

GUIDANCE NOTE

The Prejudice 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, which goes into more detail than the Guide, to help SPAs to fully understand their obligations and to promote good practice.
3. This guidance document is intended to help SPAs and practitioners, when they are considering exemptions provided by the Law, to decide whether disclosing information would lead to prejudice. Detailed guidance on each of the exemptions is available on our website, but this document explains in general terms what is meant by prejudice.
4. 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

Some of the exemptions within the Law are prejudice-based. That means that in order to engage them there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.

The test of prejudice involves several steps:

- Identify the applicable interests within the relevant exemption
- Identify the nature of the prejudice. This means that the SPA must:
 - » Show that the prejudice claimed is real, actual or of substance; and
 - » Show that there is a causal link between the disclosure and the prejudice claimed.
- Decide on the likelihood of the prejudice occurring. This means deciding whether the prejudice would or would be likely to occur.
 - » 'Would' and 'would be likely' imply different levels of likelihood.
 - » Where a SPA has not specified the level of likelihood, and in the absence of clear evidence to the contrary, the Information Commissioner will consider that 'would be likely' applies.

The prejudice test relates to circumstances at the time when the SPA received the request or within the statutory time for compliance.

Once the exemption has been engaged on the basis of the prejudice test, it is then necessary to consider the balance of public interest.



TYPES OF EXEMPTIONS

5. The Law gives people the right to access to information held by SPAs, but it also contains a number of possible exemptions from that right, which are listed in Parts 4 and 5 of the Law. Some of these exemptions 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. The absolute exemptions are contained within Part 4 of the Law, the qualified exemptions are within Part 5.
6. Qualified exemptions can be further divided into ‘class-based’ and ‘prejudice-based’ exemptions.
7. **Class-based** means that if the information is of the type described in the exemption, then it is covered by that exemption. Some qualified exemptions (and all absolute exemptions) are class-based. The SPA does not have to demonstrate that any particular harm would be caused by disclosure in order to use the exemption, but, in the case of qualified exemptions, they still have to consider the balance of public interest before deciding whether or not to disclose the information.
8. For example, Article 35 is a class-based, qualified exemption; if the information requested is held by a SPA and it relates to the *‘formulation or development of any proposed policy by a public authority,’* then the exemption is engaged, regardless of whether disclosure would prejudice policy development in any particular case. The SPA must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
9. Any prejudice or harm caused by disclosure may be a factor in the public interest test, but it is not relevant to engaging the exemption.
10. If the exemption is **prejudice-based**, then the SPA has to satisfy itself that the prejudice or harm that is specified in the exemption either would or would be likely to occur. For example, under Article 41 information is exempt if its disclosure *‘would or would be likely to, prejudice relations between Jersey and the United Kingdom; a State other than Jersey;’* etc. If the exemption is engaged on this basis, the SPA then has to carry out the public interest test to determine whether or not the information should nevertheless be disclosed.
11. The rest of this guidance relates to prejudice-based exemptions.



PREJUDICE-BASED EXEMPTIONS

12. The prejudice-based exemptions are:

- Article 27 - National Security
- Article 33(b) - Commercial interests
- Article 34 - The Economy
- Article 37 - Audit functions
- Article 38 - Health and safety
- Article 39 - Employment
- Article 40 - Defence
- Article 41 - International relations
- Article 42 - Law enforcement

13. These exemptions can be categorised as prejudice-based because of their wording. Most of them use the word 'prejudice'. For example:

Article 33(b):

"Information is qualified exempt information ifIts disclosure would, or would be likely to, prejudice the commercial interests of a person (including the scheduled public authority holding the information)."

14. In legal terms, the word 'prejudice' is commonly understood to mean harm. To say that disclosure would or would be likely to prejudice the interests specified in the exemption implies that it would (or would be likely to) harm those interests.

15. Other exemptions use other words with a similar meaning:

- a) Under Article 38, information is exempt if its disclosure would or would be likely to "endanger" the safety or physical or mental health of an individual.

Although there are some variations in wording, and these different words do not have exactly the same meaning, in our view the approach to adopt in deciding whether there is a likelihood of prejudice, in other words the prejudice test, is the same for all of these exemptions.



THE PREJUDICE TEST

16. Our approach to the prejudice test has been assisted by reference to a case heard before the UK Information Tribunal: *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) ("**Hogan**") and, on particular, paragraphs 28-34 thereof and which is referred to for guidance only and in the absence of local case law. The Information Commissioner considers that the principles set out in that case are sensible points for consideration by SPAs when undertaking the prejudice test. In Hogan, the UK Information Tribunal indicated that the consideration of the prejudice test involves the following steps:
- a) Identify the "*applicable interests*" within the relevant exemption
 - b) Identify the "*nature of the prejudice*". This means:
 - i) Show that the prejudice claimed is "*real, actual or of substance*";
 - ii) Show that there is a "*causal link*" between the disclosure and the prejudice claimed.
 - c) Decide on the "*likelihood of the occurrence of prejudice*".

Step 1 - applicable interests

17. The SPA must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect. Arguments about prejudice to any other interests will not engage the exemption. So, for example, if the exemption claimed is Article 34 (a), the 'economic interests of Jersey', any arguments about damage to Jersey's interests abroad that are not clearly economic are not relevant; they are more likely to engage Article 41 – International relations.
18. Where the exemption has subsections relating to different interests, the prejudice must relate to the specific subsection(s) that the SPA seeks to engage. For example, Article 34 distinguishes between the economic interests of Jersey in subsection (a), and the financial interests of the States of Jersey in subsection (b).

Step 2 - the nature of the prejudice

19. As exemplified in Hogan, this step involves two parts.
20. Firstly, the prejudice that the SPA has envisaged must be real, actual or of substance. The disclosure must at least be capable of harming the interest in some way, i.e. have a damaging or detrimental effect on it. If the consequences of disclosure would be trivial or insignificant there is no prejudice. However, this does not mean that the prejudice has to be particularly severe or unavoidable. There may be a situation where disclosure could cause harm, for example to commercial interests, but the SPA can mitigate the effect of the disclosure, perhaps by issuing other communications to put the disclosure in context. In such a case, where the severity of the prejudice can be mitigated, the exemption may not be engaged or we may still accept that the exemption is engaged but then consider the effect of these mitigating actions as a factor in the public interest test.
21. Secondly, there must be what the court in Hogan called a "causal link" between the disclosure and the prejudice claimed. The SPA must be able to show how the disclosure of the specific information requested would or would be likely to lead to the prejudice.



Example 1

The UK Information Tribunal case of Pauline Reith v. Information Commissioner and London Borough of Hammersmith and Fulham (EA/2006/0058 1 June 2007) concerned a request for the council's policy on towing illegally parked vehicles. The council confirmed that it targeted towing operations on certain types of illegal parking, and so in effect they partially disclosed the policy, but they withheld their more detailed criteria on the basis of section 31 (law enforcement). The relevant subsection was section 31(1)(g): prejudice to the exercise of the functions specified in 31(2)(c), which is to do with "regulatory action in pursuance of any enactment". The UK Information Tribunal found (in paragraphs 30-40) that the council had not demonstrated that disclosing this information would be likely to cause any prejudice to its parking enforcement functions.

The council believed, on the basis of their experience, that disclosing their detailed criteria for towing vehicles would encourage people to park illegally, but they had no actual evidence to support this.

The UK Information Commissioner had argued that people who park illegally would know, on the basis of the detailed criteria, where they could do so and receive only a fine, rather than being towed away as well. The UK Information Tribunal however found no evidence that there were people who would take this risk, given that the fine would be substantial in any case. If there were, they could already make an 'educated guess' as to their chances of being towed from the partial information that the council had released. Furthermore, publishing the full criteria might actually reduce illegal parking if people realised that they are more likely to be towed than they had thought.

The UK Information Tribunal therefore did not accept that there was a causal link between the disclosure and the prejudice envisaged and so the exemption was not engaged.

22. Although there must be a causal link, the prejudice test relates to something that may happen in the future, if the information were disclosed. Therefore it is not usually possible to provide concrete proof that the prejudice would or would be likely to result. Nevertheless, as the above example shows, there must be more than a mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption.
23. Establishing the causal link means that the prejudice claimed is at least possible, i.e. there are circumstances in which it could arise. The next step in engaging the exemption is to consider how likely the prejudice is to occur.

Step 3 - the likelihood of prejudice

24. The prejudice-based exemptions (with the exception of Article 27(1)) use the phrase "would or would be likely to" prejudice (or endanger). If the SPA cannot show that the prejudice would or would be likely to occur, then the exemption is not engaged.
25. The causal link shows the circumstances, or the chain of events, that could lead to prejudice. It may be possible to show that prejudice would occur even if those circumstances would only occur once or affect one person or situation. However, the more frequently those circumstances arise, the more likely the prejudice is to occur. So, while the chances of prejudice occurring in any one case may be low, if the number of cases in which it might arise is high then it may be possible to say that prejudice would or would be likely to arise.



26. In establishing whether prejudice would or would be likely to occur, it is therefore necessary to consider:
- The range of circumstances in which prejudice could occur (for example, whether it would affect certain types of people or situations);
 - How frequently the opportunity for the prejudice arises (i.e. how likely it is for these circumstances to arise); and,
 - How certain it is that the prejudice results in those circumstances.
27. The terms 'would' and 'would be likely' have separate and distinct meanings in this context.

Would prejudice

28. The UK Information Tribunal in *Hogan* said at paragraph 33:

"There are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."

29. The first limb relates to 'would' and the second to 'would be likely'. 'Would' therefore means 'more probable than not'; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
30. If a SPA claims that prejudice would occur they need to establish that either
- The chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation; or
 - Given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.

Would be likely to prejudice

31. 'Would be likely' refers to a lower level of probability than 'would', but one which is still significant. This interpretation is based on the judgment of Mr Justice Munby in the UK case of *R (on the application of Lord) v. Secretary of State for the Home Office* [2003] EWHC 2073 (Admin) (a Data Protection Act case) who said:

"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not." (Paragraph 100)

32. This interpretation was relied on by the UK Information Tribunal in *John Connor Press Associates v. Information Commissioner* (EA/2005/0005, 25 January 2006), who said at paragraph 15:

"We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."

33. On the basis of these judgments, 'would be likely' means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.



34. If a SPA claims that prejudice would be likely to occur they need to establish that
- There is a plausible causal link between the disclosure of the information in question and the argued prejudice; and
 - There is a real possibility that the circumstances giving rise to prejudice would occur, i.e. the causal link must not be purely hypothetical; and
 - The opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.

Stating the level of likelihood

35. If a SPA is withholding information under a prejudice-based exemption, it should always make a choice between would or would be likely to and state this in its refusal notice.
36. If the Information Commissioner is considering an appeal where the SPA has not specified the likelihood of prejudice, we will give the SPA an opportunity to say whether it means would or would be likely to. If this does not lead to clarification, then we may consider the approach adopted by the UK Information Tribunal in the UK case of Ian Edward McIntyre v. the Information Commissioner and the Ministry of Defence (EA/2007/0068, 4 February 2008) where the UK Information Tribunal stated:

“We consider that ... in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.”

37. The ‘clear evidence’ would include the language used by the SPA. For example, we may take references to the consequences of disclosure, rather than the possible consequences of disclosure, as evidence that the SPA meant ‘would’ rather than ‘would be likely to’. In the absence of clear evidence that the authority meant ‘would’, we will assume ‘would be likely to’. It should be noted however that this is our approach in exceptional circumstances. Situations in which the SPA does not specify the level of prejudice should not arise; the SPA should always be able to state whether it means ‘would’ or would be likely to’.

Level of likelihood accepted by the Information Commissioner

38. Cases may arise in which the SPA says that prejudice would occur, but the Information Commissioner does not accept that this has been demonstrated, and considers instead that the exemption is only engaged on the basis that the prejudice would be likely to occur. In such cases we will proceed on the basis of ‘would be likely’.
39. Establishing the appropriate level of likelihood is also important because it has an effect on the balance of the public interest test. For an explanation of this, see our separate guidance on the Public interest test.



OTHER CONSIDERATIONS

Time at which to consider prejudice

40. A SPA's assessment of prejudice may vary depending on events while it is handling the request. Circumstances may change in the time between when it receives the request and when it answers it.
41. When considering the possibility of prejudice resulting from disclosure, a SPA can take account of the circumstances either as they were at the date of the request or as they are at the point when it actually deals with the request, provided this is within the time for statutory compliance, which is normally 20 working days.
42. This flexible approach means that the SPA can make a fuller assessment of whether the exemption is engaged. However, it should not be used to disadvantage the applicant unfairly, for example where information is withheld on the basis of an exemption that is engaged on the date of the request but not when the request is answered.

Misleading information

46. A SPA might argue that the harm the exemption is designed to protect against either exists or is increased because the requested information is misleading or could be misunderstood.
47. The Information Commissioner's view is that it is generally possible to avoid this perceived difficulty by putting the disclosure into context.



Example 2

In Decision Notice FS50130316 issued by the UK Information Commissioner, the complainant had requested information from the Food Standards Agency (FSA) about a review into the safe cooking time and temperature for burgers. The FSA argued that section 43 (the Jersey equivalent to which is Article 33) applied; the company had expressed the view that disclosure of the information would be misleading and could prejudice its commercial interests. It maintained that the information could be taken out of context, leading to misunderstanding and misrepresentation, which in turn could result in a loss of trust and damage to its reputation.

The FSA acknowledged that the information could have been released with an accompanying explanatory statement setting it in context. However, it took the view that this would not have removed the risk of harm, particularly as selected media bodies would have been likely to ignore such clarification in the interest of providing sensationalist and misleading headlines and reports concerning the company. The UK Information Commissioner rejected these arguments, deciding that section 43 was not engaged:

"The Commissioner is generally reluctant to accept arguments for withholding information based on the contention that disclosure might result in the information being misunderstood or that certain parts of the media might seek to misrepresent the information in order to provide sensationalised news stories. His view is that it is always possible to offset the potential for this to happen by issuing an accompanying statement placing the information in context."

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48. However such arguments may be relevant in a small number of cases where strong and persuasive arguments are presented which are specifically tied to the exemption claimed. It may be accepted that in some cases it might not be possible to provide the necessary explanation or context, and consequently not possible to effectively mitigate the argued prejudice. An example of this might be where the only person that could provide the necessary explanation is no longer employed by the SPA.

Public interest test

48. As noted at the beginning, the prejudice-based exemptions are also qualified exemptions. Once the SPA has established that the exemption is engaged because the test of prejudice is met, the next stage is to consider whether the public interest in maintaining the exemption, and hence in withholding the information, outweighs the public interest in disclosure. This is explained in our guidance on the Public interest test.

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MORE INFORMATION

49. 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.

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

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

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