

**Freedom of Information (Jersey) Law 2011**

**DECISION NOTICE**

<b>OIC Reference</b>	202-03-57259
<b>Date of Decision Notice</b>	14 November 2016
<b>Scheduled Public Authority</b>	Chief Minister's Department (the <b>SPA</b> )
<b>Address</b>	Cyril Le Marquand House St Helier Jersey JE4 8UL
<b>Date of Initial Request</b>	8 February 2015
<b>Date of SPA's response</b>	22 June 2015
<b>Date of request for Internal Review</b>	23 June 2015
<b>Date of Internal Review</b>	15 September 2015
<b>Date of Appeal to Information Commissioner</b>	17 September 2015

**Summary/Decision**

1. On 17 September 2015, the Complainant requested from the SPA a copy of all emails (sender, recipient, subject and body text) between members of the Council of Ministers in the month October 2014 (the **Emails**).
2. The SPA initially withheld/redacted certain of the Emails (the **Withheld Information**) under Arts. 23, 25, 34, 35, 39 and 41 of the Freedom of Information (Jersey) Law 2011 (the **Law**), which the Complainant subsequently contested.
3. Further disclosure was provided to the Complainant on 15 and 21 September 2015 following the SPA's internal review.
4. After the Complainant appealed to the Information Commissioner (the **Commissioner**), it became apparent that the SPA was also seeking to apply the exemptions under Arts. 19 and 32 of the Law. The SPA also indicated to the Commissioner that they would no longer seek to rely on certain exemptions in respect of certain of the Withheld Information and that revised emails would be sent to the Complainant following the Commissioner's review.
5. The Commissioner's decision is that whilst the SPA is entitled to rely on some of these exemptions to withhold certain of the Emails (or parts thereof), some of the exemptions are not engaged and thus the SPA must disclose such information in order to comply with the legislation. Accordingly, and given the volume of information falling within the scope of this request, full details of the Commissioner's findings are set out in **Appendix 1** to this Decision Notice and

which sets out the exemption relied on by the SPA and the steps that the SPA is required to take subsequent to the issuing of this Decision Notice.

6. The Commissioner requires the SPA to take the following steps to ensure compliance with the legislation:

a. Disclose to the Complainant the documents the Commissioner has identified in **Appendix 1**.

7. The SPA must take these steps within **35 calendar days** of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the Royal Court of Jersey pursuant to Art.48 of the Law and may be dealt with as a contempt of court.

### **The Role of the Information Commissioner**

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8. It is the duty of the 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.

9. This Decision Notice sets out the Commissioner's decision.

### **The Request**

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10. On 8 February 2015 the Complainant requested the following

*"Please provide all emails (sender, recipient, subject and body text) between members of the Council of Ministers in the month October 2014."*

11. On 4 March 2015, the SPA (via the Central Freedom of Information (FOI) Unit (the **Unit**)) contacted the Complainant stating that "we are currently in the process of obtaining formal legal advice for the Chief Minister, and following the advice being received, we will require additional time to redact and apply any exemptions to the e-mails". The Unit stated that they would be in contact as soon as they had further information.

12. On 29 May 2015, the SPA (via the Unit) contacted the Complainant as follows:

*"We are in the process of preparing information in response to your FOI request received on 08 February relating to e-mails between the Council of Ministers.*

*We are writing to you to request a further 10 working days to answer your request. The additional time required is to ensure that all Ministers have had chance to review the redacted versions and liaise with the Law Officers' Department if required. As I am sure that you are aware, a considerable amount of work has been required to ensure that any information that is exempt under the FOI Law is not disclosed.*

*We sincerely apologise for this delay.*

*If you are dissatisfied with the handling of your request, you may ask for an internal review. Internal review requests should be submitted within 20 working days of the date of receipt of this communication and should be emailed to:*

*FOI@gov.je or sent to:*

*The Central FOI Unit*

*PO Box 140*

*Cyril Le Marquand House*

*St Helier*

*Jersey*

*JE4 8QT"*

13. On 12 June 2015, the SPA (via the Unit) contacted the Complainant as follows:

*"We apologise for the extreme delay that you have incurred waiting for a response to your request for emails. Unfortunately, Senator Ozouf had been out of the island for the past three weeks and has therefore been unable to review the e-mails that will be released. In addition to this, Senator Ozouf's e-mails are often copied to other Ministers, which means that any comments that he has may have a bearing on what is released for other Ministers.*

*Senator Ozouf will be available from Monday, but given the amount of backlog he will be dealing with, we are asking for a further extension until 19th June when we will have all documents loaded on to a memory stick for you.*

*Once again, we sincerely apologise for the delay."*

*If you are dissatisfied with the handling of your request, you may ask for an internal review. Internal review requests should be submitted within 20 working days of the date of receipt of this communication and should be emailed to:*

*FOI@gov.je or sent to:*

*The Central FOI Unit*

*PO Box 140*

*Cyril Le Marquand House*

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*Jersey*

*JE4 8QT"*

14. On 18 June 2015, the Complainant contacted the Unit seeking an explanation and expressing his concern that *"Ministers are redacting their own emails"*.

15. Later that same day, the Unit responded:

*"Ministers are not redacting their own e-mails, they have been redacted by one person on a software system, in conjunction with many discussions with the Law Officers' Department. Copies of the redacted versions of the e-mails, together with an original copy have been passed to Ministers for their review, and to ensure that they are made aware of the information that is to be disclosed. We have asked for them to confirm that they agree to the release of the information as a matter of courtesy rather than a point of law.*

*I hope this information addresses your concerns"*

16. On 22 June 2015 the SPA (via the Unit) responded to the Request in the following terms (the **Initial Response**):

*"Response*

*Information is attached for:*

*Senator Ian Gorst*

*Senator Philip Ozouf*

*Senator Sir Philip Bailhache*

*Senator Alan Maclean*

*Senator Andrew Green*

*Deputy Anne Pryke*

*Exemption for release of the e-mails from Mr Francis le Gresley, Mr Ian le Marquand, Deputy Kevin Lewis, Mr Patrick Ryan and Mr Rob Duhamel is claimed under Article 23 of the FOI Law, as all their e-mails have either been sent or copied to one of the above Ministers and therefore, the information is already available to you.*

*Any redacted e-mails that do not quote an exemption are redacted under Article 25 (personal Information). All officer names have been redacted with the exception of Chief Officers"*.

17. The Complainant responded to the Initial Response indicating that they were not in agreement with that decision.

18. On 23 June 2015, the Unit responded to the Complainant's email acknowledging their request for an internal review and noting that such review would be conducted by the SPA. A copy of the SPA's internal review policy was provided to the Complainant at that time and the Complainant was advised that they *"should receive a response within 20 working days"*.

19. On 21 July 2015, the Unit contacted the Complainant to advise that the internal review had been completed and that:

*"In order to fully address the comments made, we (the Chief Minister's Department) request that you allow us until 31st July to address the various comments and revert to you.*

*In the meantime, we would be pleased to meet with you, if you feel it would be of assistance, to explain our comments below.*

*"Due to the nature of the electronic retrieval process for the requested information it was not possible to wholly separate out certain information which fell outside of the ambit of your request from the information which fell within the scope of it. This information has therefore been redacted. For the avoidance of doubt, there are two types of redaction in the response provided to you:*

*1. Information which was requested but which is Absolute or Qualified Exempt information by virtue of Parts 4 or 5 of the Freedom of Information (Jersey) Law 2011.*

*2. Information which was not requested but could not be effectively separated from that which was.*

*These two types of redaction have now been distinguished/highlighted."*

*If you would like to meet, please advise us of a date and time that would be convenient to you by emailing [foi@gov.je](mailto:foi@gov.je)."*

20. It is not clear as to whether or not the Complainant took up the SPA's offer of a meeting.

21. On 31 July 2015, the Unit wrote to the Complainant advising that *"...due to the temporary absence of a lead legal adviser, the handling authority is still in the process of undertaking the review. This is taking more time than anticipated as there is a large amount of material to be reviewed. We appreciate your patience in this matter and can assure you that we are treating this as a priority and will revert to you in two weeks with a response"*.

22. The SPA's internal review on 15 September 2015 (the **Review**) partly upheld the SPA's initial refusal to release the requested information but provided certain emails (IG150, PO104, AM04, IG151 and IG21) which had been overly redacted in the first disclosure. Two further emails (PO131 and PO141) which had similarly been overly redacted were released to the Complainant on 21 September 2015.

## **The Investigation**

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### **Scope of the case**

23. On 17 September 2015, the Complainant contacted the Commissioner to complain about the way his Request and the Internal Review had been handled and to appeal the SPA's decision to

withhold certain of the requested information. The Complainant specifically asked the Commissioner to consider the following points:

- a. Whether or not the decision taken not to include correspondence involving ministers who left the States at the end of the October 2014 election was correct in all the circumstances. It was noted that no correspondence has been disclosed at all in respect of former Senators Ian Le Marquand, Francis Le Gresley or Deputies Kevin Lewis or Pat Ryan.
  - b. To review certain redactions which had been applied by the SPA to the Withheld Information. The Complainant asked for those redactions to be reviewed, and where justified, an indication given about which exemption has been used to justify each redaction.
  - c. Whether or not the fact that the disclosure was reviewed by a Minister was appropriate and whether or not Ministers should have been given the opportunity to intervene in a statutory process.
  - d. Whether or not the SPA responded to the Initial Request appropriately and whether any delay was justified in the circumstances, it being noted that the initial application was made on 8 February 2015, initial disclosure was received on 22 June 2015, the request for an internal appeal was made on 22 June 2015 and some further disclosure was received on 15 September 2015, with an assurance that further disclosure would be made the following day (but none was). The Complainant is concerned that both the initial process and the Review by the SPA took significantly longer than they should.
  - e. Whether the Initial Response and/or Review were deficient in that save for asserting that the requested information was commercially sensitive, the SPA failed to give any further information as to the analysis which had been undertaken by the SPA in coming to that conclusion.
24. The scope of the Request encompasses a significant amount of documentation. For the sake of clarity, the Commissioner has compiled a schedule which sets out the SPA's position in relation to each Email and also the Commissioner's findings in relation to same. This schedule is at **Appendix 1** to this Decision Notice.
25. The Commissioner has set out in this Decision Notice the particular issues that she has had to consider in respect of each exemption cited by the SPA and, where relevant, the public interest test. This Decision Notice should thus be read in tandem with **Appendix 1**.

### **Chronology**

26. On 22 June 2015, 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.

27. On 10 November 2015, the Commissioner wrote to the SPA asking for a copy of the requested information and their written submissions in response to the complaint made by the Complainant.
28. The SPA responded on 16 December 2015 and provided the Commissioner with a letter explaining the rationale applied by the SPA in respect of the Withheld Information, together with the following documents:
- a. Revised emails and attachments;
  - b. Redacted emails between Senators Gorst and Ozouf;
  - c. Redacted emails between other members of the Council of Ministers;
  - d. Unredacted emails between Senators Gorst and Ozouf; and
  - e. Unredacted emails between other members of the Council of Ministers.
29. Further correspondence passed between the Commissioner and the SPA in January, February, October and November 2016.

## **Analysis**

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### **Out of scope information**

30. The Complainant requested copies of all ministerial correspondence (that is to say, correspondence passing between members of the Council of Ministers) during the month of October, 2014. The Complainant has questioned whether certain information has been incorrectly withheld.

### **The SPA's position**

31. For the period 1 – 31 October 2014, the Council of Ministers comprised as follows:
- a. Senator Ian Gorst (Chief Minister);
  - b. Senator Philip Ozouf (Minister for Treasury and Resources);
  - c. Senator Alan Maclean (Minister for Economic Development);
  - d. Senator Sir Philip Bailhache (Minister for External Relations);
  - e. Senator Brian (Ian) Le Marquand (Minister for Home Affairs and Deputy Chief Minister);
  - f. Deputy Anne Pryke (Minister for Health and Social Services);
  - g. Deputy Patrick Ryan (Minister for Education, Sport and Culture);
  - h. Deputy Rob Duhamel (Minister for Planning and Environment);

- i. Deputy Andrew Green (Minister for Housing);
- j. Senator Francis Le Gresley (Minister for Social Security); and
- k. Deputy Kevin Lewis (Minister for Transport and Technical Services<sup>1</sup>).

32. Whilst the results from the local elections were announced in 15 October 2014, it was not until 6 November 2014 that the new Council of Ministers was put in place. The SPA has accordingly declined to produce any correspondence between States' members (whether serving at the time of the election, subsequently or at the time of the request), other than those individuals listed above.

33. The SPA accordingly declined to produce correspondence which it defined as not being between the Council of Ministers (**NBC**) asserting that such fell outside the scope of the Request, including in circumstances where such falls within an email chain which is, ultimately, between individuals of the Council of Ministers (i.e. an email forwarded from a private third party individual to a member of the Council of Ministers, who then forwards such on to another member of the Council of Ministers). In particular, the SPA has interpreted the word "correspondence" to mean that there must be a communication between members of the Council of Ministers only and would not therefore include an email that has been sent or forwarded without comment, or where a member of the Council of Ministers have simply been copied into the email.

34. The SPA also initially declined to produce correspondence between Ministers and Assistant Ministers and/or those members of the States who were not part of the COM, this purportedly on the basis that Assistant Ministers/other States' members are not part of the Council of Ministers and thus fall outside the scope of the Request.

#### The Commissioner's Position

35. The Commissioner agrees that those individuals listed at paragraphs 24(a-k) fall within the scope of the Complainant's request, the original wording of the request being "*Please provide all emails (sender, recipient, subject and body text) between **members of the Council of Ministers in the month October 2014***" (emphasis supplied). However, the Commissioner considers that it is artificial to suggest that correspondence as between Assistant Ministers and/or those on the Council of Ministers should not be included within the scope of the request. In particular, she has considered the States Assembly Report<sup>2</sup> dated 10 February 2015 and para.10 thereof which states, *inter alia*, that

*"The Council comprises the Chief Minister and Ministers, and is chaired by the Chief Minister, and in the absence of the Chief Minister, by the Deputy Chief Minister. In the absence of a Minister, and where one exists, an Assistant Minister shall attend in their place".*

36. The Commissioner therefore considers that emails from/to/copied to Assistant Ministers would properly fall to be disclosable unless an exemption applies. In any event, the Commissioner is cognisant of the concession made by the SPA in relation to the naming of then/current serving

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<sup>1</sup> Now the Infrastructure Department.

<sup>2</sup>[http://www.statesassembly.gov.je/AssemblyReports/2015/R.11-2015.pdf?\\_ga=1.147644855.1882903064.1428485009](http://www.statesassembly.gov.je/AssemblyReports/2015/R.11-2015.pdf?_ga=1.147644855.1882903064.1428485009)



States members and that they will not seek to rely on any Art.25 exemption in respect of the naming of such individuals and this would thus include any individuals who were Assistant/Deputy Ministers.

37. Further, the Commissioner does not agree with the very narrow interpretation of "correspondence" relied on by the SPA and considers that "correspondence" is to be afforded a broad interpretation and would cover situations whereby, for example, an email from a third party is forwarded on from one Minister to another notwithstanding the fact that the sender may add nothing to the existing email chain. The activity of one Minister forwarding on such an email to another Minister is, in the Commissioner's view, "correspondence" in that the sender is bringing to the attention of the recipient the existence of such correspondence and, in some circumstances, inviting comment thereon. On the face of it, therefore, any correspondence previously designated as NBC by the SPA should be disclosed to the Complainant unless any exemption applies (i.e. Art.25 in respect of the personal data of a private third party).

### **ABSOLUTE EXEMPTIONS**

#### **Art.23 – Information Accessible to Applicant by Other Means**

38. The full text of Art.23 of the Law can be found in the Legal Appendix at the end of this Decision Notice.
39. Art.23 provides an exemption for information which is reasonably available to the applicant, whether or not free of charge.

#### **The SPA's Position**

40. The SPA relied on this exemption in order to avoid providing duplicated emails which had passed, for example, between one Minister and another. In such circumstances, the SPA would provide only one side of the email chain.
41. In their Initial Response, this was articulated by the SPA to the Complainant as follows:

*"Exemption for release of the e-mails from Mr Francis le Gresley, Mr Ian Le Marquand, Deputy Kevin Lewis, Mr Patrick Ryan and Mr Rob Duhamel is claimed under Article 23 of the FOI Law, as all their e-mails have either been sent or copied to one of the above Ministers and therefore, the information is already available to you".*

#### **The Commissioner's Position**

42. The Commissioner considers that the Art.23 exemption has been appropriately applied by the SPA in those instances as there is no obligation, in the Commissioner's view, to provide duplicates of emails simply because they are also held in the inboxes of those individuals listed at para.41 above.

#### **Art.24 – Court Information**

43. The full text of Art.24 of the Law can be found in the Legal Appendix at the end of this Decision Notice. Art.24 specifies that information must not be disclosed if it is held by the SPA only by virtue of it being contained in a document:

- a. Filed with, or otherwise placed in the custody of the court; or
- b. Served upon, or by, the SPA

in proceedings in a particular cause or matter.

44. The SPA has only sought to rely on the Art.24 exemption in three instances<sup>3</sup>. The Commissioner's decision as to the applicability of that exemption is dealt with in the Annex however, she notes that the SPA does not appear to correctly understand the difference between Art.24 and Art.42<sup>4</sup> of the Law and the different ways in which they operate. In respect of IG35, the SPA cited the Art.24 exemption in respect of certain parts of that email and redacted certain parts that it wished to withhold. Art.24 is an absolute exemption and, if such was correctly engaged in respect of that particular email, the entire email would have been exempted from disclosure under the Law and there would have been no need to consider whether there might be a stronger public interest in making the disclosure despite the existence of an exemption: it is either exempt, or it is not.

45. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.

46. There are two main steps to considering whether information falls within this exemption: first, it is necessary to consider whether the information is contained within a document created by a court in relation to a particular cause or matter. The next step is to consider if this information is held by the relevant public authority only by virtue of being held in such a document. In the Commissioner's view, that phrase implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.

47. The information contained within IG35 does not fulfil the Art.24 criteria and the SPA should more properly have cited Art.42 in relation to that item and then sought to apply the public interest test. In any event, the items to which this exemption applied have been appropriately redacted.

### **Art.25 – Personal Information**

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

49. Art.25 specifies that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection (Jersey) Law 2005 (the **DPL**).

50. Personal data is defined at Art.1(1) as:

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<sup>3</sup> IG35, PO63 and PB11.

<sup>4</sup> Law Enforcement, qualified exemption.

*"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."*

51. The information sought in the Request was for correspondence passing between those members of the Council of Ministers for the period 1-31 October 2014. Within the collated information are instances of email exchanges involving non-Ministers (but employees within the States of Jersey) and members of the public.
52. The SPA initially applied the exemption contained at Art.25 of the Law in various instances and on the basis that a large proportion of the requested emails contain information relating to staff members who hold a position within a States of Jersey department below Chief Officer level. The SPA advised that a decision was made that any staff name in an email would be redacted unless they are at Chief Officer level or above. The SPA also sought to argue that the s.25 exemption should apply to serving members of the States' Assembly who do not form part of the COM<sup>5</sup>. The SPA contended that to release this information would breach the first data protection principle as it would not be fair to disclose this type of information into the public domain and does not consider that, on balance, disclosure is supported by condition 6 of Schedule 2 of the DPL and argue that none of the legitimising conditions for processing have been met. The SPA further considers that the data subjects would not reasonably expect their personal data to be shared in this manner.
53. The issue regarding the details of members of the States Assembly is dealt with elsewhere in this Decision Notice. Insofar as regards the names of these other States' employees, the Commissioner accepts that the withheld names *per se* constitute personal data within the meaning of Art.1 of the DPL<sup>6</sup>. Whether the surrounding information is also the personal data of that individual will involve the usual consideration of whether the information is of biographical significance and relates to that individual. For example, just because an individual has been copied to an email or forwarded something on, the content of that email would not automatically be that individual's personal data unless it relates to them in a biographical capacity and focuses on them as an individual (see Durant v. FSA [2003] EWCA Civ 1746).
54. The Commissioner has thus gone on to consider whether or not the redactions applied by the SPA are, in fact, appropriate in each instance particularly correspondence which has emanated from/involved other employees within a States of Jersey department.

*Reasonable expectations of the data subjects*

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<sup>5</sup> See paras.30-37

<sup>6</sup> See Effiom Edem v Information Commissioner and Financial Services Authority [2014] EWCA Civ 92.

55. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, 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; and
  - vi. Whether the individual consented to their personal data being disclosed or, conversely, whether they explicitly refused.
- b. The consequences of disclosing the information i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
  - i. Whether information of the nature requested is already in the public domain;
  - ii. If so, the source of such disclosure; and even if the information has previously been in the public domain, does the passage of time mean that disclosure now could still cause damage or distress?

56. Further, 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 requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.

57. 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.

58. The SPA argued that individuals below the level of Chief Officer have an expectation of privacy and would not expect their names to be disclosed. The SPA also argued that there was no legitimate need to disclose their identities. Similarly, it argued that third parties who are referred to in the requested information would not expect for their names to be revealed.

59. The SPA has not provided the Commissioner with any detailed explanation as to the possible consequences of disclosure.

60. In this instance, the Commissioner notes that whilst some of the redacted information relates to private citizens, the majority of the redactions to which this exemption has been applied relate to any individual below the rank of Chief Officer working within any department at the States of Jersey.

61. Whilst the Commissioner considers that the exemption has been correctly applied to private individuals (that is to say those outside the employment of the States), she does not accept the blanket rationale adopted by the SPA regarding the redaction of any "non-senior personnel names" i.e. those below the level of Chief Officer and refers to the decision of the UK Information Tribunal (Lower) in the case of The Department for Business, Enterprise and Regulatory Reform v. Information Commissioner (1) and Friends of the Earth (2) EA/2007/0072, where the Tribunal summarised the position relating to ranking of individuals, as follows:

*"93. ...Applying the test to this case firstly, disclosure must be necessary for the pursuance of the FOE's legitimate interests. Secondly, even where the disclosure is necessary, the Tribunal has to consider whether the disclosure is unwarranted in this case by reason of the prejudice it will cause to the rights and freedoms or legitimate interests of the data subjects, namely the officials of the CBI and other lobbyists who attended the meetings in question. Put another way we need to consider:*

*a. Whether the legitimate aims pursued by FOE could be achieved by means that interfere less with the privacy of those officials; and*

*b. If the aims could not be achieved by means that involved less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interest of those officials.*

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*e. The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case.*

*f. The extent of the disclosure in relation to the named official will be subject to the application of the tests set out under paragraph 93 above, and will largely depend on whether the additional information relates to the person's business or professional capacity or is of a personal nature unrelated to business."*

62. The Commissioner also refers to the case of Dun v. ICO (1) and National Audit Office (2) EA/2010/060 in which the First Tier Tribunal (Information Rights) considered disclosure of names. The disputed information concerned the NAO's enquiry into the FCO's handling of employee grievances of the whistleblowing variety. In that case, the Tribunal was clear that no blanket policy should apply, and that fairness depends on the particular responsibility and information with which the case is concerned. The Commissioner considers that a SPA should consider the information and the individual named therein and consider whether or not the data is personal data. It is not sufficient to simply identify an individual as being of a particular rank and claim an exemption in every single instance and redact their details.

63. The Commissioner accepts that where there is a risk to staff safety if their names are disclosed, then redaction is likely to be justified under this exemption.

64. The Commissioner also accepts that junior officials may have a reasonable expectation that their names will not be disclosed in the context of the request. She accepts that the individuals concerned were carrying out their public functions and must therefore have the expectation that their actions in that regard will be subject to greater scrutiny than would be the case in respect of their private lives. However, she is mindful that those more junior officials were not in public facing roles and did not exercise any significant level of authority in relation to the documents from which their names were redacted or were simply copied in to. Whilst there is likely to be little legitimate interest in disclosing their names, each item should be considered on a case-by-case basis. The Commissioner is mindful of the case of David Perrin v. ICO EA/2014/0303, at para.13 thereof:

*"In relation to the s.40 – the personal information exemption – the Commissioner submitted that the disclosure of the FOI officer's name would not be 'fair' in accordance with the Data Protection Act 1998. In reaching this conclusion the Commissioner took into account the FOI officer's junior role and the fact that this would give rise to an expectation on the part of that individual that his or her name would not be disclosed. The Commissioner's assessment of the pertinent authorities (which was not challenged and which the Tribunal accepted was correct) in relation to the disclosure of public sector employees' personal data was that there was a 'sliding scale' of protection depending on employees' seniority so that senior 'decision makers' should have an expectation that they would be identified and that expectation diminished the more junior an employee was. The Commissioner also took into account that the FOI officer had not consented to the disclosure of their name and indeed was concerned about the potentially distressing consequences of his or her name being disclosed"* (emphasis supplied).

65. The Commissioner considers that the SPA has, in certain cases, appropriately withheld certain of the Withheld Information but that certain other information should be disclosed, as set out in **Appendix 1.**

## **QUALIFIED EXEMPTIONS**

### **Art.31 – Advice by the Bailiff, Deputy Bailiff or a Law Officer**

66. The full text of Art.31 of the Law can be found in the Legal Appendix at the end of this Decision Notice.

67. Art.31 is a qualified exemption and therefore subject to the public interest test.

68. "Law Officer" is not defined in the Law, albeit that Art.31 refers to advice being provided by the "Attorney General or the Solicitor General". The Commissioner considers that this definition naturally extends to advice being given by a member of the Law Officers' Department.

69. The SPA doesn't address the public interest test in any detail in respect of this exemption. The Commissioner is clearly unable to discuss the content of the Withheld Information in detail. She

has, however, reviewed the Withheld Information and notes that the information contained therein falls within the scope of Art.31.

70. In its response to the Commissioner, the SPA doesn't address the public interest test in any detail, simply referring to the desirability of government being able to hold free and uninhibited discussions with those individuals falling within the scope of Art.31, without fear that such will be disclosed. Whilst this is correct, the SPA should, when seeking to rely on this exemption, explain that they have considered the public interest and set out the factors which exist for and against disclosure and why they believe that the exemptions should be maintained including the prejudice which would likely occur if the requested information was disclosed.
71. The Commissioner considers that, where applicable, the SPA correctly applied the exemption cited at Art.31.

### **Art.34 – The Economy**

72. The full text of Art.34 of the Law can be found in the Legal Appendix at the end of this Decision Notice.
73. Art.34 provides an exemption from disclosure if the information would, or would be likely to, prejudice the economic interests of Jersey or the financial interests of the States of Jersey. This is a qualified exemption, and is therefore subject to the public interest test.
74. In order for a prejudice based exemption, such as those provided by Art.34 to be engaged the Commissioner considers that three criteria must be met:
- a. Firstly, the actual harm which the SPA alleges would, or would be likely, to occur if the Withheld Information was disclosed has to relate to the applicable interests within the relevant exemption;
  - b. Secondly, the SPA must be able to demonstrate that some causal relationship exists between the potential disclosure of the Withheld Information and the prejudice which the exemption is designed to protect<sup>7</sup>. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - c. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the SPA is met – i.e., disclosure 'would be likely' to result in prejudice, or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner takes the view that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the SPA.

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<sup>7</sup> See DWP v. Information Commissioner, Decision of the Information Tribunal (Lower Tier) EA/2014/0073

75. The wording of the exemption makes plain that it covers communal interests rather than those of the individual; concerning information that would, or would be likely, to damage the economy of Jersey as a whole.

*The SPA's position*

76. The SPA had only initially sought to apply the Art.34 exemption in respect of IG95, AG46, IG92 and AG43 (all copies of the same message) and had simply annotated those emails with the words "Article 34" and no other information was given to the Complainant regarding the SPA's reliance on that exemption.

77. In its subsequent correspondence to the Commissioner, the SPA has indicated that it will not maintain its reliance on the Art.34 exemption in respect of these messages. Whilst the Commissioner does not now need to decide whether or not the exemption was correctly engaged, she considers that it may be helpful to set out in this Decision Notice the factors a SPA must take into account when seeking to rely on the Art.34 exemption.

*Does the Withheld Information relate to economic interests?*

78. The term 'economic interests' is not defined in the Law, however, it is understood to have a broad meaning, encompassing all activities which have both a direct and indirect effect on Jersey's economic interests.

*What is the nature of the prejudice?*

79. As a prejudice-based exemption, a SPA seeking to rely on Art.34 must be able to demonstrate a link between the economic interests described and the harm that it considers may arise through disclosure. Further, the risk of prejudice occurring must be real and significant. The wording of the exemption makes plain that it covers communal interests rather than those of the individual; concerning information that would, or would be likely, to damage the economy of the Jersey as a whole or the financial interests of the States.

80. The SPA needs to be able to establish that disclosure of the Withheld Information would be likely to lead to the harmful consequences claimed. Based on the arguments presented by the SPA, the Commissioner accepts that there is a causal link between the disclosure of the Withheld Information and the prejudice that may be caused to Jersey's economic and financial interests.

*What is the likelihood of prejudice?*

81. The Commissioner will then consider whether there was a sufficient likelihood of prejudice to engage Art.34. At para.26 of her Guidance Note<sup>8</sup>, the Commissioner notes that in establishing whether prejudice would or would be likely to occur, it is necessary to consider:

- a. The range of circumstances in which prejudice could occur (for example, whether it would affect certain types of people or situations);

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<sup>8</sup> <https://dataci.je/wp-content/uploads/2015/01/The-Prejudice-Test.pdf>



- b. How frequently the opportunity for the prejudice arises i.e. how likely it is for these circumstances to arise); and
- c. How certain it is that the prejudice results in those circumstances.

82. In the UK case of John Connor Press Associates v. Information Commissioner<sup>9</sup>, the Information Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that:

*"We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk" (para.15).*

83. In other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.

84. As Art.34 is a qualified exemption, the Commissioner will consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### The Public Interest Test

85. In considering the public interest, the SPA should advise the Commissioner as to the public interest arguments in favour of maintaining the exemption and why the balance should fall in favour of maintaining that exemption rather than in favour of disclosure.

86. She will then go on to consider the balance of those public interest arguments.

#### **Art.35 – Formulation and Development of Policies**

87. The full text of Art.35 of the Law can be found in the Legal Appendix at the end of this Decision Notice.

88. Art.35 provides an exemption for information which relates to the formulation or development of any proposed policy by a public authority.

89. The SPA originally only sought to apply the Art.35 exemption in respect of four sets of emails:

- a. IG5, PO1, IG47 and PO39 (copies of the same email);
- b. IG138, PO85, IG136 and PO84 (copies of the same email);
- c. IG151, PO96, IG150 and PO95 (copies of the same email); and
- d. IG159 and PB49 (copies of the same email).

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<sup>9</sup> Appeal Number: EA/2005/0005

90. In its Initial Response, those emails were simply annotated with the words "Article 35" and no further information was given.
91. In its subsequent response to the Commissioner, the SPA has indicated that it is not seeking to maintain its reliance on the Art.35 exemption in respect of any of the emails cited at para.88 above save for the emails cited at para.89(a) and attachments thereto.
92. In respect of the email chain referred to at para.89(b), the SPA has indicated that a revised copy of this email chain will be sent to the Complainant following the publication of this Decision Notice. In respect of the email chain referred to at para.89(c), this was considered at the Internal Review stage and unredacted emails have already been provided to the Complainant. Finally, the SPA has indicated that the exemption applied to IG159 was not carried across to the duplicate email at PB48 and thus the exemption cannot be maintained as such has already been provided to the Complainant. She does not, therefore, need to go on to consider whether or not the exemption was properly engaged nor the public interest test in respect of those particular emails.
93. In respect of the emails cited at para.89(a) above, the Commissioner considers that the exemption was properly engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### **Art.39 – Employment**

94. The full text of Art.39 of the Law can be found in the Legal Appendix at the end of this Decision Notice.
95. Art.39 provides an exemption for information that would, or would be likely to, prejudice pay or conditions negotiations that are being held between a public authority and an employee or representative of that authority.
96. The SPA has not (generally speaking) explicitly set out the precise grounds by which the SPA would be prejudiced if the Withheld Information was disclosed but in order for this exemption to be engaged, the Commissioner considers that three criteria must be met:
  - a. Firstly, the actual harm which the SPA alleges would, or would be likely, to occur if the Withheld Information was disclosed has to relate to the applicable interests within the relevant exemption;
  - b. Secondly, the SPA must be able to demonstrate that some causal relationship exists between the potential disclosure of the Withheld Information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - c. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the SPA is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With

regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the SPA. The anticipated prejudice must be more likely than not.

#### *Public Interest Test*

97. Art.39 is a qualified exemption and therefore the Commissioner must consider the public interest test in relation to the information which she accepts is exempt. The test is whether, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
98. The SPA has not provided any particular detail as to the balance of the public interest in circumstances where they have sought to rely on Art.39. The Commissioner has, however, considered the balance of the public interest in the information and, in particular, whether or not the public interest in disclosure of the Withheld Information is outweighed by the Public Interest in withholding that information.
99. There is no equivalent of Art.39 under the UK Act. She considers, however, that the information that Art.39 seeks to protect (namely negotiations between an individual and the SPA in respect of employment issues) will necessarily contain some personal data and which may fall under the Art.25 exemption.
100. The Commissioner considers that the SPA has appropriately withheld certain of the Withheld Information in accordance with the Art.39 exemption, as is set out in **Appendix 1**.

#### **Art.41 – International Relations**

101. The full text of Art.41 of the Law can be found in the Legal Appendix at the end of this Decision Notice.
102. Art.41 provides an exemption for information that would prejudice relations between Jersey and another country, international organisation or international court.
103. The SPA has only sought to apply the Art.41 exemption to:
- a. IG10;
  - b. IG198, PO131, PB57, AM64 and AG84 (same email message); and
  - c. PO127 and PB55 (same email message).
104. In respect of the email chain at para.103(b), the SPA has acknowledged that there has been inconsistent redaction applied to this email chain and that such has actually been disclosed in full (save for some third party information) at AG84.
105. In respect of the email chain at para.103(c), the SPA has again indicated that it will not seek to rely on the Art.41 exemption instead applying Art.25.

106. That being so, the Commissioner does not need to consider whether or not the Art.41 exemption has been engaged nor consider the public interest test in respect of the messages referred to at paras.103(b) and 103(c).

107. In respect of the email chain at para.103(a) however, the SPA has sought to apply the Art.24 exemption in respect of a message which forms part of the email chain IG10. The SPA did not address, at all, the rationale for applying the art.41 exemption to part of this email chain nor the public interest test.

108. The Commissioner considers that it may nonetheless be helpful to set out in this Decision Notice the factors a SPA must take into account when seeking to rely on the Art.34 exemption.

*The nature of the prejudice to Jersey's international relations*

109. In order for this exemption to be engaged, the Commissioner considers that three criteria must be met:

- a. Firstly, the actual harm which the SPA alleges would, or would be likely to, occur if the Withheld Information was disclosed has to relate to the applicable interests within the relevant exemption;
- b. Secondly, the SPA must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- c. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the SPA is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the SPA. The anticipated prejudice must be more likely than not.

110. Furthermore, the Commissioner has regard to the UK case of Campaign Against the Arms Trade v. the Information Commissioner and Ministry of Defence [EA/2006/0040] and the comments of the Information Tribunal which suggested that in the context of s.27(1) (this being the UK equivalent to Art.41), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not otherwise have been necessary'<sup>10</sup>.

111. The SPA should be able to explain the likelihood of prejudice to the SPA and the nature of the prejudice to the economy before going on to explain why the public interest in maintaining the exemption outweighs the public interest in disclosure.

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<sup>10</sup> At paragraph 81.

112. Art.41 is a qualified exemption and therefore the Commissioner must consider the public interest test in relation to the information which she accepts is exempt. The test is whether, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

113. The Commissioner has considered the information contained within IG10 and, in particular, the part to which the art.41 exemption is said to apply and finds that the exemption is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **The Decision**

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114. The Commissioner's decision is that whilst the SPA is entitled to rely on some of these exemptions to withhold certain of the Emails (or parts thereof), some of the exemptions are not engaged and thus the SPA must disclose such information in order to comply with the legislation.

115. The complaint is therefore partly upheld.

### **Steps Required**

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116. The Commissioner requires the SPA to take following steps to ensure compliance with the Law:

- a. Disclose to the Complainant the documents the Commissioner has identified in **Appendix 1**.

117. The SPA must take the steps required by this notice **within 35 calendar days** of the date of this Decision Notice.

### **Failure to Comply**

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118. Failure to comply with the steps described above may result in the Commissioner making a written certification of this fact to the Royal Court of Jersey pursuant to Art.48 of the Law and may be dealt with as a contempt of court.

### **Right of Appeal**

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

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

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

Dated this *29<sup>th</sup>* day of November 2016

Signed *Emma Martins*

**Mrs Emma Martins**  
Information Commissioner  
Office of the Information Commissioner  
Brunel House  
Old 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.

**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.

**23 Information accessible to applicant by other means**

- (1) Information is absolutely exempt information if it is reasonably available to the applicant, otherwise than under this Law, whether or not free of charge.
- (2) A scheduled public authority that refuses an application for information on this ground must make reasonable efforts to inform the applicant where the applicant may obtain the information.

**24 Court information**

- (1) Information is absolutely exempt information if it is held by a scheduled public authority only by virtue of being contained in a document –
  - (a) filed with, or otherwise placed in the custody of, a court; or

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

in proceedings in a particular cause or matter.

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

(a) a court; or

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

in proceedings in a particular cause or matter.

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

(a) placed in the custody of; or

(b) created by,

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

(4) In this Article –

“arbitration” means arbitration to which Part 2 of the Arbitration (Jersey) Law 1998[5] applies;

“court” includes any tribunal in which legal proceedings may be brought;

“inquiry” means an inquiry or a hearing held under an enactment;

“proceedings in a particular cause or matter” includes an inquest or post-mortem examination.

## **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.

## **31 Advice by the Bailiff, Deputy Bailiff or a Law Officer**



Information is qualified exempt information if it is or relates to the provision of advice by the Bailiff, Deputy Bailiff or the Attorney General or the Solicitor General.

### **32 Legal professional privilege**

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

### **34 The economy**

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

- (a) the economic interests of Jersey; or
- (b) the financial interests of the States of Jersey.

### **35 Formulation and development of policies**

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

### **39 Employment**

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

- (a) an employee or prospective employee of the authority; or
- (b) representatives of the employees of the authority.

### **41 International relations**

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

- (a) the United Kingdom;
- (b) a State other than Jersey;
- (c) an international organization; or
- (d) an international court.

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

- (a) any Jersey interests abroad; or

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

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

- (a) a State other than Jersey;
- (b) an international organization; or
- (c) an international court.

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

- (a) the terms on which it was obtained require it to be held in confidence; or
- (b) the circumstances in which it was obtained make it reasonable for the State, organization or court to expect that it will be so held.

(5) In this Article –

“international court” means an international court that is not an international organization and that was established –

- (a) by a resolution of an international organization of which the United Kingdom is a member; or
- (b) by an international agreement to which the United Kingdom was a party;

“international organization” means an international organization whose members include any two or more States, or any organ of such an organization;

“State” includes the government of a State and any organ of its government, and references to a State other than Jersey include references to a territory for whose external relations the United Kingdom is formally responsible.