

# GUIDANCE NOTE

## **Retention and destruction of requested information**

The Freedom of Information (Jersey) Law, 2011

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# INTRODUCTION

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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 to SPAs the issues they need to consider concerning the retention and destruction of information which has been requested 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

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- If information is destroyed before a request is received, a SPA can say it does not hold it but should explain why the information was destroyed and advise the applicant of any other available information which is pertinent to the request.
- A SPA should have disposal schedules for records in order to identify and describe those that can be routinely destroyed.
- If information is held when a request under the Law is received, a SPA may lawfully be able to say that it does not hold it if it would normally be destroyed before the deadline for responding. However, the Information Commissioner's view is that the SPA should, if possible, and as a matter of good practice, suspend any planned destruction and consider the request as usual and which is in keeping with the spirit of openness and transparency under the Law.
- Destroying requested information outside of a SPA's normal policies is unlawful and may be a criminal offence if done in order to prevent disclosure.
- As a matter of good practice, a SPA should keep all requested information for at least six months to allow for appeals to the Information Commissioner.

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# DESTRUCTION OF INFORMATION BEFORE REQUEST IS RECEIVED

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6. Requests made under the Law apply to information held at the time that the request is received. So, if a SPA receives a request for information that it held in the past, but has since been destroyed, it no longer holds that information. In order to comply with the Law, the SPA can reply to the request stating that it does not hold the information.
7. Under the duty to advise and assist in Article 12 of the Law, the SPA should advise the applicant whether the information is, or may be, available from another SPA or source, and also whether it holds any similar or related information which it can provide instead.
8. The Information Commissioner would also expect that the SPA, as a matter of good records management practice, explain to the applicant when and why the information was destroyed.

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# ROUTINE DESTRUCTION AFTER A REQUEST IS RECEIVED

8. Good records management should also dictate that a SPA should have a disposal schedule in order to identify and describe the records which can be disposed of as a matter of routine in accordance with a defined timetable. This is one of the ways in which a SPA can carry out the disposal of records in accordance with a clearly defined policy.
9. This is of relevance to Article 4 of the Law which states:  
**Article 4 -**
  - (1) For the purposes of this Law, the information held by a public authority at the time when a request for the information is received is the information that is to be taken to have been requested.
  - (2) However, account may be taken of any amendment or deletion made to the information between the time when the request for the information was received and the time when it is supplied if the amendment or deletion would have been made regardless of the request for information.
10. This means that a SPA does not have to release the information under the Law if it is scheduled to be destroyed under its usual disposal schedule before the time for compliance with the request expires. This cannot apply to situations where the decision to delete or destroy is prompted by the request, or if destruction is scheduled for a date later than the 20 working day deadline for responding. Where this is the case, a SPA must still consider the request in the usual way. However, where a request can be responded to 'promptly' under the Law (and prior to the scheduled deletion) it is not appropriate to delay any response in order to enable deletion of the information and prevent the release of the information which has been requested by the applicant.



## Example 1

*In the UK case of Harper v. the Information Commissioner and the Royal Mail (EA/2005/0001; 15 November 2005), the UK Information Tribunal provided an example (at paragraph 17) of a situation in which a public authority could take account of deletion.*

*A request is made on 1 January for information that is held on a database which is completely erased every six months. This erasure occurs on 10 January. The time for compliance with the request is the end of January, and so the public authority, if it complies with the request after 10 January, may inform the applicant that the information is not held. [Note, however, that section 10 requires public authorities to comply with section 1 promptly, and no later than the twentieth working day following receipt.]*

*In contrast, should a public authority decide to delete relevant requested information when this is not in the normal course of business, it would be acting unlawfully.*

*In particular, in such circumstances, an individual may be deemed to have committed an offence under Article 49 of the Law.*



11. In the context of Article 4, the Information Commissioner interprets the reference to “promptly” in Article 13(1) of the Law to mean that where requested information is scheduled for deletion before a response is due to be issued, if the SPA is in a position to respond earlier in the statutory twenty working day time limit, and at that point the information is still held, the SPA should provide the information and not wait to respond until after the scheduled date for deletion.
12. In any event, as a matter of good practice, a SPA should consider delaying the destruction of the information if it is known to be the subject of a request.
13. In addition to “deletion”, Article 4(2) also refers to the scheduled “amendment” of the information that is the subject of the request. Circumstances will often exist where a SPA amends information on a regular basis; for example, statistical information on a particular subject that is updated every month. Adopting the same principle as for deletion, if the SPA is able to respond before the statistics are updated, it should provide the information that is held at that point. Where the SPA is aware of the request but unable to respond prior to the amendment it should consider, as a matter of good practice, preserving the information as it existed at the time of the request where it is reasonably practicable to do so. It may also be prudent for the SPA to consider whether it is appropriate in the circumstances to apply an exemption pursuant to Article 35 or 36 of the Law.



# THE OFFENCE OF ALTERING ETC. RECORDS WITH INTENT TO PREVENT DISCLOSURE

## **Article 49 – Offence of altering, etc. records with intent to prevent disclosure**

(1) This Article applies if –

- (a) a request for information has been made to a scheduled public authority; and
- (b) under this Law the applicant would have been entitled to be supplied with the information.

(2) A person is guilty of an offence and liable to a fine if the person-

- a) Alters;
- b) Defaces
- c) Blocks
- d) Erases
- e) Destroys; or
- f) Conceals,

A record held by the scheduled public authority, with the intention of preventing the authority from supplying the information to the applicant.

14. These provisions mean that it is an offence to intentionally prevent the disclosure of requested information to which the applicant is entitled. An obvious example would be where, subsequent to a request for information being received by a SPA, information within the scope of the request is shredded with the deliberate intention of preventing its disclosure.
15. If information that is held at the time of the request is destroyed outside of a SPA's normal disposal schedule, this is a breach of the Law. Such action becomes an offence if the requested information is altered, concealed or destroyed with the intention of preventing disclosure under the Law.



# THE BENEFITS OF A DISPOSAL SCHEDULE

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21. Reference is made in paragraph 8 to having a disposal schedule as an example of good records management practice. As well as its general contribution to the efficient management of a SPA's records, a disposal schedule may offer an individual a defence to any suggestion of an Article 49 offence, as it will be able to explain that a record containing the requested information was destroyed as part of the SPA's routine disposal process.
22. Further relevant comment from the U.K. identifies the ability for a SPA *"to provide evidence that as part of routine records management processes destruction of a specified type of record of a specified age took place in accordance with a specified provision of the disposal schedule"* and that such evidence *"will enable an authority and its staff to ..... defend themselves against a charge under section 77 of the Act that records were destroyed in order to prevent their disclosure in response to a request for information."*



# DESTRUCTION AFTER DISCLOSURE OR REFUSAL

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23. SPAs are advised to follow the general principle that records should be kept for as long as they are needed. However, as a matter of good practice, a SPA should keep any requested information for a period of time after the date of the last communication concerning the request. This is particularly important if you have refused to disclose any part of the information.
24. SPAs may consider it good practice that where information is known to be the subject of a request for information, destruction should be delayed until all relevant complaint and appeal provisions have been exhausted. This will include internal reviews, any complaint made to the Information Commissioner, and any appeals from decision notices. The Refusal Notice should set out the time limit for requesting an internal review; the Information Commissioner would then expect appeals to be made within six weeks of the internal review decision; and, following the issuing of a decision notice, there are rights of appeal to the Royal Court. Given the various time limits involved, it is recommended that a SPA retain the requested information for a period of at least six months from the date of the last communication about the request, or related appeals, to allow for the appeal process.
25. When retaining information in these situations, SPAs should also consider the need to maintain the integrity of the information that has been refused pending the conclusion of the appeal process. For example, the information that has been requested may comprise statistical information that is constantly changing. If the SPA refuses the request and this becomes the subject of an appeal to the Information Commissioner, it should ensure that it retains a copy of the information that was refused and not allow it to be overwritten by more recent data.
26. Even if a SPA discloses the information, the request may indicate that there is some wider interest in the matter and that there may be other requests for it in the future. In such cases, it is still recommended that the information is retained for a minimum of six months. If it was scheduled for destruction, the SPA may also want to reconsider whether it is still appropriate to destroy the information. If the decision is to proceed with the destruction, the SPA should keep a record of the reasons for that decision.

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# OTHER CONSIDERATIONS

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27. You might also want to consider the Commissioner's guidance on *'Information held by a scheduled public authority for the purposes of the Freedom of Information Law.'*
28. Additional guidance is available on our guidance pages if you need further information on engaging the public interest test and other exemptions.

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# MORE INFORMATION

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29. 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.
30. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
31. If you need any more information about this or any other aspect of freedom of information, please contact us:

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