

Freedom of Information (Jersey) Law 2011

DECISION NOTICE

JOIC Reference	CAS-04767-Z7D0C9
Date of Decision Notice	9 April 2025
Scheduled Public Authority	Department for the Environment
Address	Union Street St Helier Jersey JE2 3DN
Date of Request	28 April 2024
Date of Response	24 May 2024
Date of request for Internal Review	24 May 2024
Date of Internal Review Response	26 June 2024
Date of appeal to Information Commissioner	3 July 2024

Summary/Decision

1. On 28 April 2024, the Complainant requested certain information from the Department for the Environment (the **SPA**) about a report, "*Groundwater Contamination Investigation: an assessment of the impact on water quality of contaminant migration from firefighting activities at Jersey Airport (JHA68) Post 2000.JHA068, CES, June 2000*" (the **Report**) that had been provided to the SPA by [X] (the **Request**).
2. The SPA wrote to the complainant on 24 May 2024 (the **Response**) stating that the Report was being withheld (the **Withheld Information**), citing the exemption at Art.26 of the Freedom of Information (Jersey) Law 2011 (the **FOI Law**). The Complainant did not agree with the Response and requested an internal review later that same day (the **IR Request**).

3. The SPA responded to the IR Request on 26 June 2024 (the **IR Response**) and upheld the previous decision that had been made.
4. The Complainant did not agree with the outcome of the Internal Review and issued an appeal to the Information Commissioner (the **Commissioner**) on 3 July 2024 (the **Appeal**).
5. The Commissioner's decision is to that the appeal is upheld. The SPA must provide a copy of the Report to the Complainant within 35 days of this Decision Notice, redacted as per version set out in the Confidential Annex (which is not provided to the Complainant as part of this Notice).

The Role of the Information Commissioner

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

The Request

8. On 28 April 2024, the Complainant submitted their Request in the following terms:

"Please supply me with a copy of a report: "Groundwater Contamination Investigation: An assessment of the impact on water quality of contaminant migration from firefighting activities at Jersey Airport (JHA68) Post 2000. JHA068, CES, June 2000."

Please note a similar FoI request, 596992879, was recently refused. Please consider this as a request for internal review if that is allowed under your procedures (The previous request was submitted by A N Other). If that is not allowable then please treat this as a new FoI request for the same report. The refusal cites Article 26 (Information supplied in Confidence) of the Freedom of Information (Jersey) Law 2011.

Please note that the confidence is owed to the supplier/author of the document and not to the Environment Department. The important quality is embodied in the word "supplied" identified in the title of Article 26. The document was not "supplied in confidence". It is a report from a public consulting group about a public resource (water) that may have been impacted by an activity of a part of Government.

There is no reason for CES to mandate that it was "supplied in confidence".

You also have cited a Settlement Deed (sic) as some sort of justification for the refusal.

R&P P.176/2004 (the public element of the Deed) includes at 8.4:

"Confidential documentation. There are over 175 documents, not all of which are confidential, related to the 10 years of this pollution and the subsequent claim against the manufacturer. The proposed Deed of Settlement, certain [sic] documents which name the chemical constituents and the manufacturer."

And at 8.3:

"In the draft Deed of Settlement, the parties agree to keep the very existence of this Deed of Settlement and each of the terms in it confidential." "Additionally, the name of the manufacturer is to be kept from the public domain."

As noted above the Deed of Settlement recognised that not all the documentation surrounding this matter are confidential.

In addition to which these confidences have long-since been dispensed with, indeed the publication on 19th October 2004 of R&P P.176/2004 immediately breached the confidentiality called for in 8.3!

The concern of the manufacturer centred on the withholding of its name, the settlement monetary sum together with the fact that the States of Jersey would defend the manufacturer against claims against it by persons in Jersey.

These supposed confidences have long-since been breached numerous times in the local media, national media but perhaps more importantly in this context by the Government of Jersey and by the States of Jersey:

PFAS Hydrogeological Study, Phase 1 Report Desk Study, Initial Conceptual Site Model and Scope for Further Assessment JUNE 2023

PFAS Hydrogeological Study Phase 1 report.pdf (gov.je) cites the manufacturer three times.

P.68/2016 (11) included: "the approval of a settlement from the manufacturer of the firefighting foam (3M) to the amount of approximately £2.6 million.

Draft Medium Term Financial Plan Addition for 2017 – 2019 (P.68/2016) – eleventh amendment (statesassembly.gov.je)

Hansard 22-03-01 records the announcement of the manufacturer, the monetary sum and the embargo on suing the manufacturer:

"Can I ask the Assistant Chief Minister, how does the deed giving Government £2.6 million in 2005, which for ever releases, acquits, discharges, and covenants, not to sue 3M or any 3M entity in relation to any and all airport claims, affect the outcomes and ways to support Islanders affected with exposure to these substances?"

(40) dep ward to cm re exposure to pfos and pfas.pdf (statesassembly.gov.je)

This question was not answered.

The previously referred to report "PFAS Hydrogeological Study, Phase 1 Report Desk Study, Initial Conceptual Site Model and Scope for Further Assessment JUNE 2023" is based upon the requested document and builds, develops and extends it.

It contains much, but not all, of the requested document. It is freely available in the public domain.

In summary the requested document is not confidential; it does not have any attributes of confidentiality and it was not supplied to authorities in Jersey with any implicit or explicit confidentiality. A later "version" of the report (authored by Arcadis) is in the public domain.

In addition and in the alternative the refusal of my request includes "The requested information forms part of the background and history to the Settlement Deed (sic) "as if merely being a part imports some confidentiality. It does not.

Furthermore R&P P.176/2004 includes:

"There are over 175 documents, [attached to the Deed of Settlement] not all of which are confidential" accepting that some of attachments were not and are not confidential.

Finally, both Government and States Assembly have breached the terms of the twenty-year-old Deed of Settlement numerous times, without any indications of legal action or complaints".

9. On 24 May 2024 the SPA provided the Response in the following terms:

"Our internal procedures do not permit your request to be treated as a request for an internal review of a response to "Another's" prior Freedom of Information response. This approach is consistent with JOIC's guidance which, amongst other matters note the complaints / internal review procedure are to be triggered whenever an applicant expresses dissatisfaction with the outcome of a Freedom of Information response.

As regards your request for a copy of the "Groundwater Contamination Investigation: An assessment of the impact on water quality of contaminant migration from firefighting activities at Jersey Airport (the Requested Document)", we note your comments with interest and have considered the same, but consider our earlier response to the similar Freedom of Information request you referenced and available at the link below remains applicable:

Copy of Groundwater Contamination Investigation June 2000 (FOI)

Whilst the requested document was provided by its author to a Government body in confidence, and on the condition that it could not be disclosed or used for any other purpose other than that it was provided for, the Article 26 (Information supplied in confidence) obligation which refusal is centred upon is the obligation of confidentiality which the scheduled public authority and Government owe to the manufacturer under the Settlement Deed.

Hansard records of what States of Jersey members might have said, do not create an actionable breach of the Settlement Deed.

On balance, whilst acknowledging there may be some public interest in the requested document being made available and in some cases that interest might be sufficient to outweigh any confidentiality provisions agreed with a third party, it is not considered that this is the case on this particular occasion".

Article applied

Article 26 - Information supplied in confidence

Information is absolutely exempt information if –

(a) it was obtained by the scheduled public authority from another person (including another public authority); and

(b) the disclosure of the information to the public by the scheduled public authority holding it would constitute a breach of confidence actionable by that or any other person"

10. The SPA declined to provide the information requested, citing the exemption provided for at Art.26 of the FOI Law.

11. The Complainant issued their IR Request on 24 May 2024 indicating that they did not agree with the SPA's reliance on Art.26 of the FOI Law. Specifically, in their IR Request, the Complainant stated *inter alia* that:

"...

The only real comment you have made of my extensive and logical reasons why the information should be released to me is that Hansard records don't constitute a breach. I cited reports and media articles quoting the manufacturer's name but you have glossed over these.

In balancing the arguments for releasing against withholding the report you have ignored all bar one of my justifications for releasing against your tacit acceptance of "there may be some public interest in the requested document".

Please ensure that the internal review is conducted by a different member of staff, hopefully more senior than the staff member who just echoed the previous refusal".

12. The results of the Internal Review were communicated to the Complainant on 26 June 2024 as follows:

"This review has been completed by two senior staff members of the Government of Jersey, independent of the original decision-making process.

The original response has been reviewed and assessed to identify whether the application of the exemption had been applied correctly and whether it was appropriate to withhold information.

The Panel, having considered all aspects of this case, specifically focused on information provided in the original response above, namely, that the document "was provided by its author to a Government body in confidence, and on the condition that it could not be disclosed or used for any other purpose other than that it was provided for".

The Panel's decision therefore is that, on balance, the application of Article 26 (Information Supplied in Confidence) of the Freedom of Information (Jersey) Law 2011 has been correctly applied.

In terms of other information already in the public domain, the Panel concluded that this does not release the Government of Jersey from complying with statutory obligations in terms of information sharing under the Freedom of Information (Jersey) Law 2011 in response to your request; and in any event any such information already in the public domain would be exempt under Article 23 (Information accessible to applicant by other means) of the Freedom of Information (Jersey) Law 2011."

The Investigation

Scope of the case

13. On 3 July 2024, the Complainant contacted the Commissioner to appeal against the IR Response. The Complainant asked the Commissioner to review the Complainant's Request and the responses received from the SPA to ascertain whether what had been provided was in accordance with the FOI Law and whether the exemption cited by the SPA was appropriately applied.
14. The Commissioner has set out in this Notice the issues he has had to consider in respect of the relevant exemption cited by the SPA.

15. In coming to a decision on this matter, the Commissioner has considered all the relevant submissions, or parts of submissions, made to him by both the Complainant and the SPA. He is satisfied that no matter of relevance has been overlooked.

Chronology

16. On 18 July 2024, the Commissioner wrote to the SPA to advise that the Complainant had made an Appeal to the Commissioner, pursuant to Art.46 of the FOI Law. The SPA was asked to provide their written submissions in response to the complaint made by the Complainant.
17. The SPA responded to that letter on 26 July 2024. Further questions were raised by the Commissioner in an email dated 12 August 2024 to which the SPA responded on 12 September 2024 providing detailed explanations as to why it considered the Art.26 exemption had been appropriately applied in this case. Additional queries were raised by the Commissioner on 11 November 2024 which the SPA responded to on 16 December 2024.

Analysis

The Complainant's position

18. The Complainant's position is as set out in the Initial Request, their IR Request and also very fully in the appeal document provided to the Commissioner. In short, the Complainant does not agree that the Report was lawfully withheld by the SPA.
19. Specifically, in their appeal to the Commissioner, the Complainant stated:

"The information is a historic (> 20 years old) factual report on the impact of certain, now ceased, activities upon the Island's public water supply. It was authored by a UK consulting company and was commissioned by Jersey's Environment Department.

The essence of the refusal is that the information was supplied in confidence; this seems unlikely, and evidence has not been proffered to support this assertion. Furthermore, the Government of Jersey has supplied this information to a commercial competitor (Arcadis) of the author without it seems any action being instigated for this "breach of confidence".

The supply, to Arcadis, along with many other reports relating to water supplies in Jersey, was in connection with a commission to produce a follow-up report which would be enlightened with new information gleaned since the production of the subject report.

Please see confirmation of this in the credit Arcadis gave to the subject report (page 9).

My purpose in seeking the information is to better understand the knowledge at the time that a crucial decision was taken by the States of Jersey to not clean-up the site of the pollution but rather move it to one side. (P.176/2004).

There is tremendous public appetite for information about PFAS in Jersey. The 30-year-old saga has in the past few years seen much publicity. Reports of many Islanders falling ill from the long-term consequences of PFAS poisoning led to the Public Health Department establishing a panel of scientific experts from around the world to report on what can, and should, be done to alleviate the suffering. Costs of this work will likely exceed a million pounds. Over 90% of the Islanders that have had their blood PFAS levels measured have been found to have raised levels, sufficient to warrant treatment were any to be identified.

Whilst the Public Health Department's activities and those of its Scientific Advisory Panel are held in public and open to comment and criticism, the Environment Department's

contribution, including the report I seek, which it commissioned, is secret. At every turn the Environment Department refuses to co-operate and explain its position.

This has led to a deep distrust and suspicion about its motives for seemingly wanting to hide from inspection.

The requested report is after all more than 24 years old and has been superseded by a subsequent report (the Arcadis report), which thanks to Public Health's work is in the public domain.

In conclusion refusing to release this decades old factual report about a public resource, water, and which has recently been supplied to a competitor, only serves to re-enforce suspicions about the motive. Publication of the report would go some small way to mitigate these suspicions. That the Environmental Regulator (the Environment Department "regulates" itself) has failed to take action to stop the pollution has sown not a seed but a whole forest of mistrust in the Department which has spilled over into the whole Government. The public's view of how this pollution crisis has been allowed to continue year in year out is anything but a transparent view. Understanding what the situation was at the time in 2004 when the States of Jersey was convened for an in-camera debate on the matter will help appreciation of the situation or confirm the suspicions of nonfeasance.

It is extremely unlikely that the author of the requested report would commence action against Jersey Government for a breach of confidence and even more unlikely still that such action would succeed."

The SPA's position

20. In addition to explanations provided in its Request Response, and IR Response, the SPA was invited to provide submissions to this office and to provide the Commissioner with a copy of the Report (such constituting the Withheld Information).
21. The SPA contends that the Report was commissioned by the "Harbours and Airport Committee of the States of Jersey" who provided it to the SPA and because the SPA had regulatory oversight of Jersey Airport at that time. As part of its submission to the Commissioner, the SPA said that:

"reports to regulators have the necessary quality of confidence and the ongoing receipt / holding of the same by the SPA was thus, implicitly on a confidential basis for that regulatory purpose.

- *it is considered that unauthorised disclosure of the Withheld Information would cause detriment to the SPA and / or other SPA and public authorities constituting the States of Jersey in particular as the same would be in breach of the terms upon which the Jersey Airport - Fireground Remediation Deed of Settlement between Harbours and Airport Committee for and on behalf of the States of Jersey and the supplier of fire fighting media for Jersey Airport (the Settlement Deed) was settled (see further below).*

Each of the above matters are of note in that they clearly illustrate the confidential basis under which the report information was commissioned, received and held by the SPA."

22. The SPA considers that the Report forms part of history, background and negotiations upon which the Deed of Settlement was settled and to release it would "effectively constitute a breach of the terms of the Settlement Deed".

Analysis

23. Relevant extracts from the FOI Law can be found in the Legal Annex at the end of this Decision Notice, but Art.26 of the FOI Law is set out, as follows:

"Information is absolutely exempt information if –

- (a) it was obtained by the scheduled public authority from another person (including another public authority); and*
- (b) the disclosure of the information to the public by the scheduled public authority holding it would constitute a breach of confidence actionable by that or any other person."*

24. For the exemption to be engaged, the following criteria must be fulfilled:

- a. the information must have been obtained by the SPA from another person (including another public authority);
- b. disclosure of the withheld information must constitute a breach of confidence by the SPA or any other person;
- c. a legal person must be able to bring an action for the breach of confidence to court; and
- d. that court action must be likely to succeed.

25. Art.26 is an absolute exemption so there is no public interest test to be carried out under the FOI Law. However, the SPA will need to carry out a test to determine whether it would have a public interest defence for the breach of confidence. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.

26. When determining if disclosure would constitute a breach of confidence, the SPA will usually need to consider;

- a. whether the information has the quality of confidence,
- b. whether it was imparted in circumstances importing an obligation of confidence, and
- c. whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Was the information obtained from another person?

27. The Commissioner has reviewed the Report in the usual way. The Report sets out who has commissioned it and states that *"CES has been commissioned **by Jersey Airport, on behalf of the States of Jersey**, to investigate the extent of groundwater contamination of the St Ouen's Bay aquifer, as a result of past operations at the fire training ground (FTG) at Jersey Airport"* (emphasis supplied).

28. Accordingly, the Commissioner notes that the Report was commissioned by Jersey Airport (prepared by Consultants in Environmental Studies Ltd (**CES**)) and provided to the SPA in its capacity as the regulator of the same (Jersey Airport) and this element of the exemption is met.

29. Having established that the Report was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOI Law) would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure of the Report constitute an actionable claim for breach of confidence by the SPA or any other person

30. With regards to the second criterion, the Commissioner notes that the usual elements required to bring an action for breach of confidence are as set out in para.26 above.

31. For that claim to be 'actionable' within the meaning of Art.26(b) of the FOI Law, the SPA must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

Does the information have the necessary quality of confidence?

32. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
33. The Complainant does not accept that the quality of confidence applies because information about the foam manufacturer and their identity are already in the public domain, as is the fact that there was a settlement between the manufacturer and the Government of Jersey. In contrast, the SPA considers the information does have the necessary quality of confidence in that it is more than trivial and not otherwise accessible. It has not been previously published and therefore is not considered to be in the public domain.
34. In this case, the SPA informed the Commissioner that the Report was not and is not otherwise accessible to the public and the Commissioner is satisfied that is the case. The Commissioner is also satisfied that the information is not trivial; the Report produced by CES follows their investigations on the extent of groundwater contamination of the St Ouen's Bay aquifer as a result of past operations at the fire training ground at Jersey Airport which was, and remains, a significant issue of concerns to islanders.
35. The Commissioner has seen the Report and notes that there is a limitation stipulated by the writer as to use of the Report and its dissemination. It is classified as an "*internal report*" for Jersey Airport's sole use and that "*it should not be relied upon or use for other than the stated purpose without the express written permission of CES*".
36. Whilst the SPA advised the Commissioner that the Report was provided by Jersey Airport to the Harbours and Airport Committee on a confidential basis and because the Committee was Jersey Airport's regulator at the time, it was not able to provide the Commissioner with any contemporaneous evidence surrounding the transmission of the Report from Jersey Airport to the Committee, simply saying that "*reports to regulators have the necessary quality of confidence and the ongoing receipt / holding of same by the SPA was thus, implicitly on a confidential basis for that regulatory purpose.*" i.e. no specific explicit conditions appear to have been attached by Jersey Airport regarding the SPA's use of the Report, but the SPA suggests that the restrictions are essentially obvious and/or implicit in light of the circumstances in which the Report was provided.
37. Notwithstanding the above, the SPA submitted to the Commissioner that the report forms part of the history, background and negotiations entered into by "*the Harbours and Airport Committee for and on behalf of the States of Jersey; and (2) the foam manufacturer*" under a Settlement Deed with strict confidentiality clauses, and its disclosure would give rise to an actionable breach of confidence by the parties to that deed (i.e. they believe that it could give rise to a cause of action by the foam manufacturer).
38. Whilst the Report is clear on its face about its use and dissemination, noting the lack of evidence about its transmission to the SPA, the Commissioner has reservations that the Report was imparted with any obligation of confidence as this could not be evidenced by the SPA and once in its hands, it was for the SPA to determine its use and audience.

Would disclosure be detrimental to the confider?

39. When considering any detriment to the confider, the parties affected by disclosure would be Ports of Jersey (of which Jersey Airport forms part) and CES. It is, in reality, Jersey's Airport's report as they were the ones who commissioned it from CES.

40. Upon questioning by the Commissioner, the SPA confirmed that it had not made any attempt to bring the Request to the attention of Ports of Jersey or CES and were therefore unable to provide the Commissioner with any assistance as to whether Ports of Jersey or CES considered they would actually be affected by disclosure of the Report or whether they resisted its disclosure. It is not clear whether CES actually remains in operation.
41. Instead, the SPA focused on the fact that unauthorised disclosure of the Report would actually cause detriment to the SPA and public authorities constituting the States of Jersey generally, as disclosure of the Report would put them in breach of the terms of a Deed of Settlement entered into between Harbours and the Airport Committee (for and on behalf of the States of Jersey) and the manufacturer of the foam. The Commissioner was advised that the foam manufacturer has declined to the disclosure of the settlement agreement and, accordingly, the SPA's position is that because the Report forms part of the "*history, background, and negotiations*" that is "*should remain confidential in line with the terms of the settlement.*" The SPA considers that there is a possibility that the foam manufacturer could have a claim for breach of confidence if the Whitheld Information is disclosed.
42. The Commissioner was provided with information relating to the Deed of Settlement, including information which is already in the public domain, specifically, [a Proposition dated 19 October 2004](#). Para.8 of that Proposition deals with a claim submitted against the foam manufacturer and specifically notes the following in terms of confidentiality surrounding the terms of the settlement:

"8.3. Confidentiality. The main problem with bringing this Report and Proposition to the attention of the States is the need for confidentiality. In the draft Deed of Settlement, the parties agree to keep the very existence of this Deed of Settlement and each of the terms in it confidential. The history, background and negotiations over the Deed of Settlement are confidential save as is required to achieve ratification by the States of Jersey or as is required by law or the proper discharge of official duties by the States of Jersey. Additionally, the name of the manufacturer is to be kept from the public domain.

8.4. Confidential documentation. There are over 175 documents, not all of which are confidential, related to the 10 years of this pollution and the subsequent claim against the manufacturer. The proposed Deed of Settlement, certain documents which name the chemical constituents and the manufacturer (see Appendix 2) and a confidential chronology of events compiled by our consultants and Environmental Services for the Medical Officer of Health and the Committee are all available for inspection at the office of the Greffier of the States at Morier House. They are available for inspection by all States' Members at any stage prior to the ratification process being debated in the States' Assembly. Members will appreciate how difficult it is to secure a settlement of the claim which the Harbours and Airports Committee considers is beneficial and in the public interest, when the other party insists on an obligation of confidentiality to the extent that the same is achievable; the Committee asks Members to respect the confidentiality which has been agreed."

43. The Commissioner has seen the precise confidentiality terms as applicable to the terms of the Settlement Deed. They cannot be replicated here.
44. The Commissioner has noted the SPA's position but is also cognisant of the fact that much information relating to this matter is already in the public domain (and, indeed, has been subject to three (3) previous appeals to the Commissioner over recent years). Whilst the SPA considers that this Report forms part of the "*history and background*" to the Deed of Settlement, the Commissioner notes that the Report was commissioned four (4) years prior to the Deed of Settlement was concluded and much of the "*history and background*" (if not all) is already in the public domain i.e. the public already know that foam used by Jersey Airport caused contamination to certain of the surrounding land and many other scientific reports have been published since that time.

45. Although Art.26 is an absolute exemption, it is accepted that if there is an overriding public interest in disclosure, this can be used as a defence against any breach of confidentiality that might be brought against a public authority disclosing information under FOI Law. In other words, the Commissioner must balance the public interest in the information with the inherent public interest in preserving the principle of confidentiality.
46. This test doesn't function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence. However, it does not require exceptional circumstances to override a duty of confidence that would otherwise exist. It is a test of proportionality; whether there is a public interest in disclosure which overrides the competing interest in maintaining the duty of confidence.
47. The Complainant has argued that there is significant public interest for information about PFAS in Jersey. They also state that over 30 years there has been much publicity and reports about *"many islanders falling ill from the long-term consequences of PFAS poisoning"* which led to the *"Public Health Department establishing a panel of scientific experts from around the world to report on what can, and should, be done to alleviate the suffering. Costs of this will likely exceed a million pounds"*
48. The Complainant further states that as noted in the Deed of settlement not all the documentation surrounding it are confidential, and that the confidences have long since been breached as the financial terms of the settlement and the name of the manufacturer have been disclosed by local and national media numerous times. The Complainant also states that the report is 24 years old and a later "version" of the report (authored by Arcadis) published in recent years, contains much of the requested information, but not all. Indeed, the Arcadis Report refers to the following:

"Groundwater Contamination Investigation: An assessment of the impact on water quality of contaminant migration from fire fighting activities at Jersey Airport (JHA68) Post 2000. JHA068, CES, June 2000.

A sample of the primary fluorinated surfactant components of the AFFF was obtained, to be used as a standard for analysis. Results of the groundwater monitoring and analysis of water samples indicate a generally westerly groundwater flow and migration of contaminant from the fire training area. Regionally there is considered hydraulic conductivity between the blown sand and the Jersey Shale. Where clay is present in the sand, water is believed to be perched. Currently, insufficient information is available to ascertain long term AFFF trends within groundwater. No correlation was identified between salinity and AFFF concentration (AFFF not affected by short term fluctuations in inorganic water quality). Le Plat Douet is considered to form the northern limit of the St Ouen's Bay contaminant plume. The plume is approximately 400m wide running westerly from the FTG. AFFF was identified in stream samples feeding the Pont Marquet public supply, considered to be related to deployment of AFFF during an accident in 1980 in upper Pont Marquet catchment."

49. And at Appendix B of that document:

"Water Quality Impact Assessment from Fire Fighting Jun-00 JHA068 CES" – the Reporting Company is "CES"

50. The SPA did not provide the Commissioner with specific public interest arguments in support of the disclosure of the Whitheld Information which would also provide a defence for breach of confidence, it simply acknowledged to the Complainant that in some cases there may be some public interest in the requested document being made available but not in this case.

51. The SPA submitted that disclosure of the Withheld Information *"has the potential to damage Government's ongoing ability to negotiate agreements and to create reputational damage for the Government. That the extent of any reputational damage may be particularly acute where Government has agreed to keep some information confidential, and the condition of confidentiality was recognised as being fundamental to the agreement in question. There being significant public interest in maintaining the sanctity of parties abiding by a settlement and being successfully settle matters, rather than incur the time and financial costs of a trial"*.
52. The SPA also submitted to the Commissioner that a report that is 24 years old is arguably of any real public interest, and that more up to date reports have been published on the matter of PFAS as highlighted by the Complainant.

Commissioner's Decision

53. The Commissioner does not consider that the SPA has advanced any realistic arguments as to why the Art.26 exemption applies in this case.
54. The Commissioner does not consider that the foam manufacturer likely has a cause of action against the SPA for disclosure of the Report. The confidentiality provisions in terms of the Settlement (which is public knowledge) are very broadly construed by the SPA and suggest that essentially any historical document relating to the use of foam at Jersey Airport, if published, would give rise to an action against the SPA. If it were the case that no other information about this matter and, specifically about the fact that the chemicals in the foam had contaminated the land surrounding Jersey Airport would likely have been published, but they have and there is now much documentation about this matter in the public domain, as the Complainant has noted. Whilst information about any terms of settlement would usually fall within scope of any confidentiality provisions, the Report does not contain any such information (and could not do so, being published some four (4) years previously).
55. If anyone has a cause of action, it would potentially be CES as their stipulations were very clearly set out in the Report. However, no stipulations were apparently attached to the Report when it was transmitted to the SPA and the SPA did not take any steps to reach out to CES to seek its views. Indeed, it is not clear to the Commissioner whether that entity (or any successor) actually remains in existence and able to pursue any claim for breach of confidence. If there was likely to be any detriment to CES, it would have been at the point the Report was transmitted to the SPA some 25 years ago. The SPA has not suggested this to be the case and so the Commissioner does not consider that disclosure of the Report more widely (i.e. to the public at large) would lead to any detriment on the part of CES (if it still exists).
56. Similarly, although the SPA has provided vague arguments about the States as a whole being subject to detriment by disclosure because it considers the foam manufacturer could possibly bring an action for breach of confidence, it did not actually seek the manufacturer's views instead relying on arguments relating to a completely different issue (release of a settlement agreement) which is not relevant to the Request that has been made.
57. The Complainant provided cogent arguments relating to transparency, openness and scrutiny and the Commissioner accepts that the Complainant has a genuine interest in the matters at the heart of the Report and despite the SPA's public interest arguments, the Commissioner's view is that there is a strong and compelling public interest in this matter.
58. In the Commissioner's view, the SPA has failed to establish that the prospect of detriment is either likely or substantial. Therefore, the Commissioner is not persuaded that disclosure of the Report would cause any reputational damage or risk of retribution. He has seen nothing in the Report that would lead to such a conclusion.

59. The Commissioner has also seen the Report which contents focus on the extent of contamination in certain areas and makes recommendations for monitoring; it does no more than that. It is common knowledge that the ground is contaminated as a result of foam used by Jersey Airport and that it affected certain land (and properties) in the surrounding area.
60. The Commissioner is therefore of the view that disclosure of the Report would not be an actionable breach of confidence and Art.26 is not engaged.
61. The SPA must disclose the Report subject to any appropriate redactions being applied in respect of third party information (including in respect of any personal information) about properties within the affected area. A marked-up report is provided to the SPA in the Confidential Annex to this Decision Notice.


The Decision

62. The Commissioner considers that in respect of the Report, the SPA misapplied Art.26 of the FOI Law.
63. Accordingly, the Complainant's appeal is fully upheld.
64. The SPA must provide the Report (subject to appropriate redactions) within 35 days of the date of this Decision Notice.

Right of Appeal

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

Dated this 9 day of April 2025

Signed..... 

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

8 General right of access to information held by a scheduled public authority

If a person makes a request for information held by a scheduled public authority –

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

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

- (1) A scheduled public authority may refuse to supply information it holds and has been requested to supply if the information is absolutely exempt information.
- (2) A scheduled public authority must supply qualified exempt information it has been requested to supply unless it is satisfied that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.
- (3) A scheduled public authority may refuse to supply information it holds and has been requested to supply if –
 - (a) a provision of Part 3 applies in respect of the request;
 - (b) a fee payable under Article 15 or 16 is not paid; or
 - (c) Article 16(1) applies.

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

- (1) A scheduled public authority must deal with a request for information promptly.
- (2) If it supplies the information it must do so, in any event, no later than –
 - (a) the end of the period of 20 working days following the day on which it received the request; or
 - (b) if another period is prescribed by Regulations, not later than the end of that period.
- (3) However, the period mentioned in paragraph (2) does not start to run –
 - (a) if the scheduled public authority has, under Article 14, sought details of the information requested, until the details are supplied; or
 - (b) if the scheduled public authority has informed the applicant that a fee is payable under Article 15 or 16, until the fee is paid.
- (4) If a scheduled public authority fails to comply with a request for information –
 - (a) within the period mentioned in paragraph (2); or

(b) within such further period as the applicant may allow,

the applicant may treat the failure as a decision by the authority to refuse to supply the information on the ground that it is absolutely exempt information.

(5) In this Article "working day" means a day other than –

(a) a Saturday, a Sunday, Christmas Day, or Good Friday; or

(b) a day that is a bank holiday or a public holiday under the Public Holidays and Bank Holidays (Jersey) Law 1951^[4].

18 Where a scheduled public authority refuses a request

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

26 Information supplied in confidence

Information is absolutely exempt information if –

(a) it was obtained by the scheduled public authority from another person (including another public authority); and

(b) the disclosure of the information to the public by the scheduled public authority holding it would constitute a breach of confidence actionable by that or any other person.

CONFIDENTIAL ANNEX