

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

---

**DECISION NOTICE**

---

<b>OIC Reference</b>	202-03-62556
<b>Date of Decision Notice</b>	14 May 2016
<b>Scheduled Public Authority</b>	Treasury and Resources (the <b>SPA</b> )
<b>Address</b>	Cyril Le Marquand House St Helier Jersey JE4 8UL
<b>Date of Initial Request</b>	15 April 2015
<b>Date of SPA's response</b>	28 April 2015
<b>Date of request for Internal Review</b>	05 May 2015
<b>Date of Internal Review</b>	30 June 2015
<b>Date of Appeal to Information Commissioner</b>	5 July 2015

**Summary/Decision**

---

1. On 15 April 2013, the complainant requested a copy of the King Sturge/Currie and Brown/Trowers & Hamblins report (2009) (the **Report**), such Report having been commissioned by the States of Jersey (the **States**). The Report was undertaken by Trowers & Hamblins (**Trowers**) regarding the proposed development between the Waterfront Enterprise Board (**WEB**) and Harcourt Developments Limited (**Harcourt**) in respect of the development of the Esplanade Quarter (the **Esplanade Development**).
2. The SPA initially withheld the entirety of the Report under Arts.33(b) and 34 of Freedom of Information (Jersey) Law 2011 (the **Law**), which the complainant subsequently contested.
3. After the complainant appealed to the Commissioner, the SPA subsequently also sought to apply the exemptions under Arts. 21, 26 and 35 of the Law.
4. The Commissioner's decision is that the SPA has correctly applied the exemptions for information supplied in confidence at Art.26, prejudice to commercial interests at Art.33(b) prejudice to the economy at Art.34 and prejudice to the formulation and development of government policy in this case and agrees that the Report was correctly withheld. The SPA, however, incorrectly applied the exemption at Art.21 in respect of vexatious requests.
5. She does not, however, require any further steps to be taken by the SPA.

**The Role of the Information Commissioner**

---

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

### **The Request**

---

8. On 15 April 2015 the complainant requested the following

*"King Sturge/Currie and Brown/Trowers & Hamlins report in 2009 on the Esplanade Quarter. Please can a copy be provided for public reference and given it is over 5 years old there should be no, very little, matters of confidentiality, especially of its island wide importance"*

9. On 28 April 2015 the SPA (via the Central Freedom of Information (FOI) Unit (the **Unit**)) responded to the Request in the following terms (the **Initial Response**):

*"This request is being refused under Article 33 of and 34 Freedom of Information (Jersey) Law 2011.*

*See details below.*

**FOI exemption(s) apply:**

*Freedom of Information (Jersey) Law 2011*

*Part 5*

*Qualified Exempt information*

**Article 33 Commercial Interests**

*Information is qualified exempt information if –*

- a. *It constitutes a trade secret; or*
- b. *Its disclosure would, or would be likely to, prejudice the commercial interests of a person (including the scheduled public authority holding the information)*

*Article 33 is a Qualified Exemption and therefore is subject to a Public Interest Test.*

**Article 34 The economy**

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

- a. *The economic interests of Jersey; or*
- b. *The financial interests of the States of Jersey.*

Article 34 is a Qualified Exemption and therefore is subject to a Public Interest Test.

### **Justification for exemption**

*The previous proposed development agreement for the Esplanade quarter is still the subject of court proceedings. The reports as requested cannot therefore be released at this time.*

*The information is of significant commercial value and its disclosure would, or would be likely to, prejudice the commercial interests of the scheduled public authority.*

*The very disclosure of some information and the premature disclosure of other information could have a long-term cost to the taxpayer and the economic and financial interests of the island.*

*Therefore we consider it would not be in the public interest to release this information at this time and these exemption(s) should be maintained."*

10. On 29 April 2015, the complainant responded to the Initial Response indicating that they were not in agreement with that decision. The complainant stated that if, however, the court case to which the SPA referred in the Initial Response was that of Harcourt v. States of Jersey Development Company then "non full disclosure would be accepted so as not to prejudice those proceedings, on the basis the commercial figures are simply redacted and the rest of the report is provided".
11. On 5 May 2015, the Unit responded to the complainant's email and indicated that the SPA had recommended that an internal review of the Initial Response should be carried out and a copy of the SPA's internal review policy was provided to the complainant.
12. On 31 May 2015, the complainant chased the Unit for a response and on 8 June 2015, the Unit responded by advising that the delay in reverting to the complainant was due to the fact that the department was awaiting legal advice.
13. The SPA's internal review on 30 June 2015 (the **Review**) upheld the SPA's initial refusal to release the requested information. The reviewer concluded that "the Treasury & Resources Department acted appropriately in refusing your request under Article 33 and 34 of the Freedom of Information (Jersey) Law 2011. It was appropriate to refuse the request on the basis that the previous proposed development agreement for the Esplanade quarter is still the subject of court proceedings. The information is of significant commercial value and its disclosure would, or would be likely to prejudice the commercial interests of the scheduled public body". The complainant was advised that if they were not happy with the outcome of the internal review then they may appeal to the Information Commissioner within 6 weeks.

## **The Investigation**

---

### **Scope of the case**

14. On 5 July 2015, the complainant contacted the Commissioner to complain about the way his Request and the Internal Review had been handled and to appeal the SPA's decision to withhold

the Report. The complainant specifically asked the Commissioner to consider the following points:

- a. There were many references in Hansard recording comments made by various politicians that the information contained within the Report was out-of-date and not relevant to the current phase of the Esplanade Development.
- b. Assurances had previously been provided to the complainant that the Report would be provided.
- c. In any event, the Initial Response was deficient as was the Review in that save for asserting that the requested information was commercially sensitive it failed to give any further information as to the analysis which had been undertaken by the SPA in coming to that conclusion.
- d. The complainant asserted that he would be prepared to receive the Report appropriately redacted so as not to jeopardise any court proceedings.

15. The complainant asked that the Commissioner review the SPA's refusal and to disclose the Report (either in whole or in part) if deemed appropriate.

### **Chronology**

16. On 4 August 2015, the Commissioner wrote to the SPA to advise that the complainant had appealed to the Commissioner regarding the SPA's handling of the Initial Request and subsequent Review, pursuant to Art.46 of the Law. The SPA was asked to begin collating the relevant documentation and prepare a written submission in response to the complaint. The SPA was asked not to send that information/submission to the Commissioner until requested to do so.

17. On 3 September 2015, the Commissioner wrote to the SPA asking for a copy of the requested information and their written submissions regarding the complaint.

18. The SPA responded on 3 November 2015.

19. Further questions were raised by the Commissioner in a letter dated 4 January 2016 (to which the SPA responded on 18 January 2016) and on 18 April 2016 (to which the SPA responded on 28 April 2016).

### **Analysis**

---

#### **Substantive Procedural Matters**

20. During the course of the investigation, the SPA clarified that, in addition to the exemptions as set out at Arts.33 and 34 of the Law and upon which they relied in the Initial Response, they also sought to rely on Arts.21, 26 and 35.

#### **Exemptions**



## **Art.21 – Vexatious Requests**

21. Art.21 states that a SPA may refuse a request if it is vexatious. The term “vexatious” is not defined in the Law but has received consideration before the UK Upper Tribunal (the **Tribunal**) in the case of Information Commissioner v. Devon County Council & Dransfield [2012] UKUT 440(AAC), (28 January 2013). The full text of Art.21 of the Law can be found in the Legal Annex at the end of this Decision Notice.
22. In Dransfield, the Upper Tribunal defined a vexatious request as one that is “*manifestly unjustified, inappropriate or improper use of a formal procedure.*” The Tribunal made it clear that the decision of whether a request is vexatious must be based on the circumstances surrounding the request and establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
23. Whilst decisions of the Upper Tribunal are not directly applicable in Jersey, given the similarities between the Law and FOIA, the Commissioner considers the findings of the Tribunal helpful.
24. In the Commissioner’s view, the key question for SPAs to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

### *The SPA’s position*

25. The SPA considers that this request is potentially vexatious and does not consider that the applicant has any real interest in the information sought. In so asserting, the SPA seeks to rely on other correspondence sent by the complainant regarding the Esplanade Development. The SPA contends that whilst previously having been willing to adopt a conciliatory approach and not treating any of the requests as vexatious, in light of the stance taken by the complainant they have, since the Initial Response, reviewed their position claiming now that this request is vexatious.
26. The complainant has also purportedly issued five other FOI requests (not all to this particular SPA), none of which relate to the Esplanade Development but rather various other Island issues. Such is characterised by the SPA as evidencing no real interest for disclosure of the Report but simply a desire to disrupt the Esplanade Development and/or thwart the SoJDC’s involvement in that project and/or enhance a competitor’s position in the marketplace. The SPA notes that whilst each request appears, in isolation, as entirely reasonable when placed together and in context, such requests assume the quality of being vexatious.
27. The SPA argued that the complainant, as an apparently ardent opposer to the Esplanade Development, has used the Law in order to bolster an apparent campaign to prevent SoJDC from developing the Esplanade.

### *The Claimant’s position*

28. The Commissioner has not considered it necessary to put such allegations to the complainant.

### *The Findings of the Commissioner*

29. For the following reasons, the Commissioner does not find the SPA's reasoning convincing. In her guidance<sup>1</sup> the Commissioner notes that one of the key questions the SPA should consider is whether the request has been made in order to cause a disproportionate or unjustified level of disruption, irritation or distress.
30. Firstly, the fact that the complainant may be opposed to the SPA/SoJDC/the Esplanade Development is not a matter which, of itself, demonstrates this request to be vexatious.
31. Secondly, the Commissioner does not believe that the requirement from her guidance for a SPA to provide "*clear evidence to substantiate its claim that the request is grossly oppressive*" has been met.
32. Thirdly, whilst the SPA has correctly identified that a SPA can take into account the wider context in which the request is made the fact that the complainant has made a number of separate requests under the Law is not enough to engage the exemption under Art.21. The Commissioner notes that the Initial Request was made on 15 April 2015, which pre-dated all of the subsequent five requests. The Commissioner further notes that none of those other requests relate to the Esplanade Development.
33. That being so, and given that such other requests had not been made at the time of the Initial Request (nor, indeed the Initial Response), the SPA cannot now seek to rely on subsequent requests to justify withholding disclosure of the Report on the grounds that the Initial Request was vexatious. The SPA seeks to assert that one may look at the entirety of the circumstances at the time the request was made but, at the time of the Initial Request no other requests had been made by the complainant. The Commissioner therefore does not accept that the Initial Request was vexatious due to the number of other requests made by the complainant. She also considers that the SPA were wrong to try and apply, with hindsight, the exemption as set out at Art.21 of the Law.
34. The Commissioner does not consider that this request meets the criteria for being considered vexatious and her finding is that the SPA was not entitled to rely on Art.21 to refuse to comply with the request.

#### **Art.26 – Information Supplied in Confidence**

35. The full text of Art.26 of the Law can be found in the Legal Annex at the end of this Decision Notice. As is clear from that article, two criteria must be met in order for the exemption to be engaged. This is an absolute exemption, if engaged.
36. Firstly, the information must have been obtained by the SPA from a third party.
37. Secondly, disclosure of the withheld information must constitute an actionable breach of confidence.

---

<sup>1</sup> <https://dataci.ie/wp-content/uploads/2015/01/Dealing-with-Vexatious-Requests-Art-21.pdf>

38. With regards to the first criterion, the Commissioner is satisfied that the relevant withheld information consists of submissions to the Report, contributed by five separate third parties (whose names are already in the public domain), as follows:

- a. Cushman & Wakefield;
- b. King Sturge;
- c. Currie & Brown;
- d. Harcourt; and
- e. Hopkins Architects (the **Report Contributors**).

39. In addition to those entities listed at para.38(a-e), it is further understood that certain of the Report Contributors also sourced information from other third parties (the **Report Third Parties**) which information was used by the Report Contributors. There is a non-disclosure agreement in place between the Report Contributors and the Report Third Parties. Consent for disclosure of the Report was not sought from the Report Third Parties.

40. With regards to the second criterion, the Commissioner considers that a breach will be actionable if:

- a. The information has the necessary quality of confidence. 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.
- b. The information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.
- c. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party. However, further developments in case law have established that information about an individual's private and personal life can be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider. Furthermore, case law also now suggests that any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right.

This follows the test of confidence set out in the English case of Coco v. AN Clark (Engineering) Ltd [1968] FSR 415<sup>2</sup>.

41. As previously stated, the Commissioner considers that information will possess the necessary quality of confidence if it is more than trivial and not otherwise accessible. The information should be worthy of protection in the sense that someone has a genuine interest in the contents

---

<sup>2</sup> Applied in Benest v. Langlois [1993] JLR 117 and Pell Frishmann Engineering Limited v. Bow Valley [2007] JLR n38.

remaining confidential. Generally, the Commissioner will not treat information as trivial if it relates to a personal matter and the confider or the person whom the information is about obviously attaches some importance to that information.

42. The Commissioner understands that Trowers, Cushman & Wakefield, King Sturge and Currie & Brown have all provided their consent to disclosure of the Report. Some reservations have been expressed as to the commercial sensitivity in relation to information about and provided by other third parties. Concerns have also been expressed the Report could be cherry-picked and misunderstood. As previously stated, certain of those Report Contributors have also obtained information from others which have informed the contribution they have made and which was provided in confidence. It is a possibility, therefore, that certain Report Third Parties could have a claim for breach of confidence if the Report is disclosed.
43. The Commissioner is satisfied that the relevant withheld information possesses the necessary quality of confidence. It is not trivial and it is not accessible to the general public.
44. The Commissioner considers that there are essentially two circumstances in which an obligation of confidence may apply: the confider has attached explicit conditions to any subsequent use or disclosure of the information or the confider has not set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances.
45. The SPA drew the Commissioner's attention to the fact that at the time the Report was commissioned, it was agreed to keep the Report confidential and agreed that the Report would not be used for any other purpose or disclosed to any other person. A Non-Disclosure Agreement was issued on 22 July 2008 by Trowers to the Report Third Parties providing information. Information was therefore provided on this basis and in the expectation that it would be kept confidential. The SPA further submitted that the presumption of confidentiality is implicit in the character of the information.
46. The SPA also drew the Commissioner's attention to the case of R v. Hackney London Borough Council [2014] EWHC 3499 which is similar in circumstances to the background upon which this Report was prepared. In particular, it concerned a viability appraisal, which contained commercially sensitive material which was to be treated as confidential and was not disclosable:

*"...the [Financial Report] was confidential. The ... report contained assumptions about build costs, sales costs and residual values. They were clearly matters of the utmost commercial sensitivity. Any reasonable person apprised of the facts would consider that was a genuine basis for the ... report to remain out of the public domain. The scope of the duty of confidentiality could vary from one case to another but in the circumstances here, where the information was provided and received on the reasonable basis that it would be treated confidentiality and concerned matters of commercial sensitivity it should be so treated..."*

47. In view of the explicit assurance of confidentiality given to the Report Third Parties who contributed to the Report, the Commissioner is satisfied that those who provided information for the compilation of the Report did so on the basis that it would be kept confidential. She is also satisfied that in the circumstances, those providing information which was ultimately fed into the Report, would have done so on the expectation that it would be kept confidential.

48. Whilst some of the Report Contributors have given consent to their contributions being made public, there are other Report Contributors who have not. Further, the Report Contributors who have provided consent have expressed some concern that releasing the information to the public may be undesirable given the commercial sensitivity of such information and also that information given to them by the Report Third Parties was also provided in confidence.
49. That being so, the Commissioner therefore finds that the second criterion at Art.26 (b) has been met.

*Public Interest Test*

50. Art.26 is an absolute exemption so there is no requirement to carry out a public interest test.
51. However, case law on the common law of confidence indicates that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a SPA can rely on a public interest defence. This effectively requires a SPA to carry out a test to determine whether it would have a public interest defence for breach of confidence when relying on the exemption at Art.26 to withhold information.
52. This test does not function in the same way as the public interest test as set out in the Law where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining an 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 public interest in maintaining the duty of confidence.
53. The SPA did not provide the Commissioner with specific public interest arguments in support of the disclosure of the Report which would also provide a defence for breach of confidence. However, it acknowledged more generally (in relation to the application of the other qualified exemptions it relied on) that there is a public interest in openness and transparency regarding the circumstances leading to the commissioning of the Report.
54. Whilst the Commissioner acknowledges the public interest in transparency and openness, the Report itself is not in the public domain. The SPA submitted that it was concerned that the publication of the Report could give rise to an actionable breach of confidence by third parties and further that whilst the public have shown an interest in the Esplanade Development, this was not to the level that the Minister would consider the release of a confidential document which could impact on extant legal proceedings and have a detrimental impact on the Island as a whole.
55. It is also noted that the Report was commissioned many years before the implementation of the Law (which came into force on 1 January 2015 some 6 years later).
56. The Commissioner has not been presented with any evidence to suggest that the public interest in disclosing the Report is of such significance that it outweighs the interest in maintaining the confidence of the various third parties who have contributed to the Report.



57. The Commissioner is therefore satisfied that all the information contained within the Report was provided by other people and that disclosing it would be a breach of confidence.

### **Art.33 – Commercial Interests**

58. The full text of Art.33 of the Law can be found in the Legal Annex at the end of this Decision Notice.

59. Art.33(b) provides an exemption from disclosure if the information would, or would be likely to, prejudice the commercial interests of any person. This is a qualified exemption, and is therefore subject to the public interest test.

#### *The SPA's position*

60. The SPA relies on Art.33(b) to further justify withholding the Report in its entirety. The Report contains information regarding the SPA's options and appraisal of future plans for the Esplanade Quarter in the context of its relationship with Harcourt. The SPA considers that disclosure of this information would not only cause commercial disadvantage to itself, but also to third parties including Harcourt. They say that other developers in the private sector would not be obliged to publish confidential internal reports and that SoJDC should not be treated differently to any other developer in the Island. The SPA also contends that release of the Report could potentially harm the commercial interests of those who have contributed to the Report.

61. The Commissioner first considered whether the information held by the SPA was exempt from disclosure under Art.33(b).

#### *Does the withheld information relate to commercial interests?*

62. Broadly speaking, Art.33 protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of Art.33 is dependent on a SPA being able to demonstrate that the following conditions are satisfied:

- a. Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the SPA holding it).
- b. In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.

63. Therefore, the first issue for the Commissioner to assess is whether, in this case, the SPA has identified relevant prejudices that the exemption is designed to protect against. If this is not found to be the case, the exemption is not engaged and there is no requirement to go on to consider the prejudice or public interest tests.

64. The term 'commercial interests' is not defined in the Law, however, it is understood to have a broad meaning, encompassing activities which have both a direct and an indirect effect on commercial activities. This will therefore include the buying or selling of goods and services as well as information which can be shown to affect a person's ability to undertake such activities

effectively. The Commissioner also notes the awareness guidance published by the UK ICO in the application of s.43(2) of FOIA (the equivalent provision to Art.33(b)), which details that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services"<sup>3</sup>.*

65. The Commissioner applies a three tier test to ascertain whether the exemption is engaged:

- a. Are the interests which will be prejudiced commercial?
- b. What is the nature of the prejudice in question?
- c. What is the likelihood of the prejudice occurring?

66. The SPA confirmed to the Commissioner that disclosure of the Report "*would be likely to prejudice*" the commercial interests of the SPA and/or other third parties if that detail was released.

67. In the context of this request, the Commissioner has reviewed the Report and the SPA's position that the information would affect its (and/or others') commercial interests. Having done so, the Commissioner has identified that the Report contains an assessment of the proposed deal with Harcourt as to whether such represented best value for the Public of the Island of Jersey (the **Public**) (in light of market conditions at that time) and whether there were appropriate levels of protection to the States and the Public, in the event Harcourt defaulted or failed to deliver the proposed project in a satisfactory and/or timely fashion. It includes expert reports from a number of third parties (who themselves sought contributions from other individuals). On this basis, the Commissioner accepts that the withheld information relates to both the procurement of services from Harcourt, the SPA's position as a purchaser in a commercial environment, and therefore relates to the commercial interests of the SPA and third parties.

*What is the nature of the prejudice?*

68. Art.33(b) consists of two limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the SPA and must be at least more probable than not. The SPA has stated that disclosure of the requested information "*would or would be likely*" to prejudice commercial interests. Where the Commissioner is not satisfied that the higher threshold of would prejudice is met but there is sufficient evidence to meet the lower threshold she may find that disclosure is likely to prejudice the specified interests.

69. The Commissioner has considered how any prejudice to the SPA's (and/or others') commercial interests would be likely to be caused by the disclosure of the withheld information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.

---

<sup>3</sup> [https://ico.org.uk/media/fororganisations/documents/1178/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](https://ico.org.uk/media/fororganisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf)

70. The SPA has informed the Commissioner that the Report was commissioned for the benefit of the Minister for Treasury and Resources to make certain decisions regarding the Esplanade Development. It was not a report commissioned by Web and the contents of the Report were not shared with Web, its successor SoJDC or, indeed, Harcourt. The Report contains financial information about the costings of the proposed development and financial forecast information. The SPA also contends that in allowing the publication of the Report then this would not allow the SoJDC to compete commercially if sensitive reports commissioned by its shareholder (the States) were disclosed to the public and competitors. This would put SoJDC at a disadvantage compared to private development companies who are under no obligation to publish information regarding the viability of their developments.
71. The Commissioner also notes that legal proceedings remain in train between Harcourt and SoJDC (the **Harcourt/SoJDC Proceedings**). The Report is not disclosable as part of those proceedings. The Commissioner has therefore considered the public interest in ordering disclosure (or part disclosure) of a Report which may impact on those proceedings.
72. The SPA has indicated that the Harcourt/SoJDC Proceedings are some way from conclusion. In any event, disclosing the Report could potentially impact on those proceedings: if the Report is disclosed in full it would be available when otherwise it would not be and could have an impact on any judgment. Depending on the outcome, this may then impact on the SoJDC and, consequently, the Public of the Island. The quantum claimed by Harcourt in respect of the contractual element of the claim is some £100 million and £6,937,309.02 in respect of the *quantum meruit* (works undertaken) claim. £44 million is also claimed against SoJDC in respect of unjust enrichment.
73. For Art.33(b) to apply, the prejudice claimed must be 'real, actual or of substance' and there must be a causal link between the disclosure and the prejudice claimed. Having considered the factual basis of this matter, the Commissioner accepts that damage to the SPA's (and SoJDC's and/or others') commercial interests is 'real, actual or of substance' and accepts that there is a logical connection between disclosure of the Report and prejudice occurring as described in the preceding paragraphs.
74. The Commissioner therefore considers that the prejudice claim is real, actual and of substance and that on this basis Art.33(b) of the Law was correctly engaged. As Art.33(b) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

The Public Interest Test

*Public interest arguments in favour of disclosing the requested information*

75. The SPA has recognised that disclosure of the information would promote greater openness and transparency in the SPA's activities (and, in particular SoJDC) through promoting accountability and trust. The Report contains details of how public monies were to be spent, and forecasts in respect of the project, including the viability of the proposed developer, Harcourt.
76. The complainant considers that there is significant public interest in ensuring scrutiny of the Esplanade Development and, in particular, why the development of the Esplanade did not progress with Harcourt.

77. The complainant argues that the age of the Report means that the information contained therein is out of date and is therefore likely to contain little (if any) confidential information. The complainant notes that various references to the Report are contained within Hansard as follows and which tend to suggest that the Report is viewed as a historical document of little use e.g.:

a. On 6 November December 2011 , the following is recorded on Hansard:

*"6.3 Deputy J.A.N. Le Fondre of St. Lawrence*

*Given that we have a debate on the Esplanade Quarter later on in the week, could the Chief Minister confirm that the 2008 King Sturge Report which forms part of the Trowers & Hamlin Report on the Esplanade Quarter states that the scheme, which for the benefit of the Members is the one that has been endorsed by this Assembly, will result in a negative sum of £50 million – i.e., will lose £50 million – and will he undertake to release unabridged that report, particularly the King Sturge element to States Members?*

*Senator I.J. Gorst:*

*I have fulfilled other functions in this Assembly and Government prior to the one I am in now. The report that the Deputy refer to, as I understand it, was a report to the then Minister for Treasury and Resources and therefore remains., I believe, a report to the Minister for Treasury and Resources and it is not within my authority to release or not. So the release of that report or the reviewing of that report was by necessity, because of the confidential commercial information contained therein, required confidentiality agreements to be signed and therefore I am not in a position at this point to confirm or deny that. However, I have been on record on what my personal opinion may be around the Waterfront."*

b. On 4 February 2014 , it is noted that Senator Philip Ozouf stated that:

*"...The scheme that the Esplanade Square is doing at the moment is very different from the previous scheme of which there was a lot of concern because it involved a single developer. S.o.J.D.C. has broken this scheme down now, as a phased development...*

*...I do not want to be too critical of Deputy Le Fondre but Deputy Le Fondre seems to be operating with these persistent questions. I think it is fair to say that he is not a fan of the Esplanade Square and never has been probably because he is stuck in a time warp of 2007. The world has moved on dramatically. The plans for Esplanade Square are being delivered in an entirely different way than previously. I would have agreed with him if a single entity was to be delivering the whole of the scheme and owning that scheme and had to bury a road which costs the numbers that he was talking about then yes, but what we are now doing with S.o.J.D.C. is seeing a phased development which will work through a series of phases which were are looking at to see whether the end result of the return available will be able to deliver all of the planning obligations, including the lowering of the road and the earlier comment about the surplus over and above that delivers an assumption of the cost*



*of delivering that road. So, the world has moved on. When he was the Assistant Minister for Treasury and Resources, we were dealing in a very different world and a very different scheme and so asking me questions about this previous report, while interesting, are not very relevant to the scheme that S.o.J.D.C. are working on now."*

- c. It is noted that Senator Philip Ozouf stated on 4 March 2014 that:

*"...the King Sturge report was commissioned in 2008 as part of the work on the Esplanade Quarter Masterplan and the proposed development at the time with the company called Harcourt...The King Sturge report was appointed themselves by further consultants, Trowers and Hamlins, which were commissioned by the States to report on 2 specific matters: did the proposed deal with Harcourt represent best value to the public of Jersey; and, secondly, did the proposed development agreement provide adequate protection to the States and the public of Jersey. The King Sturge report looked at the best value element at the time for the development agreement the developer at the time was to undertake the lowering of the Route de la Liberation as the first phase and to make staged payments to W.E.B. (Waterfront Enterprise Board) totalling £50 million at a fixed stage. Neither of these conditions apply today...As far as I am concerned the King Sturge piece of work was important at the time but has nothing to do with matters as they stand today..."*

-and-

*"This report was part of a due diligence process of a proposal to develop the Waterfront as a whole with one entity including obligations for stage payments and putting in underground roads... The world is completely different from 2007. We have had a financial crisis, there has been a credit crunch, there has been revaluation of properties, all the information concerning today's development as it is possible to disclose in public is available to Members. This, while a very interesting report of the past is not relevant to the economics, risk or finances of today."*

*Public interest arguments in favour of maintaining the exemption*

78. Firstly, the SPA considers that in light of the Harcourt/SoJDC proceedings. it is not appropriate to disclose the Report as such could impact on those proceedings. The complainant has acknowledged that those legal proceedings may be a ground for withholding full disclosure of the Report but feels that the Report could be redacted to allow for some disclosure, particularly of the purportedly out-of-date financial information.
79. Secondly, the SPA considers that disclosure of the Report would impede the working of SoJDC (a company which is wholly owned by the Public of the Island of Jersey). Whilst it is acknowledged that SoJDC must expect to be subject to a reasonable level of democratic and public scrutiny, the nature of the business in which it operates is considered to justify a degree of protection of full disclosure of its projects. To remove this protection may hamper SoJDC in its ability to compete and, potentially, call into question the entire rationale for the States operating such a company.



80. Publication of the Report may impact on the reputation not only of SoJDC but also those third parties who contributed to it.
81. The SPA also considers that disclosure would be likely to deter businesses from contracting with the States and/or SoJDC and would thus cause commercial disadvantage to the SPA through jeopardising its bargaining position. This would potentially result in a less competitive market and could result in reduced overall quality on the part of service providers, which would prejudice the States' commercial interests, and thus the Islands.

*Balance of the public interest arguments*

82. On balance, the Commissioner considers that at this time, and particularly in light of the Harcourt/SoJDC Proceedings, the public interest will not be served in ordering disclosure of the Report. Whilst noting that much of the financial information contained within the Report is purportedly out-of-date, the viability of the Esplanade Development and the reasons as to why Harcourt did not progress with the development is at the very heart of the Harcourt/SoJDC proceedings.
83. The Commissioner considers that there is force in the argument that allowing the disclosure of a document to which the parties to litigation would not ordinarily be entitled could interfere with the judicial process, which could have significant ramifications for the SPA, SoJDC, Harcourt and ultimately the Public.
84. Accordingly, the Commissioner finds that the public interest in withholding disclosure outweighs the public interest in ordering disclosure and that the SPA correctly applied Art.33 in its Initial Response

**Art.34 – The Economy**

85. Notwithstanding the fact that the Commissioner considers that Art.33 of the Law was properly engaged and the Report correctly withheld on that basis, she has gone on to consider, in any event, the arguments pertaining to Art.34 of the Law.
86. The full text of Art.34 of the Law can be found in the Legal Annex at the end of this Decision Notice.
87. Art.34 provides an exemption from disclosure if the information would, or would be likely to, prejudice the economic interests of Jersey or the financial interests of the States. This is a qualified exemption, and is therefore subject to the public interest test.
88. In order for a prejudice based exemption, such as those provided by Art.34 to be engaged the Commissioner considers that three criteria must be met:
- a. Firstly, the actual harm which the SPA alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;

- b. Secondly, the SPA must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- c. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice, or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner takes the view that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority.

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

#### *The SPA's position*

90. In its Initial Response, the SPA stated that "*The very disclosure of some information and the premature disclosure of other information could have a long-term cost to the taxpayer and the economic and financial interests of the island*" (emphasis supplied). The Commissioner takes this statement as meaning that the SPA considers that the disclosure of the Report 'would be likely' to prejudice its ability to promote economic investment and growth in a competitive environment. The Commissioner notes that at para.35 of her Guidance Note<sup>4</sup> she stipulates that "*If a SPA is withholding information under a prejudice based exemption, it should always make a choice between would or would be likely to and state this in its refusal notice*".

91. The SPA notes that the present Court case against SoJDC could have significant costs consequences for Public of Jersey if they are unsuccessful in their defence of those proceedings. Whilst any liability would fall to SoJDC, the impact of SoJDC having to satisfy an order for damages and/or any costs order would impact on the Island as a whole as the continuation and finalisation of the Esplanade Development would likely be placed into jeopardy. If the project could not be completed then revenues which had been expected from tenants of the Esplanade Development would not be realised and taxpayers' money which has already been expended would have been wasted. If the project was completed then even if rental income was achieved then such would likely be diverted to satisfy any award rather than benefitting SoJDC and ultimately the States.

92. The SPA is also concerned that publication of the Report could lead to increased difficulty in securing tenants, potentially resulting in a consequent inability to develop the land effectively and carry out the Waterfront Masterplan. It is understood that certain tenants have eschewed the Esplanade Development given the negative publicity surrounding the Esplanade Development.

---

<sup>4</sup> <https://dataci.je/wp-content/uploads/2015/01/The-Prejudice-Test.pdf>

*Does the withheld information relate to economic interests?*

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

94. The Commissioner is satisfied that the Report – and the information contained therein – relates to Jersey's economic interests.

*What is the nature of the prejudice?*

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

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

97. Taking into account the representations made by the SPA, it is the Commissioner's view that disclosure of the requested information in this case would be likely to prejudice the economy, and there is a real and significant risk of prejudice occurring. For this reason, the Commissioner has concluded that Art.34 is engaged.

*What is the likelihood of prejudice?*

98. The Commissioner finally considered whether there was a sufficient likelihood of prejudice to engage Art.34. At para.26 of her Guidance Note<sup>5</sup>, the Commissioner notes that in establishing whether prejudice would or would be likely to occur, it is necessary to consider:

- a. The range of circumstances in which prejudice could occur (for example, whether it would affect certain types of people or situations);
- b. How frequently the opportunity for the prejudice arises i.e. how likely it is for these circumstances to arise); and
- c. How certain it is that the prejudice results in those circumstances.

99. In the UK case of John Connor Press Associates v. Information Commissioner<sup>6</sup>, the Information Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that:

---

<sup>5</sup> <https://dataci.je/wp-content/uploads/2015/01/The-Prejudice-Test.pdf>

<sup>6</sup> Appeal Number: EA/2005/0005

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

100. In other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
101. The Commissioner is clearly unable to discuss the content of the Report in detail. She has, however, reviewed the Report and notes that the financial information contained therein is highly confidential to a number of third parties.
102. In the SPA's view, the release of such sensitive information (which would not ordinarily be in the public domain) and which was a key document commissioned by the States in to the viability of a development and as put forward by the proposed developer Harcourt has the potential to affect market confidence and impact on the readiness of third parties to work with the States and provide services.
103. The Commissioner notes that certain prospective tenants have decided not to ultimately secure a tenancy at the Esplanade Development given the negative publicity surrounding the Esplanade Development.
104. The Commissioner, in consequence of the above, accepts that disclosure of the Report would result in a real and significant risk of prejudice to Jersey's economic and financial interests and therefore concluded that Art.34 is engaged. As Art.34 is a qualified exemption, she went on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### The Public Interest Test

105. In considering the public interest in this matter the Commissioner has considered the English case of Hogan & Oxford City Council v. Information Commissioner<sup>7</sup>. The First Tier Tribunal (albeit in relation to a different exemption) found that when the "would be likely to" prejudice was engaged,

*"...the public interest in maintaining the exemption will be more difficult to determine than where the alternative limb of the test has been applied" (paragraph 54).*

#### *Public interest arguments in favour of disclosing the requested information*

106. The Commissioner recognises that there is a general public interest in promoting accountability and transparency in relation to the activities of scheduled public authorities. The requested information relates to a development which is contentious and has received much publicity over the past years as to viability and deliverability and attracted scrutiny, in part due to the litigation commenced by Harcourt against SoJDC. It contains information as to forecasts

---

<sup>7</sup> Appeal Number: EA/2005/0026 & 30



for the development and its performance in the years subsequent to its publication and Harcourt's ability to deliver the development on time, and in budget.

107. This is not the first time the complainant has asked for this information and an initial request was made by the complainant on 22 September 2008 to the then Chief Minister. The response to that email (from the Chief Minister) on 25 September 2008 was, in effect that, the Treasury and Resources Minister's review was to be completed in the weeks thereafter and that a review by PWC of Harcourt's financial suitability was to be concluded in a similar timeframe. It was further stated that the findings of those reviews would be made public prior to WEB concluding commercial negotiations with Harcourt and prior to the Treasury Minister giving approval of that deal.

108. Disclosure of the Report may also help the public to form a view about the appropriateness of decisions that have been taken in relation to the economy and in particular the Esplanade Development and so promote accountability of those charged with making important decisions in relation to it. This may help to promote greater public confidence and understanding in the way the Esplanade Development has been dealt with.

*Public interest arguments in favour of maintaining the exemption*

109. The Commissioner recognises that, having accepted that Art.34 is engaged, there is a strong public interest in ensuring that Jersey's economic and financial interests are not prejudiced by the disclosure of information under the Law.

110. The Commissioner also notes the issues surrounding the disengagement of Harcourt from the Esplanade Development and the fact that civil proceedings remain in train. In particular, there is a substantial risk that release of the Report may interfere with Court proceedings giving either party an unfair advantage (or disadvantage as the case may be) to which they would otherwise not be entitled as the Report is not disclosable as part of those proceedings.

111. The SPA believes that the risks from disclosure are varied and vast in that disclosure could be commercially damaging to a wholly owned States company, the Treasury and Resources Department, the States as a whole and the Island. Disclosure could also be damaging to third parties, such as Harcourt, companies involved in the Esplanade development and those third parties who contributed to the Report. Some of those risks are more easily quantifiable in financial terms such as the anticipated return to the States from the Esplanade Development. Some are less quantifiable but the SPA asserts, equally as important: business confidence is a significant factor in the success of Jersey's financial services sector and failure of the Esplanade Development would adversely affect that confidence. That cannot be in the public's best interest.

*Balance of the public interest arguments*

112. The Commissioner notes that whilst this is the only request that has been made for disclosure of the Report, there is little doubt that the information contained within the Report would attract considerable public interest. This is because the information contained relates to the financial viability of the Esplanade Development and, in particular, Harcourt's and WEB's original role in that development.



113. The Commissioner has considered both sets of arguments and considers that the weights of the respective arguments for and against disclosure are finely balanced. The Commissioner has found that the timing of the request is a critical factor in deciding where the balance of the public interest lies. In particular, she is aware that the request was made when important decisions in relation to the Esplanade Development were being made. Accordingly, some of the information contained in the Report was still live at the time of the Request. Of particular, and in the Commissioner's view crucial, importance, are the issues relating to the on-going civil proceedings regarding Harcourt and SoJDC. In particular, she considers that it is not in the public interest to interfere with a judicial process which is in train. Therefore on balance, the Commissioner considers that in this case the public interest arguments in favour of disclosing the information are outweighed by the public interest arguments in favour of maintaining the exemption.

#### **Art.35 – Formulation and development of government policy**

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

115. Notwithstanding the fact that the Commissioner considers that Art.33 of the Law was properly engaged and the Report correctly withheld on that basis, she has gone on to consider, in any event, the arguments pertaining to Art.35 of the Law

#### *Public interest arguments in favour of disclosing the requested information*

116. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of publicly held information. Disclosure of the Report in this case would enable the public to better understand how the States formulates and develops a policy which will eventually form the basis of a Projét to be laid before the States Assembly.

117. In this case, the SPA recognises that disclosure of the Report would promote transparency concerning the State's approach to the development of the Esplanade Development. It acknowledges the strong public interest in the contents of the Report, particularly in light of the civil proceedings initiated by Harcourt against SoJDC and also generally given that the Esplanade Development is essentially funded by the taxpayer. It is clearly a significant development which has and will continue to impact on a significant number of citizens.

118. The Commissioner recognises the importance of Esplanade Development policy to the public and must ascribe appropriate weight to it.

#### *Public interest arguments in favour of maintaining the exemption*

119. The Report and its findings are still referred to by the States and the Esplanade Development entered its first phase of development this year. Planning applications are still being made by the SoJDC and decisions still being taken in respect of the Masterplan. The Report, whilst containing some financial information which is out-of-date and detailing a development which has altered since that time is still used as a policy document by the States.

120. It is generally recognised that there is a strong public interest in ensuring that there is an appropriate degree of safe space in which officials are able to gather and assess information and provide advice to Ministers, without premature disclosure of the assumptions, evaluations and concerns raised by a Report conducted at a different time with different market conditions. This is particularly the case where the advice will be considered by ministers during the formulation and development of a government policy.
121. It is also recognised that Ministers should be able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and distraction. This so called "safe space" is needed in appropriate circumstances to safeguard the effectiveness of the policy process.
122. The SPA notes that the Ministers have submitted various proposals and plans on the Esplanade Development over the last 7 to 8 years and when Ministers have settled on their intent, that outcome will be made known and a Proposition tabled in the States to allow the States Assembly to debate that revised proposal. The SPA contends that until Ministers have confirmed their intention for the development, it is considered that the public interest would not be served by a premature release of an internal Report which might have commercial implications for SoJDC.

#### *Balance of the public interest arguments*

123. The timing of the complainant's request is relevant to the Commissioner's decision in this case. It is clear to the Commissioner that the formulation or development of the Esplanade Development is yet to be completed and therefore there is a real risk of prejudicing the policy development process by disclosing the requested information.
124. The detail of the Esplanade Development and its funding is still subject to debate in the States. It is through the Parliamentary process that the fully determined policy will be scrutinised, and it is at that juncture that informed transparency of the policy and the accountability of ministers can be gained by the wider public.
125. Having considered the public interest arguments associated with the requested information, the Commissioner has decided that greatest weight should be given to the need to maintain an appropriate degree of safe space. This space will allow ministers to consider what are live policy issues without the distraction and interference which would likely flow from the Report's premature disclosure.
126. The Commissioner has concluded that the SPA has properly applied Art.35.

#### **The Decision**

---

127. The Commissioner's decision is that the SPA has correctly applied the exemptions for information supplied in confidence at Art.26, prejudice to commercial interests at Art.33(b) , prejudice to the economy at Art.34 and prejudice to the formulation and development of government policy at Art.35 in this case and agrees that the Report was correctly withheld. The SPA, however, incorrectly applied the exemption at Art.21 in respect of vexatious requests.

128. Complaint not upheld.

**Right of Appeal**

---

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

130. If you wish to appeal against this Decision Notice, you can obtain information on how to do so on [www.dataci.je](http://www.dataci.je).

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

Dated this 27<sup>th</sup> day of May 2016

Signed  .....

**Mrs Emma Martins**  
Information Commissioner  
Office of the Information Commissioner  
Brunel House  
Old Street  
St Helier  
Jersey

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

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

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

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

(1) A scheduled public authority may refuse to supply information it holds and has been requested to supply if the information is absolutely exempt information.

(2) A scheduled public authority must supply qualified exempt information it has been requested to supply unless it is satisfied that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.

(3) A scheduled public authority may refuse to supply information it holds and has been requested to supply if –

- (a) a provision of Part 3 applies in respect of the request;
- (b) a fee payable under Article 15 or 16 is not paid; or
- (c) Article 16(1) applies.

**18 Where a scheduled public authority refuses a request**

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

**21 A scheduled public authority need not comply with vexatious requests**

(1) A scheduled public authority need not comply with a request for information if it considers the request to be vexatious.

(2) In this Article, a request is not vexatious simply because the intention of the applicant is to obtain information –

- (a) to embarrass the scheduled public authority or some other public authority or person; or
- (b) for a political purpose.

(3) However, a request may be vexatious if –

(a) the applicant has no real interest in the information sought; and

(b) the information is being sought for an illegitimate reason, which may include a desire to cause administrative difficulty or inconvenience.

**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.

**33 Commercial interests**

Information is qualified exempt information if –

(a) it constitutes a trade secret; or

(b) its disclosure would, or would be likely to, prejudice the commercial interests of a person (including the scheduled public authority holding the information).

**34 The economy**

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

(a) the economic interests of Jersey; or

(b) the financial interests of the States.

**35 Formulation and development of policies**

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