

Freedom of Information (Jersey) Law 2011

DECISION NOTICE

JOIC Reference	CAS-02614
Date of Decision Notice	03 November 2020
Scheduled Public Authority	Health & Community Services
Address	Peter Crill House Gloucester Street St Helier Jersey JE1 3QS
Date of Request	23 January 2020
Date of Response	19 February 2020
Date of appeal to Information Commissioner	20 June 2020

Summary/Decision

1. On 30 January 2020, the Complainant requested certain information from Health & Community Services (the **SPA**) regarding the Jersey Care Model (the **Request**).
2. The SPA responded to the Complainant's Request on 19 February 2020 (the **Response**). The Complainant did not agree with certain aspects of the Response and, in particular, they did not agree with the response provided to the third part of the Request.
3. Following various correspondence dealing with points of clarification sought by the Complainant, the Complainant appealed to the Information Commissioner (the **Commissioner**) on 20 June 2020 (the **Appeal**), asking the Commissioner to review certain aspects of the SPA's Response which the Complainant considered deficient.
4. The Commissioner's decision is that the appeal is not upheld.
5. There are no further steps the SPA needs to take.

The Role of the Information Commissioner

6. It is the duty of the Commissioner to decide whether a request for information made to a SPA has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information (Jersey) Law 2011 (the **Law**).
7. This Decision Notice sets out the Commissioner's decision.

Request and Response

8. The Complainant's Request was in the following terms:

"My question concerns the Jersey Care Model.

We are told that PWC have been appointed to carry out stress testing in the Jersey Care Model.

Could you please tell me:

- 1) When the results of the stress testing will be available to the public?*
- 2) Are PWC stress testing the actual model itself as well as the financials?*
- 3) Please provide Terms of Reference for stress testing.*
- 4) Please provide names of places such a Care Model has been rolled out and is working effectively in a similar jurisdiction. (I.e. an island)."*

9. On 19 February 2020 the SPA provided the Response:

"1) The result of the stress testing will be made available to the public after it has been to the States Assembly, which is intended to occur at the end of Q2 prior to the summer break. It is not possible to give an exact date when it will be available to the public, but likely to be in June/July 2020.

2) They are testing both the model and developing a cost profile for the model and its implementation.

3) Please see attached.

4) The model is not a replica of other jurisdictions but based on local knowledge of what would work and is needed for Jersey. It was developed by Jersey clinicians and professionals combined ideas drawing on international best practice case studies."

10. The Complainant raised certain further questions directly with the Central Freedom of Information Unit (the **Unit**) by which the Complainant disputed the response to question 3¹, as set out above (**Question 3**). In particular, in an email dated 19 February 2020, the Complainant expressed the following views: *"Thank you for this information, however number 3 is not Terms of reference. Can you please provide the TOR given to PWC for stress testing?"*
11. In its response of 24 February 2020, the SPA indicated that it had discussed matters with the relevant department that had *"clarified that the document provided is the Terms of Reference for the project, developed with PWC, pursuant to the original tender documentation"*.

1

<https://www.gov.je/Freedom%20of%20Information%20library/ID%20FOI%20Jersey%20Care%20Model%20review%20Terms%20of%20Reference%2020200219.pdf>

12. In their response of later that same day, the Complainant asserted that what had been provided was not the terms of reference (**ToR**) as requested:

"I'm sorry but that is not a TERMS OF REFERENCE document. That is more like a presentation. Terms of reference outline the criteria for testing. All the agreed services with GPs and other service providers etc should be included. All the intended financial subsidies etc. Without all this information there is nothing to stress test. What you are describing is a business case, not stress testing. A business case should have been prepared prior to any proposed model. Please provide the Terms of Reference for the stress testing."

13. The SPA responded on 12 March 2020 via the Unit:

"Our apologies for the delay in getting back to you on this matter. The department have now confirmed as follows:

The contract we have with PWC contains the scope of services, timelines (for the role it is fulfilling) and all terms and conditions of service. The contract in its entirety serves as the terms of reference. We have jointly developed terms of reference for the Jersey Care Model.

We note that the previously provided document contains the aforementioned Terms of Reference, developed with PWC."

14. There was some further correspondence between the parties and a final response was provided on behalf of the JCM team on 12 June 2020:

"Thank you for your email following up on the Freedom of Information request related to the Terms of Reference for the JCM Stress Test. We apologise for the delay in getting back to you.

After internal review, we are satisfied that the response originally provided met the request for information. The terms of reference provided were the terms of reference under which the review was conducted."

The Investigation

Scope of the case

15. On 20 June 2020, the Complainant contacted the Commissioner and asked the Commissioner to review the Complainant's Request and the Response received from the SPA in order to ascertain whether the Response provided in respect of Question 3 was in accordance with the Law.
16. The Commissioner has set out in this Notice the particular issues he has had to consider in respect of the relevant exemption cited by the SPA.
17. In coming to a decision on this matter, the Commissioner has considered all the relevant submissions, or parts of submissions, made to him by both the Complainant and the SPA. He is satisfied that no matter of relevance has been overlooked.

Chronology

18. On 24 June 2020, the Commissioner wrote to the SPA to advise that the Complainant had made an Appeal to the Commissioner, pursuant to Art.46 of the Law. The SPA was asked to provide their written submissions in response to the complaint made by the Complainant.

19. The SPA responded to that letter on 14 July 2020, providing detailed explanations as to why it considered the Art.25 exemption applied to the Withheld Information.
20. There was further correspondence that passed between the Commissioner and the SPA between 30 June 2020 and 17 September 2020.

Reasons for decision

The SPA's position

21. In addition to explanations provided in its Response and Internal Review, that SPA was invited to provide submissions to this office and to respond to certain further questions asked by the Commissioner.
22. The SPA contends that it has replied fully to the Request and that in respect of Question 3, whilst such may not be in the format preferred by the Complainant, the document provided to the Complainant contained the ToR provided to PWC to carry out stress testing of the Jersey Care Model.

The Complainant's position

23. The Complainant's position in respect of Question 3 is clear. They do not believe that the documentation provided by the SPA in response to Question 3 of the Request constitutes the ToR provided to PWC. The Complainant believes that there must be other information available constituting the ToR and they indicate that this should be provided to them.
24. As part of their Complaint, the Complainant indicated that "*Emails went back and forth, then I was told that the answer would be delayed because of Covid 19, then I was given the name of the man supposedly responsible for this (but an email address which did not exist). When I eventually managed to contact the person, he clearly either did not want me to see the TOR or he had no idea what TOR are - which is odd considering that he is supposed to be in charge of this. The document is dated February 2020 and the Stress Testing started in December 2019 so they clearly are not. Even a schoolchild could work out that this is NOT Terms of Reference and that obfuscation seems to be being applied here.*"

Decision

25. The general right to be supplied with information held by a scheduled public authority is set out at Art.8 of the Law:

"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 that authority; and

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

26. The Law is clear that it provides a right to information not to copy documentation and the information that must be provided must be that which exists at the point the relevant request is made:

"(1) For the purposes of this Law, the information held by a public authority at the time when a request for the information is received is the information that is to be taken to have been requested." (Art.4(1) of the Law).

27. The Commissioner has seen a copy of the PowerPoint presentation dated 17 February 2020 (the **PowerPoint**) provided to the Complainant in response to Question 3 and which the SPA said in their email dated 14 July 2020 "contains...the Terms of Reference developed with PWC".

28. Page 6 of the PowerPoint reads as follows:

Demand, capacity and financial modelling are being conducted to inform the development of a business case for the JCM

Demand and capacity modelling associated with the Jersey Care Model programme	Financial modelling associated with the Jersey Care Model programme	Development of a business case for the Jersey Care Model
<p>Modelling is being conducted to estimate:</p> <ul style="list-style-type: none"> In-hospital demand and capacity requirements to support the Our Hospital programme (with scenarios including and excluding the impact of the Jersey Care Model). Out of hospital demand and capacity requirements for the care areas described in the Jersey Care Model. <p>Collectively these analyses will estimate the total capacity required to provide care for the population of Jersey, and will assess the associated workforce requirements.</p>	<p>Financial modelling (aligned with the demand and capacity modelling) is being conducted to:</p> <ul style="list-style-type: none"> Confirm income and expenditure across the whole health and social care system in Jersey (including elements paid for through individual contributions). Estimate how this income and expenditure would be forecast to change without the proposed changes to the care model. Estimate the impact of implementing the Jersey Care Model, including any investment costs. 	<p>The Jersey Care Model briefing paper (updated for the results of the review) and associated modelling will be brought together into a business case for the JCM.</p> <p>This will be in the format of a Strategic Outline Case or SOC, which sets out the case for change, the investment required and the benefits of the proposals.</p> <p>The SOC will also outline key commercial considerations for the JCM, including funding models and payment structures.</p> <p>Finally the business case will outline management arrangements for the future delivery of the JCM.</p>

29. The Request was for the ToR provided to PWC to carry out stress testing. The Complainant did not specify any suggestion as to where the relevant terms of reference might be recorded; they did not ask, for example, for a copy of any contractual agreement or the contents thereof.

30. As part of its investigation, the Commissioner asked the SPA to provide a copy of the contract with PWC (the **PWC Contract**) as referred to in the email of 12 March 2020 as sent to the Complainant (which the SPA indicated contained the relevant Terms of Reference). It is unclear whether the PWC Contract has been sought by the Complainant, but the Commissioner asked for this specifically because the SPA had indicated directly to the Complainant that the PowerPoint contained the ToR that were replicated in the relevant contractual terms.

31. In addition, the SPA was also asked to confirm whether any other document exists (other than that referred to at footnote 1 and the PWC Contract) that either constitutes or contains such ToR as were provided to PWC to carry out the stress testing in respect of the Jersey Care Model and to explain why the PWC Contract was not provided to the Applicant (if such indeed does contain a copy of the terms of reference requested).

32. In response to those questions, the SPA indicated that the PWC Contract was not provided because "HCS was not asked to provide the contract and the terms of reference were provided in the FOI response of 19 February 2020". The SPA indicated that they consider that the PWC Contract acts as a tender specification and is a list of services that have been set out for supplier evaluation and contracting. They also indicated that the ToR as provided in response to the

Request *"outlines how that specification will be implemented and how the review will be conducted."*

33. The Commissioner notes that the PWC Contract is dated 10 February 2020 which is subsequent to the Complainant having made their Request for information on 23 January 2020 and the SPA indicated that as at the point the Complainant made the Request, the specifics of the terms of reference and the PWC Contract had not been finalised.
34. Further, in response to specific questioning from the Commissioner, the SPA indicated that *"Other than the contract...and the document provided in response to the FOI..."* the ToR does not exist in any other document.
35. When the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there either isn't any information or anything further to add. The Commissioner will apply the normal civil standard of proof in determining the case, i.e. he will decide on the balance of probabilities whether the information is held/whether all information has been provided that ought to have been provided.
36. As previously stated, the right is one to that of information 'held' by the SPA. It can be in any format and it could come from a variety of sources and require amalgamation in order to properly respond to the request that has been made. These rights only apply to the information held by the public authority. This means that there is no explicit right to copies of original documents. It ensures that information is covered wherever and however it is recorded. It also means that authorities have to consider the release of information within a document, rather than taking a document by document approach and withholding whole documents when only some of the information is exempt.
37. Further, the right to information applies to that held at the point at which the relevant request is made. In this case and at the time of the Request, the Commissioner is satisfied on the balance of probabilities that the Response provided to Question 3 was in accordance with the Law and contained information available at the time as to the ToR.
38. The Commissioner does, however, consider that the later references to the PWC Contract containing the ToR but which the Complainant had not apparently seen was likely to have caused confusion particularly as the PWC Contract was settled after the date of the Request and so was not actually relevant to the Response provided.

The Decision

39. The Commissioner considers that the SPA has responded to the request for information appropriately in this case. Accordingly, the complainant's appeal is not upheld and there are no further steps the Commissioner requires the SPA to take.

Right of Appeal

- 40. An aggrieved person has the right to appeal against this Decision Notice to the Royal Court of Jersey.
- 41. Information on how to do so can be found on www.jerseyoic.org.
- 42. Any Notice of Appeal should be served within 28 (calendar) days of the date on which the Decision Notice is issued.

Dated this 3rd day of November 2020



Signed.....

Mr Paul Vane
Deputy Information Commissioner
Office of the Information Commissioner
5 Castle Street
St Helier
Jersey

8 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 that authority; and
- (b) except as otherwise provided by this Law, the authority has a duty to supply the person with the information.

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

(1) A scheduled public authority may refuse to supply information it holds and has been requested to supply if the information is absolutely exempt information.

(2) A scheduled public authority must supply qualified exempt information it has been requested to supply unless 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.

(3) A scheduled public authority may refuse to supply information it holds and has been requested to supply if –

- (a) a provision of Part 3 applies in respect of the request;
- (b) a fee payable under Article 15 or 16 is not paid; or
- (c) Article 16(1) applies.

13 Time within which a scheduled public authority must deal with a request for information

(1) A scheduled public authority must deal with a request for information promptly.

(2) If it supplies the information it must do so, in any event, no later than –

- (a) the end of the period of 20 working days following the day on which it received the request; or
- (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, under Article 14, sought details of the information requested, until the details are supplied; or
- (b) if the scheduled public authority has informed the applicant that a fee is payable under Article 15 or 16, 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 authority to refuse to supply the information on the ground that it is absolutely exempt 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^[4].

18 Where a scheduled public authority refuses a request

The States may, by Regulations, prescribe the manner in which a scheduled public authority may refuse a request for information.

25 Personal information

(1) Information is absolutely exempt information if it constitutes personal data of which the applicant is the data subject as defined in the Data Protection (Jersey) Law 2005.

(2) Information is absolutely exempt information if –

(a) it constitutes personal data of which the applicant is not the data subject as defined in the Data Protection (Jersey) Law 2018; and

(b) its supply to a member of the public would contravene any of the data protection principles, as defined in that Law.

(3) In determining for the purposes of this Article whether the lawfulness principle in Article 8(1)(a) of the Data Protection (Jersey) Law 2018 would be contravened by the disclosure of information, paragraph 5(1) of Schedule 2 to that Law (legitimate interests) is to be read as if sub-paragraph (b) (which disapplies the provision where the controller is a public authority) were omitted.