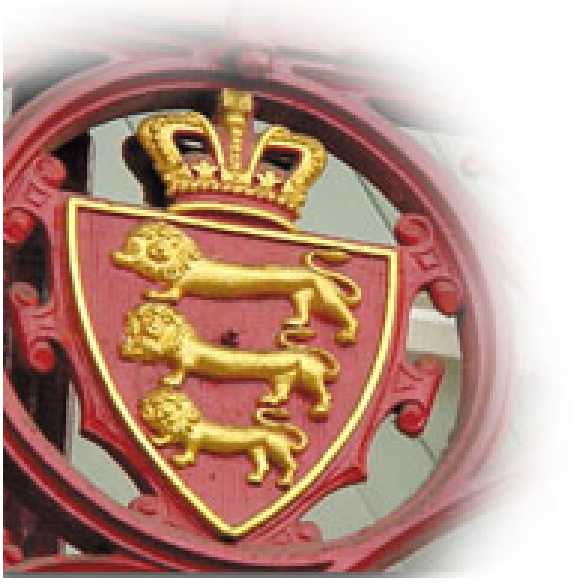
THE OFFICE OF THE
Data Protection Commissioner

Draft Freedom of Information (Jersey) Law 200-

Formal Response to the Draft Freedom of Information (Jersey) Law 200- Consultation Document



June 2006

Introduction

The following comments are in addition to those made in my consultation response in January 2005 to the Position Paper. (See "Formal Response to the Freedom of Information Position Paper" published in January 2005).

I am grateful to the Privileges and Procedures Committee for providing me with this further opportunity to comment.

Comments on the Articles of the draft Law

1. Article 2 – Public Authorities

Article 2 sets out the type of authority that will be brought within the scope of the Law. It would be helpful for a clearer indication of the specific bodies that will be covered. If there is any lack of clarity of who exactly the Law applies to, there is potential for significant boundary disputes. The UK Act contains a schedule of all bodies to which the legislation applies which serves to clarify the position.

2. Article 8 – General right of access to information held by public authorities

I would like to see the inclusion of a requirement for the authority to formally acknowledge receipt of an FOI request within a reasonable, specified timescale. I would suggest a period of 10 days may be workable.

In addition, if an authority receives a request for information which it does not hold but it is nonetheless aware that it relates to information which is held by another authority, there should be an express obligation on the authority to tell the applicant where the information is to be found and possibly forward the request on to that department. This would avoid the situation of a request being received by an authority which may take 20 days to confirm that it does not hold the information requested requiring the applicant to make a separate and new submission to a second authority. The response time scale would need to be amended accordingly. (See point 10)

3. Article 14 – Fees

Due care and consideration must be given to the introduction of fees under this Law. Any fees review should involve an open consultation process. Excessive charging which would deter applicants from making legitimate requests must be avoided. A fee regime which deterred members of the public from making a legitimate request would be

inconsistent with the principle of open government. Equally it is important that authorities are provided with the support to help them respond to requests in an efficient manner.

4. Article 15 – Time for compliance with request

15(4) states

'*If and to the extent that –*

(a) Article 8(1)(a) would not apply if the condition in Article 12(2)(b) were satisfied; or
(b) Article 8(1)(b) would not apply if the condition in Article 13(2)(b) were satisfied,

the public authority need not comply with Article 8(1)(a) or (b) until such time as is reasonable in the circumstances'

The concept of responding to a request which involves a public interest test in a 'reasonable' time is nebulous and runs the risk of providing the authority with an easy way out of responding promptly. It is clear from the UK experience that this has been a problem since the Act was implemented –

Evidence submitted by the BBC to the House of Commons Constitutional Affairs Committee (Freedom of Information – one year on) –

"problems which have been encountered include;

- Cases where public authorities have taken months to assess the public interest test (repeatedly extending their own deadlines)
- Authorities which retain all material covered by the request until they have decided on the public interest test, when only some of the material is potentially relevant to the exemption involved and the rest of it could have been supplied much more quickly (see point 13)."

Evidence submitted by Steve Wood, Senior Lecturer in Information Management, School of Business, Faculty of Business and Law, Liverpool John Moores University to the House of Commons Constitutional Affairs Committee (FOI – 1 year on) –

"The loophole of allowing public authorities when considering the public interest to extend beyond the statutory 20 working days time limit (..) is vague and very open-ended and subject to wide misapplication"

Evidence submitted by Richard Thomas, UK Information Commissioner (uncorrected transcript of oral evidence 991i) to the House of Commons Constitutional Affairs Committee (FOI – 1 year on) –

"..I am indicating that in my judgement two months should be long enough for public interest considerations."

Evidence submitted by Maurice Franknel, Director , Campaign for the Freedom of Information (uncorrected transcript or oral evidence 991ii) to the House of Commons Constitutional Affairs Committee (FOI – 1 year on) –

"One of the difficulties is that we have is that there is a nominal 20 working day response period, but it is expandable for an unspecified reasonable period, whenever public interest is to be considered. I do not think the public interest needs more time. If it does need more time I think it is a pity that it is unspecified"

As a result of personal experience as well as discussions with other regulators I do not underestimate the complexity of some of the information requests that involve the consideration of a public interest test. The process should, however, be more tightly controlled to dis-encourage misuse whilst allowing appropriate time for those authorities genuinely facing complex decision making in the area of public interest.

I would recommend that in the event of a request requiring a public interest test authorities have a provision to extend the response deadline for a single, specified period (e.g. an additional 20 working days) but any further extensions must have approval from the Commissioners office.

5. Article 17 – Exemption where cost of compliance exceeds prescribed amount

17(1) states –

'*A public authority need not comply with a request for information if it estimates that the cost of doing so would exceed the prescribed amount.*'

The prescribed amount is to be determined in Regulations and the same considerations apply as in relation to fees (point 3 above).

In addition, authorities should be expressly required to explain how they have calculated the cost and why they think it would take that number of hours. This would serve to make the process of consideration of cost more transparent and accountable. It would also enable the authority to provide relevant evidential information in an expeditious manner should a complaint be made to the Commissioner about the response.

6. Article 19 - Vexatious requests

An authority need not comply with a request for information if the request is considered vexatious. The draft goes on to describe vexatious as where the 'applicant has no real interest in the information sought' and where the 'information is being sought for a bad or illegitimate reason, which may include a desire to cause administrative difficulty'.

In his notes the draftsman quite correctly talks of vexatiousness being an 'imprecise notion'. It is. But I am not convinced of the clarity of wording of this article. Any request is applicant 'blind' so how is the authority going to attempt to establish whether or not there is a 'real interest'? It is subjective and possibly open to misinterpretation.

7. Article 21 – Special provisions relating to public records transferred to the Jersey Heritage Trust

Bearing in mind the definition of information in Article 3, I query the ability of the Trust to respond to requests on behalf of the authority whose information it is as they would appear to be simply holding that information for and on behalf of that authority. Notwithstanding the fact that the article does require the Trust to consult the authority, I am not convinced that the decision making responsibility provided to the Trust is appropriate.

8. Article 30 – Information accessible to applicant by other means.

Article 30 provides an exemption for authorities where the information being requested is accessible to the applicant by other means. The notes confirm that the article imposes no express obligation on the public authority to tell the applicant where the information is to be found. Notwithstanding the duty apparently imposed by Article 23(2)(c) to inform the applicant why the exemption applies, I would prefer to see that included as an express obligation.

9. Article 48 – Commercial interests

As a general point on information that extends into the commercial private sector, it is important that the industry is aware that this may be the case if they are dealing with public authorities. I am concerned that the consultation may not have adequately encompassed the private sector. The UK experience is that private industry remains concerned at the application of the Act and the potential impact on individual businesses.

Evidence by Dr Pollard - uncorrected transcript or oral evidence 991ii) to the House of Commons Constitutional Affairs Committee (FOI – I year on) –

"There is a concern that businesses are using the Freedom of Information (Law) to get information that will help them sell their services, or help them make commercial gain."

Evidence submitted by Intellect, a trade association for the UK hi-tech industry to the House of Commons Constitutional Affairs Committee (FOI – 1 year on)

"Many public authorities have been reluctant to accept information from commercial suppliers in confidence. They have also been reluctant to accept consultation clauses regarding the potential disclosure of commercially sensitive information under the Act. Companies that must share confidential information with public authorities are, therefore, at permanent risk of having that information disclosed (..) we believe that the Act has significant implications for the supplier community and has the potential to impact the manner in which suppliers interact with public sector customers in the future.
"Many suppliers are concerned by the decision to omit a requirement to at least inform a party that a request has been made for the disclosure of their information. If a company is unaware that a request has been made it is unable to take steps to prevent wrongful disclosure."

Indeed there is no 'reverse' of FOI in that it does not impose a legal obligation upon public authorities to consult affected third parties. I think that the inclusion of such a requirement is worthy of consideration.

10. Article 51 – Issue of code of practice in respect of Part 2 functions

51(2)(2) states –

The code of practice must, in particular, include provision relating to –

(b) the transfer of requests by one public authority to another public authority by which the information requested is or may be held.

I would prefer to see such a requirement as an express statutory requirement. (see point 2)

11. Article 61 – Issue of warrants

I would request consideration of the inclusion of an equivalent paragraph that exists in Schedule 9, para 5 of the Data Protection (Jersey) Law 2005 that allows for a police officer to accompany a person executing a warrant should the Commissioner consider it necessary.

General comments on the draft Law

12. Resources

This draft law is in some ways a departure from the original concept (e.g. the introduction of publication schemes that must be approved by my office) and as such I must stress most strongly that the issue of resources must be considered in full. This will include not only the impact on my department, but on the States as a whole. My office continues to struggle with a lack of support and funding and an inordinate amount of my time is spent attempting to resolve and negotiate the current funding/resource situation without compromising the efficient and professional administration of the department that already has a very wide remit with very limited resources.

As stated in my initial response to the FOI proposals, it is absolutely vital that the true resource implications for all departments are thoroughly and openly considered. Bearing in mind it is virtually impossible to predict with any accuracy the work volumes that will result from implementation, I do not want my department to fall in the same trap as the UK which saw their FOI teams barely survive the first year because of the sheer volume and complexity of the complaints that they were handling.

In addition, continued support from Law Officers Dept is crucial. I currently have no funding for external legal advice should that be required in situations of potential conflict of interest. Oversight of both data protection and freedom of information must necessarily be independent and as such the source and availability of legal advice when required is important.

We are well placed as a small jurisdiction to get this right, but we all need to prepare properly and effectively if it is going to work. With appropriate support and regular review I have no doubt that we can provide effective and professional oversight of FOI.

(See comments made in original consultation response)

13. Information requests

I would like to see the inclusion of an equivalent of Article 7(9) of the Data Protection (Jersey) Law 2005 which would mean that upon receipt of a request for information an authority is not excused from providing so much of the information as possible without disclosing exempt information. This would prevent authorities withholding information in its entirety simply because an element of it contains material which may be exempt. There should be an express requirement to provide all information which is not exempt within the normal time frame. (see point 4)

14. Preparation

In the UK, the Department of Constitutional Affairs was the very public face, along with the Commissioner, in the lead up to and implementation of FOI. This included media coverage and information publications. It described itself as 'vigorous in preparing central government for FOI'. We need to encourage the same level of commitment and drive from the political champions in Jersey. It cannot be left to the Information Commissioners office to prepare departments for implementation.

There was a general feeling that UK authorities were not adequately prepared for the impact of FOI and that such a lack of preparedness resulted in poor response times and poor quality of responses in general.

The General Medical Council responded remarkably efficiently to the new FOI regime and cite the fact that this was in part due to organisation-wide training programmes as well as a dedicated, well trained team of staff responsible for handling FOI and DP requests. There are data protection officers in most, if not all, States departments and they are an invaluable part of governmental compliance. Their role is likely to encompass FOI in the future and as such it is vital that they receive the support and training required to prepare them. This will be key to the success of the law from day one. FOI is effectively going to change the culture of the public sector, any culture change needs support from all levels, but especially senior management and those in political positions who should not underestimate their role in this new regime.

Records management as a whole is being tackled by the States and some progress is clearly being made. This core work will serve as the bedrock to this legislation. Records management is key in both data protection and freedom of information regimes. It is the role of the public service to make sure they look after their records management well and FOI will certainly bring this fact home. It should be considered as part and parcel of how we all do business and get better government.

(See comments made in original consultation response)

15. Sensitivity of information subject of an investigation by the Commissioners office

All staff involved with complaints at the Information Commissioners office should have an appropriate level of security clearance.

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