STATES OF JERSEY

DRAFT FREEDOM OF INFORMATION LAW 'POLICY PAPER': WHITE PAPER OCTOBER 2009

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by the Privileges and Procedures Committee

STATES GREFFE

2009 Free R.114

'Those that accept FOI as a legitimate right, necessary and desirable in a modern democracy, will enhance their public standing. They are more likely to be seen as conscientious and responsive to the public's needs and to be given the benefit of the doubt when taking difficult decisions. Those that see it as a low priority and fail to prepare for it or resist reasonable requests will stoke up public suspicion about their activities. They will attract increasing numbers of requests and enforcement proceedings, damaging their reputation and credibility.'

Maurice Frankel, Director
Campaign for Freedom of Information
February 2004

This paper sets out the work that has been done in developing the Draft Freedom of Information Law 200-, the key policies on which the Law is based, the issues, the stage which the deliberations have reached, the proposals currently under review, and the options on areas as yet undetermined.

The public and stakeholders are invited to make comments and suggestions on any aspect of the proposals and options. Please email to a.harris@gov.je or send any responses to –

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Deadline for responses – 25th November 2009

Section 1 – Background

1. Introduction and background work

Freedom of Information legislation has now been under consideration in Jersey for well over 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'.

The matter was progressed in the form of Jersey's Code of Practice on Public Access to Official Information, which came into force in January 2000. 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.

Why a Law rather than Code?

Underlying principles

The philosophical and political arguments in favour of Freedom of Information 'FOI' Law are well rehearsed. The Committee recognised that, even since the introduction of the Code, Jersey people do not have the statutory, well-defined rights of access to official information enjoyed in more than 50 other jurisdictions. The Privileges and Procedures Committee 'PPC' considers that the force of law is required to continue the culture change, giving ordinary citizens a legal right of access to government information.

Reinforcing States aims

In other jurisdictions FOI legislation has been regarded at the outset not as a standalone law but an integral part of reform and as absolutely fundamental to how government develops.

The Standing Orders of the States of Jersey set out the terms of reference of the Privileges and Procedures Committee, which include –

> (h) to keep under review the procedures and enactments relating to public access to official information and the procedures relating to access to information for elected members;

The Standing Orders therefore envisage that public access to information and access to information for elected members are two different things, and the Freedom of Information Law will not be the vehicle used by members to access information, unless that is their personal choice.

The States approved the Strategic Plan 2009 to 2014, which contained as an aim –

- Create a responsive government that provides good and efficient services and sound infrastructure and which embraces a progressive culture of openness, transparency and accountability to the public.

In Section 15 entitled "Protect and enhance our unique culture and identity" under "What we will do", it states –

- We will work to improve the public trust in government and establish a system of greater transparency, public participation, and collaboration to strengthen our democracy and promote efficiency and effectiveness in Government (CM).

Creating legally enforceable FOI rights for the people of Jersey would not only reinforce these aims but is a single, emphatic act that will enable the States to achieve its aims.

Jersey's low levels of voter turnout were recognised in the previous Strategic Plan – regularly less than 30% – as evidence of a democratic deficit in the Island and disenchantment with government.

The States approved the Public Sector Reorganisation: Five Year Vision for the Public Sector (P.58/2004) in 2004 – this set out aims for five years and made a commitment to greater transparency and accountability. Similarly, the £9.4 million Visioning Project which arose out of this exercise 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.'

From the public perspective, the force of law carries great weight and offers legal protection that cannot be offered in a policy or Code. It would remove once and for all the perception of a culture of secrecy and enshrine in law not only a duty to provide information unless exempt, but also a duty to assist a member of the public in making an application.

Deficiencies of the Code

The deficiencies of the existing Code were highlighted by several States Members during the 2004 debate on the improvements.[1] The rapporteur, Connétable 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 Code of Practice on Public Access to Official Information has served a valuable purpose in dispelling myths that allowing public access to data is unworkable, overly burdensome to States Departments or diverts attention from core work.

[1] See transcript of States Debate of P.80/2004 on 8/6/2004

Latest statistics for the working of the Jersey Code during 2008, its ninth year of operation, continue to show a low level of applications. Only two requests for information were refused and the appeals procedure through the States of Jersey Complaints Panel remains untested. No cases have proceeded to judicial review.

TOTALS FOR 2008	
Total number of applications which mentioned the Code:	**21**
Total number of refusals:	**2**

The below table shows the number of applications received and refused under the Code from 2003 to 2008 –

	2003	**2004**	**2005**	**2006**	**2007**	**2008**
Requests received	62	80	62	73	20	21
Requests refused	2	1	3	9	3	2
Appeals to President/Minister	1	0	0	2	2	0
Appeals to States of Jersey Complaints Board	0	0	0	0	0	0

It should firstly be noted that applications for personal information are now routinely processed under the Data Protection (Jersey) Law 2005. In addition, departments have commented that they often receive requests for information, but that these requests are unlikely to mention the Code of Practice on Access to Official Information. It is a fact that information is regularly provided to members of the public on a day-to-day, business as usual, basis by officers of the States during the normal course of their work, with no mention of the Code being required. As a result, it is impossible to measure accurately the number of requests for official information received by the States of Jersey each year. It is more likely that those which are handled under the Code of Practice are the slightly more difficult requests, and it is the officer concerned who identifies that the request should come under the Code, rather than the applicant citing the Code.

Despite the above statistics relating to public access to information, there is a body of opinion that asserts that there is a culture of secrecy in the Island, and the introduction of a Freedom of Information Law, properly implemented, managed and enforced, should go some way towards restoring public confidence.

It should also be noted that the States, during the debate in June 2004, also requested the Greffier of the States to take the necessary steps to ensure that all matters recorded in Part B of the minutes are properly exempt from disclosure in accordance with the provisions of the Code. This duty has now evolved, and as part of the quality assurance process carried out by the States Greffe in relation to draft decisions, there is a check of draft ministerial decisions to ensure that they are marked as public unless there is a valid exemption for not releasing the information. Advice is regularly given on draft decisions in this regard.

Practical benefits

The introduction of an FOI law raises the same issues about effective record keeping as the Data Protection law, 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.

UK experience showed 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. The Public Records (Jersey) Law 2002 imposed duties on departments in respect of record-keeping, and if adhered to, will considerably reduce any burden associated with a Freedom of Information Law.

In this regard, it should be noted that the Education, Sport and Culture Department undertook a pilot scheme in 2005 to develop an electronic records management solution within the Directorate which met information governance requirements and ensured that the department was compliant with records management guidelines provided by the Head of Archives and Collections. It was designed to provide a framework for the daily and long term management of physical and electronic objects and be accessible by all Directorate users. It was a significant piece of work but due to budgetary constraints it was not possible to resource it adequately at inception. Although valuable, the electronic solution adopted has not been straightforward for all users to use. Consequently, while it does indeed provide quick access to documents that have been uploaded, the number of actual users of the system is limited. Electronic records management therefore remains a challenging issue for that department, even though it was one of the first to initiate work in this area.

The Head of Archives and Collections is working to assist departments to work towards compliance with the Public Records Law, but is hampered by lack of resources, and it is not anticipated that full compliance will take effect before 2020, by which time retention schedules for each department, section and administration will be in place. The Head of Archives and Collections is currently working with 10 departments and administrations. These 10 departments have draft schedules in place that need to be reviewed and agreed before they become compliant with the Law. As of August 2009, there are 6 signed off retention schedules in place.

International perspective

More than 50 countries have a form of FOI legislation. In the UK, 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 UK authorities to set up publication schemes and comply with the new legal requirements.

The UK FOI Act is not regarded as a good model for Jersey to follow. It has been widely criticised as cumbersome and ineffective, principally because of the range of exemptions and inclusion of a ministerial veto. Nevertheless, the British public's right to information is enshrined in the statute book.

If the States decide not to proceed with a law, it would be extremely difficult to justify why Jersey citizens should be less legally entitled to government information than their counterparts in the UK 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 sometimes attracts.

In addition, adoption of an FOI Law, and in the long term a publication scheme, could enable Jersey to comply with the Aarhus Convention on Access to Environmental Information and Directive 2003/35/EC of the European Parliament[2], which guarantees public access to environmental information and participation in decision making. Jersey cannot currently meet the criteria, which include free access to government-held data that would be possible under an FOI Law.

A gap exists in Jersey that is covered in the UK 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 UK Local Government (Access to Information) Act 1985. Nothing similar exists in Jersey.

Key Policy Outcomes

The States, in adopting "Freedom of Information – proposed legislation" (P.72/2005), agreed that subject to further consultation, the Law should be broadly based upon the 22 following key policy outcomes –

KEY POLICY OUTCOMES

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.

6. The Law would not apply to States-aided independent bodies.

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.

[2] The Aarhus Convention, website http:europa.eu.int/comm./environment/aarhus

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 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.

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[3] and legal advice given to an authority[4] are adequately covered elsewhere in the exemptions. The explicit retention of these provides 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) [in the code], concerning the premature release of a draft policy, should be amplified so that its purpose is clearly understood as follows –

[3] *Exemptions (i), (xv), (xvi) are more than adequate regarding medical confidentiality.*
[4] *Any one of the other 19 exemptions might be more specifically used, depending on the nature of that advice.*

"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.[5]

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.

The Law relates only to *public* access to official information. As in other jurisdictions, elected members have an extended right of access in order to fulfil their parliamentary role. The Committee will seek to protect this.

It is important to note that a Freedom of Information Law is 'applicant blind'. In asking for information under an FOI Law one is asking "Can this information be made public?" If the answer is 'No' then the application will be refused.

[5] *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.*

This must not be confused with the parliamentary right of access which is quite separate, and which carries with it an implied duty of confidentiality.

The PPC as currently constituted has consulted the following experts on the proposed law, and asked them about the introduction of the UK FOI Act, its implementation, the pitfalls found and what they might have done differently if they were commencing the task again. Discussions also took place more specifically on their observations of, and the proposed exemptions in, the Jersey draft Law. In the first two cases there were sessions with the Committee and relevant senior officers and also with all States members.

- Mr. Graham Smith, Deputy Information Commissioner, UK, 22nd May 2009;
- Mr. Maurice Frankel, Director, Campaign for FOI on 12th June 2009;
- Ms Belinda Lewis, Head of Information Policy, Ministry of Justice, on 1st September 2009.

The House of Lords Select Committee, when considering the Draft Freedom of Information Bill, identified three fundamental principles which ought to be met by any freedom of information law –

> *"First, it should permit access to information as a 'general right for all people' rather than on a 'need to know' basis.*
>
> *Secondly, the right of access should be subject to a 'limited number of exemptions that permit refusal to disclose information if disclosure would cause harm of a specified kind.'*
>
> *Thirdly, there should be a 'right of appeal to an impartial arbiter who decides whether the exemption applies to particular information, and who has the power to rule that information should be disclosed.' "*

The Committee agrees with these principles and believes that the draft proposed complies with them.

The PPC has consulted on the proposals for an FOI Law on 2 previous occasions – in R.33/2006 on the first version of the Law, then R.60/2007 on a revised format. The attached proposals are greatly simplified and in very clear English making this draft Law much more accessible. The draft Law is broadly based on the policy outcomes listed in P.72/2005. The following sections discuss the salient points of each part of the draft, and should be read in conjunction with the draft Law, attached at Appendix 1. This draft Law has not yet been finalised, and is still subject to change.

Consideration and discussion of the law so far drafted

The following sections discuss the contents of articles where there has been considerable discussion or concern. Where articles have not recently attracted comment, these have not been set out below.

PART 1 – deals with the interpretation of the words and phrases used in the law, in particular the definition of what is a "public authority".

Which public bodies will be covered by the Law?

1. Ministers, departments, Scrutiny Panels, Public Accounts Committee, Chairmen's Committee and the Privileges and Procedures Committee, Greffier of the States;

2. Bailiff of Jersey, Attorney General, HM Lieutenant Governor;

3. Parishes, quasi public bodies;

4. Court system and tribunals;

5. More remote public authorities.

Which quasi public bodies will be covered? Which more remote public authorities will be covered?

The States, in approving P.72/2005, agreed that the draft Law should be broadly based on certain key objectives. The Key objectives relating to this matter are –

> *Key policy 5 – "Authorities that are emanations of the States or majority owned should be bound to release information"*
>
> *Key policy 6 – "The Law would not apply to States aided independent bodies".*

The Committee recommends that the following bodies be initially covered, with others being capable of being added in the future by Regulation –

Quasi public bodies

Jersey Financial Services Commission
Jersey Competition Regulatory Authority
Jersey Law Commission
Jersey Appointments Commission
Waterfront Enterprise Board, or successor

More remote public authorities
Jersey Telecom
Jersey Post
Jersey New Waterworks Company
Jersey Electricity Company

As described in more detail later in this report it is proposed that the application of the Law to each of the above bodies be phased, to allow an appropriate lead-in period before the commencement, and additionally a phased approach to retrospection.

The Committee considered whether to apply the Law to States-aided independent bodies at this stage. In the light of the considerable sums made available there was some concern that the public had insufficient access to information they hold. 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-, but information would only become available to the public as and when he chose to do carry out reviews or through their own reports which they make public. However, the Law is capable of being amended by Regulation (Article 49) so the list may be amended at a later date in the light of experience.

For comparison purposes, the Public Records (Jersey) Law 2002 and the Data Protection (Jersey) Law 2002 have the following definitions in relation to those public bodies required to comply with the Laws –

Public Records (Jersey) Law 2002	**Data Protection (Jersey) Law 2005**	**Proposed Freedom of Information Law**
ARTICLE 5 **Public institution** (1) For the purposes of this Law, "public institution" means any of the following – (a) a Department referred to in Article 1 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965;[6] (b) any administration of the States; (c) the Trust, to the extent that it performs functions under this Law or any other enactment (other than the Loi accordant un acte d'incorporation à l'association dite "The Jersey Heritage Trust"[7] registered on 3rd June 1983); (d) the Archivist; (e) the Panel; (f) a person prescribed by Regulations for the purposes of this definition; (g) except to the extent	The Data Protection Law is not organised around the names of bodies to which it applies. It is centred on the use of data, with certain exemptions, eg domestic processing of personal information. There is not therefore a comparable list of public authorities as all bodies processing personal data are captured. The definitions of "data controller" and "processing" are therefore the relevant definitions. **PART 1** INTERPRETATION, OBLIGATIONS AND OFFICES "data controller" means, except as provided in paragraph (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed; "processing", in relation to information or data, means obtaining, recording or holding the information or data, or carrying out any operation or set of operations on the information or data, including – (a) organizing, adapting or altering the information	"public authority" means – (a) the States Assembly; (b) a minister; (c) a committee or other body established by resolution of the States or by or in accordance with the standing orders of the States Assembly; (d) an administration of the States; (e) a Department referred to in Article 1 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965; (f) a body corporate or a corporation sole established by the States by an enactment; (g) the States of Jersey Police Force; (h) a corporation owned by the States; (i) a corporation in which the States have a controlling interest; (j) each parish; "scheduled public authority" means a public authority named in the Schedule. [amendable by Regulation]

[6] Volume 1963-1965, page 551 and Volume 1992-1993, page 439.
[7] Volume 1982-1983, page 139.
[8] Note: some material of the Lieutenant Governor is exempt from access: Article 31(2).

that Regulations otherwise provide – (i) the staff establishment of the Lieutenant Governor;[8] (ii) the States of Jersey Police Force; (iii) any office or institution in Jersey where natural persons who are officers of the Crown, or are employed by the Crown, the States or a Committee of the States, work in their capacity as such officers or employees; (iv) a corporation owned by the States or in which the States have a controlling interest; (v) any of the twelve parishes of Jersey so far as concerns its staff establishment, offices, and institutions (including the Honorary Police), that perform the temporal functions of the parish, to the extent that they perform those functions. (2) Regulations made under paragraph (1)(f) may	or data; (b) retrieving, consulting or using the information or data; (c) disclosing the information or data by transmission, dissemination or otherwise making it available; or (d) aligning, combining, blocking, erasing or destroying the information or data;	

	prescribe a person to be a public institution for the purposes of some or all of the provisions of this Law.		
(3)	Regulations made under paragraph (1)(g) may prescribe an exception for the purposes of some or all of the provisions of this Law.		

Article 2 –

> *Key policy outcome 4 – Application, especially for readily accessible information, should not be restricted by having to be in writing.*

The Committee has decided that the only workable route is for applications to be in writing, so as to provide an opportunity for the applicant to explain exactly what information he/she requires. A request for information must therefore be in writing, but this may be received by email. There is a clear distinction between FOI requests and "business as usual" requests which could be handled differently, without the need for unnecessary paperwork, but within the freedom of information rules.

Article 5 – this makes it clear that notwithstanding the exemptions, if a public authority chooses to release information, nothing in the Law prevents it from doing so. This mirrors the existing position under the Code. Releasing information which might otherwise be considered as exempt is a responsibility, and the public authority will need to consider carefully the consequences of its actions. This article ensures that the Law lays down a minimum standard, and that public authorities may exceed these standards if they wish to do so.

PART 2 – Access to information held by scheduled public authorities

Article 7 – The Law would establish for the first time in Jersey a statutory right to access information from scheduled public authorities, so long as the information was not exempt. This may seem an obvious statement under the circumstances but it is an important right.

Article 9 – a public authority is also required to release 'qualified' information unless it is satisfied that the public interest in supplying the information is outweighed by the public interest in not doing so. This means that whenever a request is received relating to qualified exempt information, **the public authority cannot just arbitrarily say 'no'**. They must consider carefully where the public interest lies.

The term "**the public interest**" is not defined in the Law. This is a very important element of the way in which the Law will work, as the way that the public interest test is considered will have a material effect upon the disclosure or otherwise of information that is qualified by that test. Some very interesting studies have been undertaken by The Constitution Unit, School of Public Policy, UCL, for example "Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000 by Meredith Cook (pub. August 2003)" which

may be downloaded free of charge from the UCL website (http://www.ucl.ac.uk/constitution-unit/publications). This publication is now in its second, and updated, edition.

However, something which is "in the public interest" may be summarised as something which serves the interests of the public. The public interest test entails a public authority deciding whether, in relation to a request for information, it serves the interests of the public either to disclose the information or to maintain an exemption or exception in respect of the information requested. To reach a decision, a public authority must carefully balance opposing factors, based on the particular circumstances of the case. On appeal, the Information Commissioner will also review the public interest test, as will any further appeals body. Where the factors are equally balanced, in the UK, the information must be disclosed.

Article 11 – the public authority has a statutory duty to make every **reasonable effort to advise and assist an applicant** in making their request. Very often this might mean ensuring that an applicant is submitting their application to the right department, it could be assisting the applicant to tailor their request so as not to incur charges, discussing with them exactly what it is they require to avoid unnecessary work or cost.

The Committee has also considered whether all requests for information should be handled through the Customer Services Centre at Cyril Le Marquand House as a way of streamlining frontline staff associated with handling requests. The Committee has noted that at each department there is a data protection liaison officer who is the liaison point between that department and the Data Protection Commissioner, and that as there is some synergy between the two items of legislation, it might be better for that officer to also have a reporting role to the Information Commissioner (likely to be either the same person, or in the same department as the Data Protection Commissioner). The ability to assist and advise is more likely to be possible from within the department, rather than at the Customer Services Centre, as the departmental office has significantly greater knowledge of the subject matter.

Article 12 – the **time allowed to provide information** is 20 full working days after the request was received. In practice, much information is currently provided in significantly shorter timescale. The clock stops if a public authority asks for clarification of the request or further details, or if a fee is payable, until that fee has been received.

> *Key policy outcomes 10 and 11 state –*
>
> *"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.*[9]
>
> *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."*

[9] *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.*

The Committee as previously constituted took heed of concerns that 3 weeks was insufficient from an administrative point of view, and therefore agreed that 4 weeks should be the time allowed to decide to release information, but did not agree to a further extension of time to cover holiday periods.

Article 14 , 15 – a public authority may request **a fee**. In the majority of cases it is expected that information will be provided free of charge, and only when a significant number of hours' work would be required would it calculate a fee.

Key policy outcome 9 states –

"9. Information should in general be released free of charge[10] and proportionate assistance should be given to a special need, such as an individual's sight impairment."

Ms Belinda Lewis, Head of Information Policy, Ministry of Justice attended on the Committee to discuss practical issues including the cost of implementing the Freedom of Information Act 2000 in the United Kingdom. The U.K. Act provides limits access to information around the level of cost involved in providing that information, and in considering any containment of costs which would be the subject of later Regulations, rather than in the Law, the Committee will need to consider whether to impose any limits to ensure the service was not swamped with unmanageable requests.

In the U.K., the limit for central government is roughly £600 and £400 for local government. That equates to broadly about 3 and a half days worth of work of one officer in trying to deal with a request for information. When a request is received the authority must first assess what the cost of complying with the request might be. A request which is termed in a very broad way, so if it is all information, correspondence, minutes, everything to do with X and if X is quite a big event that stretched out across a number of years would quite clearly be way beyond the cost limit. If the request was something that was a bit narrower, for example, all information that the authority holds on an event between a period of, say, 6 months, it might be possible do that within 3 and a half days. A rough calculation would need to be made, and officers would look into their records, look at the archives, and might come back to say: "We have got 10 feet worth of shelving with files that are relevant. We then think that there is other secondary information that is held elsewhere in an archive, and we would have to then retrieve all of that. We think that that is 6 boxes worth and we think that the boxes contain X number of files; therefore, to go through and work out what is relevant we think that that would exceed 3 and a half days."

It is important to note that the time required to assess which exemptions apply and to apply the pubic interest test in the case of qualified information does not count within the 3 and a half days.

In the United Kingdom, costs can be aggregated, so ensuring that a large request for information cannot be submitted as multiple small requests to avoid charges. In some instances, requests are submitted to multiple departments to obtain related information, and this is dealt with using the 'Clearing House' system discussed below.

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

Article 11 in the draft Law for Jersey places an obligation on the authority to assist the applicant, and this may be advice to ensure that the cost to the applicant is minimised, or to ensure that it does not fall outside that which the authority can provide.

Clearing House

In the United Kingdom there is a 'Clearing House' system for central government requests in relation to a number of issues. This initially started as quite a large body but has been reduced in size now that the Act is fully in operation. There are a number of 'triggers' which would prompt referral to the clearing house, and for the Ministry of Justice, these include information on national security issues, the Royal Household, Ministers (collective responsibility, cross-cutting scope, high political sensitivity), high likelihood of harmful media interest/story running at the time, definite/severe risk of repercussions with foreign governments or International organisations, any information received from a foreign government or international organisation that are protectively marked, honours, Cabinet and Cabinet Committee papers and correspondence, requests relating to No.10 Downing Street. This allows authorities to ensure that multiple requests or vexatious requests are identified, and that there is consistency in approach in relation to requests that may be forwarded to numerous authorities, and of course, that sensitive information is appropriately handled.

Records management

The Committee feels bound to remind departments that they should get their **records management** in order, as it would be inappropriate to seek a fee for accessing information from a poorly organised filing system. The adoption of the draft Law should be taken as a **firm signal that records should be in order.**

> *Key policy outcome 8 states –*
>
> *"8. Authorities are to be encouraged to develop records and document management schemes which will facilitate retrieval of requested information."*

Article 16 – where public records are sent for archiving to the **Jersey Heritage Trust**, for the purposes of the FOI Law, they become the 'property' of the Trust. This will be dealt with separately in Regulations.

Article 18 – the Law will enable the later introduction of **publications schemes**. There are no plans to introduce a publications scheme in early course and no regulations have therefore been prepared.

> *Key policy outcome 7 states –*
>
> *"7. A formal publication scheme is <u>not</u> 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."*

Under the UK Freedom of Information Act, authorities were required to produce publication schemes describing the range of information they publish. Evidence shows that they have done so with varying degrees of success and reluctance – but usually at great cost.

The smaller scale of public administration in Jersey means that separate schemes for each Department would be cumbersome and possibly prohibitively expensive. The Information Asset Register (IAR) to be found at www.gov.je/statesreports has provided the starting point for a more user-friendly option tailored specifically for Jersey. The IAR, which was approved as part of the improvements to the Code in 2004, contains a list of major reports either complete or underway, and where these have been produced by a consultant, the cost of the report. Where the reports are available to the public, a link has been included. This gives the public the ability to download and print copies of non-exempt reports straight from the list and could be enhanced to provide a publications scheme. The intention was that all reports from all States departments should be capable of being found in one place, and this would also allow officers to search and avoid repeating work already undertaken elsewhere in the organisation. However, the web page is currently by no means comprehensive. It could be argued that if this web page were well maintained, then the need for a publications scheme would lessen.

It is administratively easy for Departments to add reports. Specified officers in each Department have been given access to add reports on a regular basis to the relevant section of the site. The operation is no more complex than sending an email. This activity is under the purview of the Chief Minister's Department. To improve compliance, the scope and regularity with which information is added to the list can be monitored by the Information Commissioner. This would provide the necessary oversight of this work.

Article 19 – time limit on exemptions. This article describes which exemptions would be removed after 30 years, and all information becomes available after 100 years. In the UK there has been a recent review of the 30 year rule, and (as at June 2009) the government is still considering its response to those proposals. The 30 year rule will apply to the age of the information and not the period of time that it has been held by a department, so the clock will not be 'reset' upon transfer of information.

PART 3 –

Article 20 – **Vexatious requests** need not be complied with. However, the Committee has ensured that by law an authority may not deny access to information because it might embarrass that authority or because the information is required for a political purpose.

Article 21 – A public authority may decline to respond to **repeated requests** or requests for the same/similar information for an applicant. This self evident provision occurs in the FOI Laws of other jurisdictions.

RESTRICTED AND QUALIFIED INFORMATION

There are two possible perspectives on access to information – on the one hand that a public authority holds government information, but will consider release, or on the other hand, the information is available and will be given, unless there is a genuine reason for withholding it. **The starting point the Committee has agreed upon is that information is available, and will be supplied, unless it is exempt.**

Parts 4 to 6 list the exemptions, and divides them into 3 categories.

- Information otherwise available;
- Restricted information – there is no access to this information at all;
- Qualified information – this information is subject to a public interest test, and there may be circumstances in which it could therefore be released.

However, in accordance with Article 5, any public authority is not bound to withhold information if it chooses to release it.

There are a number of questions around the categorising of information.

Why have exemptions at all? Why not have all information in the same 'pot' and simply apply a public interest test when an application is received?

It is generally agreed that exemptions are necessary. This is partly from an administrative standpoint – where clear rules exist, greater consistency is achieved, and administratively, more junior officers may handle requests. Where a public interest test is necessary in every case, then more senior officers will be required to apply their judgement and bottle-necks and delays could occur.

In addition, where a lot of information must be sought from numerous files, significant time could be taken up in research and collation before a public interest test could be applied, and before the matter of costs/fees could be considered. It would be inequitable to assess the amount of work and charge a fee in advance when, once located, it was deemed that the information could not be released.

Why have a split between 'restricted information' and 'qualified information'? Why not have all information as 'qualified information'?

This is possible, however the restricted information in the draft Law is limited to –

(a)

- information that can be obtained another way (and the authority is required to assist the applicant to locate it);
- Court information in relation to proceedings, an inquiry or arbitration;
- Personal information (in which case an application may be made under the Data Protection (Jersey) Law 2005);

(b) information, the disclosure of which

- Is prohibited by another enactment;
- Constitutes a breach of confidence;
- Would jeopardise national security;
- Would affect the privileges of the States.

The majority of exemptions from disclosure refer to 'qualified information' and at each stage of the process, the public interest test needs to be applied, that is by (a) the public authority (b) the head of that authority/Minister, on appeal (c) the Information

Commissioner (d) the Appeals Body. As in the previous question, there would be considerable increase in workload, and hence cost, if all information was subject to the public interest test, as the volume of throughput would be greatly increased.

The Law will provide a much more sophisticated tool than the existing Code of Practice for the disclosure of information, with a differentiation between information that cannot be released, and information that can be assessed alongside the public interest test.

Why isn't there a 'neither confirm nor deny' clause in the draft Law?

The Committee did consider including a 'neither confirm nor deny' (NCND) clause in the draft Law to mirror that which appears in the Code, and indeed, this appeared in an earlier draft in relation to National Security. This is included by some jurisdictions and allows them to consider whether or not to disclose that they have, or have not, information on a matter. This is of particular interest in issues touching upon national security or policing matters. There was considerable concern on the part of the States of Jersey Police that its agreement with the United Kingdom whereby it is able to access sensitive data collected by the UK authorities for policing purposes would be under threat unless appropriate treatment of this information was put in place.

The Committee agreed that a **'carve out'** should be employed to ensure that any information given to a Jersey public authority by a foreign government department (to include the United Kingdom) would not be considered to be 'held' by the Jersey authorities for the purposes of the Law, and therefore there would be no need for an authority to confirm or deny that it had that information. The Committee approved this approach and thereby was able to remove the 'confirm or deny' clause.

There is an outstanding query relating to whether there is a need or not for a 'neither confirm nor deny' (NCND) clause in relation to internal policing matters or law officer investigations and these will be resolved during the consultation period. Certainly Ms B. Lewis pointed out that this was an area the Committee should consider, and the initial responses received relating to the States of Jersey Police, Customs and Immigration, and Education, Sport and Leisure indicate that an NCND clause would be important. The Law Draftsman will therefore be requested to prepare an amendment to the draft Law to include the NCND in the next draft before lodging.

PART 4 – Information otherwise available

What is 'information otherwise obtainable'?

This category relates to information which the public may obtain, but which can be obtained another way, so it is not really inaccessible, but the Freedom of Information Law is the wrong route to use.

Article 22 – Any information which can be obtained another way is not capable of being accessed using this Law. However, an authority must make reasonable efforts to inform the applicant where the information may be obtained.

Article 23 is a standard article which refuses access to information relating to Court proceedings, inquiries or arbitration.

Article 24 Personal information can be accessed by the person concerned under the Data Protection (Jersey) Law 2005.

PART 5 – Restricted information

What is 'restricted information?

Information is information which is exempt from disclosure, but it is not necessarily absolutely exempt, because –

- Under Article 5 of the draft Law, an authority may choose to release it;
- Under Article 27, the Royal Court may decide, on appeal, that the Chief Minister did not have reasonable grounds to issue a certificate certifying that information is exempt to safeguard national security – a logical conclusion of such a decision *might* be that the information is released;
- Under Article 28, the Royal Court may decide, on appeal, that the Greffier of the States did not have reasonable grounds to issue a certificate certifying that information is exempt to avoid an infringement of the privileges of the Sates Assembly. Again, a logical conclusion may be that the information is released.

Article 25 – relates to information prohibited under another piece of legislation

Article 26 –

> *Key policy outcome – 16 Existing [Code of Practice] 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.*

The Committee has decided to maintain an exemption in relation to the disclosure of the information to the public by the scheduled public authority holding where it would constitute a **breach of confidence** actionable by that or any other person. It would be inappropriate to introduce a law that could leave an authority open to being sued.

If information has been given to an authority which it might reasonably be assumed was being given in confidence (even where the word "confidential" does not appear) then this may not be released without the consent of the author.

Article 27 – national security

During earlier consultations, concerns had been raised as to whether the draft Law deals adequately with the local problem of the Islands' access to highly sensitive data held in criminal databases in the UK. Sometimes it might be downloaded or merged with local relevant material. As stated earlier in this report, the Committee has now agreed a 'carve out' in respect of such information.

Who decides whether information should not be disclosed to safeguard national security? This article provides for the Chief Minister to issue a certificate to that

effect, however this may be appealed to the Royal Court on the grounds that the Chief Minister did not have reasonable grounds for issuing the certificate.

The Committee has considered at some length whether there was a risk that the Security authorities in the UK would not see the Chief Minister as well placed to judge such issues other than in an entirely local context.

The Committee believes that the Chief Minister is the only logical person to do this, as there is no viable alternative. The protection is that if an applicant believes that the Chief Minister should not have certified that the exemption was required to safeguard national security, or indeed if the public authority believes that he should have done, then there is a right of appeal to the Royal Court.

Should the Chief Minister have access to highly sensitive data in order to certify that it should not be released? Not necessarily. The Chief Minister can be briefed in general terms by the Chief of Police or the relevant Minister as to the content and nature of the information and can make a judgment on that basis. The Committee has concluded that there is nothing to be gained by inserting another person here.

Article 28 – information which might infringe the privileges of the States Assembly

The basis of it is to protect the freedom of speech of parliament. While there is not a public interest test in relation to this exemption, there is a right of appeal to the Information Tribunal/Royal Court. The Scottish Parliament, which is a new parliament, does not have an exemption for the privileges of parliament. It is a matter for political debate whether this should be restricted information, or qualified information which is subject to a public interest test.

PART 6 – Qualified information

What is 'qualified information'?

Qualified information is information which is exempt, but which may be released if a public interest test comes out in favour of disclosure.

Megan Carter and Andrew Bouris, in their book "Freedom of Information – Balancing the Public Interest" (May 2006) put the question –

"What is a public interest test?

2.1 Most regimes which govern access to information held by government are based on the same building blocks:

- There is a general right of access to information held by public authorities.
- The right of access is subject to a range of exemptions covering issues such as security, international relations, formulation of government policy, commercial confidentially, and personal affairs.
- Some of the exemptions are subject to a public interest test that requires the decision-maker to take public interest considerations into account

when deciding whether to release information even where an exemption applies *prima facie*.

- The mechanism is referred to as a "public interest override" or "public interest test" because the public consideration in favour of disclosure may "override" the exemption.

2.2 Deciding in which aspects and to what extent the public interest is relevant involves the exercise of judgment and discretion by the decision-maker."

The exemptions relating to qualified information are –

Article 29 – Communications with Her Majesty etc and honours

The UK Deputy Information Commissioner advised that in the UK, any information relating to communications with the royal family were exempt (but subject to a public interest test) as was any information relating to the conferring of honours. This has been replicated here.

Article 30 – Legal professional privilege 'LPP'

The Freedom of Information – Exemptions guidance: Section 42 Legal Professional Privilege states –

> "The principle of LPP has been established by the Courts in recognition of the fact that there is an important public interest in a person being able to consult his or her lawyer in confidence. The courts do not distinguish between private litigants and public authorities in the context of LPP. Just as there is public interest in individuals being able to consult their lawyers in confidence, there is public interest in public authorities being able to do so".

The UK Deputy Information Commissioner stated – "The way we have approached legal professional privilege – and this has been supported by the Information Tribunal which is the appellate body for our decisions, and also by the Court – is that they recognise that there is an inherently strong public interest in the preservation of legal professional privilege, but that you can never say 'never'. You can never say that there will never be a situation where the public interest in the disclosure of that information, that legal advice in this case, will outweigh the inherent public interest in keeping the legal advice secret ".

Mr. Maurice Frankel, Director, Campaign for FOI, also stated –

> "Under the U.K. Act these are qualified exemptions. […] because there is a House of Lords ruling which says there is a high public interest in maintaining confidentiality of discussions between client and their legal advisers. They do not say between 'government' and 'government's legal advisers'; they say between 'client' and the 'legal advisers', and because this has gone all the way up to the top, the rulings are quite strict that there is an inherent strong public interest in maintaining the legal professional privilege. Nevertheless, it is subject to the public interest test. Now, our Tribunal has on 2 occasions ruled that legal advice should be disclosed on public interest grounds. It is not the

> normal situation, it is in exceptional circumstances, and that is the result of it being in the qualified exemption category."

Some might argue that law officers might be reluctant to give advice if there was a possibility that the confidentiality of that advice might be breached. Mr. Frankel stated –

> "They cannot say: 'We are not going to advise you, Minister. We are frightened our legal advice is going to be disclosed.' This [the exemption] is not to protect the law officers; this is to protect the Government's access to good legal advice. The law officers have got nothing to do with it; it is not to protect the law officers, it is to protect the Government."

In the United Kingdom, legal professional privilege has been dealt with by a qualified exemption, that is, it is subject to a public interest test. As legal professional privilege is in the qualified information category, it would similarly in Jersey be subject to a public interest test, and if on occasion that test came out in favour of disclosure, then the advice could be made public.

Article 31 – Commercial interests

It is important to remember that the Law will provide public access to information, rather than access to documents. There is an expectation of the parties to a contract that they would keep **commercially sensitive information** in confidence. Within documentation which include matters of commercial confidence, there will inevitably be information that may be released to the public at large. An FOI Law sits above this level, and a decision not to disclose information may be challenged. The test is whether objectively the commercial interests of the party would be prejudiced upon disclosure, and if so, how, by the disclosure of the information. Indeed, even if prejudice would be caused, there may nevertheless be public interest considerations which require the information to be disclosed. The appeal would first be to the Information Commissioner who would determine the public interest.

This article does not relate to access to information by a States member. A parliamentarian's ability to access information is not enshrined in this Law. This Law relates to public access, which effectively means general release of the information.

Article 33 – Formulation and development of policies

This article relates to the development of policy of any of the public authorities to which the Law applies. This will therefore include, for example, the formulation of policy by Ministers, departments, the Jersey Financial Services Commission etc.

Under the UK FOI Act cabinet minutes are never released. This contrasts with Jersey where a summary of the discussions at the Council of Ministers is released immediately, and Part A (non-exempt) minutes are published on the internet.

The report and proposition on 'Machinery of Government: Proposed Reforms' (P.122/2001) (Policy and Resources Committee) adopted by the States on 28th September 2001, set out proposals for a formal system of consultation based on the U.K. model of 'Green Papers' and 'White Papers'. This was formalised into the policy set out in R.C.80/2006, which states –

> "3.2 A Discussion Paper is similar to a Green Paper – it sets out for debate and discussion proposals that are still at a formative stage. It may contain several policy options which can be used in gauging public opinion.
>
> 3.3 A Draft Policy Paper is similar to a White Paper. It is a statement of proposed government policy on a particular area of concern. It may pave the way for legislation, but there is no obligation to act along the lines that a Draft Policy Paper proposes, indeed, the draft policy may change as a result of further public comment."

Major policy proposals are nowadays the subject of public engagement initiatives enabling the public to take part in the development of fundamental principles upon which the future proposals will be developed (eg 'Imagine Jersey' event). In Jersey, even the Budget proposals are released well in advance of debate, which some might say, would enable a rearrangement of affairs.

The publication of minutes, Green Papers and White Papers, together with the publicity afforded by the scrutiny process, means that the culture has changed to one of increased openness.

However, there are times when policy development is at an early stage, or where the release of that draft policy, or information surrounding the development of a draft policy before implementation might be damaging. The correct balance needs to be struck between authorities completely freely being able to explore all options, including those which seem unlikely, and the public's right to be able to influence and comment upon developing policy. Clearly, if the public have no knowledge of a developing issue, then they are unable to participate in shaping that policy.

States members recently spoke to the UK Deputy Information Commissioner about the relationship between the UK FOI Act and the development of policy. He states as follows –

> "But if the government department is able to satisfy us that the information does relate to – and the phrase "relate to" which we have in our legislation is very wide – the formulation and development of government policy then it is subject to a public interest test and you take into account a number of considerations which crop up in just about every case at that time as well as specific ones about the individual and some of the general ones are whether or not disclosure would restrict the way in which the policy-making process is undertaken. Would it prevent civil servants and Ministers engaging in full and free and frank discussion, exploration of options, some of which might be fairly extreme, but which nevertheless should be considered within the range of possible approaches to a particular issue? How long ago are we talking about? Are we talking about policy that was agreed 12 months ago, or are we talking about policy that was agreed 12 years ago and all the players in those circumstances are no longer active in government, everybody has moved on. It is historical information to all intents and purposes and normally, especially if it is no longer really a live issue, you would expect that the older the information the more likely it is that the public interest will favour disclosure because the harm of disclosure is likely to be less. But then you also have to take into account things like[…] the expectation of the parties and this information was created at a time

> when nobody had access to information in their sights and everybody was working on the basis that this information either would never be disclosed, or would only be disclosed under the normal 30-year rule when everybody would be retired and be well off the scene. So, those are the sorts of things that apply."

UK Deputy Information Commissioner drew a distinction between policy development and the implementation of policy, as has been done locally under the Code of Practice on Public Access to Official Information, and confirmed that information relating to the implementation of an established policy could not be exempted under that provision.

Any request for disclosure of information relating to the release of information in connexion with developing policy will be subject to a public interest test. In New South Wales, Australia in 2000 there was an important ruling in the case of Eccleston[11] and the Department of Family Services and Aboriginal and Islander Affairs. This ruling is described as a 'comprehensive examination of the meaning of "public interest" in relation to internal working documents'. The outcome of the case was that the authority had not been able to satisfy the Information Commissioner that the disclosure of seven documents used during the deliberative process would be contrary to the public interest.

> "The NSW Information Commissioner saw the FOI Act as intended to –
>
> (a) enable interested members of the Public to discover what the government has done and why something was done, so that the public can make more informed judgments of the performance of the government, and if need be bring the government to account through the democratic process; and
>
> (b)enable interested members of the public to discover what the government proposes to do, and obtain relevant information which will assist the more effective exercise of the democratic right of any citizen to seek to participate in and influence the decision-making or policy forming processes of government." [12]

In relation to any fears that the threat of disclosure would impede the giving of frank advice in the development of policy, this argument was set aside in 1999 when the Code of Practice was adopted by the Assembly. There is currently no exemption under the Code of Practice relating to advice given by officers to public authorities. Since the introduction of the Code there has been no evidence that this omission has adversely affected policy making. It is therefore not the intention to introduce such a provision in the Law now.

It is impossible to prescribe exactly what the public interest is, this will depend upon a number of circumstances and facts and may evolve over time. What is clear is that the determination of where the public interest lies is better left in the hands of an impartial person or body, and that the Information Commissioner and/or the Information

[11] 'Eccleston' in PDF format – http:/www.infocomm.qld.gov.au/imdexed/decisions/html/93002.htm.
[12] At paragraph 58 of the decision. Quotes extracted from "Freedom of Information – Balancing the Public Interest by Megan Carter and Andrew Bouris, May 2006".

Tribunal/Royal Court[13] will therefore be in the best position to determine where the public interest lies.

Article 37 – Advice by the Bailiff or a Law Officer

In the United Kingdom the advice of the Attorney General is, in practice, almost never disclosed. He is considered to be an adviser to the government and therefore receives certain protection. This is not the position in Jersey where the rôle of H.M. Attorney General is independent of the Council of Ministers and receives no such protection.

The provision of advice by the Bailiff or a Law Officer has been included under qualified information, which is therefore subject to a public interest test. This may be reviewed by the Information Commissioner and, ultimately by the Information Tribunal/Royal Court, and having weighed up the balance of public interest, could be made available to the public.

Mr. Frankel advised the Committee –

> "The current draft of the Jersey Freedom of Information Law has this subject to a public interest test which is the position in the U.K. The law officers' advice is disclosable subject to a public interest test under the U.K. Act. The fact is though it is accepted there is a substantial public interest in allowing government to receive frank legal advice. I am not aware of the information we disclosed except in a very odd form in relation to the war in Iraq."

Article 40 – Law enforcement

This article refers to information relating (either in Jersey or elsewhere) to the prevention, detection or investigation of crime; the apprehension or prosecution of offenders; the administration of justice; the assessment or collection of a tax or duty; the operation of immigration controls; the maintenance of security and good order in prisons or in other institutions; and the proper supervision or regulation of financial services. The Committee has decided that a 'neither confirm nor deny' clause is necessary here in relation to security issues (and see page 20) and will instruct the Law Draftsman accordingly.

PART 7 – The Information Commissioner and Appeals

The Committee has expressed a preference for a Jersey Information Commissioner, based on the UK model with combined responsibility for FOI and Data Protection regulation. The current Data Protection Commissioner believes this would be the most logical and cost-effective option for Jersey because it avoids the need to create a new States body. A Deputy Data Protection Registrar was employed in 2004 and it is proposed that a second Deputy would be required to co-ordinate the implementation and operation of all aspects of an FOI Law. This would ensure there is strong central co-ordination of FOI matters in the department with most relevant expertise and

[13] At this stage, the Privileges and Procedures Committee has not determined whether the appeals route should be to an Information Tribunal or the Royal Court, although it is tending towards a tribunal, so both terms appear.

administrative support. The implementation of the Law would be an executive matter, and will not involve the States Greffe.

At States' departmental level, a framework is already in place, with a network of data controllers in each Department. There are also departmental FOI officers but ideally, these two roles should be carried out by the same member of staff to avoid duplication. Data Protection officers in the UK assumed this dual role in preparation for January 2005, when the public right of access under the Freedom of Information Act came into force and the UK Deputy Information Commissioner indicated that experience there was that this combination of roles was beneficial.

The Data Protection Commissioner has successfully pursued mediation as a means of resolving disputes and so far it has not been necessary to convene the Data Protection Tribunal. In fact, it has only met once for a preliminary hearing, and co-operation with the other party subsequently meant that no further meetings were necessary. If the experience under a Freedom of Information Law were to be similar, it would suggest that a great burden would not be placed on the Royal Court if this were the appeals route agreed.

The Information Commissioner will also be involved in preparing for the introduction of the Law, to include awareness raising and the training of officers in departments.

The process of debating a law will bring heightened publicity and increased public awareness of the issues involved. Ideally, there should also be a public information campaign to dispel any misconceptions, clarify the aims and objectives of the Law, and explain the scope of information available under it. While the media are likely to be willing partners in disseminating the information, some expenditure will be required.

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 Officers in every department and this will not change significantly if the Law resembles the existing Code. To benefit from synergy between data protection and freedom of information, there would be merit in combining the role of data protection officer in departments with that of information officer, where these responsibilities are currently held by two different people. Because the States haves operated an FOI régime 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. Staff would require some training but would not be starting from the beginning.

Appeals procedure

The Appeals Procedure has been considered at length and is an area where the Committee would be particularly interested in stakeholders' and the public's views.

There are two main options –

1. An Information Tribunal.

    (a) Should there be an Information Tribunal?

(b) Should the Information Tribunal be combined with the Data Protection Tribunal?

(c) Should a new stand alone Tribunal be established?

2. A division of the Royal Court.

(a) Should the Royal Court, acting in tribunal mode, be used to hear appeals?

(b) Should steps be taken to keep the cost to the applicant low in minor cases?

(c) Could pre-emptive costs orders be made to mitigate against the fear of high costs?

(d) Should the means of the appellant be taken into account when determining any pre-emptive cost order?

How will appeals work?

STEP ONE An appeal would normally start by the applicant writing back to the authority and asking that a decision to refuse access to information to be reviewed. This would involve a review of the public interest test in respect of the information requested.

STEP TWO In the case of such a review, it is likely that a senior manager and/or the Minister would determine whether the public interest test had been met and whether the information could be released or the refusal should be maintained.

STEP THREE The next step would be that an applicant would have a right of appeal to the Information Commissioner. The Commissioner would then ask for the authority's arguments for withholding information, and all the public interest arguments being relied upon. If the authority did not comply, then the Commissioner would have the power to issue an Information Notice requiring the production of papers.

STEP FOUR If the Commissioner considered that the decision taken was the correct one, then he/she would maintain the refusal, in which case the applicant would have a right of appeal to the Appeals Body (either an Information Tribunal or the Royal Court). If the Commissioner felt that the information should be released, or possibly that part of the information could be released, then he/she will first liaise with the authority and if possible negotiate a mutually acceptable solution. If this negotiation fails, he/she could then order the release of certain/all of the information. In this case, the authority would similarly have a right of appeal to the Information Tribunal/Royal Court. The Information Commissioner could also make a Practice Recommendation relating to the authority's procedures and practice.

The Appeals Body would review one of two things.

Either –

- it would review the steps taken by the authority to consider whether or not the information requested should be released;
- it would consider evidence of the public interest test being applied in the case of qualified exempt information, any discussion with the applicant with regard to the release of any part of the information, or the request being re-structured, so that it was capable of being complied with (possibly without charge);
- It would consider the time taken or estimated to be taken with regard to the release of information, that is, it would review the practices of the authority and whether it was complying with the spirit of the Law to release information unless exempt, and to assist the applicant in making their request;
- the Appeals Body would also review the role of the Information Commissioner in considering the decision of the authority and the steps he/she had taken to progress and adjudicate on the matter.

or –

the Appeals Body would consider the application itself afresh.

At every stage of the process, it would be a given that the authority and/or the Information Commissioner, as appropriate would correspond with the applicant and keep them informed of the status and progress of a request, outlining fully any reasons for refusal, so as to give a proper level of service to the public.

Who should comprise the Appeals Body?

Information Tribunal shared with Data Protection

There has been some discussion as to how an Information Tribunal should be comprised and how it should carry out its work. There are a number of permutations.

Firstly, in relation to how it should be comprised. It is suggested that the current Data Protection Tribunal should also take on the rôle of the Information Tribunal. The current composition of the Data Protection Tribunal can be found at – http://www.dataprotection.gov.je/cms/Tribunal/.

The advantage of this course of action is that the creation of another tribunal could be avoided, along with the associated costs. This would seem to have an obvious appeal, although, clearly the cost of the Data Protection Tribunal would rise.

The way that the Data Protection Tribunal sets about its work is described in the Data Protection (Appeals) (Jersey) Regulations 2006 (revised edition 15.240.05). If the tribunal were to cover both the areas of data protection and information, then consultation would need to take place with the Data Protection Tribunal to establish its views on how a combined tribunal would address the freedom of information aspect of its role, and the best way forward, and the Regulations would need to be re-visited and amended or a new instrument put in its place.

A new Tribunal?

The alternative would be to establish a new Tribunal, perhaps along the lines of the Employment Tribunal, made up of members specifically appointed for this purpose.

However, one must consider what that Tribunal would actually need to do to decide which is the best process. The appeals process would be made up of appeals against the non-disclosure of 'qualified' information. The tribunal would need to consider the public interest test in relation to disclosure, and to do this, it would need to see the information being applied for. Some might argue that information that is considered to be so confidential by public authorities that it should not be released, should only be viewed by those with close connections to the Island, being persons held in high regard. A rigorous appointments process should include such relevant criteria and the Jersey Appointments Commission could undertake that process.

Could the Information Commissioner replace a Tribunal?

There is an argument that the Information Commissioner could undertake the role of the Tribunal, in which case the role would appear to be in two distinct phases – first in reviewing the circumstances and trying to obtain release (where appropriate) through encouragement and mediation, then secondly into a role where he/she determines the outcome of the appeal. This is not dissimilar to the role the Data Protection Commissioner currently undertakes with regard to the Data Protection Law.

Appeal to the Royal Court acting in Tribunal mode

When the Royal Court acts in Tribunal mode, it meets in an informal way, without robes, and it is not necessary to have legal representation although that remains a matter of choice. It is therefore acting like a Tribunal, except that the members of the Tribunal are the Jurats.

Where an appeal is considered by the Royal Court, it would have the option of –

(a) reviewing the practice of the authority in relation to the requests, the arguments it waged in relation to the public interest test, whether the Information Commissioner's decision was reasonable or whether the Commissioner in making his decision had got the Law wrong etc, **or**

(b) it could consider the original decision on the release of the information, ie consider the application *de novo*.

The PPC has consulted the Royal Court on the proposal that the Royal Court should be the body to consider an appeal, instead of a Tribunal, and the Court expressed the view that the Royal Court was an appropriate place for appeals to be resolved. The Jurats were concerned, however, that steps should be taken to ensure that the Court would not be overwhelmed with appeals under the legislation, and had advised that to achieve this, the Court would not wish to make decisions on appeals *de novo*. This would perhaps suggest a 4-stage process –

(1) application to a department official;

(2) internal review process to the Chief Executive or Minister;

(3) appeal to Information Commissioner;

(4) right of appeal to the Royal Court, acting in tribunal mode.

The Court recommended that the draft law should also include wording which invited it to consider whether the decision of the Information Commissioner was unreasonable having regard to all the circumstances of the case (Token test). PPC considered that it would want to avoid the position where the Information Commissioner's decision was being overturned regularly. This may best be achieved by using the reasonableness test/adherence to the Law test, rather than *de novo.*

It would be hard to imagine a scenario in which the Court would only consider the procedures and rulings of the public authority and Information Commissioner, without reviewing the information requested. The situation may therefore resolve itself. Clearly, appeals resolved by the Court would be respected and have high standing, to be unequivocally followed by Ministers and public servants. In the light of experience, the States could be invited to amend the appeals provisions if they were seen not to be working as intended.

This proposal would mean that the appeals system could be similar to that currently employed for Third Party Planning appeals, with the inclusion of an additional layer of appeal through the Information Commissioner. The Court would sit without robes so that the process would be less intimidating as far as is possible.

Cost to the applicant

The Committee was mindful that there had been some criticism about the cost to an applicant under the Planning appeals system, and how this could be reduced in relation to seeking access to information. Once an appeal had been lodged with the Royal Court it would be dealt with either as a standard appeal, or under the Court's modified procedure if it were a relatively minor matter in which case costs were unlikely to be awarded. There may be scope for the Court to make pre-emptive cost orders to mitigate against the fear of high costs being awarded. This might state that the Minister's costs would not be charged to the appellant, or that, if the appeal were successful, the appellant's costs would be charged to the Minister. The discretionary power of the Court to award costs is a particular strength of this option.

While the award of costs would reduce costs to the applicant, those costs do not evaporate, and the effect would be that it would increase costs to the taxpayer, as the Minister would always be responsible for his/her own costs, and also for the costs of a successful applicant. It might be reasonable, therefore, for the Court to take into account the circumstances of the appellant.

The process from original request to an officer of the authority, to Minister or Chief Executive, the Information Commissioner and the Court could potentially be resource hungry and protracted, especially if the entire process is regularly followed. The mediation rôle of the Information Commissioner would therefore be an important one.

Alternative Appeals Procedure

A third simplified option might be –

(1) application to a department official;

(2) internal review process to the Chief Executive or Minister, with input from the Information Commissioner;

(3) right of appeal to the Royal Court.

This option may promote a non-adversarial approach, and may also limit and/or reduce the need for external legal advice by the Office of the Information Commissioner. This might also be the cheapest, but, unless cost orders were capable of being made, it would not be cheaper from the appellant's perspective. If cost orders were made (eg the Minister's costs would not be charged to the appellant, or that, if the appeal were successful, the appellant's costs would be charged to the Minister) this will then make it cheaper for the applicant, but the cost of Court action of a member of the public will then fall to the taxpayer.

The Draft Freedom of Information Law currently provides for –

(1) application to a department official;

(2) internal review process to the Chief Executive or Minister (does not need to be specified in the Law, but good practice)

(3) appeal to Information Commissioner;

(4) right of appeal to the Royal Court.

The Committee considers that there may be merit in appointing an eminent and highly respected person with direct experience in establishing the systems and procedures for a Freedom of Information Law for an initial period. This would provide scope for the Information Commissioner designate to develop into the role, to put in place training and awareness raising mechanisms under expert guidance, and without placing an unacceptable workload on a small section in the initial period when a surge of requests for information might be expected. This approach was taken with regard to the Jersey Competition Regulatory Authority, and the appointment of the late Rt. Hon. The Lord Kingsland TD QC PC was particularly successful during a formative period of that body.

Article 41 – General functions of the Information Commissioner

The Information Commissioner will be responsible for –

- raising and maintaining awareness of freedom of information;
- encouraging good practice (with the ability to make practice recommendations and issue practice notices), initially by assisting with training;
- adjudicating on appeals relating to non-disclosure (appeal from a member of the public) or disclosure (appeal made by a public authority), to include a mediation rôle);
- the issue of an information notice;
- advising an information Tribunal/Royal Court in respect of a further appeal;
- the preparation of an annual report.

The Committee is mindful of key policy 22 of P.72/2005 which stated –

> *Key policy 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.*

However, the Committee is persuaded that this is not the most appropriate way forward, and now holds the view that the Information Commissioner should be independent and report directly to the States. This is an important role which will need to command respect and should not be susceptible, or be perceived to be susceptible, to political influence.

In the data protection rôle, the Data Protection Commissioner is completely independent, and does not report to a Minister or political body. On an administrative level, the Commissioner must, of course, conform to accounting procedures and human resource policies for example, but does not report on the core functions of her rôle. The annual report of the Commissioner is presented to the States by the Minister for Treasury and Resources, but only because that Minister is responsible for allocating resources to the function. It would therefore be logical that any report to the States on freedom of information should be presented via the same route.

The Deputy Commissioner for Freedom of Information in the UK advised the Committee that –

> "The Commissioner is answerable to Parliament. We are not answerable to a Minister. We get our funding through grants and we have what you might call a kind of "pay and rations" relationship with the Ministry of Justice. It is the Ministry of Justice at the moment. It has been various different departments through machinery of government changes. But our reporting relationship is with Parliament so we are obliged under both the Freedom of Information Act and the Data Protection Act to submit an annual report to Parliament. We are allowed to submit reports to Parliament as and when the Commissioner thinks fit."

The proposal under article 41 mirrors this position.

The Ministry of Justice in the U.K. is keen on public authorities under the Act publishing statistics to show how well they're complying with the legislation. Central Government bodies provide quarterly and annual statistics (compiled and published by MoJ). Local Authorities have also been encouraged to publish this information to increase accountability and transparency. It might be a function of the Information Commissioner to ensure such results are in the public domain.

Article 43 – Appeals to the Royal Court

The draft Law currently refers to the Royal Court as being the final appeals body. If this is the eventual outcome, then there remains the outstanding issue as to whether the Court will consider the appeal *de novo* or whether it will consider whether the decision was reasonable.

However, the Committee is minded to change this and to seek to extend the role of the Data Protection Tribunal to include access to information, to be known as the Information Tribunal.

The views of stakeholders and the public will be invaluable in reaching a final decision.

In any event, should there be an appeal against the outcome of an appeal, the Committee considers that this should be considered on points of law only, and should expressly exclude judicial review (provided that such an exclusion would be human rights compliant). The Committee proposes to request the Law Draftsman to take this point into consideration.

PART 8 – Miscellaneous and supplemental

Article 44 – Failure of a scheduled public authority to comply with a notice by the Information Commissioner.

Article 44 provides that where the Commissioner decides that a public authority should supply requested information and the public authority does not appeal to the Royal Court against the decision or, having appealed, loses the appeal, the Commissioner can register the decision with the Royal Court if the public authority still fails to supply the information. The Royal Court may inquire into the matter and may deal with the public authority as if the public authority had committed a contempt of court. This procedure follows, in general terms, the procedure set out in the in the UK legislation.

The Data Protection Commissioner has expressed a concern that the law as currently drafted does not give the Commissioner any powers to obtain information with subsequent enforcement action if the information is not provided. Under the Data Protection Law, the Data Protection Commissioner does have powers to require that a data controller furnish her with information, and also provides enforcement powers. The absence of a power to require the production of information might be seen to weaken the proposed role of the Commissioner. PPC has departed from the form of Law as it exists in the United Kingdom in favour of a much simpler law.

As currently drafted, only the Royal Court has the power to Order that information be provided, and failure to do so would result in contempt of Court, which could be seen as sufficient deterrent. This would lengthen the process, and providing the Information Commissioner with powers to order release of information might be less bureaucratic and reduce the workload of the Court. The Committee notes that the Data Protection Law includes the power to make an Order and remedies, and has therefore decided to request the Law Draftsman to include within the draft Freedom of Information Law a power for the Information Commissioner to order the provision of information, with appropriate penalty, which should include an initial fine plus an additional sum per day for continued non-compliance.

There may be times when a government is prepared to risk non compliance, which will carry a cost, added to which the remedy is likely to be political.

Article 45 – it will be an offence for a public authority to alter etc records with the intention of preventing disclosure.

Article 49 – Regulations

Regulations will be prepared relating to areas such as –

- fees that may be charged;
- action a scheduled public authority must take when it refuses a request on the grounds that it is a vexatious or repeat request;
- action a scheduled public authority must take when it refuses a request for information on the grounds that the information requested is exempt information;
- applications to the Jersey Heritage Trust for information it holds on behalf of a scheduled public authority where the scheduled public authority has not previously told the Trust that the information may be made available to the public;
- additional public authorities to be covered by the Law, if appropriate;
- the establishment of a publication scheme, if any.

Article 50 – citation and commencement

The date of commencement of the legislation is an important issue. The Deputy Information Commissioner, UK advised that a suitable lead-in period is necessary for the following reasons –

- To inform the public so that they are aware of their new rights and how to exercise them;

- To provide public authorities with certainty as to when this law is going to come into force and the need to gear up for it, in particular for the purposes of records management, because an access to information law can only work effectively if the public authority knows what information it holds and where to find it.

- The development of the new roles of Information Commissioner and Information Tribunal/Royal Court rules, the introduction of appeals mechanisms and enforcement procedures, awareness raising activity and training modules in advance of implementation.

The Committee is mindful that there are other matters to consider also and which will be set down in draft Regulations in due course, for example, in relation to procedures to be adopted by authorities when refusing a request to disclose information, the charging of fees, access to information held by the Jersey Heritage Trust on behalf of a public authority where the scheduled public authority has not previously told the Trust that the information may be made available to the public. The Committee took note of the advice of the Deputy UK Information Commissioner Mr Graham Smith that the UK lead-in period of 5 years was far too long. Staff turnover and the pressures of other work would mean that some input would be wasted if the lead-in period is too long, and in other cases there might be delay in starting on the work because of competing pressures.

The Committee envisages a lead-in period of a maximum of two years from adoption of the Law by the States.

Phasing of introduction

The Deputy UK Information Commissioner Mr Graham Smith was supportive of the suggestion that one starts off with those bodies that are already subject to the code on access to information because they have got some experience of dealing with these requests and you would expect them to be ahead of the game rather than starting from scratch. He also recommended looking carefully at retrospection. The U.K. Act when it came in was fully retrospective, so requests were received about things that happened last week and about things that happened 100 years ago, or more in some cases. This placed a huge burden on authorities and it was noted that some jurisdictions have phased retrospection as well.

It is suggested that public authorities fall under the Freedom of Information Law in the order specified. That is, Ministers, departments, Scrutiny Panels, Public Accounts Committee, Chairmen's Committee and the Privileges and Procedures Committee, Greffier of the States first. All of these bodies have been complying with the Code of Practice on Public Access to Official Information since 20th January 2000 and are best placed to comply with the coming-into-force date expected to be 1st January 2012, that is, with a lead-in period of some two years from the date of approval of the draft Law.

The remaining bodies will be permitted an additional year to prepare, that is a three year lead-in period, and for those departments the law is expected to come into force on 1st January 2013. *See the table below*.

Retrospection

Public bodies tend to hold a significant amount of information and the UK experience was that it was extremely burdensome to go for the 'big bang' approach and have full retrospection from the date of implementation. The object is to plan for transparency through effective disclosure following a clear timetable which demonstrates clear commitment to the goal.

The following table shows a possible scheme for access to information created before the date of implementation of the law.

The Committee has the option either to decide all those things at the outset, or to leave some of them to regulations to be introduced later by phased commencement orders and see how it goes. The Committee is minded to opt for the following programme –

Public authority	**2 years after the adoption of the Law**	**3 years after the adoption of the Law**	**4 years after the adoption of the Law**
Ministers, departments, Scrutiny Panels, Public Accounts Committee, Chairmen's Committee and the Privileges and Procedures	All information created from 20th January 2000	Full retrospection	

Committee, Greffier of the States			
Bailiff of Jersey, HM Attorney General, HM Lieutenant Governor	From date of implementation of Law – 1st January 2012		Full retrospection
Parishes, Quasi public bodies - Jersey Financial Services Commission, Jersey Competition Regulatory Authority, Jersey Law Commission, Jersey Appointments Commission, Waterfront Enterprise Board or successor.	From date of implementation of Law – 1st January 2012		Full retrospection
Court system and tribunals	From date of implementation of Law – 1st January 2012		Full retrospection
More remote public authorities – Jersey Telecom, Jersey Post, Jersey New Waterworks Company, Jersey Electricity Company.	From date of implementation of Law – 1st January 2012		Full retrospection

FINANCIAL AND MANPOWER CONSEQUENCES

What will the Law cost to implement?

At the outset PPC wishes to draw a distinction between the full cost of bringing a Freedom of Information Law into force and costs to the public that are directly attributable to the Law being proposed by PPC. There is an important distinction between the two, for reasons which are outlined in the latter part of this section.

Levels of Demand

Previous reports and Projets presented or lodged *'au Greffe'* by the Committee have indicated that the full cost of implementing a draft FOI Law cannot be known in advance precisely because levels of demand for public information cannot be predicted. The experience of other jurisdictions can nevertheless help to shed some light on the matter. In 2006 PPC commented –

> *'Experience in other jurisdictions, particularly in recent times in the United Kingdom, has shown that there is an initial "surge" in applications shortly after the introduction of Freedom of Information legislation but that the level of*

requests falls off relatively quickly after the first months to a more manageable level.'[14]

Analysis carried out by PPC prior to 2006 encompassed a range of jurisdictions from Scotland to New Zealand. It concluded that the experience in the United Kingdom was broadly representative of the pattern of demand experienced elsewhere. On that basis the introduction of a new FOI Law in Jersey, and the associated publicity that would follow such an action, can be expected to cause a notable initial increase in the volume of requests for public information. Although demand may well decrease over time, the Committee's understanding is that countries such as the United Kingdom and Australia have experienced sustained demand for information held by their police forces and health authorities.

PPC also acknowledges that certain costs will be relatively fixed because of the legal requirement to provide a specified service in a small community, irrespective of levels of demand.

Previous Cost Estimates

During the course of FOI consultations in 2006 and 2007 various public bodies reflected on experience in other jurisdictions and the provisions of previous draft Laws published by PPC before submitting to the Committee their estimates of the resource implications anticipated. For the public sector it is estimated that departments will require in the order of 8 staff, only one of which was earmarked for the data protection office. The Corporate Management Board estimated the additional cost of the Law as being in the region of £500,000 per annum. This figure was exclusive of the cost of establishing and operating an appeals system using either a tribunal or the Royal Court.

During previous consultations other quasi-public bodies potentially covered by the draft Law (e.g. Jersey Water) also referred to the fact that they might incur additional cost, although commercial entities identified the option of passing charges onto customers.

In considering which appeals route to take, it is evident that there would be financial impact arising should it be decided to establish a completely new tribunal. The PPC is aware that the Jersey Employment Tribunal, which receives remuneration, operates with an annual budget of approximately £200,000. Although PPC has no reason to believe that an FOI tribunal will have to consider as many cases as the Employment Tribunal (the existing Data Protection Tribunal has been markedly less active), it seems prudent to acknowledge the possibility that a sum could be required. Establishing the likely cost of an alternative appeal system utilizing the Royal Court is less straightforward. The Royal Court can hear appeals concerning planning applications determined under the Planning and Building (Jersey) Law 2002; however, very few appeals have been initiated and the Royal Court does not allocate a fixed budget to cover the administration of such appeals.

Although an increase in applications for information is expected, it is important to recall the current level of demand. In 2008, 21 applications were received States-wide for information under the Code of Practice on Public Access to Official Information, of which there were only 2 refusals. There would of course be an initial surge in

[14] R.33/2006 - Freedom of Information (Jersey) Law 200- : consultation document

requests for information, which it is hoped would soon begin to subside. The PPC would be most surprised if an enhancement of service to the tune of £500,000 per annum would be necessary to provide this service, and would expect to see strenuous efforts made on behalf of States departments, with the exception of the office of the Data Protection Commissioner, to either absorb costs or submit realistic requests for additional staff. **Indeed, when the Cayman Islands introduced their Freedom of Information Law in 2007, they created a Freedom of Information Unit, but they advised departments that they would have to absorb associated costs within their existing revenue budgets.**

The States provide information all the time, mostly on a 'business as usual' basis, and this activity should not be swept up into the costs of FOI as they are already in place and do not require more staff. The **new** costs to be met relate only to additional requests for information above and beyond those already currently handled, and the new service required to monitor and enforce the Law by the office of the Data Protection Commissioner. If the numbers of appeals to the Royal Court are low, then it may be possible for these to be absorbed.

Ms Belinda Lewis of the Ministry of Justice advised the Committee that one of the major costs to authorities has been external legal advice in the case of litigation (although internal advice is being used more often). The UK Information Tribunal is very busy and litigation had gone up to that point more frequently than anticipated. Some decisions on whether to contest the release of information have been made on a cost basis as effective use of public funds is also always a consideration.

Cost Mitigation and Recovery

Options for cost mitigation and cost recovery have been considered. In particular, the Committee did consider whether to allow only Jersey residents to access information using this law, thereby restricting access to those people who were paying for the implementation of the law, the taxpayers. Ultimately PPC has concluded that the cost of enforcing such a restriction would be disproportionate when set against the relative ease with which a determined applicant could circumvent it.

Turning to cost mitigation, the draft Law does include a provision to make Regulations to allow public bodies to levy a charge in cases where supplying information to an applicant would be less than straightforward or even to refuse to supply information if the cost of doing so would truly be excessive. This latter point is significant because it is here that the issue of which costs can reasonably be attributed to an FOI Law comes into sharp focus. The matter of cost recovery will be included in regulations and will be debated separately by the States.

Other Factors

Of the previous consultation responses that have highlighted potential resource implications, a significant number of public bodies have either asserted that the way their information is held would make it difficult to retrieve and disseminate or, more bluntly, they have suggested that the prevailing standard of record management within that public body is not high enough to service the requirements of an FOI Law. Indications are that a significant percentage of the resources would be required to address that specific issue. PPC's position in this regard is clear –

1. The public of the Island have a fundamental right to expect that public administration will be conducted efficiently, effectively, equitably and

proportionately, as was explained by H.M. Attorney General in a presentation to the Council of Ministers in January 2009.[15] Effective administration requires, amongst other things, the application of skills and good practice, supported by appropriate information technology, to improve the efficiency and effectiveness of decision making, planning and monitoring. Forward thinking public and private sector organizations refer to this as '*business intelligence*'. Such organizations invariably recognize that, in the longer term, good quality and properly sorted data costs less to collate and disseminate to the employees who need it or to those are otherwise fully entitled to view it.

2. The States Assembly adopted the Public Records (Jersey) Law 2002, which regulates the creation, retention and disposal of records concerning the activities of a public institution to the extent needed to document its activities and so as to ensure that the institution can account for its activities. That Law also makes clear that the public have reasonable rights of access to public information that cannot legitimately be classified as confidential.

3. The data at the heart of this matter is public information. In the collective sense the data is *owned* by the public.

Conclusion

Transparency is a primary objective and is a key driver for public engagement, inclusion in the political process, holding the government to account, and the continued modernisation of the public sector. However, a government needs not only to strive be transparent, but must equally be seen to be doing all it can to make its processes, procedures and decisions, together with the reasoning behind them, available to the public. On an international level, the Island will also be able to demonstrate compliance with international conventions, regulatory frameworks and the use of appropriate practices and procedures. Openness makes good business sense.

The Code of Practice on Public Access to Official Information imposed in 2000 (included at Appendix 2, section 2.1 refers) introduced a number of key obligations on departments, Committees and (hence) Ministers. What was missing under the Code was any mechanism to monitor the way departments classified, stored and retrieved information, and whether there was consistency across the States. The adoption of the Code did not establish a department responsible for ensuring that departments adhered to the Code, although the very low level of appeals would suggest that information was not being denied.

For States departments, the new step is the appeals procedure, which will involve an outside party more frequently (Information Commissioner and the Tribunal/Court). It would be naïve to ignore the fact that introducing a right of access, by Law, is likely to generate more applications for information. However, the knowledge that there have, to date, been no hearings of the States of Jersey Complaints Panel in relation to access to information, being the final appeals stage of the current Code, would indicate that the number of appeals may not be as high as feared. However, there will undoubtedly be more considerable resource implications for the Data Protection Office, which will result, for the first time, in access to information being monitored. The Information

[15] Minute No. A4 of the Council of Ministers meeting held on 15th January 2009.

Commissioner will be able to make practice recommendations, as well as issue Information notices, thus introducing monitoring and enforcement rôles.

The Law will bring new bodies within its scope that have not yet been subject to that Code. The timetable for coming into force and retrospection should allow sufficient time for those bodies to prepare, and experience of the Code of Practice since 2000 has shown that it is not necessary to re-evaluate all information, as it can, initially at least, be assessed as and when an application is received.

There have been calls for some time for increased openness. The Law will confer on the public for the first time a *right* of access to information, and on the States a *duty* to provide information having regard to the public interest.

APPENDIX 1

DRAFT FREEDOM OF INFORMATION (JERSEY) LAW 200-

REPORT

Explanatory Note

With a few exceptions, this Law will give people the right to be supplied with information held by public authorities.

The exceptions are –

(a) that the information is otherwise available (for example, it available for downloading from the Web or may be purchased from the States' Information Centre);

(b) it is restricted information that a public authority need not supply; or

(c) it is qualified information that a public authority must supply unless it is satisfied that the public interest in supplying the information is outweighed by the public interest in not doing so.

In all cases the public authority is still free to supply the information if it is not otherwise prohibited from doing so.

The Law provides that a person may appeal to an Information Commissioner (the person for the time being carrying out the functions of the Data Protection Commissioner) against a decision of a public authority.

An appeal may be made –

(a) against the any amount charged by a public authority for supplying information; or

(b) against a decision by a public authority not to supply information.

There is a further right of appeal to the Royal Court. The Court's decision is final.

At first the Law will apply to those public authorities to which the Code on Freedom of Information presently applies. However, the Law can subsequently be extended by Regulations to include other public authorities

Jersey

DRAFT FREEDOM OF INFORMATION (JERSEY) LAW 200-

Arrangement

Article

PART 1

INTERPRETATION

PART 2

ACCESS TO INFORMATION HELD BY A SCHEDULED PUBLIC AUTHORITY

PART 8

MISCELLANEOUS AND SUPPLEMENTAL

SCHEDULE

SCHEDULED PUBLIC AUTHORITIES

DRAFT FREEDOM OF INFORMATION (JERSEY) LAW 200-

A LAW to provide for the supply of information held by public authorities; and for connected purposes.

Adopted by the States	*[date to be inserted]*
Sanctioned by Order of Her Majesty in Council	*[date to be inserted]*
Registered by the Royal Court	*[date to be inserted]*

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

PART 1

INTERPRETATION

1 Interpretation

In this Law, unless a contrary intention appears –

"information" means information recorded in any form;

"Information Commissioner" means the person carrying out the functions of the office of Data Protection Commissioner referred to in Article 6 of the Data Protection (Jersey) Law 2005;

"information that is otherwise available" means information of a type specified in Part 4;

"function" includes a duty and a power;

"public authority" means –

(a) the States Assembly;

(b) a minister;

(c) a committee or other body established by resolution of the States or by or in accordance with the standing orders of the States Assembly;

(d) an administration of the States;

(e) a Department referred to in Article 1 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965;

(f) a body corporate or a corporation sole established by the States by an enactment;

(g) the States of Jersey Police Force;

(h) a corporation owned by the States;

(i) a corporation in which the States have a controlling interest;

(j) each parish;

"qualified information" means information of a type specified in Part 6;

"Regulations" means Regulations made by the States for the purposes of this Law;

"restricted information" means information of a type specified in Part 5;

"scheduled public authority" means a public authority named in the Schedule.

2 Meaning of "request for information"

(1) In this Law, "request for information" means a request for information made under this Law that –

(a) is in writing;

(b) states the name of the applicant and an address for correspondence; and

(c) describes in adequate detail the information requested.

(2) In paragraph (1)(a), a request for information in writing includes a request for information transmitted by electronic means if the request –

(a) is received in legible form; and

(b) is capable of being used for subsequent reference.

3 Meaning of "information held by a public authority"

In this Law, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person; or

(b) it is held by another person on behalf of the authority.

4 Meaning of "information to be supplied by a public authority"

(1) In this Law, the information held by a public authority at the time when a request is received is the information that is to be taken to have been requested.

(2) However, account may be taken of any amendment or deletion made between the time when the request for the information was received and the time when it is supplied if the amendment or deletion would have been made regardless of the receipt of the request.

5 Law does not prohibit the supply of information

Nothing in this Law is to be taken or interpreted as prohibiting a public authority from supplying any information it is requested to supply.

6 Parts and Schedule may be amended by Regulations

Parts 1, 4, 5, and 6 of this Law and the Schedule to this Law may be amended by Regulations.

PART 2

ACCESS TO INFORMATION HELD BY A SCHEDULED PUBLIC AUTHORITY

General right to be supplied with information

7 General right of access to information held by a scheduled public authority

If a person makes a request for information held by a scheduled public authority –

(a) the person has a general right to be supplied with the information by the scheduled public authority; and

(b) except as otherwise provided by this Law, the scheduled public authority has a duty to supply the person with the information.

8 When a scheduled public authority may refuse to supply information it holds

(1) A scheduled public authority may refuse to supply information it has been requested to supply if the information –

(a) is information that is otherwise available;

(b) is restricted information; or

(c) is qualified information.

(2) It may also refuse to supply information requested if any of the provision of Part 3 (vexatious or repeated requests) apply in respect of the request.

9 Supply of qualified information

(1) If the information requested is qualified information, a scheduled public authority may refuse to supply the information if it is satisfied that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.

(2) It must otherwise supply the information.

Supply of information and assistance

10 Means a scheduled public authority may use to supply information

A scheduled public authority may comply with a request for information by supplying the information by any reasonable means.

11 Duty of a scheduled public authority to supply advice and assistance

A scheduled public authority must make reasonable efforts 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.

Time for compliance with request for information

12 Time within which a scheduled public authority must comply with a request

(1) A scheduled public authority must supply requested information promptly.

(2) It must supply the information, in any event, no later than –

(a) the end of the period of 20 working day following the day on which it received the request; but

(b) if another period is prescribed by Regulations, not later than the end of that period.

(3) However, the period mentioned in paragraph (2) does not start to run –

(a) if the scheduled public authority has sought details of the information requested under Article 13 – until the details are supplied; or

(b) if the scheduled public authority has informed the applicant that a fee is payable under Article 14 or 15 – until the fee is paid.

(4) If a scheduled public authority fails to comply with a request for information –

(a) within the period mentioned in paragraph (2); or

(b) within such further period as the applicant may allow,

the applicant may treat the failure as a decision by the public authority to refuse to supply the information on the grounds that it is qualified information.

(5) In this Article "working day" means a day other than –

(a) a Saturday, a Sunday, Christmas Day, or Good Friday; or

(b) a day that is a bank holiday or a public holiday under the Public Holidays and Bank Holidays (Jersey) Law 1951.

13 A scheduled public authority may request additional details

A scheduled public authority that has been requested to supply information may request the applicant to supply it with further details of the information so that the authority may identify and locate the information.

14 A scheduled public authority may request fee for supplying information

(1) A scheduled public authority that has been requested to supply information may request the applicant to pay for the supply of the information a fee determined by the public authority in the manner prescribed by Regulations.

(2) The request for the fee must be made within the time allowed to the public authority to comply with the request for the information.

15 A scheduled public authority may refuse to supply information if cost excessive

(1) A scheduled public authority that has been requested to supply information may refuse to supply the information if it estimates that the cost of doing so would exceed any amount prescribed for the purpose by Regulations.

(2) Despite paragraph (1), the public authority may still supply the information requested on payment to it of a fee determined by the public authority in the manner prescribed by Regulations.

(3) Regulations made for the purpose of paragraph (1) may provide that, in such circumstances as the Regulations prescribed, if 2 or more requests for information are made to a scheduled public authority –

(a) by one person; or

(b) by different persons who appear to the scheduled public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

Information stored with the Jersey Heritage Trust

16 Where public records transferred to The Jersey Heritage Trust

An application for information that has been transferred by a scheduled public authority to The Jersey Heritage Trust is to be dealt with in the manner prescribed by Regulations.

Regulations on refusal of requests and publication schemes

17 Where a scheduled public authority effuses a request

A scheduled public authority that decides to refuse a request for information must do so in the manner prescribed by Regulations.

18 A scheduled public authority may be required to establish a publication scheme

Regulations may require a public authority to adopt and maintain a scheme that requires it to publish information.

Limit on all exceptions

19 A scheduled public authority must supply information held by it for a long time

(1) If a request is made to a scheduled public authority for information that it need not otherwise supply by virtue of –

(a) Article 28 (States Assembly privileges);

(b) Article 29 (communications with Her Majesty);

(c) Article 31 (commercial interests);

(d) Article 32 (the economy);

(e) Article 34 (audit functions); or

(f) Article 36 (employment),

it must supply the information if it has held the information for more than 30 years.

(2) If a request is made to a scheduled public authority for other information that it need not otherwise supply by virtue of any other provision of Part 5 or 6, it must supply the information if it has held the information for more than 100 years.

PART 3

VEXATIOUS AND REPEATED REQUESTS

20 A scheduled public authority need not comply with vexatious requests

(1) A scheduled public authority need not comply with a request for information if it considers the request to be vexatious.

(2) In this Article, a request is not vexatious simply because the intention of the applicant is to obtain information –

(a) to embarrass the scheduled public authority or some other public authority; or

(b) for a political purpose.

(3) However, a request may be vexatious if –

(a) the applicant has no real interest in the information sought; and

(b) the information is being sought for a bad or illegitimate reason, which may include a desire to cause administrative difficulty or inconvenience.

21 A scheduled public authority need not comply with repeated requests

(1) This Article applies if –

(a) an applicant has previously made a request for information to a scheduled public authority that it has complied with; and

(b) the applicant makes a request for information that is identical or substantially similar.

(2) The scheduled public authority may refuse to comply with the request unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

PART 4

INFORMATION OTHERWISE AVAILABLE

22 Information accessible to applicant by other means

(1) Information is information that is otherwise available if it is reasonably accessible to the applicant, otherwise than under this Law, whether or not free of charge.

(2) A scheduled public authority that refuses an application for information on this ground must make reasonable efforts to inform the applicant where the information may be accessed.

23 Court information

(1) Information is information that is otherwise available if it is held by a scheduled public authority only by virtue of being contained in a document –

(a) filed with, or otherwise placed in the custody of, a court; or

(b) served upon, or by, the scheduled public authority,

in proceedings in a particular cause or matter.

(2) Information is information that is otherwise available if it is held by a scheduled public authority only by virtue of being contained in a document created by –

(a) a court; or

(b) a member of the administrative staff of a court,

in proceedings in a particular cause or matter.

(3) Information is information that is otherwise available if it is held by a scheduled public authority only by virtue of being contained in a document –

(a) placed in the custody of; or

(b) created by,

a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(4) In this Article –

"proceedings in a particular cause or matter" includes an inquest or post-mortem examination;

"inquiry" means an inquiry or a hearing held under an enactment;

"arbitration" means arbitration to which Part 2 of the Arbitration (Jersey) Law 1998 applies.

24 Personal information

Information is information that is otherwise available if it constitutes personal data of which the applicant is the data subject, as defined in the Data Protection (Jersey) Law 2005.

PART 5

RESTRICTED INFORMATION

25 Other prohibitions on disclosure

Information is restricted information if the disclosure of the information by the scheduled public authority holding it –

(a) is prohibited by or under an enactment;

(b) is incompatible with a European Community obligation that applies to Jersey; or

(c) would constitute or be punishable as a contempt of court.

26 Information supplied in confidence

Information is restricted information if –

(a) it was obtained by the scheduled public authority from another person (including another public authority); and

(b) the disclosure of the information to the public by the scheduled public authority holding it would constitute a breach of confidence actionable by that or any other person.

27 National security

(1) Information is restricted information if exemption from the obligation to disclose it under this Law is required to safeguard national security.

(2) Except as provided by paragraph (3), a certificate signed by the Chief Minister certifying that the exemption is required to safeguard national security is conclusive evidence of that fact.

(3) A person aggrieved by the decision of the Chief Minister to issue a certificate under paragraph (2) may appeal the Royal Court on the

grounds that the Chief Minister did not have reasonable grounds for issuing the certificate.

(4) The decision of the Royal Court on the appeal shall be final.

28 States Assembly privileges

(1) Information is restricted information if exemption from the obligation to disclose it under this Law is required to avoid an infringement of the privileges of the States Assembly.

(2) Except as provided by paragraph (3), a certificate signed by the Greffier of the States certifying that exemption is required to avoid an infringement of the privileges of the States Assembly is conclusive evidence of that fact.

(3) A person aggrieved by the decision of the Greffier of the States to issue a certificate under paragraph (2) may appeal the Royal Court on the grounds that the Greffier did not have reasonable grounds for issuing the certificate.

(4) The decision of the Royal Court on the appeal shall be final.

PART 6

QUALIFIED INFORMATION

29 Communications with Her Majesty etc. and honours

Information is qualified information if it relates to –

(a) a communication with Her Majesty, with any other member of the Royal Family or with the Royal Household; or

(b) the conferring of an honour or dignity by the Crown.

30 Legal professional privilege

Information is qualified information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

31 Commercial interests

Information is qualified information if –

(a) it constitutes a trade secret; or

(b) its disclosure would, or would be likely to prejudice the commercial interests of a person (including the scheduled public authority holding it).

32 The economy

Information is qualified information if its disclosure would, or would be likely to, prejudice –

(a) the economic interests of Jersey; or

(b) the financial interests of the States of Jersey.

33 Formulation and development of policies

Information is qualified information if it relates to the formulation or development of any proposed policy by a public authority.

34 Audit functions

(1) Information is qualified information –

(a) if it is held by a scheduled public authority to which this Article applies; and

(b) if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to a matter mentioned in paragraph (2)(a) or (b).

(2) This Article applies to a scheduled public authority that has functions in relation to –

(a) the audit of the accounts of another public authority; or

(b) the examination of the economy, efficiency and effectiveness with which another public authority uses its resources in discharging its functions.

35 Endangering the safety or health of individuals

Information is qualified information if its disclosure would, or would be likely to –

(a) endanger the safety of an individual; or

(b) endanger the physical or mental health of an individual.

36 Employment

Information is qualified information if its disclosure would, or would be likely to prejudice pay or conditions negotiations that are being held between a scheduled public authority and –

(a) an employee or prospective employee of the authority; or

(b) representatives of the employees of the authority.

37 Advice by the Bailiff or a Law Officer

Information is qualified information if it relates to the provision of advice by the Bailiff or a Law Officer.

38 Defence

(1) Information is qualified information if its disclosure would, or would be likely to, prejudice –

(a) the defence of the British Islands or any of them; or

(b) the capability, effectiveness or security of any relevant forces.

(2) In paragraph (1)(b) "relevant forces" means –

(a) the armed forces of the Crown; or

(b) a force this is co-operating with those forces or a part of those forces.

39 International relations

(1) Information is qualified information if its disclosure would, or would be likely to, prejudice relations between Jersey and –

(a) the United Kingdom;

(b) a State other than Jersey;

(c) an international organisation; or

(d) an international court.

(2) Information is qualified information if its disclosure would, or would be likely to, prejudice –

(a) any Jersey interests abroad; or

(b) the promotion or protection by Jersey of any such interest.

(3) Information is also qualified information if it is confidential information obtained from –

(a) a State other than Jersey;

(b) an international organisation; or

(c) an international court.

(4) In this Article, information obtained from a State, organisation or court is confidential while –

(a) the terms on which it was obtained require it to be held in confidence; or

(b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(5) In this Article –

"international court" means an international court that is not an international organisation and that was established –

(a) by a resolution of an international organization of which the United Kingdom is a member; or

(b) by an international agreement to which the United Kingdom was a party;

"international organization" means an international organization whose members include any 2 or more States, or any organ of such an organization;

"State" includes the government of a State and any organ of its government, and references to a State other than Jersey include references to a territory of the United Kingdom outside the United Kingdom.

40 Law enforcement

Information is qualified information if its disclosure would, or would be likely to, prejudice –

(a) the prevention, detection or investigation of crime, whether in Jersey or elsewhere;

(b) the apprehension or prosecution of offenders whether in respect of offences committed in Jersey or elsewhere;

(c) the administration of justice whether in Jersey or elsewhere;

(d) the assessment or collection of a tax or duty or of an imposition of a similar nature;

(e) the operation of immigration controls whether in Jersey or elsewhere;

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;

(g) the proper supervision or regulation of financial services.

PART 7

THE INFORMATION COMMISSIONER AND APPEALS

41 General functions of the Information Commissioner

(1) The Information Commissioner must –

(a) encourage public authorities to follow good practice in their implementation of this Law and the provision of information; and

(b) supply the public with information about this Law.

(2) Each year the Information Commissioner must, in consultation with the Privileges and Procedures Committee, prepare a general report on the exercise by the Information Commissioner of his or her functions under this Law during the preceding year.

(3) The Committee must lay the report before the States Assembly as soon as practicable.

42 Appeals to the Information Commissioner

(1) This Article applies to a decision by a scheduled public authority –

(a) as to the amount of the fee payable by virtue of Article 14(1) or 15(2);

(b) as to the cost of supplying information for the purpose of Article 15(1);

(c) to refuse to comply with a request for information on a ground specified in Part 3 (vexatious or repeated requests);

(d) to refuse to comply with a request for information on the ground that it is restricted information; or

(e) to refuse to comply with a request for information on the grounds that it is qualified information and that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.

(2) A person aggrieved by a decision of a scheduled public authority to which this Article applies, may appeal to the Information Commissioner.

(3) The appeal may be made on the grounds that in all the circumstances of the case the decision was not reasonable.

(4) The Information Commissioner must decide the appeal as soon as practicable but may decide not do so if the Commissioner is satisfied that –

(a) the applicant has not exhausted any complaints procedure provided by the scheduled public authority;

(b) there has been undue delay in making the appeal;

(c) the appeal is frivolous or vexatious; or

(d) the appeal has been withdrawn, abandoned or previously determined by the Commissioner.

(5) The Information Commissioner must serve a notice of his or her decision in respect of the appeal on the applicant and on the scheduled public authority.

(6) The notice must specify –

(a) the Commissioner's decision and the reasons for the decision; and

(d) the right of appeal to the Royal Court conferred by Article 43.

43 Appeals to the Royal Court

(1) An aggrieved person may appeal to the Royal Court against a decision of the Information Commissioner under Article 42.

(2) The appeal may be made on the grounds that in all the circumstances of the case the decision was not reasonable.

(3) The appeal must be made within 28 days of the Information Commissioner giving notice of his or her decision to the applicant.

(4) The decision of the Royal Court on the appeal shall be final.

(5) Where the appeal was in respect of a decision by the Information Commission not to decide an appeal, the Royal Court may direct the Information Commission to decide the appeal.

44 Failure of a scheduled public authority to comply with a notice by the Information Commissioner

(1) This Article applies where, on an appeal under Article 42, the Information Commissioner has served a notice on a scheduled public authority that contains one of the statements set out in paragraph (2) and the public authority has not supplied the information in accordance with the notice after –

(a) failing to appeal under Article 43; or

(b) having appealed, having lost the appeal.

(2) The statements mentioned in paragraph (1) are –

(a) that the fee payable by virtue of Article 14(1) or 15(2) should be less than the fee determined by the public authority and that the information should be supplied on payment of the fee specified in the notice;

(b) that the cost of supplying information for the purpose of Article 15(1) should be less than the cost determined by the public authority and that the information should be supplied on payment of the amount specified in the notice;

(c) that the refusal by the public authority to comply with a request for information on a ground specified in Part 3 (vexatious or repeated requests) was not reasonable and that the information should be supplied;

(d) that the refusal by the public authority to comply with a request for information on the ground that it is restricted information was incorrect and that the information should be supplied;

(e) that the refusal by the public authority to comply with a request for information on the grounds that it is qualified information and that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so was not a reasonable decision and that the information should be supplied.

(3) The Information Commissioner may certify in writing to the Royal Court that the scheduled public authority should supply the information requested in accordance with the notice but has failed to do so.

(4) The Court may inquire into the matter and may deal with the scheduled public authority as if it had committed a contempt of court after hearing –

(a) any witness who may be produced against or on behalf of the public authority; and

(b) any statement that may be offered in defence.

PART 8

MISCELLANEOUS AND SUPPLEMENTAL

45 Offence of altering, etc. records with intent to prevent disclosure

(1) This Article applies if –

(a) a request for information has been made to a scheduled public authority; and

(b) under this Law the applicant would have been entitled to be supplied with the information.

(2) A person is guilty of an offence and liable to a fine if the person alters, defaces, blocks, erases, destroys or conceals a record held by the scheduled public authority, with the intention of preventing the authority from supplying the information to the applicant.

(3) Proceedings for an offence under this Article shall not be instituted except by or with the consent of the Attorney General.

46 Defamation

(1) This Article applies if information supplied by a scheduled public authority to an applicant under this Law was supplied to the scheduled public authority by a third person.

(2) The publication to the applicant of any defamatory matter contained in the information is privileged unless the publication is shown to have been made with malice.

47 Application to the administrations of the States

(1) In this Law each administration of the States is to be treated as a separate person.

(2) However, paragraph (1) does not enable an administration of the States to claim for the purposes of Article 26(b) that the disclosure of information by it would constitute a breach of confidence actionable by another administration of the States.

48 States exempt from criminal liability

(1) This Article applies to the following public authorities –

(a) the States Assembly;

(b) a committee or other body established by the States or by or in accordance with the standing orders of the States Assembly;

(c) an administration of the States.

(2) A public authority to which this Article applies is not liable to prosecution under this Law but Article 44 applies to a person acting on behalf of or employed by such an authority as it applies to any other person.

49 Regulations

The States may make Regulations the States consider are necessary or convenient for the purposes of this Law.

50 Public Records (Jersey) Law 2002 amended

(1) The Public Records (Jersey) Law 2002 is amended as specified in this Article.

(2) In Article 1(1), the definition "open access period" is omitted.

(3) In Article 9(c), for "in accordance with this Law" there is substituted "in accordance with the Freedom of Information (Jersey) Law 200-".

(4) In Article 11(o), "subject to Article 27(5)," is omitted.

(5) In Article 22(3), for everything after "a record that" there is substituted "contains information that is restricted or qualified information for the purposes of the Freedom of Information (Jersey) Law 200-.".

(6) Parts 5 and 6 are repealed.

(7) Articles 39 and 40 are repealed.

51 Citation and commencement

(1) This Law may be cited as the Freedom of Information (Jersey) Law 200-.

(2) It shall come into force 28 days after its registration.

SCHEDULE

(Article 1)

SCHEDULED PUBLIC AUTHORITIES

1 The States Assembly.

2 A minister.

3 A committee or other body established by resolution of the States or by or in accordance with the standing orders of the States Assembly.

4 An administration of the States.

APPENDIX 2

A CODE OF PRACTICE ON PUBLIC ACCESS TO OFFICIAL INFORMATION

(Adopted by Act of the States dated 20th July 1999 as amended by Act of the States dated 8th June 2004)

PART I: Description

1. Purpose

1.1 The purpose of this Code is to establish a minimum standard of openness and accountability by the States of Jersey, its Committees and departments, through –

(a) increasing public access to information;

(b) supplying the reasons for administrative decisions to those affected, except where there is statutory authority to the contrary;

(c) giving individuals the right of access to personal information held about them and to require the correction of inaccurate or misleading information,

while, at the same time –

(i) safeguarding an individual's right to privacy; and

(ii) safeguarding the confidentiality of information classified as exempt under the Code.

1.2 Interpretation and scope

1.2.1 For the purposes of this Code –

(a) "authority" means the States of Jersey, Committees of the States[16], their sub-committees, and their departments;

(b) "information" means any information or official record held by an authority;

(c) "personal information" means information about an identifiable individual.

1.2.2 **In the application of this Code –**

(a) there shall be a presumption of openness;

[16] Under the ministerial system of government, the relevant Minister applies.

(b) information shall remain confidential if it is classified as exempt in Part III of this Code;

1.2.3 Nothing contained in this Code shall affect statutory provisions, or the provisions of customary law with respect to confidence.

1.2.4 This Code applies to information created after the date on which the Code is brought into operation and, in the case of personal information, to information created before that date.

PART II: Operation

2.1 Obligations of an authority

2.1.1 Subject to the exemptions listed in paragraph 3, an authority shall –

(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 and endeavour to supply the information requested (unless exempt) within 21 days;

(d) take all reasonable steps to provide requested information that they hold;

(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 is complex, or would require extensive searches of records, when a charge reflecting the reasonable costs of providing the information may be made;

(g) if it refuses to disclose requested information, inform the applicant of its reasons for doing so;

(h) the authority shall correct any personal information 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;

(i) inform applicants of their rights under this Code;

(j) not deny the existence of information which is not classified as exempt which it knows to exist;

(k) undertake the drafting of documents so as to allow maximum disclosure;

(l) undertake the drafting of Committee and sub-committee agendas, agenda support papers and minutes so as to allow maximum disclosure;

2.1.2 An authority shall –

(a) forward to the States Greffe the names of strategic and/or policy reports prepared by the authority after the date of adoption of this amendment, to be added to a central list to be called the Information Asset Register ('the Register');

(b) notwithstanding paragraph 2.1.2 (a), the name of any report deemed to be of public interest shall be included on the Register;

(c) 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 Privileges and Procedures Committee, an authority shall forward to the States Greffe the names of such reports to be added to the Register, together with details of the cost of preparation and details of their status;

(d) subject to the exemptions of the Code, make available to the public all unpublished third party reports or consultancy documents after a period of five years."

2.2 Responsibilities of an applicant

2.2.1 The applicant shall –

(a) apply in writing to the relevant authority having identified himself to the authority's satisfaction;

(b) identify with reasonable clarity the information that he requires;

(c) be responsible and reasonable when exercising his rights under this Code.

2.3 Appeals

2.3.1 If an applicant is aggrieved by an authority's decision to refuse to disclose requested information or to correct personal information in a record, he will have the right of appeal set out in Part IV of this Code.

PART III: Access and exemptions

3.1 Access

3.1.1 Subject to paragraphs 1.2.3 and 2.1(k) and (l) and the exemptions described in paragraph 3.2 –

(a) an authority shall grant access to all information in its possession, and 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;

(b) an authority shall grant –

(i) applicants over the age of 18 access to personal information held about them; and

(ii) parents or guardians access to personal information held about any of their children under the age of 18.

3.2 Exemptions

3.2.1 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;

(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 or lead to the disclosure of legal advice to an authority, or infringe medical confidentiality;

(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;

(xiii) prejudice employer/employee relationships or the effective conduct of personnel management;

(xiv) constitute a premature release of a draft policy which is in the course of 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;

(b) the information concerned was given to the authority concerned in confidence on the understanding that it would be treated by it as confidential, unless the provider of the information agrees to its disclosure; or

(c) the application is frivolous or vexatious or is made in bad faith.

PART IV: Appeal procedure

4.1 An applicant who is aggrieved by a decision by an officer of a States department under this Code may in the first instance appeal in writing to the President of the Committee[17] concerned.

4.2 An applicant who is aggrieved by the decision of an authority under this Code, or by the President of a Committee under paragraph 4.1, may apply for his complaint[18] to be reviewed under the Administrative Decisions (Review) (Jersey) Law 1982, as amended.

[17] Note: Under ministerial government, this would be the relevant Minister.
[18] An application for a complaint to be heard by the States of Jersey Complaints Panel should be submitted to the Greffier of the States, States Greffe, Morier House, Halkett Place, St. Helier, Jersey JE1 1DD

APPENDIX 3

2. Key Policies

The States, in adopting Freedom of Information – proposed legislation P.72/2005, agreed that subject to further consultation, the Law should be broadly based upon the following key policy outcomes, numbers 1 to 22 – these are listed in the table below. Alongside the key policy is the current status

KEY POLICY OUTCOMES	COMMENTARY
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.	The Committee agrees with this principle and agrees that all records should become accessible. For practical reasons this is being phased.
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.	The vast majority of exemptions will be 'qualified exempt', that is, the information should be subject to the public interest test to establish whether release is possible, and a decision is capable of review with passing of time.
3. All legal persons (both individual and corporate) should have a right to apply, regardless of their nationality or residency.	Agreed.
4. Application, especially for readily accessible information, should not be restricted by having to be in writing.	Normal business activity may allow for release to be made very simply. For simplicity, e-mail applications will be accepted.
5. Authorities that are emanations of the state or majority owned by the public should be bound to release relevant information.	It is the intention to require the following bodies to comply in the under-mentioned order – 1. Ministers, departments, Scrutiny Panels, Public Accounts Committee, Chairmen's Committee and the Privileges and Procedures Committee, Greffier of the States; 2. Bailiff of Jersey, Attorney General, HM Lieutenant Governor; 3. Parishes, quasi public bodies such as JFSC, JCRA, Law Commission etc 4. Court system and tribunals;

	5. More remote public authorities. See later section
6. The Law would not apply to States-aided independent bodies.	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-. They could be included in the Law at a later date.
7. A formal publication scheme is <u>not</u> 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.	Publications Schemes will be enabled by the Law but there is no immediate intention to establish them. The Information Asset Register, established by the States in 2004, is being insufficiently used, and a statutory system may need to be considered in due course if this persists.
8. Authorities are to be encouraged to develop records and document management schemes which will facilitate retrieval of requested information.	The Public Records (Jersey) Law 2002 requires appropriate systems and the Head of Archives and Collections is working with departments. It is recognised that an FOI Law will be a real driver to achieve this.
9. Information should in general be released free of charge and proportionate assistance should be given to a special need, such as an individual's sight impairment.	In order to be able to respond to more significant requests, charges, yet to be agreed, for extensive work will be allowed. In the UK, there is a limit on the number of hours that a body is expected to work in order to research and retrieve information – £25 per hour set in regulations. Departments are obliged to spend 24 man hours on search and retrieval. Other public authorities are obliged to spend 18 hours (e.g. health, police) This does NOT include the time taken to decide whether information is exempt or not. This is not a cost 'exemption'. 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.

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.	Information should be available within 20 working days. The clock will start the working day after receipt and will stop during correspondence with the applicant.
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.	For departments and bodies that have been subject to the Code, information backdated to 20th January 2000 will be immediately available, subject to exemptions if appropriate. The Committee proposes that the right of access to information created prior to 20th January 2000 should be phased as set out in the report as a minimum standard, but departments will be encouraged to comply immediately if they can. For bodies that have not previously been subject to the Code, access will not be backdated to begin with, but will be phased over time. This is again a minimum standard, and bodies will be encouraged to comply immediately if they can.
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 provides scope for serious undermining of the Law.	Legal professional privilege and advice by a Law Officer or the Bailiff are proposed as qualified exemptions, that is the public interest test must be applied, and in some circumstances it may be possible to release this information.
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	The proposed qualified exemptions are as follows – **"31 Commercial interests** Information is qualified information if – (a) it constitutes a trade secret; or (b) its disclosure would, or would be likely to prejudice the commercial interests of a person (including the scheduled public authority holding

[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.*

commercial information, be likely to cause significant damage to the lawful commercial or professional activities of the authority;"	it). **32 The economy** Information is qualified information if its disclosure would, or would be likely to, prejudice – (a) the economic interests of Jersey; or (b) the financial interests of the States of Jersey."
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;".	The proposed qualified exemption is as follows – **36 Employment** Information is qualified information if its disclosure would, or would be likely to prejudice pay or conditions negotiations that are being held between a scheduled public authority and – (a) an employee or prospective employee of the authority; or (b) representatives of the employees of the authority.
18. Existing exemption (xiv) [in the code], 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;".	**33 Formulation and development of policies** Information is qualified information if it relates to the formulation or development of any proposed policy by a public authority. 'Public authority' is defined in Article 1 of the draft Law, and covers all those bodies that are defined as public authorities in this Law, including, for example, the Jersey Financial Services Authority.
15. 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.	In the United Kingdom, the approach is that most of the absolute exemptions ('restricted information' in the Jersey draft) refer to – • Information that is obtainable by other means; • Where the disclosure would open an authority to breach of another Law; • Breach of confidence. **26 Information supplied in confidence** Information is restricted information if –

	(a) it was obtained by the scheduled public authority from another person (including another public authority); and *(Code 3.2.1.(b))* (b) the disclosure of the information to the public by the scheduled public authority holding it would constitute a breach of confidence actionable by that or any other person. *(Key policy 16 has been included in the Law only where the breach of confidence would be actionable)* See also the provisions relation to International relations (Article 39). In the United Kingdom, the approach is that most of the absolute exemptions ('restricted information' in the Jersey draft) refer to – • Information that is obtainable by other means; • Where the disclosure would open an authority to breach of another Law; • Breach of confidence.
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;".	The UK experience has informed the Committee's decision that it is necessary to retain this provision, but agrees that care should be taken over its implementation.
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]	The Committee has considered including a 'confirm or deny' ('NCND')clause in the draft Law, and indeed, this will be re-instated in the next draft. This is included by jurisdictions and allows them to consider whether or not to disclose that they have, or have not, information on a matter. This is of particular interest in issues touching upon national security or policing matters. There was considerable concern on the part of the States of Jersey Police that its agreement with the United

[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.*

	Kingdom whereby it is able to access sensitive data collected by the UK authorities for policing purposes would be under threat unless appropriate treatment of this information was put in place. The Committee agreed that a 'carve out' should be employed to ensure that any information given to a Jersey public authority by a foreign government department would not be considered to be 'held' by the Jersey authorities for the purposes of the Law. The Committee has decided to include an NCND clause also in respect of other security issues.
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.	A public authority is not liable to prosecution under this Law but Article 44 applies to a person acting on behalf of or employed by such an authority as it applies to any other person – 44(2) A person is guilty of an offence and liable to a fine if the person alters, defaces, blocks, erases, destroys or conceals a record held by the scheduled public authority, with the intention of preventing the authority from supplying the information to the applicant.
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.	This is the Committee's preferred way forward. There is synergy between the two functions, and those jurisdictions that have combined the roles have had a greater measure of success.
21. The existing Data Protection Tribunal and appeals system should be adopted and adapted as necessary to consider Freedom of Information appeals.	The Committee has given considerable thought to this recommendation and has considered the following options for the appeals process – • Using the existing Data Protection Tribunal • Using an administrative procedure under the Royal Court (similar to that used for Third Party Planning appeals) • Introducing a new locally based tribunal.

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.	The Information Commissioner should be independent and report directly to the States. This is an important role which will need to command respect and should not be susceptible to political influence.