such a law in 1951, followed by Norway and Denmark in 1970, France and the Netherlands in 1978, Austria in 1987, Spain in 1992, Portugal in 1993, Belgium in 1994 and Ireland in 1997. The argument put forward by some, that Freedom of Information laws were not appropriate for countries with Westminster-style constitutions, did not discourage Canada, and Australia and New Zealand from enacting legislation in the 1980s.

II. Freedom of Information in the U.S.A.

Enacted in 1966 the U.S. Freedom of Information Act established a statutory right of public access to information held by the federal government. The Act evolved after a decade of debate among agency officials, legislators, and public interest group representatives. The introduction to the Act summarises the principles behind it –

> "The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed"[7]

Under the Freedom of Information Act virtually every record possessed by a federal executive branch agency must be made available to the public in one form or another, unless it is specifically exempted from disclosure. The 9 exemptions of the Act which provide the only bases for non-disclosure are discretionary, not mandatory, in nature. Dissatisfied record requesters are given a speedy remedy in the U.S. district courts, where judges determine the propriety of agency withholdings *de novo* and agencies bear the burden of proof in defending nondisclosure.

III. Freedom of Information in the U.K.

The Freedom of Information Act 2000 was passed in November 2000. The Act will be brought fully into force by January 2005, and will be enforced by the new post of Information Commissioner. Only public authorities are covered by the Act. It gives a general right of access to all types of recorded information held by public authorities, sets out exemptions from that right, and places a number of obligations on public authorities.

At the moment individuals already have the right to access information about themselves held on computer and in some paper files under the provisions of the Data Protection Act 1998. The Freedom of Information Act extends these rights to allow access to all types of information held by public bodies, whether personal or non-personal.

The Act has been welcomed because –

(i) the range of public bodies covered is clear and wide ranging;

(ii) the applicant is entitled to the information as a general right and need not demonstrate any need to know;

(iii) the applicant is entitled to receive the actual documentation concerned rather than the authority's summary of what it considers salient;

(iv) the right of access applies retrospectively;

(v) the authorities are required to be proactive in publishing information;

(vi) the enforcement procedure via the Information Commissioner is reasonably accessible;

(vii) there are relatively modest charges for obtaining information.

On the other hand critics argue that a brief comparison with the original government White Paper (*Your Right to Know* 1997) reveals an Act considerably reduced in its ambition. The main concern is the expansiveness of its exemptions and in particular the breadth of exemptions relating to government information. Even though the U.K. is one of the very last amongst modern democracies to adopt legislation, the experiences of Freedom of Information abroad do not seem to have convinced the government to take anything other than a cautious approach. It appears that the present U.K. government, initially committed to the principle of Freedom of Information, seems rather more reluctant to release information now they have been in power for 5 years.

So how will Freedom of Information actually work in the U.K.? Anyone can make a request for information, although the request must be made in writing, (including e-mails). The request must contain details of the applicant and the information sought. The Act gives applicants 2 related rights, firstly to be told whether the information is held by the public authority, and secondly to receive the information.

Public authorities will be obliged to provide information recorded both before and after the Act was passed, and to respond within 20 working days. They may charge a fee.

As mentioned briefly in the previous section, some of the information held by a public authority may be regarded as exempt. The 23 exemptions in the Act relate to matters of national security, law enforcement, commercial interests and personal data.

However, before relying on exemption a public authority must consider 2 further points. Firstly some exemptions can only be claimed if releasing the information would cause prejudice. Secondly, some exemptions require the public authority to consider whether the public interest in withholding the exempt information outweighs the public interest in releasing it.

Most of the exemptions require the public authority to consider both the test of prejudice and the public interest test. Only the information to which an exemption applies can be withheld. If a particular document is requested which contains exempt information, the rest of the document must be released.

IV. Exemptions: U.S.A. vs U.K.

In America the exemptions authorize federal agencies to withhold information covering –

(1) classified national defence and foreign relations information;
(2) internal agency rules and practices;
(3) information that is prohibited from disclosure by another federal law;
(4) trade secrets and other confidential business information;
(5) inter-agency or intra-agency communications that are protected by legal privileges;
(6) information involving matters of personal privacy;
(7) certain types of information compiled for law enforcement purposes;
(8) information relating to the supervision of financial institutions;
(9) geological information on wells.

Even if information may be withheld under the U.S. Freedom of Information Act, it may still be disclosed as a matter of administrative discretion if that is not prohibited by any law and would not cause any foreseeable harm.

In the U.K. there are an large number of exemptions given under the following sub-headings –

(1) Information accessible to applicant by other means.
(2) Information intended for future publication.
(3) Information supplied by, or relating to, bodies dealing with security matters.

(4) National security.
(5) Certificates under ss. 23 and 24: supplementary provisions.
(6) Defence.
(7) International relations.
(8) Relations within the United Kingdom.
(9) The economy.
(10) Investigations and proceedings conducted by public authorities.
(11) Law enforcement.
(12) Court records, etc.
(13) Audit functions.
(14) Parliamentary privilege.
(15) Formulation of government policy, etc.
(16) Prejudice to effective conduct of public affairs.
(17) Communications with Her Majesty, etc. and honours.
(18) Health and safety.
(19) Environmental information.
(20) Personal information.
(21) Information provided in confidence.
(22) Legal professional privilege.
(23) Commercial interests.
(24) Prohibitions on disclosure.

Of course, the situation is more complicated than this simple trans-Atlantic comparison suggests, because there are other points a public authority must consider before relying on an exemption, such as public interest tests. Nevertheless the sheer number and breadth of exemptions to the U.K. Act has been widely regarded as disappointing.

V. Freedom of Information in New Zealand

The New Zealand Official Information Act was passed in 1982, and quickly came to be regarded as a critical element in the reform of that country's central government. The Act included provision for an Information Authority (not a permanent authority, but established for 5 years) to oversee the measure's introduction and to promote its principles. The Information Authority was also charged with a review of those statutes which continued to restrict access to information. Its work culminated in the passage of an amending Act in 1987 which superseded many of the statutory restrictions.

The Act recognises open government through the principle that official information is to be made available unless there is a good reason for withholding it. As given in section 4 the purposes of the Act are –

(a) to increase progressively the availability of official information to the people of New Zealand in order –

(i) to enable their more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials and thereby to enhance respect for the law and to promote the good government of New Zealand;

(b) to provide for proper access by each person to official information relating to that person;

(c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

The Act has wide coverage including central government, agencies, NDPBs, the Police, the Security Intelligence Service, and virtually all public corporations e.g. Air New Zealand and the Post Office – the bank of New Zealand is the only notable exception. Exemptions concerning access to official information are discretionary. All include

harm tests and 8 are also subject to overriding public interest tests. Exemptions for personal information are more narrowly drawn than those for official information. The Act allows early access to a wide range of policy documents. In most, but not all cases, this access is granted after decisions have been made.

An important and well regarded feature of the New Zealand Official Information Act is the role played by the Ombudsman. A person whose request has been refused or who is aggrieved in some other way for example by the manner of release of the information, the charge made for it, or the time taken to reply to a request, may complain against the decision to the Ombudsman. The Ombudsman is bound to –

(a) advise the relevant agency of the intention to undertake the investigation;

(b) give the agency or other person affected an opportunity to be heard, before making any adverse comment; and

(c) consult with the relevant minister (or Mayor or chairperson of a local organisation) in certain circumstances.

One of the purposes of the Act is to increase progressively the availability of official information. To achieve this, the Ombudsman has, over time, used this provision to interpret the exemptions more narrowly. Ministers *collectively* have the right to veto a recommendation by the Ombudsman to disclose information, but the use of the veto is subject to judicial review.

A New Zealand Law Commission report, whilst concluding that the Act generally achieves its stated purposes, identified the following major problems with the Act and its operation –

(a) The burden caused by large and broadly defined requests.

(b) Delay in responding to requests.

(c) Resistance by agencies outside the core state sector.

(d) The absence of a co-ordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues.

The history and operation of the New Zealand Act may prove instructive for those developing proposals for Jersey. For example, in New Zealand it was found that the incorporating statutes of some newly privatised bodies imposed obligations to act in a commercial manner and that this was often perceived as inconsistent with, and ultimately overriding, their obligations with regard to official information. Might the same happen with Harbours, Airports, Telecoms, etc.? Would new Freedom of Information legislation for Jersey apply to authorities contracted out by the States but performing work in the private sector?

Public authorities will obviously need to prepare for the introduction of Freedom of Information, but companies also need to consider how Freedom of Information will impact on them, particularly if they provide public services.

There is also the question of contracts between public authorities and non-public authority contractors. When entering into contracts with non-public authority contractors, public authorities may come under pressure to accept confidentiality clauses so that information relating to the terms of the contract, its value and performance will be exempt from disclosure. Public authorities should not accept such clauses where this is commercially viable.

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[1] See *Leander vs Sweden* (26th March 1987) 9 EHRR 433,*Gaskin vs United Kingdom* (7th July 1989) 12 EHRR 36 *Guerra vs Italy* (29th June 1996) 26 EHRR 357.

[2] ‘Opinion’, p.8, Jersey Evening Post, 20th January 2003.

[3] H.M. Attorney General Philip Bailhache QC (States Minutes, 2nd June 1987).

[4] Syvret v Bailhache and Hamon 1998 (JLR) 128.

[5] Decision in ‘City of Birmingham District Council v O (1983) 1 All ER 497’.

[6] See definition of ‘public authority’ in Article 7(2) of the Human Rights (Jersey) Law 2000

[7] Introduction to U.S. FOIA at www.usdoj.gov/oip/introduc.htm.