

Freedom of Information (Jersey) Law 2011

DECISION NOTICE

JOIC Reference	CAS-02678
Date of Decision Notice	29 th September 2020
Scheduled Public Authority	Health & Community Services
Address	Peter Crill House Gloucester Street St Helier Jersey JE1 3QS
Date of Request	2 June 2020
Date of Response	30 June 2020
Date of request for Internal Review	1 July 2020
Date of Internal Review	24 July 2020
Date of appeal to Information Commissioner	27 July 2020

Summary/Decision

1. On 2 June 2020, the Complainant requested certain information from Health & Community Services (the **SPA**) about serious incident investigations concerning Orchard House (the **Request**).
2. The SPA wrote to the complainant on 30 June 2020 (the **Response**) providing some information but also stating that some of the other information sought in the Request was being withheld (the **Withheld Information**), citing the exemption at Art.25 of the Freedom of Information (Jersey) Law 2011 (the **Law**). The Complainant did not agree with the Response and requested an internal review on 1 July 2020 (the **IR Request**).
3. The SPA responded to the IR Request on 24 July 2020 (the **Internal Review**).

4. The Complainant did not agree with the outcome of the Internal Review and so appealed to the Information Commissioner (the **Commissioner**) on 27 July 2020 (the **Appeal**).
5. The Commissioner's decision is that the appeal is not upheld. 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 Law.
7. This Decision Notice sets out the Commissioner's decision.

The Request

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

"1. How many Serious Incident Investigations have there been concerning Orchard House in the last 12 months?

2. What did these incidents consist of?

3. What were the results of the investigations?

*4. Are the reports made public?" (the **Requested Information**).*

9. On 30 June 2020 the SPA provided the Response in the following terms:

"Response

1-3 In order to protect the privacy of patients this information is exempt under Article 25 of the Freedom of Information (Jersey) Law 2011.

4 Serious Incident reports are not in the public domain. The reports are shared with the individual to which the incident relates or shared to friends and/or family only with the consent of the individual.

In the case of a deceased person the information is shared with the next of kin/nearest relative. If the individual has died as a result of the serious incident, the report will be shared with the Deputy Viscount acting as the coroner and may be read at the inquest.

Article Applied

Article 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 2018.

(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.

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."

10. The SPA declined to provide the information requested in Questions 1, 2 and 3 (together, the Questions), citing the exemption provided for at Art.25 of the Law (the **Withheld Information**).

11. The Complainant wrote to the SPA seeking an Internal Review on 1 July 2020. That request was in the following terms:

"I am requesting an internal review of my request for information.

1. *Answering my question as to the number of Serious Incident Investigations concerning Orchard House over the last 12 months would not compromise the privacy of patients as my request was not to name the patients involved or share personal data.*
2. *Answering my question as to what these incidents consisted of would not compromise patient confidentiality as my request was not to name the patients involved or share personal data.*
3. *Answering my question as to the results of the Serious Incident Investigation would not compromise the privacy of patients as my request was not to name the patients involved or share personal data."* (the **IR Request**)

12. The results of the Internal Review were communicated to the Complainant on 24 July 2020, as follows:

" Internal review response

The review has been completed by two senior members of the Government of Jersey, independent of the original decision making process.

1. *Personal information is defined as any information or 'data' that identifies or relates to individuals. In this case, the data requested is also considered special category and therefore more sensitive in its nature as it relates to individual's mental health episodes. In using and releasing health statistics there is a risk of identifying individuals when small numbers of events are presented. This is particularly evident in Jersey, which has a small population. The risk of disclosing special category, sensitive and identifiable data in a small population, such as Jersey's, is high and therefore, requires careful consideration.*

The Health and Community Services Department (HCS) is committed to patient privacy, and maintain disclosure control when reporting statistically, and where the associated risks are significant, we remove reference to small numbers and replace with 'fewer than five' or <5.

2. *As above, personal information is defined as more than just the name of the individual, and the definition encompasses any event or episode that may relate to those individuals. The nature of a serious incident or event relates directly to an individual's episode of care, and as such, to disclose would impact on their right to privacy and its publication could have a detrimental effect on the individual to which the data relates.*

3. *As in response to Q1, personal data is defined as more than just the name of the individual, and the actions or results of the Serious Incident Investigation relate to the individual and as such to disclose would impact on their right to privacy and its publication could have a detrimental effect on the individual to which the data relates.*

In responding to this request for an internal review, we have laid out the reasons why we have responded to the FOI request in the way that we have.

HCS is committed to maintaining the trust of their patients, and to uphold the patient's right to privacy at all times. FOI responses are published on gov.je. There is a significant risk that a patient may identify themselves or a fellow service user within any disclosure that does not apply the principles we have adopted to maintain confidentiality.

After due consideration the Internal Review ultimately upholds the application of Article 25 for the above reasons".

The Investigation

Scope of the case

13. On 27 July 2020, the Complainant contacted the Commissioner to appeal the SPA's decision to withhold the Withheld Information. The Complainant asked the Commissioner to review the Complainant's request and the Response received from the SPA in order to ascertain whether the Response provided was in accordance with the Law.
14. 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.
15. 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

16. On 3 August 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.
17. The SPA responded to that letter on 18 August 2020, providing detailed explanations as to why it considered the Art.25 exemption applied to the Withheld Information.
18. Following further questions raised by the Commissioner on 18 August 2020, the SPA provided further information as requested on 24 August 2020.

Analysis – The Request

Art.25 – Personal Information

19. The full text of Art.25 of the Law can be found in the Legal Appendix at the end of this Decision Notice.
20. Art.25 specifies that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the relevant data protection legislation in force at the time the decision to withhold the information was made.

21. Art.2 the Data Protection (Jersey) Law 2018 (**DPJL**) defines personal data as follows:

- "(1) Personal data means any data relating to a data subject.*
- (2) A data subject is an identified or identifiable, natural, living person who can be identified, directly or indirectly, by reference to (but not limited to) an identifier such as –*
- (a) a name, an identification number or location data;*
 - (b) an online identifier; or*
 - (c) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the person.*
- (3) The following matters must be taken into account in deciding whether the person is identified or identifiable –*
- (a) the means reasonably likely to be used by the controller or another person to identify the person, taking into account factors such as the cost and amount of time required for identification in the light of the available technology at the time of processing and technological factors;*
 - (b) whether the personal data, despite pseudonymization, is capable of being attributed to that person by the use of information other than that kept separately for the purposes of pseudonimization."*

The SPA's position

22. In addition to explanations provided in its Response, and Internal Review, that SPA was invited to provide submissions to this office and to advise the Commissioner of the contents of the Withheld Information.

23. The SPA contends that the Withheld Information constitutes personal data and to release it would breach Art.8(1)(a) of the DPJL. That article reads as follows:

"8 Data protection principles

(1) A controller must ensure that the processing of personal data in relation to which the controller is the controller complies with the data protection principles, namely that data are

- (a) processed lawfully, fairly and in a transparent manner in relation to the data ("lawfulness, fairness and transparency")."*

24. In particular, the SPA submits that it is not fair in these particular circumstances to release the Withheld Information noting particularly that whilst in some exceptional circumstances, there is an obligation to share personal, special category data with third parties where there is a 'substantial public interest', the SPA consider this is limited to where a disclosure is essential to prevent a serious or imminent threat to public health, national security, the life of the individual or a third party, or to prevent or detect serious crime. The SPA do not consider that releasing this data is essential due to any of the factors described above, and therefore the reliance on Art.25 of the Law was appropriate in these particular circumstances.

The Complainant's position

25. The Complainant's position is as set out in the IR Request. In short, the Complainant does not believe that release of the Withheld Information would constitute a breach of the DPJL 2018 because they are seeking statistical and general information rather than any specific information about particular individuals.

Analysis

26. The definition of "personal data" is as set out at para.21 above.

27. The Commissioner refers to the guidance note provided by the UK Information Commissioner (**ICO**) entitled "Determining what is personal data"¹. Whilst not binding in this jurisdiction, the Commissioner thinks that the guidance is of assistance in assessing whether or not the Requested Information is capable of constituting personal data. At para.5 of that note, it poses the question "Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?" and, if the answer to that question is "yes" then "the data is 'personal data' for the purposes of the DPA". Similarly, at para.8 of the note it asks "Does the data impact or have the potential to impact on an individual, whether in a personal, family, business or professional capacity" and, if the answer to that question is "yes" then "the data is 'personal data' for the purposes of the DPA". The paragraph ends stating that **"What is being considered here is whether the processing of the information has or could have a resulting impact upon the individual even though the content of the data is not directly about that individual, nor is there any intention to process the data for the purpose of determining or influencing the way that person is treated"** (emphasis supplied).

28. The SPA has indicated that individuals are likely to be identified from the requested information and has provided evidence to the Commissioner in support of this assertion.

29. Without divulging the contents of the information provided by the SPA, the Commissioner is satisfied that the Withheld Information falls within the definition of personal data. He is satisfied that it is not possible to anonymise the Withheld Information in order to prevent the relevant individuals from being identified.

30. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the Law. The second element of the test is to determine whether disclosure would contravene any of the principles set out at Art.8 of the DPJL 2018.

Would disclosure of the Withheld Information contravene Art.8(1)(a) of the DPJL 2018?

31. The Commissioner has had to consider whether to release the Withheld Information would breach one of the principles set out at Art.8 of the DPL 2018. In this particular case, the SPA considers that it is not fair to release the Withheld Information into the public domain and refers to Art.8(1)(a) of the DPL 2018 in this regard.

32. Art.9 of the DPJL 2018 sets out the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions specified in Schedule 2 of the DPJL 2018 applies. Special category data can only be processed (which includes disclosure in response to an information request) if one of the more stringent conditions of Schedule 2 Part 2 of the DPJL 2018 can be met.

¹ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

33. The Commissioner considers that the lawful basis most likely applicable in this case is the basis set out at Schedule 2 Part 2 para.14 of the DPJL 2018 which states:

"The processing is necessary for reasons of substantial public interest provided for by law and is subject to appropriate protections to protect the rights and interests of the data subject."

34. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be appropriate to disclose the Withheld Information if it can be argued that the processing is necessary for reasons of substantial public interest and the rights of affected data subjects can be protected.

35. There is no definition of 'substantial public interest' in the DPJL 2018 nor in the UK's Data Protection Act 2018 nor the General Data Protection Regulation. In her guidance note², the UK ICO said:

"What are 'reasons of substantial public interest'?"

The term 'substantial public interest' is not defined in the DPA 2018 or the GDPR.

Some of the conditions assume that processing under that condition is always in the substantial public interest, e.g. ensuring equality, or preventing fraud. However, some only apply to the extent that the processing is "necessary for reasons of substantial public interest".

The public interest covers a wide range of values and principles relating to the public good, or what is in the best interests of society. Commercial or private interests are not the same as a public interest, and if you need to point to reasons of substantial public interest it is not enough to point to your own interests. Of course, you can still have a private interest - you just need to make sure that you can also point to a wider public benefit.

Substantial public interest means the public interest needs to be real and of substance. *Given the inherent risks of special category data, it is not enough to make a vague or generic public interest argument – you should be able to make specific arguments about the concrete wider benefits of your processing. For example, you may wish to consider how your processing benefits the public in terms of both depth (i.e. the amount of benefit experienced from the processing, even if by a small number of people) and breadth (the volume of people benefiting from the processing).*

You should focus on showing that your overall purpose for processing has substantial public interest benefits. *You do not need to make separate public interest arguments or show specific benefits each time you undertake that processing, or for each separate item of special category data, as long as your overall purpose for processing special category data is of substantial public interest. However, you must always be able to demonstrate that all your processing under the relevant condition is actually necessary for that purpose and complies with the data minimisation principle." (emphasis supplied).*

36. In deciding whether disclosure of personal data would breach Art.8(1)(a) of the DPL 2018, the Commissioner takes into account a range of factors including:

² <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/what-are-the-substantial-public-interest-conditions/>

- a. The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - i. What the public authority may have told them about what would happen to their personal data;
 - ii. Their general expectations of privacy, including the effect of Art.8 of the European Convention on Human Rights (ECHR);
 - iii. The nature or content of the information itself;
 - iv. The circumstances in which the personal data was obtained;
 - v. Any particular circumstances of the case, e.g. established custom or practice within the public authority;
 - vi. Whether the individual consented to their personal data being disclosed or, conversely, whether they explicitly refused;
 - vii. The consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - viii. The balance between the rights and freedoms of the data subject and the legitimate interest of the public.

37. In Decision Notice 2018-01³, this office considered, in depth, the application of Art.25 of the Law. In respect of information that may be considered to be in the public interest the following is useful in the context of this appeal:

"53. Ultimately, deciding how to apply article 25 of the FOI Law to cases, such as the present, involves balancing the privacy rights of the individual against the public interest in disclosure. Taking a proportionate approach involves two key considerations. The first is the nature and sensitivity of the information at issue. From the relevant decisions cited above, information about terms and conditions of employment set out at the time of the commencement of employment are arguably less sensitive than the details of a compromise agreement setting out the terms and conditions of an individual's departure of employment.

54. The second consideration concerns that nature of the public interest that disclosure of the information would serve. The term 'public interest' or 'interest of the public' appears in many statutes throughout the Commonwealth, but such statutes rarely, if ever, provide a definition of the term or any guidance for evaluating the circumstance of specific cases. This leaves it open to variation in interpretation. I agree with the SPA that the term public interest is more specific than 'what the public finds to be interesting'. It does not refer to interest in the sense of being entertaining. The term public interest concerns the public having a stake or right that is at issue rather than simply mere curiosity. This term applies in circumstances where an event or development is likely to affect tangibly the public in general. The fact that a topic receives media attention does not automatically mean that there is a public interest in disclosing the information that has been requested about it. As the Tribunal held in the case of House of Commons v. Information Commissioner, dealing with a request for ministerial expenses: 'The number of news articles on a particular topic may be an indication of public curiosity but is not a measure of the legitimate public interest'.

³ <https://oicjersey.org/wp-content/uploads/2018/11/Decision-Notice-2018-01-FINAL.pdf>

55. *The most illustrative case providing factors to consider in determining the application of the public interest that I have been able to find is an administrative law decision of the former Commissioner for Information and Privacy for the Province of British Columbia, Canada, David Flaherty (Order 154-199710). This case involved a request by an applicant that a public body waive a fee assessed for access to records, in accordance with section 75 of the Freedom of Information and Protection of Privacy Act 1 (FIPPA), on the grounds that the records 'related to a matter of public interest'. Former Commissioner Flaherty suggested that the following factors were relevant:*

a. has the information been the subject of recent public debate?

b. does the subject matter of the record relate directly to the environment, public health, or safety?

c. would dissemination of the information yield a public benefit by –

I. disclosing an environmental, public health, or safety concern,

II. contributing meaningfully to the development or understanding of an important environmental, health, or safety issue, or

III. assisting public understanding of an important policy, law, program, or service?

d. do the records show how the public body is allocating financial or other resources?

While the relevant provisions of FIPPA are not entirely analogous with the FOI Law, the above factors appear to me to be a sensible list of issues to consider when determining whether disclosure of information is in the public interest. Indeed, they are reflective of some of the issues that I must consider in the instant case."

38. Based on the above factors and having reviewed all the relevant information in this case, the Commissioner has determined that it has not been demonstrated that there is substantial public interest in disclosure of the Withheld Information such as to outweigh the fundamental rights and freedoms provided for in the DPJL 2018. The Commissioner therefore considers that there is no Article 9 basis for processing and so the disclosure of the Withheld Information would not be lawful under the DPJL 2018 and is therefore exempt under Art.25 of the Law.

39. Accordingly, the Commissioner, having considered the Withheld Information pursuant to Art.25 of the Law, considers that the Art.25 exemption has been correctly engaged by the SPA in this respect. The Commissioner is unable to provide any further information in this Notice regarding the contents of the Withheld Information and the submissions provided by the SPA as that would likely, of itself, constitute a breach of the DPJL 2018.

The Decision

40. The Commissioner considers that the SPA has responded to the request for information appropriately in this case and that the exemptions provided for at Art.25 of the Law was appropriately deployed. Accordingly, the complainant's appeal is not upheld and there are not further steps the Commissioner requires the SPA to take.

Right of Appeal

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

Dated this 29th day of September 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.