

Freedom of Information (Jersey) Law 2011

DECISION NOTICE

OIC Reference	CAS-01542
Date of Decision Notice	9 January 2019
Scheduled Public Authority	Parish of St Lawrence (the SPA)
Address	The Parish Hall La Grande Route de St Laurent St Lawrence Jersey JE1 1NG
Date of Initial Request	February 2018
Date of SPA's response	28 February 2018
Date of request for Internal Review	5 March 2018
Date of Internal Review	18 April 2018
Date of Appeal to Information Commissioner	18 May 2018

Summary/Decision

1. In February 2018, the Complainant requested certain information from the SPA relating to legal advice that had been provided to the Connétable and Rector regarding certain *requêtes*¹ that had been issued by members of the Parish of St Lawrence (the **Parish**) about the proposed extension to St Lawrence Church (the **Requested Information**).
2. The SPA wrote to the complainant on 28 February 2018 stating that the Requested Information was being withheld (the **Withheld Information**) under Arts. 31 and 32 of the Freedom of Information (Jersey) Law 2011 (the **Law**), which the Complainant subsequently contested and requested an internal review.
3. The SPA sent the outcome of its internal review on 18 April 2018 (the **Internal Review**), upholding its original position.
4. The Complainant appealed to the Information Commissioner (the **Commissioner**).
5. The Commissioner's decision is that the SPA withheld the Withheld Information in accordance with the Law.
6. No further steps need be taken by the SPA to comply with the Law.

¹ A *requête* is a method by which members of a parish can force either a parish or ecclesiastical assembly to be called.

The Role of the Information Commissioner

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

The Request

9. The Complainant requested the following
 - a. A copy of the legal advice supplied to the Connétable of St Lawrence (the **Connétable**) in relation to two *requêtes* served on the Parish at the end of 2017 in relation to a new meeting about the then proposed extension to St Lawrence Church (the **First Request**); and
 - b. A copy of the legal advice supplied to the Rector of St Lawrence, in relation to a third *requête* served on the Parish in relation to the then proposed extension to St Lawrence Church. (the **Second Request**).
10. On 28 February 2018 the SPA responded to the Request in the following terms (the **Initial Response**):

"1. This information is exempt under Article 31 of the Freedom of Information (Jersey) Law 2011. See exemption details below.

FOI exemption applied: Advice by the Bailiff, Deputy Bailiff or a Law Officer

Information is a qualified exempt information if it is or relates to the provision of advice by the Bailiff, Deputy Bailiff or the Attorney General or the Solicitor General.

QE31 is a qualified exemption and therefore whether the disclosure of the advice would be in the interest of the public must be considered. Given the advice is from a Law Officer, there is an inherently high threshold to keep it confidential. In this instance, the public interest does not overcome the Law Officer privilege and the exemption is maintained.

"2. This information is exempt under Article 32 of the Freedom of Information (Jersey) Law 2011. See exemption details below.

FOI exemption applied: Legal professional privilege

Information is qualified exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

QE32 is a qualified exemption and therefore whether the disclosure of the advice would be in the interest of the public must be considered. Confidentiality is of paramount importance in a lawyer client relationship. In this instance, the public interest does not outweigh the legal privilege and the exemption is maintained."

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

"I would request a Parish Internal Review of the refusal of supplying Legal Advice given to The Constable of St Lawrence, (and also to the Rector), in respect of the Requetes served on them (as per the 1804 Jersey Law) to summons new Parish Meetings.

This legal advice was to the Constable (and Rector), was used to block 3 Requetes served under the 1804 Law whereby parishioners can demand a new Parish meeting.

The eventual Parish meeting held on 26th February 2018, subsequently called by the Constable, after considerable pressure, and also a meeting with the Attorney General, was attended by a record number of parishioners, so the Constable's/Rector's legal advice, used to refuse previous meetings, is quiet clearly in the Public Interest, particularly as the Constable (& Rector) must act impartially and in Public interest, and be transparent too.

It now transpires that the Church alteration contract was signed on 18th December 2017..., after refusal of the 3 Requetes, and the "excuse" given for The Constable/Rector Refusing the Requetes (and therefore refusing a new Parish Meeting, when validly demanded under the 1804 Jersey Law) was on the basis of the Legal Advice received.

This legal advice is quiet clearly in the Public Interest, and further does not concern any individual, but is the reason given by the Constable for non compliance with the 1804 Jersey Law, and further a fundamental duties of the Constable is to be impartial, represent the parishioners best interests, and of course be transparent."

12. The response to the Complainant's request for an internal review was provided on 18 April 2018 (the **Internal Review**), stating that the Initial Response to the Request was upheld. In respect of the First Request, the SPA stated that *"in this instance, the public interest does not overcome the Law Officer privilege and the exemption is maintained"*. In respect of the Second Request, the SPA stated: *"On Internal Review the advice received was found not to have been in writing but rather oral advice received by the Rector of St Lawrence. Article 1 of the [Law] states "information" means information recorded in any form. As the information is not recorded the Internal Review concludes that the information is not held. The response to the request should therefore have been that the information is not held. The response to the request should therefore have been that the information is not held. As the information is not held the exemption does not apply."*

The Investigation

Scope of the case

13. On 18 May 2018, the Complainant contacted the Commissioner to complain about the way their Request and the Internal Review had been handled and to appeal the SPA's decision to withhold the Requested Information. The Complainant asked the Commissioner to review the Complainant's request and the responses received from the SPA in order to ascertain whether the response was in accordance with the law.

14. The Commissioner has set out in this Decision Notice the particular issues that he has had to consider in respect of each exemption cited by the SPA and, where relevant, the public interest test.

Chronology

15. On 20 August 2018, the Commissioner wrote to the SPA to advise that the Complainant had appealed to the Commissioner regarding the SPA's handling of the Initial Request and subsequent Review, pursuant to Art.46 of the Law. The SPA was asked to provide a copy of the requested information and their written submissions in response to the complaint made by the Complainant.

16. The SPA responded to that letter on 11 September 2018 explaining the rationale applied by the SPA in respect of the Withheld Information, together with a copy of the Withheld Information itself. The Commissioner had further correspondence with the SPA and Complainant on various other dates.

Analysis – The First Request

QUALIFIED EXEMPTIONS

Art.31 – Advice by Bailiff, Deputy Bailiff or a Law Officer

17. Art.31 covers information relating to Law Officers² advice. It is qualified by the public interest test and public authorities can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has seen the requested information comprising the First Request. Without divulging the contents thereof, the information comprising the First Request relates to legal advice provided by a Law Officer to the Connétable regarding the ability of the Parishioners to call a *requête*. The Commissioner therefore considers that the exemption is, on the face of it, engaged in respect of the First Request. The focus of the appeal is therefore on the application of the public interest and whether the SPA was correct in concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.

The Complainant's position

18. The Complainant has provided comprehensive submissions to the Commissioner. In essence, the Complainant argues that there is "huge" public interest in knowing the contents of the advice and contends that a number of issued *requêtes* were not complied with based on the legal advice provided by the Law Officer. The Complainant believes that parishioners are entitled to see the advice given to the Connétable because it is actually for the benefit of the parish as a whole.

The SPA's position

19. The Commissioner understands that the Law Officers are the principal legal advisers to the States of Jersey (the **States**), including the parishes. The core function of the Law Officers is to advise

² In addition to the Bailiff and Deputy Bailiff this includes the Attorney General, Solicitor General and other employees of the Law Officers' Department.

on legal matters, helping members of the States to act lawfully and in accordance with the rule of law. The SPA contends that Art.31 reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of such advice without the Law Officers' consent. The purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressurised to seek advice in inappropriate cases.

20. The Commissioner has also had sight of guidance issued by the Information Commissioner for England and Wales on the equivalent provision of the Freedom of Information Act 2001 (**FOIA**)³. Whilst not binding in this jurisdiction, the Commissioner finds the following comments constructive in helping with his consideration of the public interest test (particularly as there is a similar convention applicable in England and Wales which is afforded similar protection under that equivalent provision):

"136. The key public interest argument for this exemption will relate to protecting the Law Officers' convention of confidentiality.

Example

In HM Treasury v Information Commissioner & Evan Owen [2009] EWHC 1811 (Admin), the High Court considered the Treasury's refusal to confirm or deny whether it held legal advice which confirmed that draft legislation was compatible with the Human Rights Act 1998. The judge concluded:

"Parliament intended real weight should continue to be afforded to this aspect of the Law Officers' Convention ... the general considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining the exemption even in the absence of evidence of particular damage."

137. This being the case, the starting point should be to establish whether the Law Officers' convention is engaged for the particular information in question.

138. Where it is engaged, the convention will carry significant weight in the public interest test. However, Section 35(1)(c) is not an absolute exemption, and the strong public interest in protecting Law Officers' advice may still be overridden in some cases if there are particularly strong factors in favour of disclosure. This reflects the view taken by Judge Blake in the case of HM Treasury v Information Commissioner & Evan Owen [2009] EWHC 1811 (Admin).

139. He stated;

"Nothing in this judgment is intended to undermine the important principle of transparency and accountability that the FOIA has brought to government in many ways. ... I can certainly contemplate, for example, that the context for the commencement of hostilities in Iraq was

³ S.35 of FOIA is the equivalent provision to Art.31 of the Law.

of such public importance that... the strength of the public interest in disclosure of the advice as to the legality of the war might well have out-weighed the exemption"..."

21. The Commissioner has also paid regard to the Owen case referred to in the above extract and, in particular, the following excerpts regarding the importance of the Law Officers' convention:

"54. In my judgment, although mere deficiencies in the reasoning process or even isolated errors of law will not suffice to set aside a determination by the Information Tribunal, I am satisfied that this Tribunal has erred in considering how to approach the strength of the public interest in maintaining the exemption from disclosure of the information whether the Law Officers have advised or not. I am satisfied that the Tribunal misdirected itself:

i) By failing to conclude that Parliament intended real weight should continue to be afforded to this aspect of the Law Officers' Convention:

ii) By failing to conclude that the general considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining an exemption even in the absence of evidence of particular damage.

*iii) By failing to conclude that the evidence of the two witnesses before it, supported with detailed arguments the reasons why the general principles applied in this case, deserved some weight as emanating from senior civil servants with experience of the requirements of government in this field. This does not mean that the Tribunal were bound by these decisions or prevented from reaching their own conclusion upon the issue. Since preparing a draft of this judgment I have become aware of the decision of Keith J in *Home Office v Information Commissioner* QBD [2009] EWHC 1611 (Admin) where he rejected any suggestion of deference being required on the facts in that case at [65]. I see no inconsistency with the conclusion I have reached on the facts of the present case.*

iv) The Tribunal were unduly and wrongly influenced by a misdirection that the FOIA had tended to modify the Law Officer's Convention, as opposed to preserve it but render it amenable to being out-weighed by greater considerations of the public interest requiring disclosure of information in either limb of the Convention.

v) The Tribunal misdirected itself that the way the Convention worked operated as a trump card in the hands of the Ministerial department concerned as to whether or not to disclose but could be deployed for its advantage. If this were the case I would agree with the Tribunal's comments that this is inconsistent with the principled reasoning and the interests of transparency required by the FOIA. The history of the convention and the evidence of Mr Jones precisely in point demonstrated that it was not. Where Ministers had disclosed without the prior consent of the Law Officers this was considered to be a breach rather than an application of the convention and a matter for reprimand."

22. Whilst the case of Owen is not binding in this jurisdiction, the Commissioner considers that such cases are useful, particularly given the similarities between the Law and FOIA, and the convention itself. There is no local case law on point.

23. The Complainant submits that there is obvious public interest in understanding how to call a *requête* and understanding which matters fall within the business of the Parish Assembly and which are ecclesiastical matters.
24. The SPA does not consider that there is sufficient public interest justifying the release of the information comprising the First Request, and has indicated that information about how parishioners are able to call a *requête* and who is able to preside at a parish assembly is already in the public domain⁴. The Complainant has also advised that certain parishioners had the benefit of an informal meeting (also attended by the Connétable) about which matters fall within the ecclesiastical business of the Parish Assembly and which matters fall within all other business of the Parish Assembly. This was confirmed in a letter from the Connétable to the Complainant and the Complainant has indicated that they acknowledge the accuracy of that letter.
25. Having considered the submissions of both parties, the Commissioner does not consider the public interest to be sufficiently strong in these particular circumstances to override the convention and the exemption from disclosure provided for at Art.31 of the Law. Information as to how to call *requêtes* is already in the public domain and the Complainant (and other parishioners) have benefitted from the informal meeting as set out at para.25 above.

Analysis – The Second Request

Art.8 – General right to be supplied with information held by a scheduled public authority

26. For the purposes of the Law, an individual has a general right to be supplied with information if, at the time of the request, it is “held” by that authority. It is not obliged to create information (so for the Rector to try write down a record of a conversation that he had some time ago).
27. In respect of the Second Request, the SPA initially stated that the requested information (legal advice provided to the Rector of the Parish) was exempt from disclosure on the basis of legal privilege (Art.32). In its internal review, however, the SPA advised that in fact that information was not “held” by the SPA as the advice had been provided verbally. Accordingly, there was nothing to be provided. The Complainant does not believe that there is no information held by the SPA and does not accept that the Rector only received verbal and no written advice. It is unclear why the SPA initially responded citing the Art.32 exemption and no explanation was given to the Complainant.
28. When considering whether information is “held”, the Commissioner considers the question to the civil standard of proof, that is, on the balance of probabilities. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches; and, or other explanations offered as to why the information is not held.
29. The Commissioner has received representations from the SPA who has confirmed that the information comprising the Second Request was provided verbally to the Rector of the Parish and there are no notes of the conversation. The Complainant is sceptical of this and does not

⁴ www.parish.gov.je (sections on Parish Assembly and Procedure for Meetings of the Parish Assembly).

consider it likely that someone would simply accept legal advice orally, without such being followed up in writing.

30. The SPA gave the Complainant a misleading impression in its initial response, but corrected its position at internal review. Having received submissions from the SPA, the Commissioner is satisfied on the balance of probabilities that the SPA does not hold information in scope of the Complainant's Second Request. The Complainant's scepticism is understandable given the change in position but the Commissioner does not agree with the Complainant's position that verbal legal advice is always confirmed in writing. The Complainant may consider that any person seeking to rely on legal advice may wish for it to be recorded in this way but that is an issue as between the lawyer and the client.
31. Whilst the Commissioner has not made any findings on this article because the SPA amended its position correctly at internal review, its initial refusal notice should have provided more detail about what exemption it thought was relevant and should have explained why, in fact, the exemption had been incorrectly cited. Failure to do so made it more difficult for the Complainant to understand the SPA's position and, understandably, raised their suspicions when there was an unexplained reversal of this position. The Commissioner has considerable sympathy with the Complainant in this regard.

The Decision

32. The Commissioner's decision is that the SPA correctly withheld the Withheld Information in respect of both the First and Second Request.
33. The Commissioner does not require the SPA to take any steps in respect of this notice.

Right of Appeal

34. An aggrieved person has the right to appeal against this Decision Notice to the Royal Court of Jersey.
35. If you wish to appeal against this Decision Notice, you can obtain information on how to do so on <https://www.oicjersey.org>.
36. Any Notice of Appeal should be served within 28 (calendar) days of the date on which the Decision Notice is issued.

Dated this 9th day of January 2019

Signed.....

Mr Paul Vane

Deputy Information Commissioner
Office of the Information Commissioner
4th Floor
One Liberty Place
St.Helier
Jersey JE2 3NY

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

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

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

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

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

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

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

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

18 Where a scheduled public authority refuses a request

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

31 Advice by the Bailiff, Deputy Bailiff or a Law Officer

Information is qualified exempt information if it is or relates to the provision of advice by the Bailiff, Deputy Bailiff or the Attorney General or the Solicitor General.

32 Legal professional privilege

Information is qualified exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.