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JERSEY OFFICE OF THE INFORMATION COMMISSIONER

# GUIDANCE NOTE

# The Public Interest Test

## The Freedom of Information (Jersey) Law, 2011

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# INTRODUCTION

1. The Freedom of Information (Jersey) Law, 2011 ("the **Law**") gives rights of public access to information held by scheduled public authorities ("**SPAs**").

2. An overview of the main provisions of the Law can be found in "The Guide to Freedom of Information". This is part of a series of guidance notes issued by the Office of the Information Commissioner ("the **OIC**"), which provide further detail on specific areas and in more detail than the "Guide to the Law", in order to help SPAs to fully understand their obligations and to promote good practice.

3. This guidance endeavours to provide assistance to SPAs regarding the interpretation of "public interest" and "the public interest test", when it is required and how to apply it, what relevant factors should be taken into account (and weighing those factors up appropriately), in order to decide whether or not it is appropriate to disclose information.

4. A number of references are made to cases and decisions linked to operation of the Freedom of Information Act 2000 ("the **UK Act**") as a means of providing additional context to some areas subject of this guidance and given the lack of case law in Jersey. It should be noted, however, that judgments from the Courts of England and Wales are not binding in Jersey (albeit that they may be viewed by the Royal Court as being persuasive) and that there are 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

The exemptions as set out in Parts 4 and 5 of the Law are either 'absolute' or 'qualified'.

If an absolute exemption applies, the information does not have to be released to the applicant. If the information is qualified exempt information, the SPA must weigh the public interest in maintaining the exemption against the public interest in disclosure. This defined as "the public interest test".

You must bear in mind that the principle behind the Law is to release information unless there is good reason not to. A SPA can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

The public interest here means the public good, not what is of interest to the public, and not the private interests of the requester.

In carrying out the public interest test the SPA should consider the circumstances at the time of the request or within the normal time for compliance.

Public interest arguments for the exemption must relate specifically to that exemption. For example, where the exemption is about prejudice to a particular interest there is an inherent public interest in avoiding that prejudice. However, there is not necessarily an inherent public interest where the exemption protects a particular class of information.

The SPA must consider the balance of public interest in the circumstances of the request.

There will always be a general public interest in transparency. There may also be a public interest in transparency about the issue the information relates to. The SPA should consider any public interests that would be served by disclosing the information.

If there is a plausible suspicion of wrongdoing on the part of the SPA, this may create a public interest in disclosure. And even where this is not the case, there is a public interest in releasing information to provide a full picture.

Arguments based on the applicant's identity or motives are generally irrelevant. Arguments that the information may be misunderstood if it were released usually carry little weight.

The fact that other methods of scrutiny are available does not in itself weaken the public interest in disclosure. Where other means of scrutiny have been used, apart from the Law, this may weaken the public interest in disclosure.

There is a public interest in promoting transparency about the States of Jersey government and SPAs, although applicants do not have to be Jersey residents.

The SPA must consider the relative weight of the arguments for and against disclosure. This can be affected by the likelihood and severity of any prejudice; the age of the information; how far the requested information will help public understanding; and whether similar information is already in the public domain.

Where a qualified exemption applies and the SPA does not wish to confirm nor deny that it holds the requested information, the decision to give a 'neither confirm nor deny' response is itself subject to the public interest test.

# WHAT THE LAW SAYS

Article 9 of the Law is as follows:

**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;

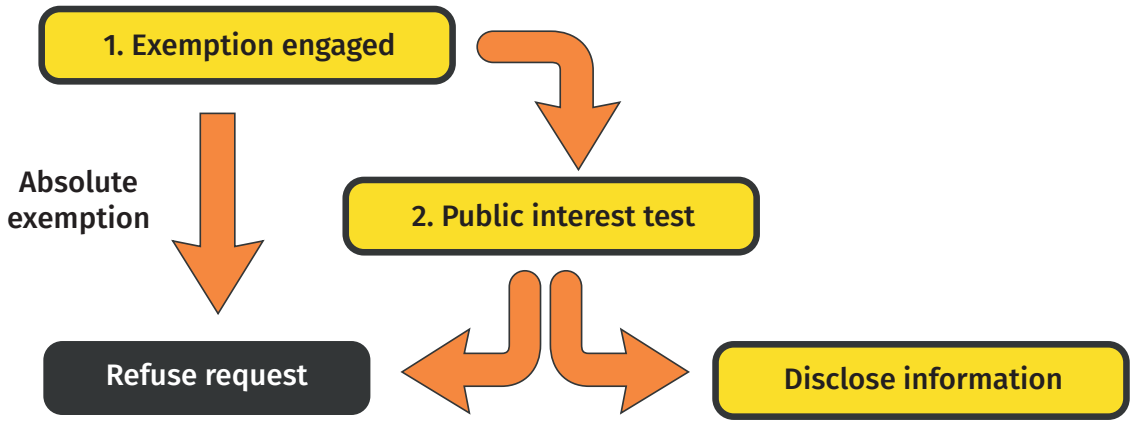
(b) a fee payable under Article 15 or 16 is not paid; or

(c) Article 16(1) applies.

# TYPES OF EXEMPTIONS

5. The Law gives a right of access to information that SPAs hold, but it also contains several possible exemptions from that right, which are listed in Parts 4 and 5 of the Law. Some of these exemptions, within Part 5, require the SPA to consider the balance of public interest in deciding whether to withhold the information; these are known as 'qualified' exemptions. Others do not; these are known as 'absolute' exemptions and are within Part 4 of the Law

6. The following diagram shows the difference in the way that absolute and qualified exemptions are handled:




7. As the diagram indicates, when a SPA wishes to withhold information under a qualified exemption, it must carry out a two-stage process. Firstly, it must decide that the exemption is engaged i.e. the exemption applies to the requested information. Then it must carry out the public interest test, which means that it must decide whether the public interest is better served by maintaining the exemption (and hence withholding the information) or by disclosing the information.

8. The effect of Article 9(2) is that when the SPA has carried out the public interest test, it can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosing it. If the public interest is equal on both sides, then the information must be released. If the public interest in disclosure is greater than the public interest in maintaining the exemption, then the information must also be released. In this sense we can say that there is an assumption in favour of disclosure in the Law.

# THE PUBLIC INTEREST

9. To carry out the public interest test it is necessary to understand what 'the public interest' means in the context of the Law

## In the public interest

10. The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.

11. However, these examples of the public interest do not in themselves automatically mean that information should be disclosed or withheld. For example, an informed and involved public helps to promote good decision making by public bodies, but those bodies may also need space and time in which to fully consider their policy options, to enable them to reach an impartial and appropriate decision, away from public interference. Revealing information about wrongdoing may help the course of justice, but investigations into wrongdoing may need confidentiality to be effective. This suggests that in each case, the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption.

## Of interest to the public

12. The public interest is not necessarily the same as what interests the public. The fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing the information that has been requested about it.

**Example 1**

**UK** *In the UK case of Guardian Newspapers Ltd and Heather Brooke v. the Information Commissioner and the British Broadcasting Corporation (EA/2006/0011 and 0013, 8 January 2007) the Information Tribunal said at paragraph 34:*

*"Mr Wells also exhibited to his statement a long list of press articles relating to the affair. Lord Wilberforce said in British Steel Corp v Granada Television Ltd [1981] AC 1096 at 1168: "There is a wide difference between what is interesting to the public and what it is in the public interest to make known". We did not find that the list of articles assisted us, since in the selection no distinction was made between matters which were in the interests of the public to know and matters which were merely interesting to the public (ie, which the public would like to know about, and which sell newspapers, but which under the Act are not relevant)."*

13. Media coverage of an issue may indicate that there is a public interest at stake, but it is not proof of the fact.

## Private interests

14. Article 9 (2) of the Law refers to the public interest; furthermore, disclosures of information under the Law are in effect to the world at large and not merely to the individual applicant. So the applicant's private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest.

**Example 2**

**UK** *The UK case of Grace Szucs v the Information Commissioner (EA/2011/0072, 16 August 2011) concerned a request from Mrs Szucs to the Intellectual Property Office (IPO) for the legal advice they had received about how to deal with a previous request that Mrs Szucs' husband had submitted. Mr Szucs was involved in a dispute with the IPO about how it had handled a complaint from him. In response to Mrs Szucs' request, the IPO withheld the legal advice under section 42(1) of the UK Act. In carrying out the public interest test, the Information Tribunal distinguished between private interests and what is in the public interest. They said at paragraph 54:*

*"The disclosure of the disputed information is not necessary for the public to obtain information about the IPO. The fact the legal advice the IPO received in relation to the request for information made by Mr Szucs in 2005 may be of interest to Mrs Szucs, her husband, their associates and perhaps a slighter wider section of the public, but it does not follow that its disclosure is in the public interest."*

# THE PUBLIC INTEREST TEST

## Timing

15. When carrying out the public interest test a SPA may consider the circumstances at the date of the request or when it actually deals with the request, provided this is within the statutory time for compliance (normally 20 working days from receiving the request). This is addressed by the Information Tribunal's comment in the UK case, Department for Business, Enterprise and Regulatory Reform v. Information Commissioner and Friends of the Earth (EA/2007/0072, 29 April 2008), at paragraph 110 that "the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10" (Time for compliance with request.)

16. Theoretically this may assist a SPA to consider that information can be withheld where the balance of the public interest test at the time they received the request was in favour of maintaining the exemption, even if this shifted during the time for compliance. However, if such a case arose, the applicant could submit a new request and receive the information. So, it would be in the SPAs interests to avoid damaging its customer relations by not seeking to rely on this technicality in the first place.

17. In considering this point under the Jersey Law, when dealing with a complaint that information has been wrongly withheld, the Information Commissioner will consider the situation at the time of the request or within the time for compliance. There may be rare cases where events after the time for compliance change the balance of the public interest test, in such a way that disclosure would be inappropriate or undesirable. If so, the Information Commissioner will decide what he or she orders the SPA to do.

## Public interest arguments

18. In carrying out the public interest test, the SPA should consider the arguments in favour of disclosing the information and those in favour of maintaining the exemption. The SPA should try to do this objectively, recognising that there are always arguments to be made on both sides.

    It may be helpful for the SPA to draw up a list showing the arguments it is considering on both sides; this will help when it comes to assessing the relative weight of the arguments.

## Arguments in favour of maintaining the exemption

***- Arguments must be relevant to the specific exemption***

19. The Law provides a right of access to information SPAs hold and the exemptions from that right listed in Parts 4 and 5 of the Law aim to protect particular, specified interests. So, the public interest arguments in favour of maintaining an exemption must relate specifically to that exemption.

20. Arguments that relate to other exemptions are irrelevant. So if for example a SPA wishes to apply Article 42 (a) relating to the prevention or detection of crime, the public interest arguments put forward for maintaining the exemption must relate specifically to the need to avoid prejudicing crime prevention or detection, and not for example, to endangering health and safety, which is dealt with in Article 38.

***- Class-based and prejudice-based exemptions***

21. When considering the public interest test, there is a difference between 'prejudice-based' and 'class-based' exemptions. These two terms are explained in our separate guidance document on the Prejudice test. Briefly, class-based exemptions protect information because it is of a particular type (for example information held which relates to 'Advice by the Bailiff, Deputy Bailiff or a Law Officer); prejudice-based exemptions protect information where its disclosure would or would be likely to harm a particular interest (for example the prevention or detection of crime).

22. There is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in that exemption, such as prejudicing crime prevention or endangering health and safety. The fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test. The same is not necessarily true if the exemption is class-based.

23. As a general rule there is no inherent public interest in class-based exemptions. However, there is an inherent public interest in Article 32, which exempts legally privileged information. This is because of the importance of the principle of legal privilege; disclosing any legally privileged information threatens that principle.

24. Class-based exemptions are engaged because the information is of a particular type. If it can also be shown that disclosure of the information would or would be likely to have a prejudicial effect, then there is a public interesting in avoiding that prejudice.

***- Blanket rulings***

25. Article 9 (2) requires the SPA to consider whether "in all the circumstances of the case", the public interest in maintaining the exemption outweighs the public interest in disclosure. This means that although a SPA may have a general approach to releasing certain types of information, and this may be helpful from an administrative point of view, this should not prevent them from considering the balance of public interest in the individual circumstances of each request. In the UK case of Hogan, the Information Tribunal said at paragraph 57:

> *"The public authority may well have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information. However such a policy must not be inflexibly applied and the authority must always be willing to consider whether the circumstances of the case justify a departure from the policy."*

# Arguments in favour of disclosure

***- General public interest in transparency***

26. The public interest arguments in favour of maintaining an exemption must relate specifically to that exemption, but this is not necessarily the case when considering the arguments in favour of disclosure. The UK Information Tribunal in Hogan made this point at paragraph 60:

*"While the public interest considerations against 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."*

27. There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. The Freedom of Information Law is a means of helping to meet that public interest, so it must always be given some weight in the public interest test.

***- Public interest in the issue***

28. As well as the general public interest in transparency, which is always an argument for disclosure, there may also be a legitimate public interest in the subject the information relates to. If a particular policy decision has a widespread or significant impact on the public, for example changes to the education system, there is a public interest in furthering debate on the issue. So, this can represent an additional public interest argument for disclosure.

29. If a major policy decision is being taken, there may also be a contrary argument that information should not be disclosed because of the need for a safe space in which to formulate and develop policy.

***- Public interest in the information***

30. In addition to the general public interest in transparency and accountability, and any public interest arising from the issue concerned, there may be a specific public interest in disclosing the information in question. This will of course depend on the circumstances of the case.

31. The following UK case is an example of where there is a specific public interest in transparency, to help people to understand their legal obligations.

**Example 3**

**UK** *Simon Philip Kalman v. Information Commissioner and Department for Transport (EA/2009/0111, 6 July 2010) concerned a request for Directions issued under the Aviation Security Act 1982 (ASA) relating to security-screening passengers at airports. The Department for Transport withheld the Directions under section 24(1) of the UK Act, relating to national security (Section 24(1) is a qualified, prejudice-based exemption).*

*The applicant argued that the effect of the Directions was that refusing to submit to a search could potentially constitute a criminal offence. Furthermore, the ASA provides a bar to civil or criminal claims arising from anything done or not done in compliance with a Direction. If they were not disclosed the Directions could be described as a 'secret law'; people were entitled to know the source of their legal obligations and any legal restrictions on their right to make a claim.*

*The Information Tribunal accepted the 'secret law' argument as a public interest factor in favour of disclosure. They said at paragraph 66:*

*"The public have a legitimate interest therefore in knowing whether an action complained of arises out of a Direction or not... it is in the public interest for parties to know, if they have a complaint, where they stand in relation to the powers exercised by airport security staff before bringing legal actions"*

*- Suspicion of wrongdoing*

32. A further example of a potential public interest in transparency is where there is a suspicion of wrongdoing on the part of a SPA. An applicant may, for instance, allege that a SPA has committed some form of wrongdoing, and that the information requested would shed light on this. For this to be considered as a factor in the public interest test,
    a) Disclosure must serve the wider public interest rather than the private interests of the applicant (see **Private interests** above); and
    b) The suspicion of wrongdoing must amount to more than a mere allegation; there must be a plausible basis for the suspicion, even if it is not actually proven.

33. A number of sources may suggest whether a plausible basis exists:
    a) The facts may suggest that the basis for an SPA's actions is unclear or open to question. The UK case of *Mersey Tunnel Users' Association v. Information Commissioner and Merseytravel* (EA/2007/0052, 15 February 2008), is an example of this and is discussed below under **Weighing the arguments**. The Information Tribunal in that case said at paragraph 46;

        *"legitimate and serious questions can readily be asked about both the power to make the payments and the obligation to do so".*
    b) If there has been an independent investigation, for example by an Ombudsman or auditors, the outcome of this may indicate whether or not there is any substance in an allegation of wrongdoing.
    c) The content of the information is important in making this assessment. It may refute the suspicion, in which case there may be some public interest in disclosing the information in order to clear up misconceptions; or, it may indicate that the suspicion is justified (a so-called 'smoking gun'), in which case there is an even stronger public interest in disclosure.
    d) Evidence of public concern about the issue could also be a factor for disclosure. An example of this is MPs' expenses in the UK.

**Example 4**

**UK** *In the UK case of House of Commons v. Information Commissioner and Leapman, Brooke, and Thomas (EA/2007/0060, 26 February 2008) the Information Tribunal at paragraph 49 found "as a fact" that there was "a long-standing lack of public confidence in the system of MPs' allowances" and "the extent of information published is not sufficient to enable the public to know how the money is spent". This clear evidence of public concern gave a plausible basis for the suspicion which created an additional public interest in disclosure.*

34. If there is evidence of public concern but those concerns do not have an objective basis, there can still be a public interest argument for disclosure if this would show that the concerns are unjustified and would help restore confidence in the SPA.

35. The Information Commissioner cannot assess whether there has been maladministration or other wrongdoing. In dealing with a complaint, we would consider the types of evidence listed above to assess whether the suspicion of wrongdoing creates a public interest in disclosure, not to decide whether there has been wrongdoing.

***- Presenting a 'full picture'***

36. Even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for SPA decisions, to remove any suspicion of manipulating the facts, or 'spin'. For example, this may well be a public interest argument for disclosing advice given to decision makers. The fact that the advice and the reasons for the decision may be complex does not lessen the public interest in disclosing it and may strengthen it. Similarly, the information does not have to give a consistent or coherent picture for disclosure to help public understanding; there is always an argument for presenting the full picture and allowing people to reach their own view. There is also a public interest in the public knowing that an important decision has been based on limited information, if that is the case.

**Example 5**

**UK** *The UK case of Cabinet Office and Christopher Lamb v. Information Commissioner (EA/2008/0024 and 0029, 27 January 2009) concerned a request for the minutes of Cabinet meetings at which the Attorney General's advice on the Iraq war was discussed. The Information Tribunal said at paragraph 82:*

*"...the majority considers that the value of disclosure lies in the opportunity it provides for the public to make up its own mind on the effectiveness of the decision-making process in context"*

37. If information that is already in the public domain (rather than the requested information) is misleading or misrepresents the true position, or does not reveal the full picture, this may increase the public interest in disclosure. For instance, where part of some legal advice has been disclosed, leading to misrepresentation or a misleading picture being presented to the public, there may be a public interest in disclosing the full advice.

## Irrelevant factors

38. There are a number of arguments which may be put forward in the public interest test, that we consider are unlikely to be relevant. This is supported by the comments of the UK Information Tribunal in *Hogan* at paragraph 61:

> *"While FOIA requires that all the circumstances of the case be considered, it is also implicitly recognised that certain factors are not relevant for weighing in the balance.*
>
> *First, and most importantly, the identity and, or, the motive of the applicant is irrelevant ...*
>
> *Second, the 'public interest' test is concerned only with public interests, not private interests.*
>
> *Third, information may not be withheld on the basis that it could be misunderstood, or is considered too technical or complex."*

39. These may include:

***- Identity of the applicant***

40. The applicant's identity or their motives in seeking the information are not relevant to the public interest test. The Law is often said to be 'applicant and motive blind'. This is because a disclosure under the Law is in effect a disclosure to the world. The public interest issues that come into play when a qualified exemption is engaged are about the effect of making the information public, not the effect of giving it to a particular applicant. This does not mean that the applicant's public interest arguments should not be considered.

***- Private interests of the applicant***

41. The applicant's private interests are not in themselves relevant to the public interest test. For example, an applicant may have a grievance they are pursuing and may think the information they want will help them. This in itself is not a relevant factor. There would only be a public interest argument if it could be shown that there is a wider public interest that would be served by disclosing that information.

***- Information may be misunderstood***

42. Information requested under the Law may be technical or complex. This is not usually in itself an argument for maintaining the exemption. The obvious solution is for the SPA to publish an explanation of the information, rather than withhold it.

43. It may be argued that the information would be misleading, perhaps because it consists of notes reflecting only part of a discussion or because it may be inaccurate or out of date. The Law provides a right to information that SPAs hold; it does not require that information to be complete, accurate or up to date.

**Example 6**

**UK** *In the UK case Home Office v. Information Commissioner (EA/2008/0027, 15 August 2008), the Home Office had argued that data it held on work permits should not be disclosed because it may be inaccurate or incomplete. The Information Tribunal said at paragraph 15 that:*

*"... if the records are faulty or inadequate and the information turns out therefore to be inaccurate that is irrelevant: the right under the Act is to information which is held, not information which is accurate."*

44. The SPA should normally be able to publish some context or explanation with the information it releases. The argument that it would not be in the public interest to publish inaccurate or misleading data would usually only carry any weight if the Article 36 exemption is claimed (information intended for future publication) and the SPA's publication plans include providing the necessary context or explanation. In any other type of case, the argument may only be used if it is not possible to provide this explanation, or if the explanation would not limit any damage caused.

**Example 7**

**UK** *In the UK case of HMRC v. IC (EA/2008/0067 – 11 March 2009), the applicant requested a copy of the report prepared following an investigation into allegations about a proposed amnesty for United Kingdom tobacco producers. The UK Information Commissioner found that the information about the involvement of third parties should not be disclosed under section 31 of the UK Act (Law Enforcement) (the Jersey equivalent of which is Article 42 of the Law) but that the elements of the report relating to an HMRC employee could be disclosed because the authority would have other means to require an employee to co-operate with an investigation which it would not have with external third parties e.g. employment obligations.*

*On appeal, HMRC argued that only disclosing the information provided by its own staff presented an "unbalanced picture". Secondly, HMRC argued that this unbalanced picture "...would [have] a resultant deleterious effect upon future non-statutory investigations of a similar kind if the future interviewees felt there was a risk of partial, and therefore possibly unbalanced, disclosure" (paragraph 58).*

*The UK Information Commissioner countered these arguments by suggesting that the unbalanced picture argument was overstated because the ".... Report essentially exonerated those about whom allegations were made" and secondly that if these third parties felt that their role in the affair had been misrepresented, then it was open to them to present their side of the story (paragraph 60).*

*At paragraph 59 the Information Tribunal said: "....this is tantamount to a suggestion that any third parties otherwise affected could, as HMRC put it in written submissions, 'speak up about their role and put rebuttals into the public domain' .... HMRC points out that the Commissioner has held that it would be contrary to the public interest to require evidence of third parties to be disclosed under FOIA and therefore it would be totally inappropriate, as well as unfair, and not in the public interest to force them by indirect means to make such disclosure. The Tribunal respectfully agrees".*

*The Tribunal therefore found that the public interest test for section 31 favoured maintaining the exemption, because it would not be in the public interest to compel third parties to present arguments in their defence when the Commissioner had already found that it would not be in the public interest to disclose information about the third parties. Therefore in this case, the prejudicial effect could not be mitigated by an accompanying explanatory statement or by setting the disclosure into context.*

*Similar arguments may also go to support the engagement of exemptions other than Article 42.*

## Other means of scrutiny

45. It may be argued that, where issues of public concern are at stake, the existence of other means of scrutiny or regulation that could address them weakens the public interest in disclosure. This argument suggests that there is no need for the public to scrutinise the requested information through the Law because it can be adequately considered by another body as part of their scrutiny or regulatory function.

46. The fact that other means of scrutiny are available and could be used does not in itself weaken the public interest in disclosure and we consider this argument to be irrelevant in the public interest test. However, where other means have been used or are being pursued, this may go some way to satisfying the public interest that would otherwise be served by disclosure. If, for example, a report providing the conclusions or outcome of other means of scrutiny or regulation is publicly available, this may to some extent lessen the public interest in disclosing the information requested under the Law. Furthermore, if the other investigation is on-going, the public interest may be better served by allowing it to continue without interference, rather than disclosing information prematurely.

47. The questions to be considered are:
    a) How far the other means of scrutiny go to meet the specific public interest in transparency in any particular case; and
    b) What information is available to the public by these other means. There is always some public interest in disclosing the 'full picture', for general transparency and accountability, so the public interest in disclosure cannot be completely discounted.

## The interests of people in other countries

48. Where information is about events in another country or the actions of a foreign government, it may be argued that the public interest test should consider the interests of the people of that country. In our view, the purpose of the Law is to promote transparency about the States of Jersey and the SPAs defined in Schedule 1 of the Law. So, any interest that people of another country have in greater transparency about their government and their public authorities is not relevant to the public interest test under the Jersey Law.

49. If citizens of other countries wish to understand more about the actions of the Jersey government, they can submit local requests under this Law in the same way as Jersey citizens – an applicant under the Law does not have to be a Jersey national or resident and should not be treated differently to applicants based in Jersey. The public interest test is not about whether it is in the specific interests of the people of a foreign country to hold the Jersey government to account but rather, that it is in the general public interest that there is transparency about what the Jersey government does. The public interest test is about what is in the best interests of society in general, and this includes citizens of other countries.

"(1) In the absence of an adequacy decision under Article 45 of the GDPR, a controller or processor may transfer personal data to a third country or an international organization only if the controller or processor has provided appropriate safeguards in accordance with this Article, and on condition that enforceable data subject rights and effective legal remedies for data subjects comparable to those under this Law are available in that country or organization.

## Attaching weight to the public interest arguments

50. Once the SPA has identified the relevant public interest arguments for maintaining the exemption and for disclosure, it must then assess the relative weight of these arguments, to decide where the balance of public interest lies. This is not an exact process, but the authority should try to approach it as objectively as possible. If the Information Commissioner is dealing with the case, we will consider these arguments, or consider other public interest arguments that the SPA did not include, and may reach a different conclusion.

51. Certain factors can add weight to the arguments on either side and these will help decide where the balance of public interest lies. These factors include the following.

***- Likelihood of prejudice***

52. A key factor is the SPA's assessment of the likelihood of prejudice. Likelihood is discussed in detail in our guidance on the Prejudice test. Briefly, in engaging a prejudice-based exemption, the SPA has to decide whether disclosure would or would be likely to cause the prejudice described in the exemption. 'Would' means more probable than not (a more than 50% chance). 'Would be likely' means that there must be a real and significant chance of the prejudice occurring, even though the probability may be less than 50%.

53. 'Would' is a higher standard to meet than 'would be likely'. So, if the SPA can establish that prejudice would happen, the argument for maintaining the exemption carries greater weight than if they had only established that prejudice would be likely to happen. This does not mean that where prejudice would happen, the public interest will always be in favour of the exemption - there may be equally weighty arguments in favour of disclosure - but it does make it more likely that the balance of public interest will be in favour of maintaining the exemption.

54. There may be cases in which the Information Commissioner does not accept that the SPA has shown that prejudice would happen and instead proceeds on the basis of would be *likely*.

***- Severity***

55. The severity of the prejudice that may happen also affects the weighting. This is about the impact of the prejudice when it happens and not about how frequently the prejudice may happen; that is part of the likelihood of it occurring. Prejudice may still happen, even if its impact would not be severe. However, if the prejudice has a particularly severe impact on individuals or the SPA or other public interests, then this will carry considerable weight in the public interest test. This would be relevant if, for example, there is any risk of physical or mental harm to an individual.

**Example 8**

**UK** *In the UK case, People for the Ethical Treatment of Animals Europe (PETA) v. Information Commissioner and University of Oxford EA/2009/0076, 13 April 2010, the University argued that publishing certain information about animal experiments would be likely to endanger the physical and mental health and safety of University staff and visitors, given the activities of animal-rights extremists. Section 38 of the UK Act (the Jersey equivalent to which is Article 38 of the Law), relating to health and safety, was therefore engaged.*

*The Information Tribunal said at paragraph 68:*

*"... the University argued that there was significant additional weight in favour of withholding the disputed information because of the nature of the threat (in this case an increased risk of indiscriminate and extreme acts of bombing and arson). It was not suggested that the nature of the risk has the status of turning section 38 into an absolute exemption but that it requires a very strong public interest to equal or outweigh it. The Tribunal agrees with this assessment of the weight that should be given to the nature of the additional endangerment in this case, and in light of the history ... considers that section 38 is engaged, and that significant and conclusive weight should be given to the factors weighing against disclosure of the disputed information in this case."*

56. In our view, severity and likelihood together indicate the impact of the prejudice, and this in turn will affect the weight attached to the arguments for the exemption.

57. In circumstances where severe prejudice "would be likely" to happen, this would attract greater weight in the public interest test than a prejudice that "would" occur but the consequences for which are deemed to be "not severe".

***- Age of the information***

58. Generally speaking, the public interest in maintaining an exemption will diminish over time, as the issue the information relates to becomes less topical or sensitive and the likelihood or severity of the prejudice diminishes. However, this is not necessarily true in every case; for example an investigation may be closed for a long time and it may be argued that the weight of public interest in disclosure has increased, but if the investigation is re-opened, the weight of the public interest argument for the exemption may be restored. So, the weight of the arguments on either side can depend on the age of the information and the timing of the request.

59. The Law recognises the effect of the passage of time - under Article 19 some exemptions cease to apply altogether after a certain number of years. However, if information is several years old but not yet at the point of becoming a 'historical record', this doesn't mean there is a stronger argument for disclosure simply because the information is nearing the point at which the exemption no longer applies.

***- The specific information and the public interest in disclosure***

60. In assessing the weight of arguments for disclosure, it is important to consider how far disclosing the requested information would further the public interests identified. The information may be relevant to a subject of public interest, but it may not greatly add to public understanding - in such cases the public interest in maintaining the exemption may outweigh that in disclosure. On the other hand disclosure may help inform that debate, and if so the public interest in disclosure is strengthened. The weight of the argument for disclosure will depend on the content of the information and the nature of the public interest identified. This is shown in the following UK examples.

**Example 9**

**UK** *In Paolo Standerwick v. Information Commissioner (EA/2010/0065, 27 July 2010), the applicant had made a request to the Financial Services Authority for legal advice they had obtained on the time limit for making complaints about financial advisers (the so-called "15 year long-stop"). The FSA had withheld the advice under section 42 because it was legally privileged.*

*The Information Tribunal said at paragraph 6:*

*"Disclosure of the advice would undoubtedly have given the public some additional understanding of the operation of a public authority with significant responsibilities and of its decision-making process in relation to the 15 year long-stop issue, which would tend to foster transparency and accountability. Having seen the advice in question, however, we can say that it would have contributed to such understanding in a very modest way, adding very little to the contents of the board paper already provided to Mr Standerwick, which itself focuses on the policy issues surrounding whether or not to introduce a 15 year long-stop rule."*

*So there was little weight in the argument for disclosing this information, compared with the substantial inherent weight in preserving legal privilege.*

**Example 10**

**UK** *The Information Tribunal case of Office of Government Commerce v. the Information Commissioner (EA/2006/0068 and EA/2006/0080, 19 February 2009) concerned a request to the OGC for Gateway Reviews (a type of project management document) of the Government's identity cards programme. These were withheld under section 35 (formulation and development of government policy) (the Jersey equivalent of which is Article 35 of the Law) and section 33 (audit functions) (the Jersey equivalent of which is Article 37 of the Law). The Information Tribunal found that there was a public interest in debating the benefits and costs of the scheme, and in seeing how the scheme had evolved and how government policy on ID cards had developed. The OGC claimed that the information in the Gateway Reviews would add nothing to the public debate on the merits of ID cards.*

*The Information Tribunal however said at paragraph 159:*

*"...the disputed information itself needs to be carefully examined to see whether it would have "materially added" to any debate. It is enough for this Tribunal to confirm that on examining this information, it would, in the Tribunal's view, undoubtedly make an important contribution to the debate for the reasons which have been set out above, namely that there must be an assumption that an interested and educated observer would be likely to glean something material from the Reports."*

***- Information already in the public domain***

61. *It may be necessary to consider whether similar information is already available in the public domain, and what effect this has on the public interest test. If similar information is already available and the requested information would not significantly add to it, the public interest arguments about furthering debate and increasing accountability may carry little weight. If the requested information contains new material that would help inform public debate, then the weight of the specific public interest argument is not reduced. Moreover, there is always some weight in the general argument for transparency and having the 'full picture'.*

62. *The factors discussed above will help in assigning relative weight to the public interest arguments on each side but they are not intended to be a complete list. Other factors may also be relevant, depending on the circumstances of the case.*

# The balancing exercise

63. SPAs must then carry out a balancing exercise to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. If it does not, the information must be released.

64. The following UK case is an example of how the UK Information Tribunal has approached the balancing exercise. The arguments on each side and the weight attached to them reflect the particular circumstances of this case. This case is unusual because in cases involving the UK section 42, (Legal Professional Privilege) (the Jersey equivalent to which is Article 32 of the Law) the strong inherent weight in preserving legal privilege often means that the public interest in maintaining the exemption outweighs the public interest in disclosure. In this case it did not, and the reasons for this are shown in the balancing exercise.

**Example 11**

**UK** *The UK case of Mersey Tunnel Users' Association v. Information Commissioner and Merseytravel (EA/2007/0052, 15 February 2008) concerned a request for legal advice received by Merseytravel, who operate the Mersey tunnels. Merseytravel had previously met losses on operating the tunnels by increasing the levy on the Merseyside district councils. When the tunnels started to make a profit the issue arose as to whether the profit should be used to repay the councils (treating the levy increase as a loan) or whether it could be used to reduce toll charges. After getting legal advice, Merseytravel used the money to repay the councils. The advice was legally privileged and hence section 42 of the UK Act was engaged (Article 32 of the Law). This is a qualified exemption, so the question was whether the public interest in maintaining legal privilege outweighed the public interest in disclosure.*

*The balance of public interest, as described by the Information Tribunal, can be summarised as follows:*

| Public interest in maintaining the exemption | Public interest in disclosure |
|---|---|
| The significant inbuilt weight of public interest in maintaining legal privilege. The Tribunal said that the inbuilt weight would have been even greater if the advice had significantly affected individuals. | The specific need for transparency in this case because of Merseytravel's lack of clarity about their legal duty to repay the district councils, in addition to the general public interest in transparency. |
| The advice was still 'live', in the sense that it was still being relied on. | The amount of money involved (tens of millions of pounds). |
| The age of the information (it was 14 years old) diminished the impact on legal privilege and reduced the weight of the argument for the exemption. | The numbers of people affected (all users of the tunnels). |
| The outcome depended on the relative weight of the arguments on each side, not the quantity of those arguments. The Information Tribunal said at paragraph 51:<br><br>"Weighed in the round, and considering all the aspects discussed above, we are not persuaded that the public interest in maintaining the exemption is as weighty as in the other cases considered by the Tribunal; and in the opposing scales, the factors that favour disclosure are not just equally weighty, they are heavier." | |
| The lack of transparency about the basis for the authority's actions seems to have been a crucial factor in tipping the balance. | |

65. The Mersey Tunnel case is an example of how the public interest test was carried out in that particular case. The relative weight of the public interest arguments will always depend on the circumstances of the case.

# OTHER CONSIDERATIONS

## Neither confirm nor deny ("NCND")

66. The public interest test is also relevant to the question of whether a SPA confirms or denies that information is held pursuant to Article 10 and the Law recognises that there are circumstances where it would be appropriate for a SPA to issue an NCND response in respect of requests which may fall within the ambit of Article 10(2) of the Law.

67. If the exemption is prejudice-based then the question is whether stating that the information is or is not held would or would be likely to prejudice the interests that the exemption protects. If the exemption is class-based, then the type and class of the information (whether held or not) would engage that exemption.

68. If the exemption (whether prejudice-based or class-based) is qualified, then the decision to give a 'neither confirm nor deny' response is subject to the public interest test. The effect of Article 10 (2) and (3) is to release the SPA from any obligation to confirm or deny that they hold the information if the public interest in neither confirming nor denying outweighs the public interest in disclosing whether they hold the information.

*Decision Notice FS50128245 of the UK Information Commissioner concerned a request to the Department for Business, Enterprise and Regulatory Reform (DBERR) for information about an investigation into a named company. DBERR refused to confirm or deny whether it held such information. One of the exemptions cited was section 43(3) which deals with 'neither confirm nor deny' in relation to prejudice to commercial interests.*
*In considering the public interest test, the UK Information Commissioner recognised the public interest in information about possible investigations and in knowing about the activities of regulatory bodies. On the other hand, he accepted the authority's arguments about the potential commercial damage to companies if the public knew whether or not they had been investigated. The Commissioner considered that the balance of public interest lay in neither confirming nor denying that the information was held.*

69. If the SPA is issuing a NCND response under a qualified exemption, it should indicate in that response that it has considered the public interest test specifically on the issue of whether to confirm or deny.

70. NCND is a complex area, and further information is available in our separate guidance on this topic.

# MORE INFORMATION

71. 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.

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

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

**Jersey Office of the Information Commissioner**
**2nd Floor**
**5 Castle Street**
**St Helier**
**Jersey JE2 3BT**

**Telephone number:** +44 (0) 1534 716530
**Email:** enquiries@jerseyoic.org