

Freedom of Information (Jersey) Law 2011

DECISION NOTICE

JOIC Reference	CAS-02732
Date of Decision Notice	7 July 2021
Scheduled Public Authority	Justice and Home Affairs
Address	19-21 Broad Street St Helier Jersey
Date of Request	29 February 2020
Date of First Response	27 April 2020
Date of request for First Internal Review	27 April 2020
Date of First Internal Review and issue of Revised Response	19 June 2020
Date of request for Second Internal Review	25 June 2020
Date of Second Internal Review	7 August 2020
Date of appeal to Information Commissioner	2 September 2020

Summary/Decision

1. On 29 February 2020, the Complainant requested certain information from Justice and Home Affairs (the **SPA**) about a disciplinary complaint that had been made by the Complainant about Person 1 (the **Request**). Specifically, he sought unredacted copies of two letters (the first dated 11 October 2019) (**Letter B**) and the second dated 21 October 2019 (**Letter C**).
2. The SPA wrote to the complainant on 27 April 2020 (the **First Response**) stating that the information sought in the Request was being withheld (the **Withheld Information**), citing the

exemption at Art.25 of the Freedom of Information (Jersey) Law 2011 (the **Law**). The Complainant did not agree with the First Response and requested an internal review later that same day (the **First IR Request**).

3. The SPA responded to the IR Request on 19 June 2020 (the **First Internal Review**) and issued a revised response (the **Revised Response**).
4. The Complainant did not agree with the Revised Response and requested an internal review thereof on 25 June 2020 (the **Second IR Request**).
5. The SPA responded to the Second IR Request on 7 August 2020 (the **Second Internal Review**).
6. The Complainant did not agree with the outcome of the Second Internal Review and issued an appeal to the Information Commissioner (the **Commissioner**) on 2 September 2020 (the **Appeal**).
7. The Commissioner's decision is to that the appeal is partially upheld. The steps the SPA needs to take are as set out at the end of this Decision Notice.

The Role of the Information Commissioner

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

The Request

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

"On 24th October 2019 and again on 2nd December 2019, I requested information relating to my Disciplinary Complaint, submitted on 7th February 2019, against [name redacted] of the States of Jersey Police.

Thus far, the only communication I have received from you is a letter (20th December 2019) in which, in essence, you seek only to terminate your involvement in the handling of the Complaint.

That letter in no way or form responds to my outstanding requests for information. For that reason, I reaffirm that I am awaiting your full and proper response to the following requests (adapted from earlier correspondence cited above):

A. Bearing in mind that I informed you of a potentially prejudicial conflict of interests affecting the Chairman of the Jersey Police Complaints Authority, Mr. Howard Cooper, I request the names of the individuals appointed to the Investigating Panel. It is not sufficient, in these circumstances, to be informed that the Panel is required by law to comprise three persons designated by virtue of their functions within Jersey society. Likewise, you have not responded to my request for the identity (or even the official functions or departmental affiliation) of the person(s) who advised the Panel about the conflict of interests affecting Mr. Cooper; you merely refer to "the civil service".

B. In response to my earlier request for a copy of the communication from the Chairman of the Investigating Panel dated 11th October 2019 setting out the Panel's conclusions and recommendations, you responded (your letter of 26th November 2019) with the statement: "the Regulations do not provide for me to share a copy of the communication from the Chair

of the Panel setting out its conclusions and recommendations". That might be true. But likewise the Regulations do not expressly prohibit the sharing of that communication with me, the Complainant –and least of all when you, in your capacity as a Scheduled Public Authority, have been expressly asked to provide that information. If you seek to deny me access to that communication, it would be appropriate to do so in the manner required by the FOI Law, that is, by citing the applicable exceptions.

C. I also reiterate my request for a full and complete copy of your letter to the SoJP in which you set out the "lessons in relation to the process and procedure of recording and processing complaints" drawn from the Panel's examination of my Complaint.

The documents referred to in points B and C were produced by a public body set up according to the Law of Jersey and accountable to the tax-paying public and other users of the services provided by the Government of Jersey for its actions and opinions. You, in your capacity as Minister responsible for convening the Panel and also for overseeing the functioning of the SoJP, have controlling access to that public information and have been asked to provide it to me in my capacity as Complainant in this case.

Given that the documents already exist and are readily accessible to you, I anticipate that I shall receive them within twenty working days from the date of this e-mail, without recourse to the legal options that remain open to me.

For the avoidance of doubt: this e-mail is a Freedom of Information request as defined in the Freedom of Information (Jersey) Law 2011, and requires a response in accordance with that Law and the relevant guidelines and good practices".

11. On 27 April 2020 the SPA provided the First Response in the following terms:

"Response

This request is refused as the information is considered absolutely exempt under Article 25 (Personal Information) of the Freedom of Information (Jersey) Law 2011.

The information requested relates to a complaint and therefore needs to be considered as personal information under the Data Protection (Jersey) Law 2018. The information requested is held for a specific purpose and it is considered that release of the information would breach the principles of Article 8(1)(a) of the Data Protection (Jersey) Law 2018.

Article Applied

Article 25 Personal information

- (1) Information is absolutely exempt information if it constitutes personal data of which the applicant is the data subject as defined in the Data Protection (Jersey) Law 2018.*
- (2) Information is absolutely exempt information if –*
 - (a) it constitutes personal data of which the applicant is not the data subject as defined in the Data Protection (Jersey) Law 2018; and*
 - (b) its supply to a member of the public would contravene any of the data protection principles, as defined in that Law.*
- (3) In determining for the purposes of this Article whether the lawfulness principle in Article 8(1)(a) of the Data Protection (Jersey) Law 2018 would be contravened by the disclosure of information, paragraph 5(1) of Schedule 2 to that Law (legitimate*

interests) is to be read as if sub-paragraph (b) (which disapplies the provision where the controller is a public authority) were omitted."

12. The SPA declined to provide the information requested, citing the exemption provided for at Art.25 of the Law.
13. The Complainant issued their First IR Request on 27 April 2020. That email ran to some seven pages and is not replicated in full here as such would make this decision notice unwieldy. Suffice to say the Complainant did not agree with the SPA's reliance on Art.25 of the Law.
14. The results of the First Internal Review were communicated to the Complainant on 19 June 2020. Given the length of the First IR Request, the First Internal Review was similarly lengthy. Essentially, the SPA issued the Complainant with a Revised Response to the Request. The salient points from the First Internal Review/Revised Response are as follows:

"...Review response

Prior to commencement of an Internal Review, the original responding team and approver have revisited the decisions made in relation to this request. After further consideration of the public interest test and the application of the exemption, it was decided that they would, in the first instance, release an amended final response to this request. It is noted that this does not affect the ability of the requester to request an Internal Review should they remain unsatisfied with the revised final response.

Revised Final Response

A(i)

I request the names of the individuals appointed to the Investigating Panel.

When assessing whether it is appropriate to release the names of individuals, we are required to consider a number of factors in order to weigh up the rights and freedoms of the individuals concerned against the wider public interest in the release of this data. The factors that need to be considered include:

- The type of data concerned*
- The consequences of disclosure*
- The seniority of the individual (if a staff member)*
- The role of the individual*
- The reasonable expectation of the individual*
- The public interest versus an individual requester's interest.*

The request is to provide the name of the individual panel members.

The investigatory panel comprised three members

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Whilst there appears to be limited public interest in the release of this data, the roles of the Government employees concerned would carry a reasonable expectation that this information could be disclosed. Furthermore, it is not considered that the disclosure of this information would harm the rights of the individuals concerned.

The first two roles of the investigatory panel were filled by Mr Mark Rogers (Director General, as alternate for the Chief Executive Officer) and Mr Howard Cooper, Chairman of the Police Complaints Authority.

The third member of the panel was a third party appointed by the Minister for Home Affairs in accordance with the Regulations. This individual is not a Government of Jersey employee and would have an expectation of privacy. Given the limited public interest in identifying this individual, the details of the third member of the panel are withheld under Article 25 (Personal Information) of the Freedom of Information (Jersey) Law 2011.

A (ii) The identity (or even the official functions or departmental affiliation) of the person(s) who advised the Panel about the conflict of interests affecting Mr. Cooper

Advice was provided by a senior member of the Strategic Policy, Planning and Performance department.

B

A copy of the communication from the Chairman of the Investigating Panel dated 11th October 2019 setting out the Panel's conclusions and recommendations.

C

A full and complete copy of your letter to the SoJP in which you set out the "lessons in relation to the process and procedure of recording and processing complaints" drawn from the Panel's examination of my Complaint.

Whilst the data being requested is not 'sensitive personal data' as defined in the Data Protection (Jersey) Law 2018 there is limited public interest in the release of this data. The release of the data appears to be in the private interests of the individual requester. Complaints procedures, notwithstanding the employment level of the defendant, carry a high risk of prejudice against the defendant (and also potentially against the complainant). Public interest is not in favour of exposure of personal information in relation to complaints that have not proceeded past an investigatory panel.

After due consideration it was determined that there would be no sufficient means of redaction of the documents to remove solely the identity of the subject, as it is public knowledge who was within the relevant roles at the time of the complaint. If such a redaction were to be undertaken, not only would the details of the individual need to be removed but all dates and a number of other references. The limited public interest in release of the document would be removed.

Notwithstanding these difficulties, it is considered that release of extracts from each of the documents would not breach the Data Protection (Jersey) Law 2018 and would satisfy the requirements of legitimate public interest. Document B, having not been seen by the defendant, carries a greater weight of privacy and the extracts from this document have therefore been restricted to the conclusions and recommendations of the panel, as per the terms of the request:

Extracts from item B

The Panel did not find any evidence that the [redacted] has acted in any way that would justify a criminal or disciplinary charge. However, in the absence of a report or record of how [redacted] was advised on the matter, the Panel is of the view that the SOJP [redacted] have not paid sufficient attention to documenting their decision making process and communicating the rationale for the actions taken to the complainant.

Recommendation

The Panel strongly recommends that the SOJP provide [redacted] with a detailed and comprehensive response to [redacted] complaint. This response should clearly set out and explain the criteria by which the specific aspects of the complaint were measured and determined to be a civil matter and, therefore, not one which warranted further police action. The Panel would also recommend that the response should reveal the rationale for the decisions taken and the procedural steps that were followed.

Extracts from item C

The Panel did not question the experience or integrity of the reviewing officers in forming a view and reaching their decision in relation to [redacted] complaint. The Panel did not question the validity of the decisions made by those officers and acknowledged the discretion the States of Jersey Police has to determine which allegations and claims warrant further investigation. The Panel did not find any evidence that the matter had not received formal consideration and appropriate assessment.

Despite these positive findings, the Panel found that there was an absence of auditable records of the decision-making process and procedures which hindered that Panel's ability to assess the level or degree of analysis to which the complaint was scrutinised.

The Panel was clear that it would have expected to have seen an explanation and justification for the conclusion that was reached. The Panel was of the view that the SOJP [redacted] did not pay sufficient attention to documenting the decision-making process and communicating the rationale for the actions taken to the complainant.

These represent important lessons which need to be learnt.

Of particular importance is the need to ensure that auditable records of SOJP decision-making processes and procedures are kept; and that complainants receive a detailed and comprehensive response to their complaint, clearly setting out and explaining the criteria by which the specific aspects of the complaint were measured and determined.

The Panel recommended that SOJP provide [redacted] with a detailed and comprehensive response to [redacted] complaint".

15. The Complainant did not agree with the Revised Response and - following some further correspondence between the Complainant and the Unit - issued their Second IR Request on 25 June 2020, to which the SPA responded on 7 August 2020, *inter alia* as follows:

"Internal Review response

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

Whilst they have reviewed the arguments raised by the Requester, they have not sought to respond to these arguments, but have instead reviewed the information provided within the Freedom of Information review, to ascertain whether the utilised exemption was correctly applied.

The panel did note an inaccuracy within the submission of the Requester at point 13. The Requester states that the preliminary investigation of a complaint (if not dealt with internally within the SoJP) is conducted by the JPCA. To clarify this point, it should be noted that the JPCA do not conduct or undertake any investigations into complaints. The role of the JPCA as defined in the law is to 'supervise' an investigation as set out in Article 8 of the Police (Complaints and Discipline) (Jersey) 1999 - Referral of other matters to the Authority, and Article 9, Supervision of investigation of a member of the Force

A (i) I request the names of the individuals appointed to the Investigating Panel.

The panel noted the Review response error in stating that Mr Howard Cooper was a Government employee and noted that Mr Cooper was a lay Person appointed to the public office of Chair of the Jersey Police Complaints Authority. They clarified that the Jersey Police Complaints Authority is an independent organisation set up by the States of Jersey under the Police (Complaints and Discipline) (Jersey) Law 1999.

The Internal Review panel then discussed the role of the third member of the investigating panel and their expectation of privacy. After discussion it was considered that, due to his previous political career and high-profile positions, there would be sufficient public interest in releasing this information. They therefore confirmed the third panel member was Mr John Refault.

A (ii) The identity (or even the official functions or departmental affiliation) of the person(s) who advised the Panel about the conflict of interests affecting Mr. Cooper

The Internal Review Panel considered the Review had provided a significant response to this request, in that the request asks for 'even the official function or departmental affiliation' of the person who provided advice.

They noted the Review had confirmed that advice was provided by a senior member of the Strategic Policy, Planning and Performance department.

However, they also considered the senior position of the Government employee in question and agreed the seniority of the role weighted this information towards release. They therefore confirmed the Government employee advising the panel was the Director General, Mr Tom Walker.

B

A copy of the communication from the Chairman of the Investigating Panel dated 11th October 2019 setting out the Panel's conclusions and recommendations.

C

A full and complete copy of your letter to the SoJP in which you set out the "lessons in relation

to the process and procedure of recording and processing complaints" drawn from the Panel's examination of my Complaint.

The Internal Review Panel reviewed the letters in question. They considered the previous extracted information provided and agreed that whilst this went some way to answering the applicants request, it did not provide the full information requested. They did not consider the Review had purposefully distorted the information requested at Question B, rather the Review had sought to provide information within a very strict definition of Article 25 (Personal Information) of the Freedom of Information (Jersey) Law 2011.

The Internal Review Panel then considered whether they believed that a more lightly redacted copy of the letters would breach the privacy of either the complainant or the complaint subject. After due review, the Internal Review Panel agreed that it would be difficult to sufficiently redact the letters to avoid the potential for identification of the complaint subject.

They did, however, agree that due to the seniority of the complaint subject, the redacted letters should still be released. The redacted letters are therefore attached to this Internal Review, with the redactions applied under the following exemptions:

Article 25 Personal information

...

Article 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

Public interest test:

The Scheduled Public Authority (SPA) is withholding the release of the information as some of the information contained in the letters relates to the provision of Law Officer advice. Article 32 is a qualified exemption, which means that a public interest test is required. The public interest in disclosing information when this article is being applied must weigh particularly heavily in favour of disclosure in order to outweigh the inherent right to privilege. It is not considered the public interest in disclosing the information is outweighed by that in maintaining the exemption, as it is designed to protect the constitutional Law Officer privilege.

We note that parts of the redacted portions of the letters relate to your own personal data – should you wish to have this information released to you, the process for Subject Access Requests would need to be followed. It is noted that a requirement for Subject Access Request would be to provide verification of your identity

*The Subject Access Portal can be accessed at the following link:
<https://www.gov.je/government/dataprotection/pages/subjectaccessrequest.aspx>*

In relation to your final request, that the drafter of the original response be identified, we would note there is no obligation under the Freedom of Information (Jersey) Law 2011 to identify such individuals."

The Investigation

Scope of the case

16. On 2 September 2020, the Complainant contacted the Commissioner to appeal against the Second Internal Review. 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 Law and whether the exemptions were appropriately applied.
17. The Commissioner has set out in this Notice the issues he has had to consider in respect of the relevant exemptions cited by the SPA.
18. 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

19. On 17 November 2020, the Commissioner wrote to the SPA to advise that the Complainant had made an Appeal to the Commissioner, pursuant to Art.46 of the Law. The SPA was asked to provide their written submissions in response to the complaint made by the Complainant.
20. The SPA responded to that letter on 10 December 2020, providing detailed explanations as to why it considered the Art.25 and Art.32 exemptions had been appropriately applied in this case.

Analysis

ABSOLUTE EXEMPTIONS

Art.25 – Personal Information

21. The full text of Art.25 of the Law can be found in the Legal Appendix at the end of this Decision Notice.
22. Art.25 specifies that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the relevant data protection legislation in force at the time the decision to withhold the information was made.
23. Art.2 the Data Protection (Jersey) Law 2018 (**DPJL**) defines personal data as follows:
 - "(1) *Personal data means any data relating to a data subject.*
 - (2) *A data subject is an identified or identifiable, natural, living person who can be identified, directly or indirectly, by reference to (but not limited to) an identifier such as –*
 - (a) *a name, an identification number or location data;*
 - (b) *an online identifier; or*
 - (c) *one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the person.*
 - (3) *The following matters must be taken into account in deciding whether the person is identified or identifiable –*

- (a) *the means reasonably likely to be used by the controller or another person to identify the person, taking into account factors such as the cost and amount of time required for identification in the light of the available technology at the time of processing and technological factors;*
- (b) *whether the personal data, despite pseudonymization, is capable of being attributed to that Person 2y the use of information other than that kept separately for the purposes of pseudonimization."*

The SPA's position

- 24. In addition to explanations provided in its Revised Response, and Second Internal Review, that SPA was invited to provide submissions to this office and to advise the Commissioner of the contents of the Withheld Information. It provided the Commissioner with copies of Letters B and C in unredacted format.
- 25. Letter B is a letter to Person 1 and Letter C is a letter to the Minister. In both letters, identifying references to Person 1 have been redacted by the SPA. In Letter C, two references to another individual (**Person 2**) have also been redacted. Both letters also refer to the Complainant and contain the Complainant's personal data.
- 26. The SPA contends that the Withheld Information relating to Person 1 and Person 2 constitutes personal data and to release their information would breach Art.8(1)(a) of the DPJL. That article reads as follows:

"8 Data protection principles

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

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

- 27. In particular, the SPA submits that it is not fair in these particular circumstances to release the Withheld Information relating to Person 1 and Person 2 noting particularly that whilst in some exceptional circumstances, there is an obligation to share personal data with third parties where there is a 'substantial public interest', the SPA consider this is limited to where a disclosure is essential to prevent a serious or imminent threat to public health, national security, the life of the individual or a third party, or to prevent or detect serious crime. The SPA does not consider that releasing this data is essential due to any of the factors described above, and therefore the reliance on Art.25 of the Law was appropriate in these particular circumstances.
- 28. The SPA has indicated that on the basis that the Withheld Information constituting the Complainant's personal data will be released to them directly in accordance with the DPJL 2018 (such being disclosable under data protection legislation) but that it will not form part of any FOI log, as the Complainant's information would not be disclosable under FOI legislation.

The Complainant's position

- 29. The Complainant's position is as set out in the Second IR Request and also very fully in the appeal document provided to the Commissioner. In short, the Complainant does not believe that release of the Withheld Information in Letters B and C would constitute a breach of the DPJL 2018.
- 30. Specifically, the Complainant considers that Art.25 has been incorrectly applied in respect of Person 1's information and that *"such application does not achieve the intended purposes of the exemption, which is to protect a data subject's personal information. **In the case at hand***

[Person 1's] anonymity cannot be protected by Article 25 because his identity is already certain public knowledge within the same social, professional, chronological, legal and disciplinary context...Furthermore...the [SPA's] argument about the public interest in the disclosure of the names of individual persons is irrelevant when the exemption that is being invoked is the absolute exemption of Article 25, which requires no public-interest test. That entire argument is designed to disguise the failure to apply Article 25 correctly in the first place... the purpose of the redactions serving to conceal [Person 1's] identity appears to be essentially political – and hence unlawful under the FOI Law.."

31. The Complainant goes on to say that following the provision of the Second IR (which released more information), it was clear from a reading of the document and from other information that was publicly available that Person 1's identity was readily ascertainable via jigsaw identification and that, accordingly, "no legitimate purpose whatsoever is served by the [SPA's] persistent attempts to redact his identity out of the requested documents." The Commissioner notes the Complainant's comments regarding the identity of Person 1 and the fact that their identity is already known to the Complainant.

Analysis

32. The definition of "personal data" is as set out at para.23 above.
33. The Commissioner refers to the guidance note provided by the UK Information Commissioner (**ICO**) entitled "Determining what is personal data"¹. Whilst not binding in this jurisdiction, the Commissioner considers that the guidance is of assistance in assessing whether the Withheld Information (so, information about Person 1 contained in Letters B and C and information about Person 2 contained in Letter B) is capable of constituting personal data. At para.5 of that note, it poses the question "Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?" and, if the answer to that question is "yes" then "the data is 'personal data' for the purposes of the DPA". Similarly, at para.8 of the note it asks "Does the data impact or have the potential to impact on an individual, whether in a personal, family, business or professional capacity" and, if the answer to that question is "yes" then "the data is 'personal data' for the purposes of the DPA". The paragraph ends stating that "**What is being considered here is whether the processing of the information has or could have a resulting impact upon the individual even though the content of the data is not directly about that individual, nor is there any intention to process the data for the purpose of determining or influencing the way that person is treated**" (emphasis supplied).
34. The SPA has indicated that Person 1 and Person 2 are likely to be identified from the requested information and the Commissioner has had sight of the unredacted information.
35. The Commissioner is satisfied that the Withheld Information about Person 1 and Person 2 falls within the definition of personal data.
36. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the Law. The second element of the test is to determine whether disclosure would contravene any of the principles set out at Art.8 of the DPJL 2018.

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

37. The Commissioner has had to consider whether to release the Withheld Information would breach one of the principles set out at Art.8 of the DPL 2018. In this case, the SPA considers

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

that it is not fair to release the Withheld Information into the public domain and refers to Art.8(1)(a) of the DPL 2018 in this regard.

38. Art.9 of the DPJL 2018 sets out the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions specified in Schedule 2 of the DPJL 2018 applies.

39. The Commissioner considers that the lawful basis most likely applicable in this case is the basis set out at Schedule 2 Part 2 para.3 of the DPJL 2018 which states:

"The processing is necessary for

- (a) the administration of justice;*
- (b) the exercise of any functions conferred on any Person 2y or under any enactment;*
- (c) the exercise of any functions of the Crown, the States or any public authority; or*
- (d) the exercise of any other functions of a public nature with a legal basis in Jersey law to which the controller is subject and exercised in the public interest by any person."*

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

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

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

42. In Decision Notice 2018-01², this office considered, in depth, the application of Art.25 of the Law. In respect of information that may be in the public interest the following is useful in the context of this appeal:

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

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

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

- a. has the information been the subject of recent public debate?*
- b. does the subject matter of the record relate directly to the environment, public health, or safety?*
- c. would dissemination of the information yield a public benefit by –*
 - I. disclosing an environmental, public health, or safety concern,*
 - II. contributing meaningfully to the development or understanding of an important environmental, health, or safety issue, or*
 - III. assisting public understanding of an important policy, law, program, or service?*

² <https://oicjersey.org/wp-content/uploads/2018/11/Decision-Notice-2018-01-FINAL.pdf>

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

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

43. Information about an employee's actions or decisions in carrying out their job is still their personal data. However, given the need for accountability and transparency about public authorities, there must be some expectation of disclosure. On the other hand, information that may be held in a personnel file about their health or disciplinary record, for example, all relates to them as individuals and to their personal circumstances. There is a greater expectation that such information will not be disclosed.
44. Based on the above factors and having reviewed all the relevant information in this case, the Commissioner has determined that in respect of Person 1 it has not been demonstrated that disclosure of the Withheld Information (namely, the identity of Person 1) in Letters B and C is necessary such as to outweigh their fundamental rights and freedoms provided for in the DPJL 2018. The information relates to a complaint process involving Person 1 and that is a personal matter involving their performance. It is known to the Complainant but the SPA contends that it is not necessary and not fair to further disclose that information to the world at large. All pertinent information has already been disclosed to the Complainant, including the findings in relation to their complaint. The Commissioner considers that it would not be fair to disclose Person 1's information and, accordingly, there is no Article 9 basis for processing and so the disclosure of Person 1's information in Letters B and C would not be lawful under the DPJL 2018 and is therefore exempt under Art.25 of the Law.
45. In respect of Person 2, however, the Commissioner does not consider that it would be a breach of the DPJL 2018 to reveal that information. Whilst the information recorded in Letter C relates to Person 2's participation in a matter, it is clear that such references record Person 2's carrying out certain duties as part of their ordinary work functions i.e. them being tasked with and carrying out a particular role. The SPA's focus in their written submissions was not that disclosure of Person 2's information would be unlawful under the DPJL 2018, but rather than it was "not necessary" because the Complainant already has pertinent information that has been disclosed. The SPA also indicates that it is not in the public interest to release Person 2's information.
46. The Commissioner finds the issue in relation to Person 2 to be very finely balanced. However, it is clear that Person 2 was performing a public function as part of their role and the Commissioner considers that there is, on the face of matters, a public interest in knowing the identities of those who are tasked with and do carry out functions and who are tasked with making findings that affect members of the public. In this case, Person 2 was directly involved in dealing with matters raised by the Complainant and their findings are referenced in information that has already been released to them. It is also noted that other individuals tasked with reviewing the matters raised by the Complainant have had their identities released to the Complainant, in the Revised Response.
47. Accordingly, and on balance, the Commissioner considers that Letter B ought to be re-released to the Complainant with the redactions relating to Person 2 removed and that it is fair to release this information. This information must be provided to the Complainant within 28 days.

QUALIFIED EXEMPTIONS

Art.32 – Legal Privilege

48. In its response to the Commissioner's request for information, the SPA has provided its rationale as to why it considers legal privilege applies to certain of the Withheld Information. The SPA

advised in its written submission that it was actually Art.31 of the Law that should have been cited, rather than Art.32; so advice from a Law Officer, rather than general legal privilege.

49. Art.31 of the Law provides that:

"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."

50. The Commissioner has reviewed the one sentence that is said to be covered by the Art.31 exemption. He is satisfied that the information contained therein relates to the provision of advice given by a Law Officer. Accordingly, on the face of matters, Art.31 is engaged.

Public Interest Test

51. The exemption given at Art.31 is a qualified exemption. This means that even where the exemption is engaged, information is only exempted if the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. The focus here is whether the SPA was correct in concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.

52. The SPA has argued that Art.31 reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of such advice without the Law Officers' consent. The purpose of this confidentiality is to protect fully informed decision making by allowing Government to seek legal advice in private, without fear of adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that Government is neither discouraged from seeking advice in appropriate cases, nor pressurised to seek advice in inappropriate cases.

53. Factors which may be relevant in balancing the public interest arguments may include whether a large number of people are affected, lack of transparency in the SPA's actions and misrepresentation of any advice given.

54. The Commissioner considers that safeguarding openness in communications between client and lawyer is essential to ensure access to full and frank legal advice. The application of Art.31 was considered in the Commissioner's recent decision³ and is not repeated here.

55. The Commissioner has reviewed those items to which the SPA says Art.31 applies and without revealing the contents of that information, considers that the exemption has been appropriately applied by the SPA.

GENERAL MATTERS

56. The Complainant has asked the Commissioner to "admonish" the SPA for the manner in which they dealt with the Request.

57. Whilst it is correct that the request took longer than the timeframe provided for by law to respond to, it must be acknowledged that the Request was being dealt with at the time the Island was getting to grips with the Covid-19 pandemic. The SPA also indicated that a significant part in any delay related to the seeking of legal advice by the SPA and that there was some delay in receiving this, due to the pandemic. Accordingly, whilst the Commissioner notes that technically the response took longer to respond to than might otherwise have been the case, this was due to

³ <https://jerseyoic.org/media/0y0dfhwb/chief-ministers-dept-decision-notice-107345662.pdf>

factors outside the SPA's control. There is no suggestion that the SPA was unwilling to respond (or, as the Complainant suggested, that they were trying to evade the request) and, indeed, the Commissioner notes the fact that information was released to the Complainant as part of the review process (i.e. the review process appears to be working in the manner in which such was intended).

The Decision

58. The Commissioner considers that in respect of Letter B, the SPA misapplied Art.25 in respect of Person 2. (The SPA appropriately applied the Art.25 exemption in respect of Person 1.)
59. However, the Commissioner considers that in respect of Letter C, the SPA has responded to the request for information appropriately in this case and that the exemptions provided for at Arts.25 and 31 of the Law were appropriately deployed.
60. Accordingly, the complainant's appeal is partially upheld and the SPA must release to the Complainant a revised version of Letter B, with the redactions pertaining to Person 2 removed.
61. (It is noted that any information comprising the Complainant's personal data in Letters B and C will also be released to the Complainant.)

Right of Appeal

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

Dated this 7th day of July 2021

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.

25 Personal information

(1) Information is absolutely exempt information if it constitutes personal data of which the applicant is the data subject as defined in the Data Protection (Jersey) Law 2005.

(2) Information is absolutely exempt information if –

(a) it constitutes personal data of which the applicant is not the data subject as defined in the Data Protection (Jersey) Law 2018; and

(b) its supply to a member of the public would contravene any of the data protection principles, as defined in that Law.

(3) In determining for the purposes of this Article whether the lawfulness principle in Article 8(1)(a) of the Data Protection (Jersey) Law 2018 would be contravened by the disclosure of information, paragraph 5(1) of Schedule 2 to that Law (legitimate interests) is to be read as if sub-paragraph (b) (which disappplies the provision where the controller is a public authority) were omitted.

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.