

Freedom of Information (Jersey) Law 2011

DECISION NOTICE

JOIC Reference	CAS-01827
Date of Decision Notice	18 July 2019
Scheduled Public Authority	Department for Home Affairs (the SPA)
Address	19-21 Broad Street St Helier Jersey JE2 3RR
Date of Initial Request	12.12.2018
Date of SPA's response	18.12.2018 (updated addendum provided on 21.12.2018)
Date of request for Internal Review	
Date of Internal Review	28.01.2019
Date of Appeal to Information Commissioner	04.02.2019

Summary/Decision

1. In December 2018, the Complainant requested certain information from the SPA relating to correspondence that may have passed between the Minister for Home Affairs and other third parties relating to an e-petition created by the Complainant (the **Fireworks E-Petition**) (the **Requested Information**).
2. The SPA wrote to the complainant on 18 December 2018 and 21 December 2018 stating that the Requested Information was being withheld (the **Withheld Information**) under Art.35 of the Freedom of Information (Jersey) Law 2011 (the **Law**), which the Complainant subsequently contested and requested an internal review.
3. The SPA sent the outcome of its internal review on 28 January 2019 (the **Internal Review**), upholding its original position.
4. The Complainant appealed to the Information Commissioner (the **Commissioner**).
5. The Commissioner's decision is that whilst the SPA withheld some of the Withheld Information in accordance with the Law, other information fell outside the scope of Art.35 and must be provided to the Complainant.
6. The SPA must provide this information to the Complainant within 7 days of the date of this Notice.

The Role of the Information Commissioner

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

The Request

9. The Complainant requested the following in respect of the Firework's E-Petition:
 - a. Correspondence between Connétable Norman (in his capacity as Minister for Home Affairs) and Environmental Health;
 - b. Correspondence between Connétable Norman (in his capacity as Minister for Home Affairs) and the States Vet; and
 - c. Correspondence between Connétable Norman (in his capacity as Minister for Home Affairs) and the Comité des Connétables (the **Request**).
10. On 18 December 2018 the SPA responded to the Request in the following terms (the **Initial Response**):

"There was no correspondence between Constable Norman as Home Affairs Minister and the Environmental Health Section, the States Vet or the Comite des Connetables regarding the ministerial response to the recent e-petition entitled 'Only allow fireworks to be sold or supplied in Jersey for licensed displays'.
11. The SPA provided an Addendum (the **Addendum**) to the Initial Response on 21 December 2018:

"It should be noted that there was correspondence between the various entities and the Justice and Home Affairs department (JHA), on behalf of the Home Affairs Minister, and that the Home Affairs Minister signed off the Ministerial Response after being fully briefed on these discussions.

The correspondence between the JHA staff is exempt from release under Article 35 (Formulation and development of policies) of the Freedom of Information (Jersey) Law 2011 as it deals with specific aspect (sic) of the proposed policy in relation to the sale, and potential restriction thereof, of fireworks.

Article applied

Article 35 Formulation and development of policies

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

The SPA is withholding the release of the information as it relates to the formulation and development of policy by the public authority. Article 35 is a qualified exemption, which means that a public interest test is required to be undertaken by the SPA. On balance, it is

our view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Although there is a need for transparency, accountability, financial and good decision making by public authorities this information relates to ongoing discussions. The SPA needs the ability to consider and reconsider the assumptions and evaluations raised by the various parties to inform their decisions.

Once a policy is formulated, the public interest in withholding information relating to its formulation is diminished, however, the use of the exemption can be supported if it preserves sufficient freedom during the formulation phase to explore options without that process being hampered by some expectation of future publication. The public authority needs safe space in which to rigorously explore and develop the best policy possible."

12. The Complainant responded to the Initial Response indicating that they were not in agreement with that decision and asked for an internal review. The Complainant made comprehensive submissions in support of their application for an Internal Review *inter alia* as follows:

"...Article 35...In these circumstances when looking at the Public Interest test. The department is relying on the 'safe place for policy formulation [qualified] exemption' as a reason for the Public Interest being that of non disclosure.

However in this case, the issue is the formulation of a ministerial response which was only required due to an e-petition being launched and more than one thousand signatures being garnered.

If the e-petition has not been launched and the required number of signatures were not obtained, then the minister in question would not have been required to make that public response.

The entire process ending in the requirement for a ministerial response, is as a result of, and led by the public interest in a specific matter. In this case the distress to animals caused by the random use of fireworks over an extended period...

You cannot have Public Confidence in this States Greffe E-Petition system, if the process by which the minister formulates his response, and the information he receives in order to do so, is not in the public domain. We will have no way of knowing whether or not the minister in question has undertaken his duties responsibly, taking into consideration the information given by the parties from whom he requested assistance...

The SPA has not shown in its declaration that it has made its decision as a result of considering "in all the circumstances of the case"

The SPA has merely completed a cut and paste of the legislation or guidance on the subject..."

13. The response to the Complainant's request for an internal review was provided on 28 January 2019 (the **Internal Review**), stating that the Initial Response to the Request was upheld. In respect of the First Request, the SPA stated that "I am asked to conduct an internal review of the decision that correspondence between officials in supporting the Minister for Home Affairs in

respond (sic) to an e-petition relating to fireworks should be exempted as the correspondence relates to the formulation and development of government policy. Having reviewed the correspondence in question, I have concluded that this decision was correct, given that there is a live process underway and so a need to ensure a safe space to consider policy options in private as part of the government policy-making process."

The Investigation

Scope of the case

14. On 4 February 2019, the Complainant contacted the Commissioner to complain about the way their Request and the Internal Review had been handled and to appeal the SPA's decision to withhold the Requested Information. The Complainant asked the Commissioner to review the Complainant's request and the responses received from the SPA in order to ascertain whether the response was in accordance with the law.
15. The Commissioner has set out in this Decision Notice the particular issues that he has had to consider in respect of each exemption cited by the SPA and, where relevant, the public interest test.

Chronology

16. On 21 February 2019, the Commissioner wrote to the SPA to advise that the Complainant had appealed to the Commissioner regarding the SPA's handling of the Initial Request and subsequent Review, pursuant to Art.46 of the Law. The SPA was asked to provide a copy of the requested information and their written submissions in response to the complaint made by the Complainant.
17. The SPA responded to that letter on 8 March 2019 explaining the rationale applied by the SPA in respect of the Withheld Information, together with a copy of the Withheld Information itself. The Commissioner had also received comprehensive submissions from the Complainant, including copies of the correspondence which had passed between the Complainant and the SPA.

Analysis – The Request

QUALIFIED EXEMPTIONS

Art.35 – Formulation and development of policies

18. The full text of Art.35 of the Law can be found in the Legal Annex at the end of this Decision Notice.
19. Art.35 provides an exemption for information which relates to the formulation or development of any proposed policy by a scheduled public authority. It is a qualified exemption meaning that it is subject to the public interest test.
20. The Commissioner has sight of the judgment of the First Tier Information Rights Tribunal in the case of Department for Education v. Information Commissioner EA/2014/0079 dated 29 January

2015. Whilst not binding in Jersey, the Commissioner finds the guidance given by the Tribunal in respect of s35(1) of the Freedom of Information Act 2011¹ instructive:

"21. Section 35 is a class based exemption. There is much case law relating to this provision. This Tribunal is not bound by any decision of the Information Tribunal or another First-tier Tribunal ("FTT"). However it can take note of any persuasive arguments in such decisions, but is not bound by them. The FTT is of course bound by decisions of higher courts. In relation to the case law the parties variously brought the FTT's attention to the following matters:

a. The question in determining whether section 35 is engaged is whether "the information relates to the formulation or development of government policy" and this would appear to be answered by considering the contents of the information itself.

b. The characterisation of the information cannot change over time. The fact that particular information contained in a document relates to the formulation of policy at a particular point in time, does not mean that it no longer relates to formulation of policy once the policy has in fact been finalised.

c. The timing point goes solely to the question of the public interest balancing exercise.

d. The words "relates to" and "formulation and development of policy" in section 35(1)(a) can be given a "reasonably broad interpretation".

e. Every decision is specific to the particular facts and circumstances under consideration.

f. No information within section 35(1)(a) is exempt from the duty of disclosure simply on account of its status, of its classification as minutes or advice to a minister nor of the seniority of those whose actions are recorded.

g. The timing of a request is of importance to the decision. When the formulation or development of a particular policy is complete is a question of fact. A parliamentary statement announcing the policy will normally mark the end of the process of formulation.

h. In judging the likely consequences of disclosure on official's future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants.

22. From the case law where information falls within the class described in section 35(1)(a) there is no presumption of a public interest in non-disclosure and no inherent weight is to be attached to the fact that information relates to the formulation or development of government policy in the public interest balancing exercise. Section 35 does not

¹ S35(1) of FOIA is the equivalent provision to Art.35 of the Law.

automatically deem or assume that disclosure of the information will be harmful. The DfE need to demonstrate to the Tribunal the actual interest that it is seeking to protect by maintaining the exemption, rather than just pointing to the fact that information is of a sort that falls within the class described in section 35(1)(a)."

21. In its Initial Response, the SPA gave some limited reference to the public interest test noting that whilst it may be in the public interest to disclose the requested information for the purposes of transparency and openness, that it was considered not to be in the public interest to disclose the information at this time *"...this information relates to ongoing discussions. The SPA needs the ability to consider and reconsider the assumptions and evaluations raised by the various parties to inform their decisions"*. This position was expanded on in their more fulsome written submissions.

Public interest arguments in favour of disclosing the requested information

22. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of publicly held information. Disclosure of the information sought in the Request in this case would enable the public to better understand the e-petitions process and whether the Minister for Home Affairs consulted with any other interested party prior to releasing his response to the E-Petition.
23. The Commissioner has noted the views of the Information Rights Tribunal in E&W in the case of DWP v. Information Commissioner (EA/2006/0040) as regards the general operation of FOIA:

"It can be said...that there is an assumption built into FOIA, that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis: section 2(2)(b) requires the balance to be considered 'in all the circumstances of the case'."

24. Similarly, in the case of Guardian Newspapers Ltd and Heather Brooke v. The Information Commissioner and BBC (EA/2006/0011 and 13), the Information Rights Tribunal said:

"While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

There is, in our opinion, considerable public interest in disclosing information about decisions that have already been made. Such information is capable of, inter alia, encouraging participation in and debate about future decisions; informing people of which considerations were taken seriously, which were, and, may routinely be, ignored; the weight that is, or

appears to be, given to particular factors; which 'tactics' are successful and which are not; revealing more about the role of the civil servant and the 'negotiations' that take place; and confirmation that the democratic process is working properly."

25. In this case, the SPA itself recognises that disclosure of the information sought in the Request would promote openness and transparency and that release of information may inform the public and thereby stimulate debate.

Public interest arguments in favour of maintaining the exemption

26. It is similarly generally recognised, however, that there is a strong public interest in ensuring that there is an appropriate degree of safe space in which officials are able to gather and assess information and provide advice to Ministers, without premature disclosure of the assumptions, evaluations and concerns regarding the development of process. This is particularly the case where the advice will be considered by ministers during the formulation and development of a government policy (here the potential regulation of firework sales).
27. It is also recognised that public authorities should be able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and distraction. This so-called "safe space" is needed in appropriate circumstances to safeguard the effectiveness of the policy process.
28. The Commissioner understands that whilst certain interested third parties were consulted prior to the Minister's response to the E-Petition being released, those third parties were not consulted regarding the Complainant's Request nor asked for their views as to whether the Requested Information ought to be released. The SPA has indicated in its submission that it is the SPA's view that the decision to release with the SPA and not with the third parties. Whilst it is correct that the decision to release information remains with the SPA, it is entirely appropriate to consult with any third parties who may be impacted by the release of information and the Commissioner would have expected in this particular case (given the very specific nature of the request in that it included a request for correspondence with the States Vet and Comité de Connétables) the SPA to gauge the views of those third parties.

Balance of the public interest arguments

29. The timing of the complainant's request is relevant to the Commissioner's decision in this case.
30. At the time of the application, the Minister for Home Affairs had laid a Proposition before the States Assembly regarding an amendment to the Explosives (Jersey) Law 2014. It was debated by the States on 30 April 2019 and adopted subject to being sanctioned by Her Most Excellent Majesty in Council. (As at the date of this Notice, it has not received sanction nor been registered before the Royal Court.) The amendment amends the principal law to cover all types of Pyrotechnic Articles (including Fireworks) and it is necessary for the legislation to be amended prior to work beginning on any Regulations that may cover the regulation of sales of those items.
31. Having considered the public interest arguments associated with the Request, the Commissioner has decided that whilst weight should be given to the need to maintain an appropriate degree of safe space that such only applies to certain parts of the Withheld Information. This space will

allow the SPA to consider what are live policy issues without the distraction and interference which would likely flow from premature disclosure of information relating to the regulation of fireworks sales.

32. It is against this background, however, the Commissioner notes that much of the Withheld Information refers not to the formulation of policy but simply to the proposed response to the E-Petition. It is worth repeating that the Complainant's Request (as refined) was specifically for correspondence passing between certain individuals relating to the E-Petition.
33. Accordingly, the Commissioner considers that whilst the exemption was properly engaged in respect of certain of the Withheld Information, there are other parts of the Withheld Information that ought properly to be disclosed to the Complainant. The Commissioner has considered the information and provided with this Decision Notice a copy of the Withheld Information indicating the redactions to be applied.

General comments

34. As previously indicated, the Commissioner has had sight of all the correspondence passing between the Complainant and the SPA. This includes the first request made by the Complainant to the SPA and the Initial Response, together with accompanying correspondence. The Commissioner notes the strict interpretation given by the SPA to the wording of the Initial Request and the response given by the SPA (simply that no communications existed between Connétable Norman and the other named third parties). Whilst the rationale for doing so is understood by the Commissioner, the Commissioner considers that the Complainant's response to the Initial Response was entirely understandable and, in fact, the points raised by the SPA in their Addendum could easily have been explained to the Complainant at that point, rather than requiring the Complainant to submit an additional request asking for correspondence between members of the Minister's Office and the named third parties. The Complainant described the SPA's response as overly pedantic and obstructive.
35. Similarly, the response to that amended request (that if any information did exist that it would likely be withheld pursuant to Art.35 of the Law) clearly suggested to the Complainant that if any information did exist that the issue of disclosure had already been determined. This is an unhelpful stance to adopt and clearly gave the Complainant the impression that the issue had been pre-determined.
36. The Commissioner has sympathy with the Complainant's concerns in respect of both matters.

The Decision

37. The Commissioner's decision is that the SPA must disclose to the Applicant a copy of the Withheld Information with certain information redacted. The SPA has been provided with a copy of the Withheld Information indicating the relevant passages to be redacted as follows namely:
- a. Email 1
 - i. Second email in the chain (in its entirety)

- b. Email 5
 - i. First email in the chain (in its entirety)
- c. Email 6
 - i. First email in the chain (in its entirety)
- d. Email 7
 - i. Third email in the chain (in its entirety (duplicated from Email 6))
- e. Email 8
 - i. words 4 thru 14 inclusive of line 1, first email in the chain
 - ii. lines 3-5, second email in the chain.

Right of Appeal

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

39. If you wish to appeal against this Decision Notice, you can obtain information on how to do so on <https://www.oicjersey.org>.

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

Dated this 18th day of July 2019

Signed



Mr Paul Vane
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8 General right of access to information held by a scheduled public authority

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

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

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

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

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

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

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

18 Where a scheduled public authority refuses a request

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

35 Formulation and development of policies

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