

GUIDANCE NOTE

Refusing a request: Writing a refusal notice

The Freedom of Information (Jersey) Law, 2011



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INTRODUCTION

1. The Freedom of Information (Jersey) Law, 2011 (“the **Law**”) gives rights of public access to information held by Scheduled Public Authorities (“**SPAs**”).
2. An overview of the main provisions of the Law can be found in The Guide to Freedom of Information.
3. This is part of a series of guidance, which goes into more detail than the Guide, to help SPAs to fully understand their obligations and promote good practice.
4. This guidance explains when and how to refuse a request made under the Law.
5. 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.



OVERVIEW

- SPAs have two basic obligations under the Law; an obligation to inform an applicant that information is not held (Art.10(1)), and, except as otherwise provided by the Law, to supply the person with information (Art.8(b)). If a SPA is refusing to meet the Art.8(b) duty it will need to issue a Refusal Notice to the applicant explaining why.
- If a SPA intends to refuse a request on the grounds that it is subject to an exemption in Parts 4 or 5 of the Law, or would exceed the cost limits under Article 16(1) (and the Freedom of Information (Costs) (Jersey) Regulations 2014), then it must always issue the applicant with a Refusal Notice informing them of its decision.
- A SPA relying on an Article 21 or 22 exemption must also issue a Refusal Notice unless it has already done so in response to an earlier vexatious or repeated request from the same individual, and it would be unreasonable to issue another one.
- The Refusal Notice will need to state the Article of the Law being relied upon and in most instances explain the reasons for its decision, including the details of any public interest and prejudice tests.
- The Refusal Notice must provide the applicant with details of the SPA's internal complaints procedure.
- The Refusal Notice must also inform the applicant of their right to complain to the Information Commissioner.
- The SPA should issue its Refusal Notice 'promptly' and, in any event, no later than 20 working days after the date of receipt of the request. If the SPA needs further time to consider the request then it should write to the applicant to provide an estimated date by which the request will be completed.
- Where the applicant has asked for their own personal data, we would expect the SPA to treat this as a subject access request under the Data Protection (Jersey) Law, 2005 ("the **Data Protection Law**"), rather than issuing a Refusal Notice under Article 25 of the Law.

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WHAT THE LAW SAYS

6. When a SPA receives a request made under the Law then it must either:
 - a) Provide the information to the applicant;
 - b) Write back to the applicant to inform them that the information is not held;
 - c) Refuse to confirm or deny whether information is held; or
 - d) Confirm that information is held but refuse to provide it.
7. If the SPA refuses to confirm or deny whether information is held, or refuses to provide information, then it will usually need to send the applicant a Refusal Notice explaining why.
8. A SPA may only refuse a request if the information is subject to an exemption in Part 4 or 5 of the Law, would exceed the appropriate cost limits under Article 16(1) or is deemed to be vexatious or repeated under Article 21 or 22.

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EXPLAINING WHY THE REQUEST HAS BEEN REFUSED

9. The Refusal Notice should firstly make clear that the request was considered under the Law.
10. SPAs should not make assumptions about the applicant's level of background knowledge when drafting a Refusal Notice. It is therefore good practice to use plain English and avoid the use of jargon or abbreviations whenever possible.

Refusing a request because of a Part 4 or 5 exemption

11. Article 9 states:
 - (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. (Part 4)
 - (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. (Part 5)
12. Further guidance on how to apply the exemptions in parts 4 and 5 of the Law can be found in our Guide to Freedom of Information. The guide includes explanations of the differences between Class and Prejudice based exemptions and qualified and absolute exemptions.
13. If a SPA is refusing a request because it has decided that a Part 5 exemption applies then its Refusal Notice will usually need to include the following information:
 - a) The exemption(s) on which the SPA is relying, including Article, subsection, and wording of the exemption concerned.
 - b) The reasons why the exemption applies.
AND, where applicable
 - c) A breakdown of the public interest factors which were taken into account.
 - d) The reasoning behind the SPAs conclusion that the public interest lay in maintaining the exemption.



14. The explanation in the Refusal Notice should be detailed enough to give the applicant a real understanding of why the SPA has chosen not to comply with the request. This will usually mean explaining the following things in some detail:
- If a prejudice based exemption has been claimed, exactly how disclosing the information, or confirming or denying whether it is held, would lead to the prejudice set out in the exemption; or
 - If a class based exemption has been claimed, exactly how the information requested, or confirmation or denial that would need to be provided, meets the public interest test set out in the exemption
 - When the exemption is qualified by a public interest test, all the matters taken into consideration and an explanation of why the public interest has been found to favour withholding the information or refusing to confirm or deny whether it is held.
15. In most cases it will be possible to do this without any problem. There should be relatively few cases where it isn't possible to explain in detail why the information has been withheld.
16. In the few cases where it would undermine the purpose of claiming the exemption to explain why the request has been refused, Article 10 (2) and (3) allows this detail to be left out of the Refusal Notice.
17. Article 10 (2) states:
- If a person makes a request for information to a scheduled public authority and –
 - the information is absolutely exempt information or qualified exempt information; or
 - if the authority does not hold the information, the information would be absolutely exempt information or qualified exempt information if it had held it,
the authority may refuse to inform the applicant whether or not it holds the information if it is satisfied that, in all the circumstances of the case, it is in the public interest to do so.
 - If a scheduled public authority so refuses –
 - it shall be taken for the purpose of this Law to have refused to supply the information requested on the ground that it is absolutely exempt information; and
 - it need not inform the applicant of the specific ground upon which it is refusing the request or, if the authority does not hold the information, the specific ground upon which it would have refused the request had it held the information.
18. If the reasons for the decision are particularly complex or several exemptions were applied then it may be advisable to split the notice into shorter subsections to make it easier for the applicant to follow.

Refusing a vexatious or repeated request

19. Further guidance on when a request can be considered to be vexatious or repeated can be found in the Article 44 Code of Practice, Guide to Freedom of Information or via our Guidance Index.
20. Paragraph 18 (b) of the Article 44 Code of Practice states:-

'(b) A SPA relying on a claim that Article 21 or 22 applies must issue a Refusal Notice unless it has already done so in response to an earlier vexatious or repeated request from the same individual, and it would be unreasonable to issue another one.'



21. There is no requirement for the SPA to provide the applicant with any further explanation of why it has reached this conclusion. SPAs may wish to consider providing more explanation, but will need to judge whether it is likely to help matters or make them worse.
22. Paragraph 18(b) of the Article 44 Code of Practice allows a SPA not to issue a Refusal Notice at all when both the following conditions are met:
- a) The SPA has already given the same person a Refusal Notice for a previous vexatious or repeated request; and
 - b) It would be unreasonable to issue another one.
23. The Information Commissioner will usually only consider it reasonable for the SPA to not issue a further notice when a SPA has previously warned the applicant that it will not respond to any further vexatious requests or repeated on the same or similar topics.

Refusing a request because answering it would exceed the costs limit

24. Further guidance on how to establish whether a request exceeds the costs limit under Article 16(1) of the Law can be found in the Article 44 Code of Practice, Guide to Freedom of Information or via our Guidance Index.

25. Paragraph 18(d) of the Article 44 Code of Practice states:-

'(d) Where a request is refused because compliance is estimated to exceed the appropriate cost limit, the Commissioner recommends that Article 12 (duty to provide advice/assistance) extends to a need for the Refusal Notice to include a summary of the estimated costs. This should be set out as a simple schedule of the separate tasks at the regulated hourly rate, displaying both sub-totals and the overall total.'

26. If a SPA is refusing a request under the cost limit then it must send the applicant a Refusal Notice stating that the request is being refused because compliance would exceed the appropriate cost limit.

27. In doing so a SPA has a duty under Article 12 of the Law to provide applicants with advice and assistance.

28. Article 12 states:

Duty of a scheduled public authority to supply advice and assistance

A scheduled public authority must make reasonable efforts to ensure that a person who makes, or wishes to make, a request to it for information is supplied with sufficient advice and assistance to enable the person to do so.

29. The Information Commissioner considers that the best way to meet this requirement will be to discuss with the applicant whether the request can be re-defined so as to bring the request within the cost limit including providing an indication as to what could be provided under the limit and also to include a breakdown of the costs involved in meeting the request, as part of the Refusal Notice.



INFORMATION ABOUT THE APPEALS PROCEDURE

30 Paragraph 18 of the Article 44 Code of Practice states:

- (e) All Refusal Notices must provide the applicant with the relevant details of their ability to seek an internal review of the decision/s contained within the Refusal Notice.
- (f) All Refusal Notices must also inform the applicant of their right to appeal to the Commissioner under Article 46 of the Law.

31. The Refusal Notice must provide details of the SPA's internal review procedure through which the applicant can appeal the SPA's decision.

32. Although there is no statutory requirement to offer an internal review, pursuant to section 39 of the Article 44 Code of Practice, all SPAs must have an internal review/complaint procedure in place and which must be exhausted prior to any appeal being made to the Information Commissioner under Article 46 of the Law.

33. The SPA must provide details in its Refusal Notice to include:

- a) Contact information for the relevant department or member of staff.
- b) An outline of the appeals process.
- c) Timescales for dealing with complaints.

34. The Refusal Notice must also advise the applicant of their right to make an appeal to the Information Commissioner and should include the relevant contact details to allow them to do so.



TIME LIMITS FOR ISSUING A REFUSAL NOTICE

35. A SPA must issue its Refusal Notice promptly, as soon as practicable and within the time limit provided at Article 13 of the Law. The time limit for SPAs responding to a request for information is 20 working days after the date they receive a request, but a SPA should not wait until the 20th day to respond if it can reasonably provide the Refusal Notice earlier.

36. There are circumstances within which a SPA may seek an extension not exceeding 65 working days in which to respond to a request for information pursuant to Article 2 of the Freedom of Information (Miscellaneous Provisions) (Jersey) Regulations 2014 but only if such extension is “reasonable in all the circumstances of the case”. However, the applicant should be made aware of any delay as soon as possible.

For more information on this issue refer to the Article 44 Code of Practice.

37. The question of what is ‘reasonable’ will be decided by the Information Commissioner on any appeal. This may therefore apply to a number of circumstances including where a SPA requires more time to respond to the request.

38. Our position is that a SPA should take no more days than are reasonable and necessary to fulfil the request and that where possible requests should always be dealt with ‘promptly’ and within the 20 day limit set out in the Law.

The use of any extension should be limited and an infrequent occurrence.

39. Where the SPA does require an extension of time, they should identify to the applicant that they will not likely be in a position to respond to the request within the 20 day limit and provide an estimated date by which the public interest test will be completed.



DEALING WITH A REQUEST FOR THE APPLICANT'S OWN PERSONAL DATA

40. Article 25 of the Law exempts a SPA from the requirement to make available any information which is also the applicant's own personal data.
41. However, we would not expect a SPA receiving such a request to issue a Refusal Notice under Article 25 of the Law. Rather we would expect the SPA to advise the applicant within 20 working days that it intends to treat the request as a subject access request ("**SAR**") made under the Data Protection (Jersey) Law, 2005 ("the **Data Protection Law**").
42. The applicant should not be required to submit a separate request, although as with any SAR, the SPA will be entitled to write back to the applicant if it requires further identification or a fee before it can process the request.
43. Sometimes requests are made for a broad category of information that includes some of the applicant's own personal data and some other information. In this situation, if some of the 'other' information is being refused under a different exemption, it will make sense for the Refusal Notice to also explain that the applicants own personal data is exempt under Article 25 of the Law and will be dealt with in accordance with the provisions set out under the Data Protection Law.
44. More information about how to deal with a request for personal information can be found in our Guide to Data Protection.



THE BENEFITS OF ISSUING A GOOD REFUSAL NOTICE

45. There are a number of benefits to providing as much explanation as possible when issuing Refusal Notices.
- a) It will help to enhance the SPA's reputation.
 - b) The SPA may receive fewer applications for internal review, because the applicant will have a better understanding of why their request for information has been refused.
 - c) This should in turn result in fewer complaints being made to the Information Commissioner about the handling of requests.
 - d) When investigating the manner in which a request has been dealt with by a SPA, the Information Commissioner may consider the quality and timeliness of a Refusal Notice, including how well the application of any exemptions has been explained.
 - e) If an appeal is made to the Royal Court against a decision notice, the Royal Court may consider the quality of the SPA's Refusal Notice.
 - f) It will help the SPA to conform to the Article 44 Article 44 Code of Practice.
likelihood of prejudice is more probable than not.

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MORE INFORMATION

46. 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.

47. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

48. If you need any more information about this or any other aspect of freedom of information, please contact us:

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