

Freedom of Information (Jersey) Law 2011

DECISION NOTICE

OIC Reference	202-03-161553
Date of Decision Notice	19 th December 2018
Scheduled Public Authority	Chief Minister's Department (the SPA)
Address	Cyril Le Marquand House St Helier Jersey JE4 8QT
Date of Initial Request	23 July 2017
Date of SPA's response	15 August 2017
Date of request for Internal Review	28 August 2017
Date of Internal Review	18 October 2017
Date of Appeal to Information Commissioner	19 November 2017

Summary/Decision

1. On 23 July 2017, the Complainant requested certain information regarding workforce modernisation within the States of Jersey (the **Requested Information**).
2. The SPA wrote to the complainant on 15 August 2017 via the FOI Unit stating that the Requested Information was being withheld (the **Withheld Information**) under Arts. 35 and 39 of the Freedom of Information (Jersey) Law 2011 (the **Law**), which the Complainant subsequently contested and requested an internal review.
3. The SPA sent the outcome of its internal review on 18 October 2017 (the **Internal Review**), upholding its original position.
4. The Complainant appealed to the Information Commissioner (the **Commissioner**) on 19 November 2017.
5. During the course of the appeal, and on 28 March 2018, the SPA wrote to the Complainant indicating that given matters which were on-going regarding the workforce modernisation, they wished to re-open the original request and consider matters afresh.
6. Ultimately, the SPA declined to disclose the Requested Information and the Complainant indicated that they wished to continue with their appeal.
7. The Commissioner's decision is that the SPA withheld the Withheld Information in accordance with the Law.
8. No further steps need be taken by the SPA to comply with the Law.

The Role of the Information Commissioner

9. It is the duty of the Information Commissioner (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.
10. This Decision Notice sets out the Commissioner's decision.

The Request

11. On 23 July 2017 the Complainant requested the following:

"Please can you supply a list of all jobs that have been evaluated as part of [the current work force modernisation programme] process including:

1. *The job title*
2. *The existing pay grade for that job*
3. *The final JIT "score" that has been determined for that job" (the **Request**).*

12. On 15 August 2017 the SPA (via the Central FOI Unit (the **Unit**) responded to the Request in the following terms (the **Initial Response**):

"Given that the employer and its recognised trade unions are in the midst of negotiations on workforce modernisation in which the data request is core, exemptions under article 35 and 39 of the Freedom of Information (Jersey) Law 2011 (the Law) are exercised. On completion of this process we will publish the bands, jobs within the bands and the salary range for each band, in line with current practice."

13. The Complainant responded to the Initial Response on 28 August 2017 indicating that they were not in agreement with that decision and asked for an internal review. In particular, the Complainant indicated that they disagreed with the application of Arts.35 and 39 of the Law to the Requested Information and again asked the SPA to comply with the Request. The Complainant made comprehensive submissions in support of their application for an Internal Review considering that the explanations provided by the SPA were inadequate, that the exemptions may have been incorrectly applied and that they were concerned that the public interest test has either failed to be considered or incorrectly applied.
14. On 29 August 2017, the Unit responded to the Complainant's email acknowledging their request for an internal review.
15. On 27 September 2017, the Complainant contacted the Unit noting that they had not heard anything further in respect of the internal review. The Complainant referred to the States of Jersey's own guidelines relating to internal review procedure, which states that all reviews must be completed as soon as possible and, unless there are exceptional circumstances, within 20

working days of the request for an internal review being received. The policy also states that "*If at any time it becomes apparent that this target cannot be met, you will be informed and given an explanation for the delay.*"

16. The Unit responded to the Complainant on 28 September 2017 apologising for the continued delay indicating that the review would be complete by 3 October 2017 but that a further extension may be necessary.
17. The Unit sent a further email to the Complainant on 4 October 2017 seeking a further extension until 10 October 2017.
18. On 12 October 2017, the Complainant contacted the Unit noting that they had still not received a response to their request for an internal review.
19. On 13 October 2017 and 17 October 2017, the Unit wrote to the Complainant advising that the review was not complete and, in the latter email, that it was anticipated that the review would be complete by 20 October 2017.
20. Ultimately, the response to the Complainant's request for an internal review was provided on 18 October 2017 (the **Internal Review**), stating that the Initial Response to the Request was upheld. In this Internal Review, the reviewers reiterated that, in their opinion, Arts.35 and 39 were appropriately cited as qualified exemptions. The reviewers also considered that additional exemptions were applicable to the Request namely Arts.25, 34(b) and 36 of the Law.

The Investigation

Scope of the case

21. On 19 November 2017, the Complainant contacted the Commissioner to complain about the way their Request and the Internal Review had been handled and to appeal the SPA's decision to withhold the Requested Information. The Complainant asked the Commissioner to review the Complainant's request and the responses received from the SPA in order to ascertain whether or not the response was in accordance with the law.
22. The Commissioner has set out in this Decision Notice the particular issues that he has had to consider in respect of each exemption cited by the SPA and, where relevant, the public interest test.
23. In addition to the decision to withhold the Withheld Information, the Complainant also indicated that they were unhappy with the time taken by the SPA to provide the Requested Information. Accordingly, the Commissioner has considered whether the SPA adhered to the stipulated timeframes prescribed by the Law.
24. It is noted that the Complainant provided extremely thorough and well-articulated submissions at the time of making their appeal and the Commissioner is grateful to the complainant for doing so.

Chronology

25. On 30 November 2017, the Commissioner wrote to the SPA to advise that the Complainant had appealed to the Commissioner regarding the SPA's handling of the Initial Request and subsequent Review, pursuant to Art.46 of the Law. The SPA was asked to begin collating the relevant documentation falling within the scope of the Request (including the Withheld Information) and prepare a written submission in response to the complaint. The SPA was asked not to send that information/submission to the Commissioner until requested to do so.
26. On 5 January 2018, the Commissioner wrote to the SPA asking for a copy of the Withheld Information and their written submissions in response to the complaint made by the Complainant.
27. On 29 March 2018, the SPA wrote to the Complainant notifying the Complainant that the SPA wished to re-open the Request. The SPA considered that recent events may have had an impact on the Request given that negotiations with the unions on the matters raised in the Request were concluded and the pay award and other matters under consideration as part of the workforce modernisation package had been subject to ballot. Since the Internal Review, information had also been forwarded on to individual States employees about their own particular circumstances and how the modernisation would impact on their terms and conditions. The SPA considered that given some of the original circumstances which existed at the time of the Request were no longer in place, the SPA considered it prudent to reassess matters in light of that altered landscape.
28. The Complainant agreed to the re-opening of the Request and the appeal process was halted to allow this review to take place.
29. On 12 April 2018, the Complainant contacted the SPA asking for an updated timeframe for response. The Unit responded that same day indicating that it would reply in due course.
30. On 18 May 2018, the Unit contacted the Complainant to apologise for the on-going delay. In particular, the Unit indicated that whilst a number of exemptions relied on previously had fallen away the Requested Information was in a non-disclosable format as it could readily identify individuals and that to disclose such would be in breach of applicable data protection legislation. The Complainant responded that same day indicating that they did not agree with that rationale. The Complainant also indicated that they would be willing to receive the information in redacted form (simply the JIT score and grade, but redacting the job title and replacing it with the department in which it sits).
31. The Unit wrote to the Complainant on 22 June 2018 with a final response on the re-opening of the case (the **Final Response**). The SPA maintained its original decision to withhold the Requested Information, citing the exemption provided at Art.25 of the Law.

32. The Commissioner wrote to the SPA on 9 August 2018 seeking the SPA's rationale for its reliance on Art.25 of the Law, and the SPA responded to that letter on 6 September 2018 explaining the rationale applied by the SPA in respect of the Withheld Information, and provided a copy of the Withheld Information.

Analysis

33. As the SPA has indicated that it is only seeking to maintain its reliance on Art.25 of the Law, this Decision Notice considers that provision only, and will not review the exemptions relied on by the SPA at the time of the Initial Response (Art.34 (the economy), Art.35 (formulation and development of policies) and Art.39 (employment)).

ABSOLUTE EXEMPTIONS

Art.25 – Personal Information

34. The full text of Art.25 of the Law can be found in the Legal Appendix at the end of this Decision Notice.

35. 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. In this case, the Data Protection (Jersey) Law 2005 (the **DPL 2005**) was in force at the time of the Initial Response and the Data Protection (Jersey) Law 2018 (the **DPL 2018**) at the time of the Final Response (the latter having come into force on 25 May 2018). As this appeal relates to the refusal to provide the Requested Information in the Final Response, it is the DPL 2018 that is relevant for the purposes of this appeal, although reference will be made to the DPL 2005 when appropriate.

36. Personal data is defined at Art.1 of the DPL 2005 as follows:

“personal data” means data that relate to a living individual who can be identified –

(a) from those data; or

(b) from those data and other information that is in the possession of, or is likely to come into the possession of, the relevant data controller,

and includes any expression of opinion about an individual who can be so identified and any indication of the intentions of the data controller or any other person in respect of an individual who can be so identified...”

37. Art.2 the DPL 2018 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 pseudonymization.”*

The SPA's position

38. The information sought in the Request was for a list of all jobs that have been evaluated as part of the current workforce modernisation programme, including information as to the various job titles, the existing pay grade and the final JIT score applied to that job.
39. In its Initial Response, the SPA indicated "*...there are some cases where job titles relate to posts held by a sufficiently small number of people that it might be possible to identify those individuals by name and relate the requested information to those individuals. Those individuals are afforded protection under Article 25*".
40. In its Internal Review the SPA acknowledged that "*the initial response did not provide the applicant with sufficient explanation of the exemptions being applied*" but in respect of the Art.25 exemption, it simply stated that "*Article 25 – Personal Information: there are some cases where job titles relate to posts held by a sufficiently small number of people that it might be possible to identify those individuals by name and relate the requested information to those individuals. Those individuals are afforded protection under Article 25*".
41. In its Final Response, the SPA maintained its reliance on Art.25 of the Law and indicated as follows:

"We appreciate that a considerable amount of time has passed since the re-opening of your original request. We apologise for the delay but hope that you will understand that this delay has arisen through a thorough and detailed analysis of the information requested.

The information requested is a large amount of data held in a spreadsheet comprising several thousand lines. The information is currently held by an individual job title rather than by a grouped title (i.e. Freedom of Information Administrator rather than Administrator). This leads to ready identification of individuals and the necessary application of Article 25 (Personal Information) of the Freedom of Information (Jersey) Law 2011.

We acknowledge that in other jurisdictions this information has been released and also note the argument that the JIT score is an assessment of the role and not the role holder. However it must also be acknowledged that the impact of the release of this information in a small community such as Jersey is far higher than in the UK. Within a smaller community the requirements of data protection must be considered more vigorously. It is our position that JIT scores can be considered as belonging to the individual who is the subject of that score (and can be identified) and therefore cannot be disclosed without breaching the Data Protection (Jersey) Law 2018.

Whilst we are unable to provide the source data in the format it is held, the team have been working to assess whether it would be possible to bundle roles into groups (i.e. all Grade 8 Administrators in one group) and then providing a JIT range. Again we appreciate that this has taken time and apologise for the delay. Through the application of the process it has become apparent that to perform such grouping would require manual review and manipulation of every line of the data and as such falls far outside the time cost allowances of the Freedom of Information (Jersey) Law 2011 Regulations.

We do acknowledge that there is public interest in these scores and the WFM process as a whole. However that process did not, ultimately, process.

Within your original request for Internal Review you note that:

the disclosure of information regarding the integrity and quality of an authority's decision making in respect of this expenditure is a matter of legitimate public interest.

We would draw your attention to the following Freedom of Information responses which identify and detail the various factors of WFM expenditure.

Workforce modernisation implementation costs

Workforce Modernisation costs

Real term changes of workforce modernisation

States Modernisation costs."

42. In addition to explanations provided in its Initial Response, Internal Review and Final Response, that SPA was invited to provide submissions to this office and asked to provide a copy of the Withheld Information.

43. The SPA contends that the Withheld Information constitutes personal data and to release it would breach Art.8(1)(a) of the DPL 2018. 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")."

44. In particular, the SPA submits that it is not fair in these particular circumstances to release the Withheld Information.

45. In terms of fairness, the SPA referred to an extract from guidance published by the Information Commissioner for England and Wales regarding the application of the "Personal Information" exemption provided for at s.40 of the Freedom of Information Act 2000 (**FOIA**)¹. Para.44 of that guidance note, as relied upon by the SPA, reads as follows:

"44. Fairness can be a difficult concept to define. In the context of disclosing personal information under FOIA it will usually mean considering:

- Whether the information is sensitive personal data;*
- The possible consequences of disclosure on the individual;*
- The reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and*
- Whether there is any legitimate interest in the public or the requester having access to the information and the balance between this and the rights and freedoms of the individuals who are data subjects."*

46. In respect of the possible consequences of disclosure the SPA indicated that there were several possible consequences of releasing information for individuals:

- a. Exposure of performance information
- b. Exposure of salary information
- c. Banding of individuals

¹ S.40 of FOIA is the equivalent provision to Art.25 of the Law. The Commissioner also looks at this guidance note at para.52 of this Notice.

- d. Distress arising following potential media coverage;
- e. Potential for harassment.

47. The SPA further considers that the data subjects would not reasonably expect their personal data to be shared in this manner. The States of Jersey regularly publishes salary bands for those individuals of a certain seniority² but such refers to only some 17 individuals (approx.0.003% of the entire States of Jersey workforce) and, as such, the overwhelming majority of individuals would have no reasonable expectation that their salary details would be made available to the public at large. The SPA advised that it considers that individuals have a reasonable expectation of privacy in relation to their employment, their salary and their performance reviews. This information was obtained as part of an internal employment review. The SPA has also provided the Commissioner with copies of information given to all States Employees about the workforce re-evaluation process. Whilst it does not say that any information generated as part of that review would not be made public, neither does it say that it may be. Indeed, it is indicated that the results of the job evaluation process would be provided to the affected employee, with opportunity for that employee to discuss matters further with a more senior member of staff. It also allows for an appeal process.

48. As a further point, the SPA indicates that it has considered whether it would be possible to redact or otherwise manipulate the raw data comprising the Withheld Information so that it could be provided in a suitable format to the Complainant. However, the SPA has indicated that it would take the SPA over the time limit provided for under the relevant regulations. There are some 6000+ employees working for the States of Jersey³.

The Complainant's position

49. The Complainant has provided extensive and comprehensive submissions to the Commissioner in support of its appeal, which the Commissioner has found to be well articulated and helpful to this appeal process.

50. In essence, the Complainant does not agree that the Request Information comprises personal information. The Complainant also considers that the explanations previously provided by the SPA in support of its reliance on the Art.25 exemption have been inadequate, that the exemptions may have been incorrectly applied and that the public interest test has either failed to be considered or incorrectly applied.

51. The Complainant has noted that there are a number of cases in the UK that have considered a similar request to the instant case and, in particular, that in those cases results of job evaluation processes have been requested and disclosed. The Complainant notes that whilst decisions taken

² In its 2017 annual report and accounts, the States published salary details for "Senior Officers" as follows: <https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/States%20of%20Jersey%20Annual%20Report%20and%20Accounts%202017.pdf>.

³ According to its 2017 annual report and accounts. *Ibid*.

in the UK are not binding in Jersey they suggest that they should be given some weight given the similarities in the wording of the legislation and the limited local precedent available.

Analysis

52. The definition of “personal data” is as set out at para.32 above.
53. The Commissioner refers to the guidance note provided by the UK Information Commissioner (ICO) entitled “Determining what is personal data”⁴. Whilst not binding in this jurisdiction, the Commissioner thinks that the guidance is of assistance in assessing whether or not an address 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).
54. The Commissioner agrees with this interpretation.
55. In this case, the Requested Information relates to job titles and job evaluation scores of individuals working for the States of Jersey. The documentation provided to employees in respect of the workforce modernisation process contains information about the new pay band structure. It includes the minimum and maximum points for each pay band and maximum, minimum and target salary rates for 2017-2020 for each of those bands. If someone is designated as falling within a particular band, it is possible to identify a pay bracket for that individual.
56. The Withheld Information (as seen by the Commissioner) comprises raw data about an individual’s job title and job evaluation score (so, essentially, which pay band an individual carrying out a certain job will fall). The Commissioner considers that the Withheld Information does constitute personal data, in these particular circumstances.

Reasonable expectations of the data subjects

57. Accordingly, 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.

⁴ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

58. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the Withheld Information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.

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

- 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.

60. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

61. The Withheld Information consists of a spreadsheet comprising:

- a. Post number
- b. Job title
- c. Spine code
- d. Job evaluation number; and
- e. Score

62. Of the job titles reviewed by the Commissioner, over 1000 titles appear to be unique. The SPA acknowledged that whilst it may be possible to simply redact that information relating to the unique job titles and related information, that this would automatically give rise to a prejudice because such would amount to treating one set of staff differently to another. This could, potentially, lead to a feeling of unrest amongst the employees and to certain of them feeling exposed and/or placed in an unfair position. The Commissioner accepts this submission.
63. Of those non-unique jobs, it may also be possible for individuals within that band to experience some unrest because it may be possible to identify others supposedly on the same grade but who appear to attract a higher salary for the same job. For example, if a certain role attracts a salary within a particular band, an assumption (whether correct or not) may be drawn that an individual with a higher JIT score might attract the higher salary. That may not be the case but the Commissioner accepts the submission that the information could be viewed in that way and that it could cause distress to employees. The SPA also indicates that this could potentially lead to harassment of employees but the Commissioner has not been provided with any evidence that this is a realistic possibility. It does not accept the SPA's submission in this regard.
64. The SPA considers that whilst similar information has been released in the UK, that this would not be desirable in a small jurisdiction such as Jersey. The States of Jersey is a large employer and it would be possible to link the Withheld Information to individuals within the community as certain information may be published online (such as an individual's name and role) and it would then be possible to link that information through to salary information. It is also possible that individuals within the States of Jersey may have a wider knowledge of the staffing structure to identify individuals working within the various roles listed on the spreadsheet. There is a greater chance of this than, perhaps, is the case in the UK: it is more than a "very slight hypothetical possibility that someone might be able to reconstruct the data in such a way that the data is identified..."⁵
65. While the reasonable expectations of employees of the States of Jersey and any damage or distress caused by the disclosure are key factors in determining the application of Art.25 of the Law, it is necessary to weigh these concerns against any legitimate public interest in disclosing the information.
66. Former Commissioner Martins held in Decision Notice 202-03-57259 that: In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to take a proportionate approach. The SPA considered that there were several possible consequences of releasing this information:
- a. Exposure of performance information, such as may lead to internal conflict and prejudice;

⁵ See footnote 4, *ibid*.

- b. Exposure of salary information, such as may lead to internal conflict and prejudice;
- c. Formulation of a 'league' table of individuals within band (with negative impressions both at the top and bottom of the table);
- d. Distress to individuals due to media coverage and negative public image;
- e. High potential for harassment of individuals in a small public sphere.

67. The SPA noted that the vast majority of individuals whose details make up the spreadsheet are well below the threshold at which the States of Jersey publishes salary bands. That being so, such employees have a reasonable expectation of privacy in relation to their employment, their salary and their performance reviews. This information was obtained as part of an internal employment review. Individual members of staff would have had no expectation of their JIT scores being made public. All staff members were given access to their own JIT score and a detailed breakdown of the ramifications this would have on their employment and could appeal the score given for their role. That information was purportedly provided in a confidential manner and there was nothing within the process that would have explicitly led employees to believe that this information would be made public or that their own scores would be shared with other States of Jersey employees.

68. In Decision Notice 2018-01⁶, 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

⁶ <https://oicjersey.org/wp-content/uploads/2018/11/Decision-Notice-2018-01-FINAL.pdf>

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'.

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 Act¹¹ (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."

69. The Commissioner finds this matter to be finely balanced in that whilst there is obvious public interest in the details of the workforce modernisation scheme as a whole, the Commissioner does not consider that this extends to revealing details which are personal to each individual employee. The States routinely publishes details relating to seventeen senior States of Jersey employees: in ordering disclosure of the Withheld Information, this would effectively mean ordering the release of salary details (even if just a band) for every employee in the States no matter what their role or seniority. Whilst those seventeen senior individuals will have an expectation of transparency regarding their employment details, other States employees do not.

70. There is already a large amount of information in the public domain and whilst it is accepted that there is public interest in the workforce modernisation program itself, the information generated in relation to individuals is not considered to have that same public interest (even if the Applicant may have a private interest in the information). The Commissioner considers that the release of the information is not likely to further contribute to the debate on this topic and the Complainant has not been able to articulate why it is fair or otherwise in the public interest to release this information, other than citing the usual arguments about transparency of government. In this case, the process is transparent in respect of those employees who are engaged in the process: they have been engaged in the review (and able to make submissions on their own role) and can appeal the ultimate score given to their role (and thus salary banding). That is personal information and not something that is ultimately likely to be usefully debated in the public domain.
71. Similarly, the release of the Withheld Information is not likely to assist in public understanding of the process itself.
72. Accordingly, and having considered the Withheld Information and the submissions presented by both parties the Commissioner considers that the Art.25 exemption has been correctly engaged by the SPA in respect of the Withheld Information.

OTHER MATTERS

Art.13 – time for compliance

73. Art.13(1) requires that a scheduled public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt (Art.13(2)(a)).
74. Article 2 of the Freedom of Information (Miscellaneous Provisions) (Jersey) Regulations 2014 (the **2014 Regulations**) provides that a SPA may extend the timeframe for responding to a request for information in certain circumstances:
- "2 Time limits for authority to deal with a request for information For the purposes of Article 13(2)(b) of the Law the period prescribed is such period as is reasonable in all the circumstances of the case, not exceeding 65 working days following the day on which the scheduled public authority received the request."*
75. The Commissioner notes that the SPA complied with the requirements of Art.13(1) when providing the Initial Response and provided such in 18 working days.
76. The Law is silent on the timeframe by which SPAs are expected to comply with a request for internal review. It is noted, however, that the SPA did not adhere to its own published internal

review policy which is that it will respond to internal reviews within 10 working days. It actually took the SPA 37 working days to respond to that request for an internal review.

77. The SPA helpfully and of its own volition decided to review the Initial Request. When it did so, however, it then took 61 working days to carry out that review and provide the Final Response. This was unfortunate given the time that had already passed since the date of the Initial Request.

78. Whilst no further steps need to be taken by the SPA at this time, the Commissioner reminds the SPA of the need to respond to all requests promptly and in any event, within the 20-day timeframe save for in exceptional circumstances or where such has been expressly agreed with the requester of the information. The SPA is also referred to this office's most recent decision notice 2018-01⁷ and, in particular, paragraphs 12-15 thereof and the general guidance given in respect of the timeframes for responding to requests for information.

The Decision

79. The Commissioner's decision is that the SPA correctly withheld the Withheld Information. This part of the complaint is therefore not upheld.

80. The Commissioner does, however, uphold the complaint in that the Requested Information was not technically provided within the requisite time frame.

81. The Commissioner does not require the SPA to take any steps in respect of this notice.

⁷ <https://oicjersey.org/wp-content/uploads/2018/11/Decision-Notice-2018-01-FINAL.pdf>

Right of Appeal

82. An aggrieved person has the right to appeal against this Decision Notice to the Royal Court of Jersey.

83. If you wish to appeal against this Decision Notice, you can obtain information on how to do so on <https://www.oicjersey.org>.

84. Any Notice of Appeal should be served within 28 (calendar) days of the date on which the Decision Notice is issued.

Dated this 19th day of December 2018

Signed.....

Mr Paul Vane
Deputy Information Commissioner
Office of the Information Commissioner
4th Floor
One Liberty Place
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.

16 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 an amount determined in the manner prescribed by Regulations.

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

(3) Regulations may provide that, in such circumstances as the Regulations prescribe, if two 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.

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 2005; 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.