

GUIDANCE NOTE

Dealing with repeat requests **Article 22**

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 a request may be regarded as repeated under Article 22 and provides advice on how to use that article.
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

- Under Article 22 of the Law, a SPA does not have to comply with a request which is identical, or substantially similar to a previous request submitted by the same individual, unless a reasonable period has elapsed between those requests. There is no public interest test.
- A SPA may only apply Article 22 where;
 - » An applicant has previously made a request for information to a SPA that it has complied with; and
 - » The applicant makes a request for information that is identical or substantially similar. If neither of these conditions applies then the SPA must deal with the request in the normal manner.
- A request will be identical if both its scope and its wording precisely matches that of a previous request.
- It will be substantially similar if; (a) The wording is different but the scope of the request is the same; or (b) The scope does not differ significantly from that of the previous request.
- The reasonable interval is largely dependent upon the likelihood of any of the information caught within the scope of the request differing or having changed from that previously provided.
- If the information is unlikely to be different then the SPA will need to consider the amount of time between requests and decide whether this is enough to make it reasonable to provide the same information again.
- The SPA must issue a Refusal Notice unless it has already served the applicant with a Refusal Notice in response to a previous request for the same information, and it would be unreasonable to issue another one.



WHAT THE LAW SAYS

6. Article 22(2) states:

The scheduled public authority may refuse to comply with the request unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

7. This means that Article 22(2) may only be applied when the following criteria have been fulfilled;

- a) An applicant has previously made a request for information to a schedule public authority that it has complied with; and
- b) the applicant makes a request for information that is identical or substantially similar

8. In such circumstances, the SA may refuse to comply with the request unless a “reasonable interval” has elapsed between compliance with the previous request and the making of the current request.

9. If the SPA has not already provided the information to the applicant, then it is not a “repeated request” and the SPA must deal with the request in the normal manner.

10. As the scope of Article 22(2) is fairly narrow, the circumstances in which it may be applied are unlikely to arise very often because;

- a) It will be rare that an applicant will ever need to ask for the same information twice;
- b) Unless the information caught by the requests is identical, or the differences or changes are insignificant, it is likely to be reasonable for the SPA to provide an updated version of the information.

SPAs cannot use Article 22(2) to refuse identical or substantially similar requests that were submitted by different applicants. If a SPA receives numerous requests from different applicants, for information that it has already disclosed, then we recommend that it considers making the information available on its website or via another method of publication.



IS THE REQUEST IDENTICAL OR SUBSTANTIALLY SIMILAR?

11. If the SPA is satisfied that the requests do originate from the same applicant then the next step will be to determine whether they are identical or substantially similar.
12. A request will be identical if both its wording and its scope precisely matches that of a previous request.
13. If the wording is identical but the scope of the request is different (for example a recurring request asking for “any new or amended information” on a particular subject, or for “last month’s figures”) the request will not be identical.



Example 1

On the last day of April an individual submits a request to the Fire Service in which he asks; “How many emergency call outs have you responded to this month?” The Fire Service provides him with the requested information. At the end of June he sends them a further request with exactly the same wording. Although the phrasing of these requests is exactly the same the request will not be identical because the information being sought, (the call out figures for April and June respectively) is entirely different.

14. A request will be substantially similar if it meets either of the following criteria;
 - a) The wording is different but the scope of the request (the criteria, limits or parameters which define the information being sought) is the same as for a previous request.
 - b) The scope of the request does not differ significantly from that of the previous request (regardless of how the request is phrased).
15. The following is an example of a substantially similar request which, although differently worded, has the same scope as an earlier request.



Example 2

A SPA decides to outsource its street cleaning services and invites private companies to tender for the contract.

Following this decision, a local resident sends the SPA the following FOI request;

“Can you please provide me with a summary of the factors that influenced the SPA’s decision to outsource local street cleaning services?” The SPA provides him with the requested information.

Two months later he sends another FOI request in which he asks;

“I would like to know why the SPA has decided to outsource local street cleaning services to a private company”

In this case, the requests are phrased differently but the scope is the same, as in both instances the applicant is asking the SPA to explain the reasons for outsourcing the service. The second request can therefore be regarded as substantially similar to the first.

16. If there is an overlap in the scope of the requests then the question as to whether they are substantially similar will be dependent upon the significance of those differences in scope.
17. If the area in which the requests differ is insignificant, as in the example below, then the second request may be considered substantially similar.



Example 3

In January 2013 an applicant sends a request to a secondary school in which she asks;

‘Please provide me with a breakdown of the number of pupils suspended, excluded or otherwise subjected to disciplinary action in the period between September 2011 and July 2012?’

The school provides supplies the requested information.

Several weeks later the same applicant later submits a substantially similar request which is phrased as follows;

‘I would like to know how many pupils were suspended, excluded or otherwise subjected to disciplinary action in the academic year 2011 – 2012’ The school recognises that the scope of the second request is wider than the first because the ‘academic year’ also includes August. However, as the pupils were on their summer holidays during that month, it concludes that little, if any, disciplinary action would have taken place during that additional period.

In this case therefore, given that the differences in the information caught by the requests are likely to be insignificant, the second request may be considered substantially similar to the first.

18. However, if the difference in scope is clearly of more than minor significance, as in the next example, then the requests will not be substantially similar for the purposes of the Law, and the SPA will need to deal with the new request in the normal manner.



Example 4

An individual makes the following request to his local parish.

'I would like copies of all minutes of all the parish monthly meetings from October 2007 to September 2008'

The parish provides the information.

Six weeks later he submits another request worded as below;

'I require you to send me copies of all your monthly meeting minutes from July 2007 to May 2009'

Whilst there is a clear an overlap between these requests, in that they both cover the parish minutes from October 2007 and September 2008, the area where they do not overlap is significant as it encompasses an extra eight month period, and consequently, an additional eight sets of meeting minutes. In this case, therefore, the differences in scope are sufficiently meaningful that the second request cannot be regarded as substantially similar to the first.

19. SPAs will need to make a judgement about the significance of any difference in scope, taking into account what they know about their own records and practice and the context in which the request is made. If a complaint is made to the Information Commissioner then we would expect a SPA to be able to explain why it has decided that any differences in scope are insignificant.
20. It also is important to keep in mind that Article 22(2) should not be applied to requests where only the subject or theme is identical or substantially similar. This is particularly the case where a request for information relating to the same subject from another record is not an identical or substantially similar request for the purposes of Article 22(2).

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HAS THE SPA PREVIOUSLY PROVIDED THE INFORMATION OR CONFIRMED IT IS NOT HELD?

21. A SPA can only apply Article 22(2) to a request where it has either;

- a) Already provided the information to the same applicant in response to a previous request; or
- b) Previously confirmed that the information is not held in response to an earlier request from the same applicant.

If neither of the above criteria applies, then the request is not repeated and the SPA must process it in the usual manner.

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HAS A REASONABLE INTERVAL ELAPSED?

22. A request which is identical or substantially similar to a previous request by the same individual cannot be refused as repeated unless a reasonable interval has elapsed between the respective requests.
23. The Law does not define what is meant by a 'reasonable interval' but it is our view that this should be determined by taking the following into account;
- a) The likelihood that the information will differ significantly from that provided in response to the previous request.
 - b) The amount of time that has passed (where it is unlikely that the information will differ in any significant way).

The likelihood that the information covered will differ significantly from that previously provided.

24. If the SPA is satisfied that the scope of the request is identical or substantially similar, then its next step should be to assess the likelihood of the information covered being different from that caught by the previous request.
25. If the SPA does consider it likely that the information will differ significantly, then we would normally expect it to conclude that a reasonable interval has elapsed since the last request was answered and not refuse the request as repeated.
26. If a SPA is concerned about the costs of answering multiple requests from the same applicant, for information that changes frequently, then it should consider the aggregation provisions linked to Article 16 of the Law (the appropriate cost limit Regulations).
27. If a SPA thinks the information is likely to be the same, or that any differences are likely to be insubstantial then it should go on to consider the amount of time that has passed since the information was last provided.

The amount of time between requests

28. If the SPA is confident that the information will not differ to any significant degree, perhaps because it has produced no further material on the subject or the request is for a historical document (such as a report or letter), then the only remaining consideration is the amount of time between requests
29. Often, it will be obvious that a reasonable interval has not elapsed because the requests have been submitted within a relatively short time of each other, as in the example below.



Example 5

In May 2012 an individual makes the following request to a SPA;

'I would like to know how much you charged our two local football clubs for repair and ground maintenance following each individual fixture this season.'

The SPA provide the information which includes a breakdown of the charges for each of the 58 fixtures played so far.

Two weeks later he submits a substantially similar request in which he states;

'Please advise me of the amounts charged for repair and ground maintenance at our two local football clubs at each of their individual games this season'

As each club only plays at their ground every other week the SPA know that only two further matches took place in the period between the first and second requests. They are thereby confident that the information caught by the second request would not differ significantly from that already provided.

In this case, as only two weeks have elapsed since the original request, the SPA would have justifiable grounds to conclude that the relatively short interval between the requests was not a reasonable period.

30. In other cases the length of time between requests may be so great that it would be reasonable for the applicant to no longer have a copy of the original response. If this is the case then the interval between requests will be reasonable.
31. We cannot give a definitive answer to the question of when the interval between requests changes from being unreasonable to reasonable. This will depend on all the circumstances of the case. However, we do encourage SPAs to be sensible about this. It will often be easier, and certainly good practice, to just provide a second copy of the information rather than refuse a request as repeated, that can in fact be easily answered.
32. We recommend that the use of Article 22(2) is reserved for those situations when it is really needed. For example, when the applicant submits another identical or substantially similar request, despite still having the original information and being given a clear indication that no new information is likely to be available for the foreseeable future.
33. However whatever conclusion the SPA reaches it should be sure to make its decision objectively, taking into account the specific circumstances surrounding each particular request.



Multi-parted requests

34. Sometimes applicants submit multi-parted requests. SPAs will need to treat each element of a multipart request as a separate request and can only refuse any repeated elements under Article 22(2).



Example 6

An individual makes the following requests to his local parish.

'I would like copies of your policies in place in June 2011 on the following matters:

- i) Health and safety*
- ii) Equality and diversity*
- iii) Whistleblowing'*

The parish provides the information.

Six weeks later he submits another request worded as below.

'Please could you send me:

- a) your equality and diversity policy in use in June 2011*
- b) your whistleblowing policy in use in June 2011*
- c) your recruitment policy in use in June 2011'*

In this case parts a) and b) of the later request are repeated, but part c) is treated separately and is not a repeated request.



REFUSING A REPEATED REQUEST

35. There is no requirement under Article 22(2) to carry out a public interest test.

36. In most cases the SPA will need to issue a Refusal Notice stating that it is relying on Article 22(2).

37. The SPA should include the relevant details in the Refusal Notice. The notice must also inform the applicant of their right to appeal to the Information Commissioner.

38. Paragraph 18(b) of the Article 44 Code of Practice states:

'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.'

39. Whether or not the SPA issues a Refusal Notice or explains why it considers the request to be repeated, it should keep written records clearly setting out the procedures it followed and its rationale for concluding that Article 22(2) applied.

40. This should make it easier to evidence the reasoning behind the decision, should the applicant decide to take the matter further.

41. If the applicant submits a repeat of a request which has recently been refused in which they express clear dissatisfaction about the handling of their previous request, then it is good practice to ask them if they would like their latest request to be treated as a request for an internal review of the original decision.

Advice and assistance

42. There is no obligation to provide advice and assistance in response to a obvious repeated request. However, if the requested information is liable to change in future, and the SPA can reasonably predict when this will happen, then it is good practice to advise the applicant of the likely timeframe in the Refusal Notice.

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MORE INFORMATION

43. 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.

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

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

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