
Decision Notice 2018-01

Date of Decision Notice	21 November 2018
Scheduled Public Authority	Chief Minister's Department
Address	Cyril Le Marquand House St Helier Jersey JE3 8UL
Date of Initial Request	30 April 2018
Date of SPA's Response	17 August 2018
Date of Request for Internal Review	17 August 2018
Date of Internal Review	20 September 2018
Date of Appeal to Information Commissioner	20 September 2018

Summary/Decision

The applicant requested from the Chief Minister's Department (SPA) employment information regarding the Chief Executive for the States of Jersey, including his contract. The SPA responded after 75 days by disclosing some information but withholding the contract in its entirety, citing article 25 of the FOI Law. The applicant asked the SPA to review its decision to withhold the contract. The SPA reviewed its decision but decided to continue to withhold the entire document. The applicant appealed the decision to the Office of the Information Commissioner and complained that the SPA failed to meet the timelines that article 13 of the FOI Law requires for responding to requests. The Commissioner found that the SPA contravened article 13 of the FOI Law by failing to respond within the required timelines. The Commissioner found that the SPA had correctly applied article 25 of the

FOI Law to the home address of the Chief Executive and two passages within the contract, but article 25 did not apply to the remainder of the record. The Commissioner required the SPA to disclose a copy of the contract with the home address and two passages redacted.

Background

1. On 30 April 2018, the Bailiwick Express, a virtual newspaper, (Applicant), made a request (the Request) under the Freedom of Information (Jersey) Law 2011 (FOI Law) to the Chief Minister's Department, a Scheduled Public Authority (SPA). The request was for a copy of the employment contract (Contract) for the Chief Executive of the States of Jersey (Chief Executive), together with certain details pertaining to the Chief Executive's salary (the Requested Information). The SPA responded on 17 August 2018, disclosing information about the Chief Executive's salary. However, it refused access to the Contract on the grounds that it was absolutely exempt in accordance with article 25 of the FOI Law (the Initial Response), as it constituted the personal information of the Chief Executive and disclosing the information would contravene the data protection principles of the Data Protection (Jersey) Law 2018 (DPJL).
2. On 17 August 2018, the Applicant requested the SPA conduct an internal review of its decision to refuse to provide access to the Contract. On 20 September 2018, the SPA informed the Applicant that it was upholding its original decision to deny access to the information (the Internal Review). The Applicant then appealed the decision of the SPA to the Information Commissioner, in accordance with article 46(2) of the FOI Law. The Applicant also complained that the SPA had failed to provide a response to the request within the timelines stipulated in article 13 of the FOI Law.
3. Under the authority of article 46(4) of the FOI Law, I must decide the appeal. This decision fulfils the requirement of article 46(5) to provide notice of my decision to the Applicant and the SPA.

4. The Requested Information that remains within the scope of this appeal is contained in the Contract. The SPA has provided me with a copy of this Contract for determining whether article 25 of the FOI Law permits the SPA to withhold the Contract.

Issues

5. The matters at issue in this decision are:
 - a. Did the SPA respond within the timelines that article 13 of the FOI Law requires? and
 - b. Does article 25 of the FOI Law apply to the Contract, in whole or in part?

Issue 1: Did the SPA respond within the timelines that article 13 of the FOI Law requires?

6. Article 13 of the FOI Law requires that SPAs respond to requests for information within certain timelines. It reads as follows:

13 Time within which a scheduled public authority must deal with a request for information

- (1) A scheduled public authority must deal with a request for information promptly.
- (2) If it supplies the information it must do so, in any event, no later than –
 - (a) the end of the period of 20 working days following the day on which it received the request; or
 - (b) if another period is prescribed by Regulations, not later than the end of that period.

7. Article 2 of the Freedom of Information (Miscellaneous Provisions) (Jersey) Regulations 2014 (FOI Law Regulations) provides that a SPA may extend the timeframe for responding to a request for information in certain circumstances:

2 Time limits for authority to deal with a request for information

For the purposes of Article 13(2)(b) of the Law the period prescribed is such period as is reasonable in all the circumstances of the case, not exceeding 65 working days following the day on which the scheduled public authority received the request.

8. The Applicant made the original request on 30 April 2018. The SPA responded on 17 August 2018, which was 75 working days after the Request.
9. The Applicant submits that the refusal to provide the information within 65 days was unacceptable. It was a straightforward request for a single document that SPA should have been able to easily retrieve and redact, if necessary.
10. The SPA stated that the reason for the delay was that its decision as to how to respond required careful deliberation because it was so important. The SPA believed it would set a precedent for all individuals employed by the States of Jersey. It was also necessary to balance the privacy of the employee and the public interest. It acknowledged that, while it had previously apologised to the Applicant for the delay, it did not provide reasons at the time. It conceded that its failure to update the Applicant was not in keeping with the spirit and letter of the law. The SPA expressed regret that it had not complied with the statutory maximum timeline and noted that staff absences had contributed to its failure to respond within the statutory timeframe.

11. By its own admission, the SPA failed to meet the timelines for responding to requests that the FOI Law requires and I uphold this aspect of the appeal. Consequently, given this admission, I could stop here. However, I consider that further examination of this issue will provide useful guidance to SPAs generally on meeting the timelines of the FOI Law and improve practice going forward.

General guidance

12. There is a general precept in access to information that delaying access to information is equivalent to refusing access. The accountability value of information is often time-limited. Without timely access to information, we cannot achieve the transparency objectives of the FOI Law. Delaying the response to the request denies the applicant the ability to exercise their rights of review and appeal in a timely manner. That is why article 13(4) permits an applicant to treat the failure of a SPA to respond within the stipulated timelines as a refusal of access. It treats this lack of action as if it were a decision that all of the information were absolutely exempt information, thus granting the applicant their statutory rights to have the decision reviewed without having to wait further.

13. I also note that the timelines of 20 working days stipulated in article 13(2)(a) of the FOI Law is unqualified. I mean by this that, in every case, the SPA has the discretion to take the full 20 days to respond. Conversely, the timelines of 65 working days stipulated in article 2 of the FOI Law Regulations is qualified, because it includes a reasonableness test with respect to the length of time the SPA may take. The limit does not automatically extend to 65 days, but allows further time respond, not to exceed 65 working days, depending what is reasonable in the circumstances. This means that a SPA must be able to justify why it has taken more than 20 working days to respond to the request. For example, if the reasonableness test only justifies taking 40 days, it would be contrary to the FOI Law for an SPA to take the full 65 days to respond.

14. Therefore, it is important for SPAs to provide detailed explanation, whenever they take more than 20 working days to respond, and to identify and justify an appropriate timeline in accordance with those reasons. This should take into account the volume and type of work required to complete the response to the request. In this case, the SPA did not indicate the activities needed to complete the decision-making process. I acknowledge that, in the absence of any previous cases, it was a difficult decision as to whether to disclose the information, but the SPA gave no indication as to what it was doing to resolve that difficulty. SPAs must be able to justify their compliance with the FOI Law through detailed, evidence-based explanations. They should be able to explain clearly to the applicant why responding to their request requires longer than the anticipated 20 days.

15. I would also note that the FOI Law does not recognise staff absence as a legitimate justification for extending the timelines for responding to requests, or for failing to meet the timelines. Staff absences are a reality for all SPAs. I recognise that this can be challenging, given that budgets are tight and there are competing priorities, with a focus on service to the public. Nevertheless, it is incumbent on employers to ensure that they have enough resources to allow them to meet their legal obligations, including those under the FOI Law. SPAs should find temporary solutions for temporary absences. It is also important to recognise that responding to requests under the FOI Law is itself a service to the public.

Decision

16. In accordance with article 46(4) of the FOI Law, I find that SPA failed to meet the timelines for responding in accordance with article 13 of the FOI Law and article 2 of the FOI Law Regulations.

Steps Required

17. As my powers with respect to this matter are remedial rather than punitive, there is no further remedy with respect to the current request. However, I require the SPA to take whatever steps are necessary to meet the statutory requirement to respond to requests in compliance with the timelines in the FOI Law. As the Information Commissioner Office for England and Wales (the ICO) has stated, 'Statutory time limits are not optional.'¹

Issue 2: Does article 25(2) of the FOI Law apply to the Contract, in whole or in part?

18. Article 9 of the FOI Law provides that SPAs may refuse to disclose information that is absolutely exempt. Article 25(2) of the FOI Law requires SPAs to protect personal information of individuals.

It reads as follows:

25 Personal information

- (2) Information is absolutely exempt information if –
 - (a) it constitutes personal data of which the applicant is not the data subject as defined in the Data Protection (Jersey) Law; and
 - (b) its supply to a member of the public would contravene any of the data protection principles, as defined in that Law.

19. The DPJL defines personal data as -

2 Personal data and data subject

- (1) Personal data means any data relating to a data subject.

¹ <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/09/ministry-of-justice-monitored-over-unacceptable-delays-to-freedom-of-information-responses/>

- (2) A data subject is an identified or identifiable, natural, living person who can be identified, directly or indirectly, by reference to (but not limited to) an identifier such as –
- (a) a name, an identification number or location data;
 - (b) an online identifier; or
 - (c) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the person.

20. In this case, the remaining Requested Information is the Contract of the Chief Executive. As such, the Contract consists of personal data that relates to an individual whom that information can identify.

21. The DPJL stipulates the following data protection principles:

8 Data protection principles

- (1) A controller must ensure that the processing of personal data in relation to which the controller is the controller complies with the data protection principles, namely that data are –
- (a) processed lawfully, fairly and in a transparent manner in relation to the data (“lawfulness, fairness and transparency”);
 - (b) collected for specified, explicit and legitimate purposes and once collected, not further processed in a manner incompatible with those purposes (“purpose limitation”);
 - (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (“data minimization”);

(d) accurate and, where necessary, kept up to date, with reasonable steps being taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (“accuracy”);

(e) kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the data are processed (“storage limitation”); and

(f) processed in a manner that ensures appropriate security of the data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures (“integrity and confidentiality”).

22. The only principle relevant in this case is whether disclosure of personal data in response to the Applicant’s Request would constitute processing ‘lawfully, fairly and in a transparent manner’.

23. Former Commissioner Martins established in Decision Notice 202-03-57259 that in considering whether disclosure of the withheld information would contravene the ‘lawfulness, fairness and transparency’ principle as set out at article 8(1)(a) of the DPJL, it is relevant to consider the reasonable expectations of the individual in terms of what would happen to their personal data.

In her analysis, she considered the following factors:

- a. What the public authority may have told them about what would happen to their personal data;
- b. Their general expectations of privacy, including the effect of Art.8 of the European Convention of Human Rights (ECHR);
- c. The nature or content of the information itself;

- d. The circumstances in which the personal data was obtained;
- e. Any particular circumstances of the case, e.g. established custom or practice within the public authority;
- f. Whether the individual consented to their personal data being disclosed or, conversely, whether they explicitly refused;
- g. The consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- h. The balance between the rights and freedoms of the data subject and the legitimate interests of the public.²

I take the same approach here. For this reason, I invited the SPA to address these points in its submission.

24. The SPA responded that, with respect to the first point, it had not told the Chief Executive, at the time of negotiating his contract, that it might disclose his personal data contained within that contract. While the SPA has provided no evidence of any explicit assurances of confidentiality, it submits that the negotiations took place between the parties in closed sessions and contends that this would likely give rise to an expectation of privacy.

25. I find this consideration to be relevant but not determinative. Financial negotiations, including those that do not involve personal information, normally occur in private to protect the contract negotiation process and to allow for the frank exchange of offers and counteroffers without interference or constraints from outside parties. The key factor here is that there were no expressed commitments of ongoing confidentiality.

² Decision Notice 202-03-57259, 14 November 2016.

26. The SPA submits that the general expectation of privacy is relevant in this case. It also quotes article 8 of the European Convention of Human Rights (ECHR), 'Everyone has the right to respect for his private and family life, his home and his correspondence.'
27. The SPA cites further that, in accordance with this article, the state should not interfere with this right, except in compelling circumstances involving national security, public safety or the rights of others. It submits that disclosure of the contract could contravene the Chief Executive's rights in this regard.
28. I agree that the Chief Executive's right to privacy is an important factor in this case. I would note, however, that the concept of privacy in the ECHR relates to 'private and family life'. This recognises that there are other spheres of life where the right to privacy is less absolute. Workplace or professional life is one of those spheres. That is not to say that employees do not have rights of privacy in the workplace, because they do. It does mean, however, that their activities in the workplace are inherently less private than in the home.
29. There needs to be a distinction between when an individual in the workplace is operating in a personal capacity as opposed to a professional capacity. For example, a solicitor drafting a legal opinion for a client is acting in a professional rather than a personal capacity. In contrast, if the same solicitor were involved in disciplinary proceedings before the Law Society and appearing on their own behalf, they would be operating in their personal capacity. Therefore, it is critical to consider the context of the information at issue, when determining whether it relates to professional or private life. This is particularly important in a case such as this, where the individual's professional life is in a prominent position in the civil service.

30. As to the nature and content of the Contract, the SPA submits that some of the content is highly sensitive and personal to the Chief Executive. It acknowledges that many other provisions of the Contract resemble those of other States employees. It considered the option of disclosing this information, while redacting what they considered the highly sensitive personal information. The SPA submits that this would be 'profoundly unsatisfactory', as it would enable an informed reader to infer the nature of that information and that would lead to speculation as to the details. Therefore, it states that article 25 should apply to the Contract in its entirety, despite that some passages of the contract 'appear relatively benign'.

31. I agree that the Contract at issue contains different kinds of information, in the range of inherently personal to clearly non-personal with varying degrees of sensitivity. Some of the personal information relates directly to private life, while other relates more to professional life. Correct application of article 25 requires careful consideration of each passage separately to determine whether disclosure would reveal directly, or indirectly, information to which this article should apply.

32. However, the stated position of the SPA that disclosing a redacted copy would permit inferences about the redacted information requires convincing argument and clear evidence. The assertion that it would lead to speculation about the details, appears weak, given that there is no explanation as to what the speculation would be or how it would undermine the Chief Executive's right to privacy. Nor does it establish how the withholding of the Contract in its entirety would result in less speculation as to its contents.

33. With respect to the circumstances in which the personal data was obtained, the SPA notes again that the Contract was negotiated in confidence but does not provide any information as to the extent of those negotiations and which clauses, if any, were subject to particular discussion

between the parties. I suggest, however, that some of the details of the contract may not have been the subject of negotiation, as they appear to reflect standard contract provisions.

34. The SPA submit that Chief Executive has not consented to the disclosure of his personal information. It provides no evidence that he actually refused to consent to the disclosure. I assume therefore that the SPA did not ask him the question.
35. The SPA argues that the consequences of disclosure of the information would cause unnecessary damage or distress to the Chief Executive and to the States and employees in general. It cites ‘distress due to media coverage and negative public image’ and ‘high potential for harassment of the CEO in a small public sphere’. It states disclosure could cause a breach of trust, or other developments, that may lead to the Chief Executive leaving his position and hamper any future efforts to replace him. This would also undermine a level of trust in the States as an employer.
36. The SPA appears to me to be overstating its case. I do not see any passages in the Contract that, on the face of them, would appear likely to provoke the level of harassment or distress that the SPA suggests. Most of the Contract appears to be standard contract language that anyone familiar with the States would expect to find in a contract of this nature. Even the information that is highly personal, does not appear on the face of the record to be controversial or likely to incite harassment, even in a small community. Nor has the SPA established how disclosure could lead to the Chief Executive leaving his position. I note that certain aspects of the Chief Executive’s employment package, relating to his local housing qualifications³ and his salary⁴, are already in

³ <https://www.gov.je/Government/PlanningPerformance/Pages/MinisterialDecisions.aspx?docid=E7A8A352-C9CE-4282-8834-0D7FCEFA6583>; <https://jerseyeveningpost.com/news/2018/07/27/states-chief-executive-gets-quallies-as-contract-perk/>

⁴ <https://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=3830>;
<https://jerseyeveningpost.com/news/2017/07/23/new-states-chief-exec-to-earn-over-250k/>

the public domain. Moreover, his employment has already been the subject of substantial public comment without causing him to leave his position.

37. The SPA speculates 'harms' as a result of disclosure but does not make a persuasive case or provide any direct evidence. I have seen no evidence in any media coverage of this case thus far of any inclination to harass or cause distress. Individuals in senior positions within the civil service with a high public profile expect to face adverse publicity and public criticism, sometimes warranted and other times unwarranted. I think it important to draw a distinction between harassment causing distress to an individual, on the one hand, and individuals expressing opinions about the expenditure of public funds, on the other. I see no evidence to suggest that disclosure of other details of the Contract would be likely to lead to his leaving his position.

38. While the reasonable expectations of the Chief Executive and any damage or distress caused by the disclosure are key factors in determining the application of article 25 of the FOI Law, it is necessary to weigh these concerns against any legitimate public interest in disclosing the information.

39. Former Commissioner Martins held in Decision Notice 202-03-57259 that:

In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests.

In balancing these legitimate interests with the rights of the data subject, it is also important to take a proportionate approach.

I agree with this approach and adopt it here.

40. The SPA also adopted this approach in its deliberations on whether to disclose the record, that is to say, it balanced the public interest in disclosure against the rights to privacy of the Chief Executive. It cited the following factors as weighing in favour of disclosure:

- a. The need for transparency about the value to the public of a senior official with a high salary.
- b. Sufficient public scrutiny, if the official were not successful in achieving his public policy objectives.
- c. The need to demonstrate that officials had negotiated a contract that was fit for purpose.

41. The SPA weighed the following factors against disclosure:

- a. That disclosure might set a precedent that would dissuade good candidates from accepting employment with the States of Jersey.
- b. Keeping the contract confidential gives the employee a greater level of autonomy in achieving his public service objectives.
- c. The general right to privacy.
- d. The expectations of confidentiality at the signing of the contract.
- e. Implications of disclosure for the personal information of other States employees.
- f. Potential use of the contract to force the removal of the Chief Executive.

42. The SPA distinguishes between the information relating to the expenditure of public funds and other personal information. However, it submits that contracts are personal matters. Even though the personal information in a contract comes into existence as the result of professional rather than private activities, contracts are private in nature and carry a considerable expectation of privacy. The SPA notes that it has already made the exact salary of the Chief Executive public to

serve the purposes of transparency. They say that the disclosure of information beyond that would set a wide-ranging precedent for all employees working for the States.

43. The SPA is concerned only about the disclosure of some of the information in the Contract. As noted above, it acknowledges that there are many provisions in the Contract that are standard and follow the format and content of the contracts of other States employees. However, the SPA states it was unable to find a way to redact the pertinent information that would not permit a knowledgeable person to infer or speculate about the nature and content of the redacted information. It submits that the only way to ensure that the relevant information remained protected was to withhold the document in its entirety. Therefore, it concludes that the factors in favour of privacy outweigh those in favour of transparency.

44. The Applicant takes the opposite view. It cites, not only the public importance of the position of the Chief Executive, but also the fact that his remit is to oversee a major reform of the public services. It distinguishes between the senior employees earning high salaries, like the Chief Executive, and the vast majority of States employees, with respect to the need for transparency. Consequently, it suggests that this case should not be a precedent for employment contracts generally. The scale of power that senior employees wield and the far-reaching consequences of decisions they make warrants a greater level of scrutiny. It submits that the States has professed a commitment to transparency that argues in favour of disclosure of the contract. It has already disclosed the salary of the Chief Executive and information about his residential qualifications. It does not understand why the States should apply the FOI Law differently to other provisions of the Contract. This has inevitably led to a degree of suspicion as to what other provisions might be contained in the Contract.

45. The Applicant acknowledges that the Contract could contain some personal data that may warrant protection, such as the Chief Executive's residential address, social security number as well as tax and other financial details. It submits that there are other provisions in the Contract where it would be in the public interest to disclose. It is concerned that protecting the entire Contract will set a 'worrying precedent' for transparency and the right of the people of Jersey to know. The fact that the SPA failed to respond to a straightforward request for a discreet document within 65 days (and failed to provide adequate explanations to the Applicant as to the reasons for the delay) has undermined the faith of the applicant that the SPA's final decision to withhold the entire document was lawful in the circumstances.

Analysis

46. This is the most important case to come before the Office of the Information Commissioner under the FOI Law. I say this not from the perspective of its public profile, but with respect to the issues that it raises. It is a common misconception that the principles of transparency and privacy are generally in conflict. Transparency concerns holding public officials to account. It requires providing access to information concerning the decisions of public officials. Privacy involves protecting the personal information of individuals. The conflict only appears in cases where the personal data of public officials is at stake. This is one such case. In determining where to draw the line between the needs for transparency and privacy, I think it is informative to examine the French term for privacy: *la vie privée*, which translates literally as private life. Public officials must be accountable for their decisions as public officials. On the contrary, all individuals, including public officials, have a right to a private life.

47. This case is particularly challenging because the arguments are finely balanced. The principle of transparency, as the Applicant advocates, is compelling. The principle of privacy, with respect to at least some of the information in the contract, as the SPA argues, is persuasive.

48. In cases where both competing positions are strong, it is customary to consult previous decisions issued by the Commissioner that have dealt with the same issues, together with any decided cases that may have come before the court. Unfortunately, there are not any such decisions in Jersey that provide definitive guidance. However, I have found previous decisions that can assist me by identifying factors that are relevant to determining the application of certain provisions of the law.

49. The previous decision cited above of former Commissioner Martins deals with the application of article 25, but only in relation to the names of public employees that appeared in operational correspondence. This does not provide guidance with respect to personal details in an employment contract. Given the small body of Decision Notices in Jersey, it is customary to consult the larger body of cases in England and Wales, Scotland or other territories who have similar legislative provisions. I have identified two relevant cases. The first is Decision Notice FS50569714 (2015)⁵ concerning a request for records, including a Headteacher's contract, issued by the ICO.

50. In that case, the ICO required the public authority to disclose a copy of the Headteacher's contract with only the details of the salary redacted. The applicant had agreed to the redaction of the salary. This means that the ICO did not make a formal decision with respect to the salary. The ICO balanced the privacy rights of the Headteacher against the public interest in disclosure. It found that the contract largely comprised generic details of the position for which arguments in favour of privacy were less convincing. Therefore, the ICO was satisfied that the public interest in disclosure outweighed the potential negative impacts on the Headteacher to render it fair to disclose the information.

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560193/fs_50569714.pdf

51. However, it was necessary to determine whether: there was a 'legitimate interest' in disclosing the information; disclosure must be necessary to meet that legitimate interest; and any interference in the data subject's rights and freedoms was warranted. The ICO considered that its analysis as to whether disclosure was fair addressed the points about the legitimacy of the interest and the interference with the data subject's rights. The ICO then had to determine whether disclosure was necessary to meet the legitimate interest. This first involved determining the nature of the pressing social need, which it identified as transparency and accountability of the school. The ICO found that disclosure would assist the public in understanding the role and duties of a senior public sector employee. Therefore, the ICO concluded that the disclosure was necessary to meet the pressing social need, and there was no other means, which were less privacy invasive, to achieve the objective. While the ICO found that personal data in other records that the applicant had requested should remain protected, the public authority should disclose the contract.

52. The other relevant case is Decision Notice FS50349391 (2011)⁶ issued by the ICO, which concerned a request for copies of compromise agreements between doctors and a National Health Service Foundation Trust. This document contained the terms and conditions relating to the agreed departure of an employee from the Trust. These agreements traditionally are confidential, as they record an agreement between the employer and employee, whereby the employer agrees to make a compensation payment to the employee on the basis that the employee agrees not to bring certain claims against the employer. Therefore, it is reasonable for employees to assume that their personal information would remain private. The ICO found that the individual's right to privacy outweighed any public interest in disclosure. It cited a previous case (FS50202562), which went before the Information Rights Tribunal (the Tribunal) on appeal.

⁶ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/658954/fs_50349391.pdf

The Tribunal found that the disclosure of past events that related to the termination of an individual's employment might cause them considerable distress.⁷ Therefore, disclosure of the information would not be fair.

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

54. The second consideration concerns that nature of the public interest that disclosure of the information would serve. The term 'public interest' or 'interest of the public' appears in many statutes throughout the Commonwealth, but such statutes rarely, if ever, provide a definition of the term or any guidance for evaluating the circumstance of specific cases. This leaves it open to variation in interpretation. I agree with the SPA that the term public interest is more specific than 'what the public finds to be interesting'. It does not refer to interest in the sense of being entertaining. The term public interest concerns the public having a stake or right that is at issue rather than simply mere curiosity. This term applies in circumstances where an event or development is likely to affect tangibly the public in general. The fact that a topic receives media attention does not automatically mean that there is a public interest in disclosing the information that has been requested about it⁸. As the Tribunal held in the case of *House of Commons v. Information Commissioner*, dealing with a request for ministerial expenses: 'The number of news

⁷ Appeal: *Bousfield v. Information Commissioner and Liverpool Women's Hospital NHS Foundation Trust* (EA/2009/0113).

⁸ See para.12 - <https://oicjersey.org/wp-content/uploads/2015/01/The-Public-Interest-Test.pdf>

articles on a particular topic may be an indication of public curiosity but is not a measure of the legitimate public interest⁹.

55. The most illustrative case providing factors to consider in determining the application of the public interest that I have been able to find is an administrative law decision of the former Commissioner for Information and Privacy for the Province of British Columbia, Canada, David Flaherty (Order 154-1997¹⁰). This case involved a request by an applicant that a public body waive a fee assessed for access to records, in accordance with section 75 of the *Freedom of Information and Protection of Privacy Act*¹¹ (FIPPA), on the grounds that the records 'related to a matter of public interest'. Former Commissioner Flaherty suggested that the following factors were relevant:

- a. has the information been the subject of recent public debate?
- b. does the subject matter of the record relate directly to the environment, public health, or safety?
- c. would dissemination of the information yield a public benefit by -
 - I. disclosing an environmental, public health, or safety concern,
 - II. contributing meaningfully to the development or understanding of an important environmental, health, or safety issue, or
 - III. assisting public understanding of an important policy, law, program, or service?
- d. do the records show how the public body is allocating financial or other resources?

⁹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i85/HoC3.pdf>

¹⁰ <https://www.oipc.bc.ca/orders/399>

¹¹ [RSBC 1996] CHAPTER 165

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

57. I take judicial notice of the fact that there has been recent media coverage of issues relating to the role and activities of the Chief Executive. There has also been discussions of certain aspects of his conditions of employment. The salary and benefits that a SPA provides to its employees relate to the allocation of financial resources. These two factors clearly engage the public interest. The public funds the SPA through taxation. It has a stake in being able to understand and evaluate how the SPA is expending those resources. For democracy to function properly, taxpayers with the right to vote also require enough information about the decisions for which elected officials are ultimately accountable.

58. This interest applies only with respect to information relating to the Chief Executive's professional life. It does not apply with respect to his private life.

59. In determining the application of article 25 to the information at issue, I must consider, on a line-by-line basis, whether disclosure information from the Contract would be fair. As I review each line, I have considered the following factors:

- a. That the role of the Chief Executive is the highest within the civil service with a considerable public profile and a high salary;
- b. The public interest in transparency, particularly with respect to the expenditure of public funds;
- c. That the SPA has already made some of the information public;

- d. That the role and conditions of employment of the Chief Executive have been the subject of public discussion;
- e. Whether the information relates to the professional or private life of the Chief Executive;
- f. Whether it is reasonable to assume that disclosure of information would cause unfair or undue harm or distress;
- g. Whether decisions in similar cases have favoured disclosure; and
- h. Whether providing a redacted version of the contract would effectively protect any information to which article 25 of the FOI Law applies.

60. I find that most of the information in the Contract relates to the professional life of the Chief Executive, but that some passages relate clearly to his private life. As the SPA has conceded, most of the information is of a generic nature that anyone familiar with the civil service would expect to find in a contract of this kind. I have seen no evidence to suggest that the disclosure of this information would be unfair to the Chief Executive; cause him distress due to media coverage and negative public image; or expose him to harassment. Nor can I conceive of how it might.

61. I find that there is a public interest in the disclosure of this information, as it relates to the expenditure of public funds and to a matter of recent public discussion concerning a senior public official. I also note that the salary of the Chief Executive is public already, and this constitutes one of the most sensitive elements of personal data contained in the contract. The SPA has not presented any evidence to suggest that the Chief Executive has suffered distress by the release of this information or that he has been subject to harassment (rather than public discussion). The previous cases cited above also support the approach of disclosing information concerning a senior employee's professional life and withholding information about their private life.

62. The general principles of transparency and accountability apply in this case. The purpose of transparency and accountability is to increase public confidence in SPAs, by promoting good practice through the prospect of exposing contraventions of standard policies and procedures and public expectations. However, it is important to recognise that it is equally valuable when it demonstrates that SPAs are indeed following good practices. I should clarify that I see no evidence on the face of the record of any failure to follow good practices.
63. It is general practice that SPAs redact exempt information from records and disclose the remaining information. There are some cases where it is not possible to redact information without enabling a knowledgeable individual to infer the precise nature and detail of the exempt information. The SPA argues that this is one of those cases, but I disagree. I find that it is not reasonable to conclude that disclosure of non-exempt information would reveal the exempt information.
64. The SPA submits that the gaps that the redactions would leave in the document would cause unfair speculation about the contents of the exempt information. However, the Applicant is already speculating about the contents of the record. It is reasonable to conclude that disclosure of the generic information is more likely to decrease speculation. Moreover, decisions about the applications of exemptions should reflect whether disclosure of some information would provide accurate indications of the actual information that should remain protected, rather than possible speculation about the content that is uninformed and, therefore, likely to be inaccurate.
65. SPAs should base their decisions on reasonable expectations of real harm, rather than mere conjecture or concerns about possible unfounded speculation. In this case, I see no evidence on the face of the record to suggest that it would be reasonable to expect that disclosure of a properly redacted version of the record would cause the Chief Executive any harm or distress.

66. Consequently, I find that it is possible to provide a redacted version of the Contract that will appropriately protect the information that is subject to article 25 of the FOI Law. This information includes the personal address of the Chief Executive, which the Applicant agrees deserves protection. It also includes two passages that relate clearly to the Chief Executive in his capacity as a private individual, rather than an employee. While I see no evidence that disclosure of the information would cause him any harm or distress, I find that, on balance, his right to privacy outweighs any public interest in the disclosure of that information. In conclusion, the disclosure of that information would not be fair and would contravene the first data protection principle. Therefore, article 25 of the FOI Law applies and the SPA may withhold that information.

67. I would reiterate that, as the seniority and salary of the position of the Chief Executive were significant factors in balancing the interests of privacy and accountability, this outcome is not necessarily determinative with respect to any future requests for copies of employment contracts, particular for employees below the most senior level. It is always necessary to consider all the relevant factors, including the unique circumstances of each case, and to decide it on its own merits. This decision can provide guidance only with respect to what are the relevant factors and how to evaluate them.

68. My final comment is to reiterate that the arguments for transparency and privacy were finely balanced in this case. Both the Applicant and SPA made reasonable and legitimate arguments. My decision required a close examination of the all the nuances of the case and reference to the few relevant cases that exist, none of which were determinative. Given all these circumstances, I understand why the SPA decided to err on the side of caution and withhold the record in its entirety. I recognise that it is not possible to rectify or mitigate the loss of privacy when anyone

discloses personal data in error. Therefore, it is necessary for SPAs to be certain that they have the appropriate authority before disclosing any personal data.

Decision

69. Under the authority of article 46(4) of the FOI Law, I find that the article 25 of the FOI Law authorised the SPA to withhold the personal address of the Chief Executive and two passages in the requested contract. I find that it did not authorise the SPA to withhold the remainder of the contract.

Steps Required

70. I require the SPA to comply with the FOI Law by disclosing to the Applicant a copy of the Contract with the personal address of the Chief Executive and the two relevant passages redacted. I have provided the SPA with a copy of the Contract indicating the relevant passages. They consist of the personal address on the page 1; the paragraph comprising section 10 on page 2; and the seventh, eighth and ninth paragraphs on page 5.

The SPA must comply with this notice within 28 calendar days of the date of this Decision Notice, which is 19 December 2018.

Failure to Comply

71. Failure to comply with the steps required may result in the Commissioner making a written certification of this fact to the Royal Court of Jersey pursuant to article 48 of the FOI Law. This may result in the Royal Court treating the failure to comply as committing a contempt of court.

Right of Appeal

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

73. They can obtain information on how to appeal against this Decision Notice here:

- a. <https://www.oicjersey.org>.

In accordance with article 47(3) of the FOI Law, any Notice of Appeal must be made within 28 calendar days of the date on which this Decision Notice is issued or December 2018.

Dated 21 November 2018

Signed

Dr Jay Fedorak
Information Commissioner
One Liberty Place
St. Helier
Jersey JE2 3NY