

GUIDANCE NOTE

Requests where the cost of compliance with a request exceeds the cost limit

The Freedom of Information (Jersey) Law, 2011



CONTENTS

Introduction	3
Overview	4
What the Freedom of Information (Jersey) Law, 2011 says about Article 16	5
The cost limit	6
Estimating the costs of complying with a request	7
Staff time	7
Costs other than staff time	7
A reasonable estimate	9
‘Sensible and realistic’	9
Estimates and searches	9
Estimates and sampling exercises	10
Providing ‘cogent evidence’	10
Example	11
Aggregation of requests	12
‘Two or more requests’	12
‘Same or similar information’	12
‘Requests received within 60 consecutive working days’	12
Time at which to apply Article 16	13
Time at which to apply Article 16 for aggregated requests	14
Late claiming of Article 16	15
What the Law says about advice and assistance under Article 12	16
How to satisfy the requirements under Article 12	18
Indicate that no information can be provided within the cost limit	18
Indicate what information can be provided within the cost limit	18
Failure to provide advice and assistance	19
More information	20



INTRODUCTION

1. The Freedom of Information (Jersey) Law, 2011 (“the **Law**”) gives rights of public access to information held by scheduled public authorities (“**SPAs**”).
2. An overview of the main provisions of the Law can be found in the Guide to freedom of information.
3. This is part of a series of guidance, which goes into more detail than the Guide to freedom of information to help SPAs to fully understand their obligations, and to promote good practice.
4. This guidance explains to SPAs how to calculate the costs of complying with a request and what they should do if costs would exceed the cost limit to comply with the request.
5. Guidance issued by the Information Commissioner may include references to cases and decisions linked to operation of the Freedom of Information Act 2004 (“the **U.K. Act**”). Such references are provided as additional context to relevant areas given the lack of case law regarding the interpretation of the Freedom of Information (Jersey) Law 2011 (“the **Law**”). It should be noted, however, that judgments from the Courts of England and Wales (which includes any decisions from the Information Tribunal) are not binding in Jersey (albeit that they may be viewed by the Royal Court as being persuasive). There are, however, differences between the Law and the UK Act and so the judgments which have flowed following an interpretation of the UK Act may not be directly applicable in this jurisdiction.



OVERVIEW

- Article 16(1) of the Law allows a SPA to refuse to deal with a request:

'if it estimates that the cost of doing so would exceed an amount determined in the manner prescribed by Regulations.'

The estimate must be reasonable in the circumstances of the case and explained in a schedule included within the Refusal Notice.

The cost limit is currently £500 calculated from 12.5 hours work at £40 per hour.

Upon inclusion within the Law requests made to any Parish will be subject of a limit of £200 for 5 hours work at £40 per hour.

Where a SPA claims that Article 16(1) is engaged, it should, where reasonable, provide advice and assistance to help the applicant to refine the request so that it can be dealt with under the cost limit.



WHAT THE LAW SAYS ABOUT

ARTICLE 16

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.
6. Article 16(1) of the Law is a provision which allows a SPA to refuse to comply with a request for information where the cost of compliance is estimated to exceed a set limit known as the cost limit.
7. The Regulations which define the cost limit for Article 16 purposes are the Freedom of Information (Costs) (Jersey) Regulations 2014 (“the **Fees Regulations**”).:

11011101
101



THE COST LIMIT

8. Article 1 of the Fees Regulations defines the 'specified amount' which is the applicable limit as either £500 or £200 for SPAs listed within Schedule 1 of the Law.

101

001

1101110
1101



ESTIMATING THE COSTS OF COMPLYING WITH A REQUEST

9. Article 2(2) of the Fees Regulations states that a SPA can only take into account the costs it reasonably expects to be spent by a person undertaking any of the following activities on the SPAs behalf in complying with the request:
- determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
10. All SPAs should calculate the time spent on the permitted activities at the flat rate of £40 per person, per hour.
11. This means that the cost limit will be exceeded if it would require more than 12.5 hours work for a SPA other than requests which are made to any Parish which will equate to 5 hours work.

Staff time

12. It is likely that any estimate will be largely or completely made up of the costs of staff time in carrying out the permitted activities.
13. A SPA should note that even if it uses contract or external staff to carry out some or all of the permitted activities, it can only include their time at the rate of £40 per hour irrespective of the actual cost charged or incurred.
14. However, a SPA cannot include the staff time taken, or likely to be taken, in considering whether any exemptions apply in the costs estimate as this activity does not fall within the list of permitted activities.
15. Also, the staff time taken, or likely to be taken, in removing any exempt information in order to leave the information that is to be disclosed, often referred to as 'redaction', cannot be included as part of the costs of extracting the requested information.
16. This approach has been confirmed by the UK Information Tribunal in the UK case of *The Chief Constable of South Yorkshire Police v the Information Commissioner (EA/2009/0029, 14 December 2009)* and also by the High Court on appeal ([2011] EWHC44 (Admin)).

Costs other than staff time

17. Sometimes, a SPA may expect to incur costs other than those relating to staff time when carrying out the permitted activities. The key to deciding whether or not these costs can be included in the estimate is whether it would be reasonable to include those charges.



18. For example, if a SPA is able to evidence that its existing software is unable to do the job but that it could purchase other specialist software which would allow the requested information to be retrieved, then the full costs of purchasing that specialist software could be reasonably included in the estimate. In such cases, the Information Commissioner would require sight of the estimates of any proposed purchase if an appeal were made.
19. If a SPA uses off-site storage, it will depend on the terms of the contact between the SPA and the contractor as to whether the costs of locating, retrieving and transporting the information from deep storage can be included in the estimate. SPAs should note that the Information Commissioner may want to see the contract in order to be satisfied that such costs can be correctly included.



Example 1

A council has a contract with its storage company which provides scheduled six weekly delivery runs without any extra cost. Therefore, if the requested information is retrieved on a scheduled delivery run, then the cost of retrieving the requested information from the deep storage facility is not an additional cost and cannot be included in the estimate.

However, if the delivery run is scheduled to take place after the date for compliance with the request, the public authority may be in breach of Article 13 (1) or (2) of the Law if it waited for the scheduled delivery run. If a SPA is able to comply with the time limit by arranging a special delivery, the Information Commissioner is likely to accept that it is reasonable to include the actual additional costs of the special delivery in the estimate.



Example 2

A SPA instructs its contractors to retrieve five documents – four documents are required for its own business purposes and one document is required in order to answer a freedom of information request. The contract sets out a standard fee of £50 for the retrieval of up to 10 documents on any one visit.

The SPA would only be able to include the costs of retrieving the document required for purposes and therefore should only include a fee of £10 in the estimate.



A REASONABLE ESTIMATE

20. A SPA does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate.

21. What amounts to a reasonable estimate can only be considered on a case by case basis. However, the UK Information Tribunal in the UK case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004, 30 October 2007)* said that a reasonable estimate is one that is “...sensible, realistic and supported by cogent evidence”. The Information Commissioner agrees.

‘Sensible and realistic’

22. A sensible and realistic estimate is one which is based on the specific circumstances of the case. In other words, it should not be based on general assumptions, for example, that all records would need to be searched in order to obtain the requested information when it is likely that staff in the relevant department would know where the requested information is stored.

23. This does not mean that a SPA has to consider every possible means of obtaining the information in order to produce a reasonable estimate. However, an estimate is unlikely to be reasonable where a SPA has failed to consider an absolutely obvious and quick means of locating, retrieving or extracting the information.

24. A realistic estimate is one based on the time it would take to obtain the requested information from the relevant records or files as they existed at the time of the request, or up to the date for statutory compliance with the request.

25. For example, if the requested information is only contained within paper files at the time of the request, then it is realistic to accept that it would take longer to search paper files than to search the same information if it were stored electronically.

26. Similarly, it is realistic to accept that it will take longer to find the requested information where the relevant records are poorly organised or filed (albeit that this may mean the SPA needs to address any records management issues.)

Estimates and searches

27. A SPA is not obliged to search for, or compile some of the requested information before refusing a request that it estimates will exceed the cost limit. Instead, it can rely on having cogent arguments and/or evidence in support of the reasonableness of its estimate. It is good practice to give these arguments or evidence to the applicant at the outset to help them understand why the request has been refused. This reasoning is also likely to be required if an appeal is made to the Information Commissioner.

28. However, it is likely that a SPA will sometimes carry out some initial searches before deciding to claim Article 16(1). This is because it may only become apparent that the article is engaged once some work in attempting to comply with the request has been undertaken.



29. If a SPA does carry out some searches, it may wish to bear in mind the following points:

- If a SPA starts to carry out some searches without an initial estimate, it can stop searching as soon as it realises that it would exceed the cost limit to fully comply with the request.
- A SPA is not obliged to search up to the cost limit.
- If a SPA initially estimates that it could complete its searches under the cost limit, but then finds that it cannot, it can stop searching once it reaches that limit. This is because it is not obliged to continue searching just because it originally estimated that the searches could be completed within the cost limit.

This was confirmed by the UK Information Tribunal in the UK case of *Quinn v Information Commissioner and the Home Office* (EA/2006/0010, 15 November 2006).

30. A SPA may search up to or even beyond the cost limit of its own volition. Also, if an applicant asks a SPA to search up to or beyond the cost limit and the SPA is willing, then it can do so.

31. As a matter of good practice, SPAs should avoid providing the information found as a result of its searching and claiming Article 16 for the remainder of the information. It is accepted that this is often done with the intention of being helpful but it ultimately denies the applicant the right to express a preference as to which part or parts of the request they may wish to receive which can be provided under the cost limit.

32. In practice, as soon as a SPA becomes aware that it intends to rely on Article 16, it makes sense for it to stop searching for the requested information and inform the complainant. This avoids any further and unnecessary work for the SPA as it does not need to provide any information at all if Article 16 is engaged.

Estimates and sampling exercises

33. A SPA may also choose to support its claim of Article 16 by providing evidence of the random or representative sampling exercise it has carried out.

34. For example, in cases where the authority holds a large number of files of varying sizes, it may be useful to choose a random selection of those files in order to calculate an average for the time it would take to locate, retrieve and extract the relevant information.

35. Alternatively, it may be useful to pick a representative sample of files or records which fall within the scope of the request to demonstrate the application of Article 16. For example, one file from each of the years referred to in the request or one file from each relevant department.

Providing 'cogent evidence'

36. It is useful if a SPA explains how it has calculated its estimate by explaining:

- its search strategy, for example:
 - » whether it has carried out any searches for the requested information;
 - » whether it has based its estimate on a random or representative sampling exercise;
 - » which departments or members of staff have been contacted;
 - » the search terms used when querying electronic records;
- why it needs to search the files/records it has referred to;
- how the information is stored, for example, whether the information is held in paper or electronic files;
- how many files, boxes, documents, records or emails need to be reviewed and;



- how long it would take to determine whether the requested information is held or to locate, retrieve and extract it. For example, it is useful to detail the size of the relevant files; the average length of time it would take to review each file and the number of staff required.

37. It is not a statutory requirement to explain how the estimate has been calculated but it is beneficial to a SPA to do so and the Information Commissioner considers that it may be useful to set this out in any Refusal Notice, for the following reasons:

- to enable the applicant to assess the reasonableness of the estimate. This may help to prevent an appeal to the Information Commissioner which will avoid further time and costs being expended on the same request;
- if an appeal is made to the Information Commissioner, then he/she will expect the level of detail, as set out above, to be provided. This may require the SPA to incur further costs in providing this detail. This task may also be complicated by changes in circumstances between the time of the request and the time of the Information Commissioner's investigation;
- in any event, providing a suitable breakdown is likely to be required as part of a SPA's statutory obligations under Article 12 to provide advice and assistance (for more detail see the relevant content below).



Example 3

A SPA receives a request for all expenses claims submitted by two employees over a 10 year period.

Good practice

- *Consider a search strategy at the outset*

The FOI officer considers who would be the most appropriate member of staff to speak to about where to start the search. The FOI officer considers contacting the relevant employees but one has recently retired and the other is on holiday until after the time for compliance with the request. The FOI officer decides to contact a member of the Finance team.

The Finance Executive advises that information relating to expense claims over four years old is stored in archived paper files off-site, whilst claims for the last four years are stored electronically. The electronic expenses files are not stored by employee name but in date order. It is estimated that it would take 5 seconds to open each claim and check whether it related to one of the employees referred to in the request. The total estimate is approximately 1 hour 23 minutes (5 seconds x 1,000 claims).

The FOI officer then speaks to a colleague who deals with archiving. The relevant Administration Support employee advises that archived records are filed in date order. He suggests that there is an average of 10 accounts files per year of varying sizes. He advises that it would take one hour to search one file to find any relevant expenses forms for the two employees. Accordingly, he estimates that it would take approximately 60 hours to search these files (10 files per year x 6 years @ one hour per file).

- *Apply Article 16 as soon as the SPA realises it intends to rely on this provision.*

At this point, the SPA claims Article 16 and provides the applicant with the above breakdown. This allows the applicant to understand what information could realistically be provided under the cost limit and make a refined request for the information they are most interested in.

Undesirable practice

The SPA decides that it can provide the expenses information for the last four years under the cost limit from its electronic records; it discloses this information and refuses the rest of the request under Article 16.

This is undesirable practice because it assumes that the applicant would rather have the information in the electronic records than receive a more limited amount of the older information held in the paper files, this assumption may be incorrect.



AGGREGATION OF REQUESTS

38. When a SPA is estimating whether the cost limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in Regulation 3 of the Fees Regulations can be satisfied. Those conditions require the requests to be:

- made by one person, or
- by different persons who appear to the SPA to be acting in concert or in pursuance of a campaign;

In such cases the estimated cost of complying with any of the requests as determined in accordance with Regulation 2, is to be taken to be the estimated total cost of complying with all of them.

39. SPAs should note at the outset that requests which clearly fall under different regimes, for example, the Freedom of Information Law and the Data Protection Law cannot be aggregated.

‘Two or more requests’

40. SPAs can aggregate two or more separate requests.

41. They should also note that multiple requests within a single item of correspondence are separate requests for the purpose of Article 16(1). This was considered by the UK Information Tribunal in the UK case of *Ian Fitzsimmons v ICO & Department for Culture, Media and Sport (EA/2007/0124, 17 June 2008)*.

42. Therefore a SPA should ensure that each request can be aggregated in accordance with the conditions laid out in the Fees Regulations. Any unrelated requests should be dealt with separately for the purposes of determining whether the cost limit is exceeded.

‘Same or similar information’

43. Regulation 3(2) of the Fees Regulations requires that the requests which are to be aggregated relate “to any extent” to the same or similar information. This is quite a wide test but SPAs should still ensure that the requests meet this requirement.

44. A SPA needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the applicant has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.

‘Requests received within 60 consecutive working days’

45. The Fees Regulations state that requests received within 60 consecutive working days can be aggregated.

11011101
101



TIME AT WHICH TO APPLY

ARTICLE 16(1)

46. A SPA should consider whether it would exceed the cost limit to comply with the request based on the circumstances as they existed either on the day on which the request is deemed to be received, or on any day up to the time for statutory compliance.

101

001

1101110
1101



TIME AT WHICH TO APPLY ARTICLE 16(1) FOR AGGREGATED REQUESTS

47. Where a SPA wishes to aggregate the costs of dealing with more than one request, it is noted that the Fees Regulations do not cover how to reconcile the ability to aggregate requests received over 60 consecutive working days with the SPAs obligation to respond to requests within 20 working days as required by Article 13 of the Law.
48. The Information Commissioner's approach is to allow the aggregation period to only run up to 20 days 'forward' from the date of any single request under consideration to take into account the requirements of Article 13(2).
49. The aggregation period will however be able to run up to 60 days 'backwards' from the date of any single request under consideration.
50. The total aggregation period, (running either forwards or backwards or a combination of both) from the date of any single request must not exceed 60 working days.



Example 4

A SPA receives a request on 1 September. The SPA also receives requests from the same applicant on the same subject matter on 14, 18 and 21 September. The SPA estimates that the cost of complying with all four requests would exceed the cost limit.

Outcome: As the SPA has until 29 September to comply with the request of 1 September; it is able to include the costs of responding to the other three requests when refusing this request. This is because these later requests were all received within the period 20 days 'forward' from 1 September.



Example 5

In the same scenario, the SPA had also already received the following requests:-

*9 June (in respect of which it issued a Refusal Notice claiming Article 33 Commercial Interests) and;
18 August (in respect of which it disclosed all relevant information).*

The SPA can include the costs of dealing with the request of 18 August when refusing the requests of 1, 14, 18 and 21 September. This is because it was received within the period 40 days 'back' from 1 September. As the other requests were received within the period 20 days 'forward' from 1 September, the total aggregation period does not exceed 60 days.

The SPA could not however include the costs of dealing with the 9 June request as this was received outside the period 40 days 'back' from the request of 1 September.

11011101
101



LATE CLAIMING OF ARTICLE 16

51. A SPA may, on a rare occasion, seek to claim Article 16 outside the time for statutory compliance. It should note that if an appeal is made to the Information Commissioner, then he/she has discretion to decide whether or not to accept the late claim of Article 16. In exercising this discretion, the Information Commissioner will take into account the particular circumstances of the case and any unfairness or disadvantage caused to the applicant in accepting a late claim.
52. SPAs should also note that the Information Commissioner is unlikely to be sympathetic to accepting a late claim of Article 16 where an authority would only have to incur minimal additional costs in collating the requested information, for example, where it has already collated the majority of the information for the purposes of applying an exemption.
53. To avoid incurring unnecessary costs, it is therefore useful for a SPA to consider the possible application of Article 16 as soon as possible.

101

001

1101110
1101



WHAT THE LAW SAYS ABOUT ADVICE AND ASSISTANCE UNDER ARTICLE 12

Article 12 states as follows:

Duty of a scheduled public authority to supply advice and assistance

A scheduled public authority must make reasonable efforts to ensure that a person who makes, or wishes to make, a request to it for information is supplied with sufficient advice and assistance to enable the person to do so.

54. Paragraph 14 of the Article 44 'Code of Practice' states that where a SPA is not obliged to comply with a request because the cost of complying would exceed the cost limit:

'the SPA should consider providing an indication of what, if any, information could be provided which would bring the request below the cost limit. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied within any costs limits.'

55. Where a SPA has satisfied the requirements of the Code of Practice; it will be deemed to have complied with Article 12. Although this should not be taken to mean that a SPA should not go beyond the provisions of the Code as SPAs should try to be as helpful and flexible as possible.

56. SPAs should also note however that the duty to provide assistance and advice under Article 12 is expressly qualified by the words that the SPA must make 'reasonable efforts' to ensure that a person who makes, or wishes to make, a request 'is supplied with sufficient advice and assistance to enable the person to do so.'

57. This suggests that although compliance with the Article 44 Code is likely to mean that the SPA has complied with Article 12; it does not necessarily mean that a failure to meet the requirements of the Code will inevitably lead to a breach of Article 12 if it was not reasonable to provide advice and assistance.



Example 6

Decision notice of the UK Information Commissioner: Ofcom (FS50203058, 21 December 2009)

The requestor made a series of requests regarding the number of complaints received from viewers/listeners which were deemed not to have broken any broadcasting code and which were subsequently overturned on review.

Ofcom confirmed that it would need to examine 78,000 complaints cases in order to answer the request. Based on a sampling exercise, Ofcom estimated that it would take approximately 9,750 hours to review all cases at a cost of £243,750.00. Ofcom claimed section 12 and did not provide any advice and assistance.

Outcome: The Commissioner upheld Ofcom's section 12 claim. The Commissioner also accepted that given the scope of the request and the way in which Ofcom held the information; it could not offer any meaningful advice as to how to refine the request. Accordingly, the only advice and assistance which could be offered would be to say that no information could be provided under the cost limit.



HOW TO SATISFY THE REQUIREMENTS UNDER ARTICLE 12

58. In cases where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a SPA should do in order to satisfy Article 12 is:

- either indicate if it is not able to provide any information at all within the cost limit; or
- provide an indication of what information could be provided within the cost limit; and
- provide advice and assistance to enable the applicant to make a refined request.

Indicate that no information can be provided within the cost limit

59. There is likely to be a breach of Article 12 where a SPA has failed to indicate that it is unable to provide any information within the cost limit. This is based on a plain English interpretation of the phrase “...what, if any, information could be provided...” (paragraph 14 of the Article 44 Code of Practice).

60. In any event, it is useful to inform the applicant of this as it may avoid further and futile attempts to refine the request to bring it under the cost limit. Also, if the applicant understands the way in which the estimate has been calculated to exceed the cost limit, it should help them decide what to do next. For example, if the applicant accepts that the estimate is reasonable then they may decide to refocus their request in another direction. However, if they believe the estimate is not reasonable, then they may decide to appeal against the refusal instead.

Indicate what information can be provided within the cost limit

61. A SPA should inform the applicant of what information can be provided within the cost limit. This is important for two reasons: firstly, because a failure to do so may result in a breach of Article 12. Secondly, because doing so is more useful than just advising the applicant to ‘narrow’ the request or be more specific in focus. Advising applicants to narrow their requests without indicating what information a SPA is able to provide within the limit, will often just result in applicants making new requests that still exceed the cost limit.



Example 7

Northampton General Hospitals NHS Trust (FS50210439, 17 August 2009)

The requestor sought copies of all job evaluations which took place during a period of 8 months and 3 days. The public authority claimed section 12 (cost limit) and claimed that it could not offer any advice and assistance to reduce the costs of complying with the request.

Outcome: Whilst the UK Information Commissioner upheld the application of section 12, he also found the Trust had breached section 16 (advice and assistance) for failing to provide advice and assistance, for example, by suggesting that the requestor could refine the request to only cover specific departments or only job evaluations post September 2008 when the Trust centralised its records on an electronic database.

Failure to provide advice and assistance

62. The UK Information Tribunal in the UK case of Alasdair Roberts and the Information Commissioner (EA/2008/0050, 4 December 2008) confirmed that a failure to provide advice and assistance does not invalidate the original costs estimate. Although, such a failure may of course mean that the public authority has breached its duty to provide advice and assistance.
63. The Information Commissioner considers that the implication of the original estimate remaining valid is that the refined request becomes a new request. This means that the statutory time for compliance commences on the date of the receipt of that new request.
64. However, SPAs should note that the original and refined/new requests should not be aggregated for the purposes of calculating the costs of dealing with the new request as to do so would frustrate the purposes behind Articles 12 and 16(1).

11011101
101



MORE INFORMATION

65. This guidance has been developed with assistance of the Office of the Information Commissioner in the United Kingdom. The guidance will be reviewed and considered from time to time in line with new decisions of the Jersey Information Commissioner and the Royal Court.
66. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
67. If you need any more information about this or any other aspect of freedom of information, please contact us:

Jersey Office of the Information Commissioner
2nd Floor
5 Castle Street
St Helier
Jersey JE2 3BT

Telephone number: +44 (0) 1534 716530

Email: enquiries@jerseyoic.org

101

001

1101110
1101