

GUIDANCE NOTE

Official information held in private email accounts

The Freedom of Information (Jersey) Law, 2011

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INTRODUCTION

The Freedom of Information (Jersey) Law, 2011 (“the **Law**”) gives rights of public access to information held by scheduled public authorities (“**SPAs**”).

An overview of the main provisions of the Law can be found in The Guide to Freedom of Information.

This is part of a series of guidance, which goes into more detail than the Guide to the Law, to help you as a SPA fully understand your obligations, as well as promoting good practice.

This guidance is intended to clarify the legal status under the Law of information relating to the business of a SPA held in private email accounts in particular, but also other media formats. This is an emerging area of compliance with the Law and so the guidance may be updated in due course.

This guidance does not deal with exemptions which might be applicable to information held in private email accounts, only whether it may be held for the purposes of the Law.

Guidance issued by the Information Commissioner may include references to cases and decisions linked to operation of the Freedom of Information Act 2004 (“the **U.K. Act**”). Such references are provided as additional context to relevant areas given the lack of case law regarding the interpretation of the Freedom of Information (Jersey) Law 2011 (“the **Law**”). It should be noted, however, that judgments from the Courts of England and Wales (which includes any decisions from the Information Tribunal) are not binding in Jersey (albeit that they may be viewed by the Royal Court as being persuasive). There are, however, differences between the Law and the UK Act and so the judgments which have flowed following an interpretation of the UK Act may not be directly applicable in this jurisdiction.

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OVERVIEW

- The Law applies to official information held in private email accounts (and other media formats) when held on behalf of the SPA. Such information may be exempt and will not necessarily have to be disclosed.
- It may be necessary to request relevant individuals to search private email accounts in particular cases. The occasions when this will be necessary are expected to be rare.
- Adherence to good records management practice should assist in managing risks associated with the use of private email accounts for any business purposes connected to a SPA.

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WHAT THE LAW SAYS

1. Article 3 sets out the two legal principles by which it is established whether information is held for the purposes of the Law.

Article 3.

For the purposes of this Law, information is held by a public authority if-

- (a) it is held by the authority, otherwise than on behalf of another person; or
- (b) it is held by another person on behalf of the authority.

2. Under Article 3(a) information will be held by the SPA for the purposes of the Law if it is held to any extent for its own purposes. Only if information is held solely on behalf of another person will the SPA not hold it for the purposes of the Law.
3. Article 3(b) provides that in circumstances where information is held by another person on behalf of the SPA, the information is considered to be held by the SPA for the purposes of the Law. It is this sub-section that is of relevance to information held in personal email accounts.



THE INFORMATION COMMISSIONER'S APPROACH

4. Information held in non-work personal email accounts (e.g. Hotmail, Yahoo and Gmail) may be subject to the Law if it relates to the official business of the SPA. All such information which is held by someone who has a direct, formal connection with the SPA is potentially subject to the Law regardless of whether it is held in an official or private email account. If the information held in a private account amounts to SPA business it is very likely to be held on behalf of the SPA in accordance with Article 3(b).
5. This can apply to any SPA. For example, a Civil Servant may hold information relating to SPA business in his/her private email account on behalf of the SPA. There is therefore need to have a clear demarcation between States business and personal emails and correspondence. However information in private email accounts that does not relate to the business of the SPA will not be subject to the Law.
6. When a request for information is received, SPAs should consider all locations where relevant information may be held. This may include private email accounts.
7. The Information Commissioner recommends that, as a matter of good practice, SPAs establish procedures for dealing with such situations. These should outline the relevant factors to be taken into account in deciding whether it is necessary to ask someone to search their private email account for information which might fall within the scope of a freedom of information request under the Law which a SPA has received. Relevant factors are likely to include:
 - a) The focus of the request, indicated by the words used by the applicant;
 - b) The subject matter of the information which falls within the scope of the request;
 - c) How the issues to which the request relates have been handled within the SPA;
 - d) By whom and to whom was the information sent and in what capacity (e.g. civil servant or States member);
and
 - e) Whether a private communication channel was used because no official channel was available at the time.
8. Where a SPA has decided that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the SPA's own system, it will need to ask that individual to search their account for any relevant information.
9. The enquiries made should be directed towards deciding whether any information which is so held was generated in the course of conducting the business of the SPA. If it was, it is likely to be within the scope of the request. It will therefore be held by the individual on behalf of the SPA for the purposes of the Law.

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10. Where members of staff or other relevant individuals have been asked to search private email accounts for requested information, there should be a record of the action taken. The SPA will then be able to demonstrate, if required, that appropriate searches have been made in relation to a particular request. The Information Commissioner may need to see this in the event of an Article 46 appeal arising from the handling of the request.
11. Where a SPA has decided that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the SPA's own system, it will need to ask that individual to search their account for any relevant information.
12. The enquiries made should be directed towards deciding whether any information which is so held was generated in the course of conducting the business of the SPA. If it was, it is likely to be within the scope of the request. It will therefore be held by the individual on behalf of the SPA for the purposes of the Law.
13. Where members of staff or other relevant individuals have been asked to search private email accounts for requested information, there should be a record of the action taken. The SPA will then be able to demonstrate, if required, that appropriate searches have been made in relation to a particular request. The Information Commissioner may need to see this in the event of an Article 46 Appeal arising from the handling of the request.

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RELEVANT INFORMATION

IN OTHER FORMS

14. Although the main emphasis of this guidance is on information held in private email accounts, SPAs should be aware that it applies to information in other forms. The definition of information under the Law is provided with the Article 1 'Interpretation' where it is stated that "information" ... means information recorded in any form". Therefore, official information recorded on mobile devices, including text messages on mobile phones, or in any other media, may also be considered to be held on behalf of the SPA in the circumstances outlined in this guidance. Again, this does not necessarily mean that such information will be disclosable, but, on receipt of a valid request, SPAs should consider all locations where the requested information may be found.

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CONCEALMENT AND DELETION

15. SPAs should also remind staff that deleting or concealing information with the intention of preventing its disclosure following receipt of a request is a criminal offence under Article 49 of the Law. For example, where information that is covered by a request is knowingly treated as not held because it is held in a private email account, this may count as concealment intended to prevent the disclosure of information, with the person concealing the information being liable to consideration of prosecution.

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RECORDS MANAGEMENT

16. The Information Commissioner stresses the importance, and benefits, of having good records management. As such, SPAs are advised to use their records management policies to clarify the types of information that could be considered as records relating to the SPA's business. These policies should include clear advice to staff that recorded information held by individuals, regardless of the form in which it is held, and which relates to the business of the SPA, is likely to be held on behalf of the SPA and so subject to the Law.
17. In order to avoid the complications of requesting searches of private email accounts, and other private media, records management policies should make clear that information on SPA-related business should be recorded on the SPA's record keeping systems in so far as reasonably practicable.
18. It is accepted, that in certain circumstances, it may be necessary to use private email for SPA related business. There should be a policy which clearly states that in such cases a SPA email address must be copied in to ensure the completeness of the SPA's records. In this way, records management policies will make it easier for SPAs to determine whether information is held and to locate and retrieve it in response to requests. If the information is contained within the SPA's systems it can also be subject to consistently applied retention and destruction policies.

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MORE INFORMATION

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

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