

STATES OF JERSEY



FREEDOM OF INFORMATION (JERSEY) LAW 200-: CONSULTATION DOCUMENT

**Presented to the States on 21st April 2006
by the Privileges and Procedures Committee**

STATES GREFFE

FREEDOM OF INFORMATION (JERSEY) LAW 200- CONSULTATION DOCUMENT

Introduction

The Privileges and Procedures Committee is pleased to circulate this consultation document containing a first draft of the proposed Freedom of Information (Jersey) Law 200-. The Committee is conscious that a wide range of stakeholders will have an interest in the draft and the Committee is keen to receive comments from as many people as possible.

The Committee is keen to progress the legislation during this year but will take careful consideration of all submissions made to it during this consultation period to ensure that the Law balances the objective of providing improved rights of access to official information against the need to ensure that the operation of the Law is not unduly costly or complex for public authorities.

Comments on the consultation draft should be sent to the Privileges and Procedures Committee, c/o States Greffe, Morier House, St. Helier, Jersey JE1 1DD or by email to p.horton@gov.je. Comments should be submitted by Friday 16th June 2006 to enable the Committee to finalise the draft and lodge it "au Greffe" for debate later this year.

Background

In 2004 the then Privileges and Procedures Committee brought forward to the States certain minor amendments to the Code of Practice on Public Access to Official Information which first came into force in January 2000. The 2004 amendments to the Code were intended to strengthen the public's right of access to official information and established for the first time, for example, a public right of access to supporting papers on a Committee's "A" agenda. During the debate on the amendments to the Code it was clear that a large majority of States members supported the Committee's stated intention to replace the Code with a Freedom of Information Law in accordance with the original States decision in 1999.

In late 2004 the PPC presented to the States a position paper on progress towards the preparation of a Freedom of Information Law (R.C.55/2004 presented to the States on 21st December 2004) and following the presentation of the position paper to the States comments were received by the Committee from a wide range of persons. On 19th April 2005 the Committee lodged a proposition asking the States to agree that the Code should be replaced with a Law (P.72/2005 lodged "au Greffe" on 19th April 2005). Somewhat unusually the proposition contained as an appendix the full text of the proposed law drafting instructions so that members could formally endorse the approach being taken by the Committee.

Following the lodging of the proposition the then Policy and Resources Committee expressed some concern that the proposition as lodged was unduly restrictive in that it effectively bound the PPC to bring forward a draft Law which gave effect to all 22 key policy outcomes in precisely the terms outlined in the accompanying report. Following discussions between the two Committees the Privileges and Procedures Committee lodged an amendment to its own proposition to provide that further consultation would take place and that the Law would be "broadly based upon" the key policy principles. The intention of the amendment was to ensure that further refinements could take place during the consultation and drafting period and the publication of this consultation document is a very key part of this process.

During the discussions with the Policy and Resources Committee which led to the lodging of the amendment there were 4 particular issues which that Committee considered might need further refinement. These were as follows –

1. Whether requests for information should be in writing. The Policy and Resources Committee was concerned that if there was no requirement for requests to be in writing any number of uncontrolled and wholesale oral requests could be made. The Privileges and Procedures Committee felt that making this a legal requirement for readily available information would be a nonsense, although it accepted that those on the receiving end of requests should not be able to be

swamped or unable to prove how they had dealt with a contentious request.

2. Exemption regarding employer/employee relations. The Policy and Resources Committee suggested that the exemption might need to be widened so that requests for information that would prejudice not only the resolution of a dispute but also the successful completion of other negotiations could be refused. The PPC accepted that some change in wording might be necessary to achieve this objective.
3. Exemption concerning the premature release of a draft policy. The Privileges and Procedures Committee agreed that the proposed wording might be too restrictive and accepted that changes which clarified the scope of the exemption could be considered.
4. The scope of offences and penalties. The Policy and Resources Committee expressed concerns that at least one of the proposed offences (that of an unreasonable failure to provide the information requested) could lead too easily to a prosecution. PPC accepted that some change in wording might be required in relation to penalties and offences during the drafting stage.

The proposition was adopted as amended by the States on 6th July 2005 in the following terms –

“The States, adopting the proposition, as amended, of the Privileges and Procedures Committee

- (a) agreed that the existing Code of Practice on Public Access to Official Information should be replaced by a Law, to be known as the Freedom of Information (Jersey) Law 200-;
- (b) agreed that, subject to further consultation, the Law should be broadly based upon the key policy outcomes listed at Section 17, numbers 1 to 20, of the report of the Privileges and Procedures Committee dated 19th April 2005; and,
- (c) requested the Privileges and Procedures Committee to bring forward for approval the necessary draft legislation to give effect to the decision”.

Paragraph (a) was approved by 32 votes to 12 and paragraphs (b) and (c) by 31 votes to 13.

The consultation draft

Following the adoption of the “in principle” proposition in July 2005 detailed law drafting began on the legislation. This report contains a draft of the Law for consultation purposes. As can be seen, each Article is accompanied by a detailed note setting out its provisions.

The Committee accepts that the legislation is relatively complex but is nevertheless hopeful that it will provide a robust framework to ensure proper access to official information whilst containing a sensible and workable framework of exemptions for information that it would be inappropriate to release. Because Jersey’s data protection and public records legislation mirrors the U.K. legislation it will be seen that this draft Freedom of Information Law is closely modelled on the U.K. legislation.

PPC believes that the draft addresses many of the concerns raised during the debate on the “in principle” proposition. For example, Article 5 of the draft Law states that a request for information must be made in writing although the provision is, of course, wide enough to allow e-mail requests to be made. The Law makes it clear (Article 9) that any request that does not specify with sufficient precision what information is being sought does not have to be complied with by the public authority until further information specifying the precise information requested has been given.

During the consultation stages in late 2004 and early 2005 there was concern expressed from some respondents that any Freedom of Information Law would be unduly costly to administer. PPC noted that there were clearly significant differences of opinion in relation to the likely cost of implementation of any Law and it was accepted that the true impact of the Law was unlikely to be known until it was brought into force. It is effectively simply

impossible to know in advance what level of requests will be made under it. Experience in other jurisdictions, particularly in recent times in the United Kingdom, has shown that there is an initial “surge” in applications shortly after the introduction of Freedom of Information legislation but that the level of requests falls off relatively quickly after the first months to a more manageable level.

The draft Law contains provision to address some of the concerns about resource implications. Article 14 makes it clear that a public authority may charge a fee for the provision of information and there is no obligation to provide the information until the necessary fee has been paid. The level of fees will be established by Regulations and Article 14 makes it clear that there will be flexibility to provide for different fees in different circumstances and for different persons. The Committee does not believe it is appropriate or feasible to restrict the application of the Law to persons who are in Jersey as any person outside the Island could simply circumvent any such restriction by channelling the request through a person who was in the Island. Nevertheless it will be possible, if deemed appropriate, for the scale of fees established by Article 14 to make different provision for applicants in Jersey and applicants who are outside the Island. Although it will, in the majority of cases, be appropriate to assist persons outside the Island seeking information, for example for legitimate business purposes, it is not unreasonable to suggest that the Jersey taxpayer should not be obliged to meet the total cost of requests for information made by persons outside the Island who make no financial contribution to the operation of the public administration meeting the request. Article 17 of the Law provides an exemption from the requirement to comply with a request for information if the cost of doing so would exceed an amount which the States will prescribe by Regulations. Whilst this provision should not be used to prevent the proper operation of the Law it is not difficult to imagine that, in the absence of any such provision, tremendously complex or detailed requests for information could be submitted that would place an unacceptable burden on a public authority. Even if a public authority is able to rely on the exemption given by Article 17 on cost, there is provision in Article 18 for the information to be provided on the payment of an appropriate fee. In addition, to avoid the Law being abused, Article 19 and 20 contain provision to prevent vexatious or repeated requests for information.

A change introduced into the draft Law from the “in principle” proposals is the inclusion in Article 28 of provisions relating to publication schemes. The Committee would stress that it is not necessarily intended to bring Article 28 into force immediately on the coming into force of the Law but it has been felt appropriate to include the possibility of publication schemes as it is possible that with the development of improved records management systems in States’ departments it will be easier to make information publicly available through an agreed publication scheme rather than responding to numerous ad hoc requests for information.

The Committee would draw attention to Article 31 which addresses some of the concerns expressed during the consultation period on the premature disclosure of information. It can be noted that Article 31 allows information to be exempt if it is held with a view to its publication at some future date. The Article would, for example, allow the Statistics Unit to exempt information it was collating for a forthcoming statistical release and similarly evidence being collated in a draft report by a scrutiny panel would not be accessible in its draft form through this Law. In a similar way draft policies are exempt from disclosure through the operation of Article 41 if it would not be in the public interest to disclose policy during its formulation or development.

Concerns were expressed by the States of Jersey Police and others during the consultation stages that inappropriate provisions in a Freedom of Information Law could prejudice law enforcement. Article 37 is intended to address such concerns and makes it clear that the release of any information that would prejudice the prevention or detection of crime, the apprehension or prosecution of offenders or the administration of justice is exempt. It should be noted that there is, in addition, no requirement to confirm or deny the existence of information if such a disclosure would, in itself, lead to prejudice in law enforcement matters.

The draft Law contains a facility for Codes of Practice to be made by Regulations (Article 51 and 52) concerning the manner in which public authorities should discharge their responsibilities under the Law and concerning records management procedures. The Committee became aware during the initial work preparing the law drafting brief that projects were underway in some States’ departments to introduce new systems of record management, in particular to meet the stringent obligations already placed on public authorities by the Public Records (Jersey) Law 2002. As explained in the notes accompanying the Articles to this Law there is clearly a need to ensure that the Public Records (Jersey) Law 2002, the Data Protection (Jersey) Law 2005 and the new Freedom of Information (Jersey) Law 200- are aligned and create a workable and appropriate framework for the management

of information and its release.

During the discussions that took place between the Policy and Resources and the Privileges and Procedures Committees prior to the debate on the “in principle” proposition one matter of significant concern to the Policy and Resources Committee was the scope of offences and penalties in the proposals. PPC has responded to these concerns in the draft Law. Although further advice is needed on the proposed procedure set out in Article 59 in relation to any failure to comply with a notice the Committee is keen, if possible, to avoid making any such failure a criminal offence. The only offences remaining in the draft Law are found in Article 70 and in Article 91. Article 70 refers to the offence of intentionally instructing a person executing a warrant under the Law or failing without reasonable excuse to give a person executing such a warrant assistance as the person might reasonably require. The offence in Article 91 refers to the offence of deliberately taking steps to alter, deface, block, erase, destroy or conceal any record to prevent disclosure. It is important to stress that the offence is only committed if a person intends to prevent the disclosure and any inadvertent action by an employee of a public authority which led for example to a record being deleted, would not constitute an offence under this Article.

Conclusion

In the spirit of the Freedom of Information Law the Committee has made available this early draft of the legislation to seek comments. The detailed drafting may develop during and after the consultation period and the Committee wishes to stress that –

1. Although the Committee has put forward a complete draft of the proposed Law this does not indicate that the Committee is not prepared to consider any alternative proposals and the Committee would stress that the draft should not be viewed as the Committee’s final opinion on what should or should not be included in the Law.
2. Although the Committee has put forward a complete draft of the Law it is not necessarily the case that all the Law would be brought into force at the same time. In all likelihood there will need to be a considerable lead in time between the enactment of the legislation and its coming into force (as was the case in the United Kingdom) and, in addition, it is possible that certain provisions (for example publication schemes) might not be brought into force until it was considered appropriate, and resources were available, to do so.

The Committee will, of course, welcome comments on any aspect of the draft Law. The Committee would nevertheless be particularly grateful to hear the views of stakeholders on the following points –

- are the exemptions in the draft Law appropriate? Are there any exemptions that should not be included and, conversely, are there any that should be added?
- will the draft Law have resource implications for the public authority you represent? What lead time do you consider should be allowed between the enactment of the Law and its coming into force?
- is the overall framework set out for the operation of the Law appropriate for Jersey?

As stated above comments on the draft should be received before Friday 16th June 2006.



Jersey

FREEDOM OF INFORMATION (JERSEY) LAW 200-

Arrangement

Article

PART 1

INTERPRETATION AND ADMINISTRATION

Interpretation

- 1 Interpretation
- 2 Public authorities
- 3 Information held by public authorities
- 4 Absolute exemptions
- 5 Request for information

The Information Commissioner and the Information Tribunal

- 6 The Information Commissioner and the Information Tribunal
- 7 Consequential amendments to the Data Protection (Jersey) Law 2005

PART 2

ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

Right to information

- 8 General right of access to information held by public authorities
- 9 Public Authority may request additional information
- 10 The information requested
- 11 Compliance with obligation to confirm holding of information
- 12 Effect of the exemptions in Part 3– duty to confirm or deny
- 13 Effect of the exemptions in Part 3– duty to disclose
- 14 Fees
- 15 Time for compliance with request
- 16 Means by which communication to be made
- 17 Exemption where cost of compliance exceeds prescribed amount
- 18 Fees for disclosure where cost of compliance exceeds appropriate limit
- 19 Vexatious requests
- 20 Repeated requests
- 21 Special provisions relating to public records transferred to the Jersey Heritage Trust.
- 22 Duty to provide advice and assistance

Refusal of request

- 23 Refusal of request – absolute exemption
- 24 Refusal of request – not an absolute exemption
- 25 Refusal of request – cost of compliance will exceed prescribed amount
- 26 Refusal of request – vexatious request
- 27 Refusal of request – repeated request

- 28 Publication schemes
- 29 Model publication schemes

PART 3

EXEMPT INFORMATION

- 30 Information accessible to applicant by other means
- 31 Information intended for future publication
- 32 National security
- 33 Defence
- 34 International relations
- 35 The economy
- 36 Investigations and proceedings conducted by public authorities
- 37 Law enforcement
- 38 Courts records, etc.
- 39 Audit functions
- 40 States Assembly privileges
- 41 Formulation of States policy
- 42 Communications with Her Majesty etc. and honours
- 43 Health and safety
- 44 Environmental information
- 45 Personal information
- 46 Information provided in confidence
- 47 Legal professional privilege
- 48 Commercial interests
- 49 Prohibition on disclosure
- 50 Pre-Code information

PART 4

FUNCTIONS OF INFORMATION COMMISSIONER

- 51 Issue of code of practice in respect of Part 2 functions
- 52 Code of practice for management of records
- 53 General functions of Commissioner
- 54 Recommendations as to good practice
- 55 Reports to be laid before the States

PART 5

ENFORCEMENT

- 56 Application for decision by Commissioner
- 57 Information notices
- 58 Enforcement notices
- 59 Failure to comply with notice
- 60 No action against public authority

Action by Commissioner

- 61 Issue of warrants
- 62 Additional conditions for issue of warrant

Entry and inspection

<u>63</u>	<u>Execution of warrants</u>
<u>64</u>	<u>Warrant to be shown</u>
<u>65</u>	<u>Receipt to be given</u>
<u>66</u>	<u>Matters exempt from inspection and seizure</u>
<u>67</u>	<u>Exempt communications about legal advice</u>
<u>68</u>	<u>Occupier to furnish what is not exempt</u>
<u>69</u>	<u>Return of warrants</u>
<u>70</u>	<u>Offences</u>

PART 6

APPEALS

<u>71</u>	<u>Appeals against decision, information and enforcement notices</u>
<u>72</u>	<u>Determination of appeals</u>
<u>73</u>	<u>Appeals from decision of Tribunal</u>
<u>74</u>	<u>Appeals against national security certificate</u>
<u>75</u>	<u>Appeal proceedings</u>

PART 7

HISTORICAL RECORDS AND RECORDS HELD BY THE TRUST

<u>76</u>	<u>Interpretation of Part 7</u>
<u>77</u>	<u>Removal of exemptions: historical record generally</u>
<u>78</u>	<u>Removal of exemption: historical records held by the Trust</u>
<u>79</u>	<u>Decision as to refusal of discretionary disclosure of historical records</u>
<u>80</u>	<u>Amendment of Public Records (Jersey) Law 2002</u>

PART 8

AMENDMENT OF DATA PROTECTION (JERSEY) LAW 2005

Amendments relating to personal information held by public authorities

<u>81</u>	<u>Extension of meaning of data</u>
<u>82</u>	<u>Right of access to unstructured personal data held by public authorities</u>
<u>83</u>	<u>Exemptions applicable to certain manual data held by public authorities</u>
<u>84</u>	<u>Particulars registrable under Part 3 of Data Protection (Jersey) Law 2005</u>
<u>85</u>	<u>Availability under Law disregarded for purpose of exemption</u>

Other amendments

<u>86</u>	<u>Exemptions applicable to privileges of the States Assembly</u>
<u>87</u>	<u>Application to the States Assembly</u>
<u>88</u>	<u>Amendments to Schedules of Data Protection (Jersey) Law 2005</u>

PART 9

MISCELLANEOUS AND SUPPLEMENTAL

<u>89</u>	<u>Power to make provision relating to environmental information</u>
<u>90</u>	<u>Power to amend or repeal enactments prohibiting disclosure of information</u>
<u>91</u>	<u>Offence of altering, etc. records with intent to prevent disclosure</u>
<u>92</u>	<u>Saving of existing powers</u>
<u>93</u>	<u>Defamation</u>
<u>94</u>	<u>Application to the Crown, the States Assembly and administrations of the States</u>
<u>95</u>	<u>Citation and commencement</u>

SCHEDULE

PROVISIONS AND AMENDMENTS CONSEQUENT ON ARTICLE 6

- 1 Data Protection (Jersey) Law 2005 – general
- 2 Data Protection (Jersey) Law 2005 – amendments
- 3 Amendments to other legislation



Jersey

FREEDOM OF INFORMATION (JERSEY) LAW 200-

A LAW to make provision for the disclosure of information held by public authorities or by persons providing services for them and to make consequential amendments to the Public Records (Jersey) Law 2002 and the Data Protection (Jersey) Law 2005; and for connected purposes

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

PART 1

INTERPRETATION AND ADMINISTRATION

Interpretation

1 Interpretation

(1) In this Law, unless a contrary intention appears –

“absolute exemption” means an exemption from the duty of a public authority –

(a) to confirm or deny information requested; or

(b) to communicate information requested,

that is contained in a provision of Part 3 and mentioned in Article 4(2);

“applicant”, in relation to a request for information, means the person who made the request;

“body” includes an unincorporated association;

“Commissioner” means the Information Commissioner mentioned in Article 6;

“decision notice” means a notice served by the Commissioner in accordance with Article 56(4)(b);

“duty to confirm or deny” means the duty of a public authority to comply with Article 8(1)(a);

“enforcement notice” means a notice served by the Commissioner in accordance with Article 58(2);

“exempt information” means information that is exempt information by virtue of Part 3;

“fees notice” means a notice given in accordance with Article 14(1);

“information” (subject to Articles 57(12) and 79(2)) means information recorded in any form;

“information notice” means a notice served by the Commissioner in accordance with Article 57(3);

“premises” includes a vessel, vehicle, aircraft or hovercraft, and a reference to the occupier of premises includes a person in charge of a vessel, vehicle, aircraft or hovercraft;

“prescribed” means prescribed by Regulations made by the States;

“public authority” has the meaning given to that expression by Article 2;

“public record” has the same meaning as it has in the Public Records (Jersey) Law 2002;

“publication scheme” means a scheme to which Article 28(1)(a) applies;

“request for information” has the meaning given to that expression by Article 5(1);

“transferred public record” means a public record that has been transferred to the Trust in accordance with the Public Records (Jersey) Law 2002;

“Tribunal” means the Information Tribunal mentioned in Article 6;

“Trust” means the Jersey Heritage Trust incorporated by an Act of Incorporation granted by the States by the Loi accordant un acte d’incorporation à l’association dite “The Jersey Heritage Trust” registered on 3rd June 1983;

“warrant” means a warrant issued under Article 61;

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day that is a bank holiday or a public holiday under the Public Holidays and Bank Holidays (Jersey) Law 1951.

NOTE

This Article defines certain words and expression used in the Law.

It is to be noted that “public record” is defined in the Public Records (Jersey) Law 2002 in the following terms –

“3 Public record

- (1) *For the purposes of this Law, a public record is a record that has been created, or received, by a public institution in the performance of its functions and to the possession of which that or another public institution is entitled.*
- (2) *However, a record is not a public record merely because it was received by the Trust in the performance of such functions as it has otherwise than under this Law or any other enactment.”.*

2 Public authorities

- (1) In this Law “public authority” means –
 - (a) the States Assembly;
 - (b) a minister;
 - (c) a committee or other body established by resolution of the States or by or in accordance with the standing orders of the States Assembly;
 - (d) an institution that is a public institution by virtue of Article 5 of the Public Records (Jersey) Law 2002.
- (2) The States may amend paragraph (1) by Regulations.

NOTE

This definition brings within the Law an extensive range of organisations that is likely to increase over time. This is because “public institution” is widely defined in the Public Records (Jersey) Law 2002. It provides –

“5 Public institution

- (1) *For the purposes of this Law, “public institution” means any of the following –*
- (a) *a Department referred to in Article 1 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965;*
 - (b) *any administration of the States;*
 - (c) *the Trust, to the extent that it performs functions under this Law or any other enactment (other than the Loi accordant un acte d’incorporation à l’association dite “The Jersey Heritage Trust” registered on 3rd June 1983);*
 - (d) *the Archivist;*
 - (e) *the Panel;*
 - (f) *a person prescribed by Regulations for the purposes of this definition;*
 - (g) *except to the extent that Regulations otherwise provide –*
 - (i) *the staff establishment of the Lieutenant Governor,*
 - (ii) *the States of Jersey Police Force,*
 - (iii) *any office or institution in Jersey where natural persons who are officers of the Crown, or are employed by the Crown, the States or a Committee of the States, work in their capacity as such officers or employees,*
 - (iv) *a corporation owned by the States or in which the States have a controlling interest,*
 - (v) *any of the 12 parishes of Jersey so far as concerns its staff establishment, offices, and institutions (including the Honorary Police), that perform the temporal functions of the parish, to the extent that they perform those functions.*
- (2) *Regulations made under paragraph (1)(f) may prescribe a person to be a public institution for the purposes of some or all of the provisions of this Law.*
- (3) *Regulations made under paragraph (1)(g) may prescribe an exception for the purposes of some or all of the provisions of this Law.”.*

It should also be noted that by virtue of the commencement provision (Article 95) it would be possible to delay applying this Law in respect of a public Authority (or a class of public authorities – the Parishes, for example) if the States were to think that this was an appropriate thing to do because, for example, funding or facilities were not immediately available.

3 Information held by public authorities

For the purposes of this Law, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person; or
- (b) it is held by another person on behalf of the authority.

NOTE

While Article 2 aims to identify those persons who are subject to the obligations imposed by Article 8, this Article

concerns a different question.

Paragraph (a) limits the Law to information that is held by the authority on its own behalf. Information that is held "on behalf of" another person is not subject to disclosure obligations. There is likely, in practice, to be an overlap between this Article and the Article 46 exemption, since information held "on behalf of" a third person is likely often to be subject to a duty of confidence. But there will be cases that are covered by paragraph (a) but not by Article 46 and— more commonly — cases that are covered by Article 46 and not by paragraph (a). Of course, if the "third person" is another public authority, then that authority may be under duties of disclosure, pursuant to paragraph (b). In those cases, this Article serves simply to identify the particular body to which application should be made. Where information is held by an authority both on its own behalf and on behalf of a third person paragraph (a) will apply.

Paragraph (b) makes it clear that a public authority is obliged to disclose information that it does not itself hold but which is held "on its behalf". It does not impose any obligation on the person holding the information. That person may or may not be a public authority itself: but even if it is, it will not be obliged to disclose the information because of paragraph (a). Where information is held by a third person on his or her own behalf and on behalf of the authority paragraph (b) will apply.

The words "on behalf of" are not to be regarded as applying only where there is a technical agency relationship, although that would be one example of their application. If, for example, a contractor operates a database for a public authority and collects information for that purpose, the legal relationship may well be that of independent contractor, but the information would be held by the contractor "on behalf of" the public authority.

The term "held" will apply where a public body has physical possession of the material on which the information is stored. However this does not confine the notion of holding "information" to physical possession of any particular item, especially since the Law applies to "information" not to documents. Equally, it would be wrong to draw an analogy with, e.g., the law relating to disclosure of documents in litigation, and regard a public authority as holding any information that it has power to demand of a third party. The purpose of the Law is not to enable applicants to force public authorities to use their powers to collect information from others, but to permit access to information that has been collected.

4 Absolute exemptions

- (1) A provision of Part 3 confers absolute exemption where it so provides or to the extent that it so provides.
- (2) The provisions of Part 3 mentioned in paragraph (1) are—
 - (a) Article 30 (information available to applicant by other means);
 - (b) Article 38 (court records, etc.);
 - (c) Article 40 (States Assembly privileges);
 - (d) in Article 45 (personal information)—
 - (i) paragraph (1), and
 - (ii) paragraph (2) so far as relating to cases where the first condition referred to in that paragraph is satisfied by virtue of paragraph(3)(a)(i) or (b) of that Article;
 - (e) Article 46 (information provided in confidence); and
 - (f) Article 49 (disclosure otherwise prohibited).

NOTE

Although the effect of absolute exemptions is covered in greater detail in other notes, the main point to keep in mind is that the information covered by an absolute exemption is, in most cases, only exempt from disclosure under this Law. This may be because the information is already in the public domain or is available under some other more specialized arrangement, which may, in fact, provide for easier disclosure than under this Law.

It is only, therefore, in a very limited number of cases will information be absolutely exempt from disclosure. Even in some of these cases it will be possible for the States to amend the relevant Law to provide for disclosure (Article 90).

5 Request for information

- (1) In this Law a reference to a “request for information” is a reference to such a request that –
 - (a) is in writing;
 - (b) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested.
- (2) A request is to be treated as made in writing if the text of the request –
 - (a) is transmitted by electronic means;
 - (b) is received in legible form; and
 - (c) is capable of being used for subsequent reference.

NOTE

Paragraph (1)

The formal requirements that must be met by a request for information are minimal; there is no requirement to refer to the Law expressly in making the request. It can be seen from Article 9 that an absence of specificity does not make a request wholly invalid. But it does give the authority concerned the right to refuse to respond until sufficient details are forthcoming to enable the information concerned to be located. Moreover, very wide or detailed requests are liable to be rejected under provisions such as Article 18 (unduly burdensome requests) or Article 19 (vexatious requests). Applicants would, therefore, normally be required to frame requests as narrowly and specifically as reasonably possible.

Paragraph (2)

This provides that a request for information made by fax or e-mail is “made in writing”.

The Information Commissioner and the Information Tribunal

6 The Information Commissioner and the Information Tribunal

- (1) The Data Protection Commissioner shall be known instead as the Information Commissioner.
- (2) The Data Protection Tribunal shall be known instead as the Information Tribunal.

NOTE

A primary role in enforcing this Law, and promoting its purposes, is given to the Information Commissioner and the Information Tribunal. These are taken over from the institutions already established under the Data Protection (Jersey) Law 2005, with a few minor changes provided for by Article 7 and found in the Schedule to this Law. The Commissioner's role is spelt out in more detail in Article 53: “to promote the following of good practice by public authorities and, in particular ... to promote the observance by public authorities of (a) the requirements of this Law, and (b) good practice”.

The Commissioner has a central role in enforcement of the Law (Part 5). The Tribunal performs the function of an appellate body in that process (Part 6).

7 Consequential amendments to the Data Protection (Jersey) Law 2005

The Schedule to this Law (which makes provision consequential on Article 6 and amendments of the Data Protection (Jersey) Law 2005 relating to the extension by this Law of the functions of the Commissioner and the Tribunal) has effect.

NOTE

Please see note to Article 6.

PART 2

ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

Right to information

8 General right of access to information held by public authorities

- (1) A person who makes a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request; and
 - (b) if it does, to have the information communicated to him or her.
- (2) These entitlements are limited by –
 - (a) Article 9 (additional information needed);
 - (b) Article 12 (exemptions from duty to confirm or deny);
 - (c) Article 13 (exemptions from duty to disclose);
 - (d) Article 14 (fee to be paid in certain circumstances);
 - (e) Article 17 (cost of compliance would exceed prescribed limit);
 - (f) Article 19 (vexatious requests); and
 - (g) Article 20 (repeated requests).

NOTE

This Article begins with a broad statement of the rights that it confers.

Paragraph (1) sets out the two separate but related rights that may be given to an applicant for information: a right to know whether the information exists (the "duty to confirm or deny": paragraph (1)(a)) and a right to be given the information (paragraph (1)(b)). There are two distinctions between these separate rights.

First, the duty to confirm or deny applies whether or not relevant information is held (a denial that information is held will sometimes be of value in itself), but only information that is held need be disclosed.

Secondly, there may be circumstances in which relevant information need not or may not be supplied, because of other provisions of the Law, but where it is compulsory to inform the applicant that the information exists.

If information is held and is disclosed, the fact of that disclosure amounts to confirmation that the information existed, and there is no need to go through the formality of giving formal notice to that effect (see Article 11).

The information to be communicated is that which is held at the time of the request, but Article 10 permits

"account to be taken" of amendments and deletions made in the interim, provided they are not caused by the request being received (deliberate deletion of information, however, in order to frustrate disclosure under the Law, is a criminal offence: Article 91). The purpose of this is to prevent the need to freeze files or databases that are in active use when a request for information is received.

9 Public Authority may request additional information

A public authority is not required to comply with Article 8(1) if the public authority—

- (a) has reasonably required further information in order to identify and locate the information requested;
- (b) has informed the applicant of that requirement; and
- (c) has not been supplied with the further information.

NOTE

Please see note to Article 4

10 The information requested

- (1) For the purpose of this Law, the information held at the time when the request is received is the information –
 - (a) in respect of which the applicant is to be informed under Article 8(1)(a); or
 - (b) that is to be communicated under Article 8(1)(b).
- (2) However, account may be taken of any amendment or deletion made between the time when the request for the information is received and the time when it is to be communicated but only if the amendment or deletion would have been made regardless of the receipt of the request.

NOTE

Please see note to Article 8

11 Compliance with obligation to confirm holding of information

A public authority is to be taken to have complied with Article 8(1)(a) in relation to requested information if it has communicated the information to the applicant in accordance with Article 8(1)(b).

NOTE

Please see note to Article 8

12 Effect of the exemptions in Part 3— duty to confirm or deny

- (1) This Article applies where a provision of Part 3 states that the duty to confirm or deny does not arise in relation to any information.
- (2) Article 8(1)(a) does not apply if—
 - (a) the provision confers absolute exemption; or
 - (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

NOTE

This Article and Article 13 are important Articles that set out the way in which exemptions operate.

The scheme is as follows. Part 3 of the Law contains 21 exempting provisions, some of which create more than one exemption. Each provision is capable of limiting either the duty to supply information alone, or both the duty to confirm and deny, and the duty to supply information - it is hard to see how there could logically ever be a duty to supply information but no duty to confirm or deny. This is the first dimension of exemption: each of the distinct duties should be considered separately for exemption purposes, emphasized by the separate treatment of each duty in Articles 12(2) and 13(2) Although the test is in each case the same, the fact that a separate Article applies to each duty shows that the result of applying the test may not be.

The second dimension is that of the public interest. Exemptions fall into two categories.

Some categories of exemption do not require any balancing of the public interest in disclosure against the public interest in maintaining secrecy. These are known as "absolute" exemptions, and are listed in Article 4. An absolute exemption applies to: information that is reasonably accessible to the applicant by some means other than an application under the Law (Article 30); information in court records (Article 38); information that is required for the purpose of avoiding an infringement of the privileges of the States Assembly (Article 40); information that constitutes "personal data" of which the applicant is the data subject or that would normally be protected from disclosure under the Data Protection (Jersey) Law 2005 (Article 45 to the extent set out in paragraphs (7) and (8) of that Article); information provided in confidence (Article 46); information whose disclosure is positively prohibited by Law, court order, or EC law (Article 49).

*Great care is needed here however. For instance, it might at first appear that Article 4, by making the exemption for "confidential information" absolute, gives greater protection to it than the general law, under which it is recognised that it may be a defence to an action for breach of confidence if disclosure was in the public interest. See, e.g., *Price Waterhouse -v- BCCI* [1992] BCLC 583. But Article 46 only confers an exemption at all if the disclosure of the information to the public "otherwise than under this Law" would be a breach of confidence. So, in fact, the public interest is put out of the front door by Article 13(2)(a), but comes in again at the back door under Article 46 and through the customary law. This is an exemplary reminder that although Article 4 provides that certain exemptions, where they apply, are to be "absolute", there will often be a balancing exercise to be carried out when deciding whether the exemption applies at all. In other words, "absolute" exemptions are not necessarily rigid or capable of being mechanically applied. They often require quite delicate judgement about matters of degree. It is only once those judgements have been made, and it has been decided that they justify exemption, that the exemption applies at all. It is then "absolute" in the sense that no further weighing of the public interest in disclosure against the public interest in secrecy is required. Moreover, some of the absolute exemptions (e.g. those under Article 45 (personal data)) are designed only to ensure that the application is treated within the framework of another statutory regime for disclosure of information, which may be more rather than less generous than this Law. "Absolute exemption" is certainly not, therefore, to be equated with absolute confidentiality.*

Those exemptions that are not absolute, however, always require such a further balancing exercise, which is described in Article 12(2)(b) and 13(2)(b). The test, as enacted, gives pride of place to the public interest in disclosing information. Unless that is outweighed by the public interest in concealment, there ought to be disclosure.

13 Effect of the exemptions in Part 3— duty to disclose

- (1) This Article applies in respect of any information that is exempt information by virtue of a provision of Part 3.
- (2) Article 8(1)(b) does not apply if or to the extent that—
 - (a) the provision confers absolute exemption; or

- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

NOTE

Please see note to Article 12.

14 Fees

- (1) A public authority to which a request for information has been made may, within the period for complying with Article 8(1), give the applicant a written notice that states that a fee of an amount specified in the notice is to be charged by the authority for complying with Article 8(1).
- (2) If a public authority gives an applicant a fees notice, it is not obliged to comply with Article 8(1) unless the fee is paid within 3 months of the fees notice being given to the applicant.
- (3) A fee imposed under this Article –
 - (a) must be determined by the public authority in the prescribed manner; but
 - (b) where provision is made by or under any other enactment as to the fee that may be charged by the public authority for the disclosure of the information, must be the fee so provided for.
- (4) Regulations made for the purpose of paragraph (3)(a) may, in particular, provide–
 - (a) that no fee is to be payable in prescribed cases;
 - (b) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the Regulations;
 - (c) that any fee is to be calculated in such manner as may be prescribed by the regulations; and
 - (d) that a public authority shall have the right to waive the whole or any part of a fee if it considers it appropriate to do so.

NOTE

This Article provides a mechanism by which authorities may charge fees for providing information.

Paragraph (1) makes it clear that a public authority is not obliged to charge a fee. If it decides to do so, it must send a notice to that effect to the applicant within the time for complying with Article 8 (see Articles 8(2)(d) and 15). Article 15(2)(a) provides that, if fees are required, time ceases to run for the purpose of calculating the deadline for the authority to reply. If the fee has not been paid within three months of the fees notice being given, the application lapses altogether (paragraph (2)).

The fees chargeable under this Article apply to information that the authority is obliged to disclose, or to handling the initial request. If the information requested would be excessively expensive to provide, that is a ground for refusing the application, under Article 17. As an alternative to refusal, however, the authority may voluntarily agree to provide the information, in which case an additional fee can be charged under Article 18. In those cases, two fees may be payable: the first for the initial consideration of the application (which leads to a conclusion that there is no right to receive it, but to an offer to locate it under Article 18), and a second fee for the actual provision of the information.

It is important to remember that by virtue of the Interpretation (Jersey) Law 1954 it is not obligatory to provide for a single scale of fees so it would be quite possible to provide for different scales of fees depending upon, for example, the person making the application, a person or a corporation, and the residence of the applicant, Jersey or elsewhere.

15 Time for compliance with request

- (1) A public authority must comply with Article 8(1) promptly and in any event not later than–
 - (a) the end of the period of 20 working day following the day on which the public authority receives the request for information; but
 - (b) if another period is prescribed, not later than the end of that period.
- (2) However, a period mentioned in paragraph (1) does not start to run–
 - (a) if the public authority serves a fee notice on the applicant – until the fee is paid; or
 - (b) if the public authority seeks further information in accordance with Article 9– until that information is supplied.
- (3) Regulations made for the purpose of paragraph (1)(b) may–
 - (a) prescribe different days in relation to different cases; and
 - (b) confer a discretion on the Commissioner.
- (4) If, and to the extent that –
 - (a) Article 8(1)(a) would not apply if the condition in Article 12(2)(b) were satisfied; or
 - (b) Article 8(1)(b) would not apply if the condition in Article 13(2)(b) were satisfied,the public authority need not comply with Article 8(1)(a) or (b) until such time as is reasonable in the circumstances; but this paragraph does not affect the time by which any notice under Article 24(2) must be given.

NOTE

This Article lays down the timetable for dealing with applications. The overall effect is as follows –

- (a) *Time begins to run when the authority receives the request or (if it reasonably requires additional details in order to locate the information requested) on the date when that additional information is provided (paragraph (2)(b) and Article 8(2)(a)).*
- (b) *A public authority must always respond "promptly" (paragraph (1)).*
- (c) *The outer limit of time within which the public authority must respond is never less than 20 working days, not counting the date of receipt itself: paragraph (1). Working days exclude weekends, Christmas Day and Good Friday, and all bank holidays.*
- (d) *The time limit is extended as follows –*
 - (i) *There are not counted any days between the day when the authority gives a fees notice and the payment of the fee (inclusive) (paragraph (2)(a)).*
 - (ii) *The States have power to make Regulations extending the time for compliance with the intention that this power should normally be used to deal with special cases, rather than as a way of extending the deadline in a blanket fashion (though there is no limit on the use of the power for that purpose).*
 - (iii) *Special provisions apply where the authority intends to rely on an exemption (paragraph (4))*

The only complicated provision is paragraph (4). It applies where there is a relevant exemption but, under Article 12 or Article 13, that exemption may be outweighed by the public interest exception (i.e., the exemption is not "absolute"). The effect of paragraph (4) is that the authority can proceed in two stages. Stage 1 requires that the authority must give notice of its view that an exemption applies. This is the notice required by Article 24(2), to which paragraph (4) refers. It must be given within the ordinary time for responding. It is open to the authority, however, when giving that notice, to tell the applicant that it has not yet decided whether, despite the exemption, some degree of disclosure will be made. Stage 2 then begins. Having indicated that it considers an exemption

applies, it then has further time – which is not specifically circumscribed, but must be "reasonable under the circumstances" – to make that further decision and to tell the applicant whether it will or will not make any disclosure. This open-ended extension has been created in order to reflect the difficult issues that may arise when considering the public interest. It must be remembered that this "reasonable" period is subject to the over-riding requirement of reasonableness, which is justiciable by the Commissioner under Article 56.

16 Means by which communication to be made

- (1) If, at the time of making a request for information, an applicant requests –
 - (a) a copy of the information in permanent form or in another form acceptable to the applicant;
 - (b) a reasonable opportunity to inspect a record containing the information; or
 - (c) a digest or summary of the information in permanent form or in another form acceptable to the applicant,the public authority shall, so far as it is reasonably practicable to do so, give effect to the request.
- (2) If the public authority decides that it is not reasonably practicable to comply with the request, it must notify the applicant of the reason for its decision.
- (3) Except as provided by paragraph (1), a public authority may comply with a request for information by communicating the information to the applicant by any reasonable means.

NOTE

This Article deals with the manner in which information is to be communicated. It can be summed up by saying that a public authority can communicate in any reasonable way, but should honour any reasonable request made by the applicant. Paragraph (2) envisages challenges before the Commissioner to decisions about how, rather than whether, information should be communicated.

17 Exemption where cost of compliance exceeds prescribed amount

- (1) A public authority need not comply with a request for information if it estimates that the cost of doing so would exceed the prescribed amount.
- (2) Paragraph (1) does not exempt a public authority from complying with Article 8(1)(a) (confirmation that the public authority has the information requested) unless the estimated cost of doing so alone would exceed the prescribed amount.
- (3) Regulations made for the purpose of paragraph (1) may provide–
 - (a) what costs are to be included in estimates; and
 - (b) how those cost are to be estimated.
- (4) Regulations made for the purpose of paragraph (1) may also provide that, in such circumstances as may be prescribed, where 2 or more requests for information are made to a public authority –
 - (a) by one person, or
 - (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

NOTE

This is an important provision, but its practical effect is crucially dependent on the Regulations that will be made

under it.

In order to operate the Article correctly, the authority will first have to make an estimate of the costs of complying with the request for information, and, if Regulations have been made under paragraph (4), permitting separate requests to be aggregated where one person makes more than one request or, where multiple requests are made in pursuance of a "campaign", of all the relevant requests.

Regulations may be made under paragraph (3) specifying what such estimates are to include, and how they are to be made. Separate estimates will be required of the costs of confirming or denying the existence of information and of the costs of obtaining and supplying that information, since the duty to confirm or deny may apply even if the supply of the information would be excessively costly (paragraph (2)). The authority must then consider whether either or both those estimates would exceed the appropriate limit, and (if so) may refuse to answer them (paragraph (1)).

18 Fees for disclosure where cost of compliance exceeds appropriate limit

- (1) This Article applies where a request is made to a public authority for information and the public authority –
 - (a) is not required to comply with the request by virtue of Article 17(1) or (2); and
 - (b) is not otherwise required by law to supply the information requested.
- (2) The public authority may provide the information on payment of a fee determined by the public authority in the prescribed manner.
- (3) Regulations made for the purpose of paragraph (2) may provide–
 - (a) that any fee is not to exceed such maximum amount as may be specified in, or determined in accordance with, the Regulations; and
 - (b) that any fee is to be calculated in such manner as may be prescribed by the Regulations.
- (4) Paragraph (2) does not apply where provision is made by or under any other enactment as to the fee that may be charged by the public authority for the disclosure of the information.

NOTE

Even when they are not obliged to provide information under Article 8, public authorities will often be free to decide to do so (see Article 92). This Article permits standard fees for the provision of such information to be levied in cases where the only basis for the refusal to provide the information under the Law is excessive cost. Such Regulations will not apply where disclosure is required under any other enactment (either free or for a fee).

19 Vexatious requests

- (1) A public authority need not comply with a request for information if it considers the request to be vexatious.
- (2) A request is not to be considered to be vexatious simply because the intention of the applicant is to obtain information to embarrass the provider or some other public authority, or for a political purpose.
- (3) A request may be vexatious if –
 - (a) the applicant has no real interest in the information sought; and
 - (b) the information is being sought for a bad or illegitimate reason, which may include a desire to cause administrative difficulty.

NOTE

This provision is designed to prevent abuse of the rights granted by the Law (there is a similar provision to prevent vexatious complaints to the Commissioner in Article 56(3)(c), which also applies to "frivolous" complaints).

Vexatiousness is an imprecise notion. It could be taken as applying to any person who could not point to a good positive reason for desiring information. However that would be too broad an interpretation, it is not necessary for an applicant to establish (or, indeed, to have) any reason beyond curiosity for seeking information. The word is to be more narrowly understood. It will apply where a person both (i) has no real interest in obtaining any information and (ii) has, or can be inferred to have, a bad or illegitimate reason for seeking it (e.g., in order to cause administrative difficulty).

The desire to obtain information in order to embarrass the provider with its contents or make political capital out of it would be the complete reverse of vexatiousness: it is one of the purposes that the Law intends to promote.

The hallmark of the vexatious request is that the applicant has no real expectation or desire to know the substance of the information, but is making the request for some other purpose.

20 Repeated requests

- (1) This Article applies if –
 - (a) an applicant has previously made a request for information to a public authority that it has complied with; and
 - (b) the applicant makes a request for information that is identical or substantially similar.
- (2) The public authority need not comply with the request unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

NOTE

This provision is also designed to prevent abuse of the rights granted by the Law.

The Article can be understood as delimiting a specific category of vexatious request: the repeated request for the same information. Parents will be familiar with the bored child's request for information as to the progress of a car journey, repeated at intervals of a few seconds "Are we nearly there yet?" This Article deals with the adult version of that technique. The key phrase is "reasonable interval". What is a reasonable interval will depend on the type of information sought: there is no absolute yardstick. Information about a situation that is likely to change often might reasonably be sought much more frequently than information about a situation that is static.

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

- (1) This Article applies where –
 - (a) the Trust receives a request for information that relates to information that is, or if it existed would be, contained in a public record transferred to the Trust by a public authority; and
 - (b) where the public authority has not indicated that the public record should be made available for public inspection.
- (2) The Trust shall consult the public authority before determining whether the information sought –
 - (a) falls within any provision of Part 3 relating to the duty to confirm or deny; or
 - (b) is exempt information.
- (3) Where subsequently the Trust determines that –
 - (a) a provision of Part 3 relating to the duty to confirm or deny is relevant to the request and is an absolute exemption; or
 - (b) the information is exempt information by virtue of an absolute exemption,

the Trust shall refuse the request in accordance with Article 23.

- (4) Where the Trust determines that –
 - (a) a provision of Part 3 relating to the duty to confirm or deny is relevant to the request but is not an absolute exemption; or
 - (b) the information is exempt information but not by virtue of an absolute exemption,the Trust shall, within the period for complying with Article 8(1), send a copy of the request to the public authority.
- (5) On receiving the copy, the public authority must, within such time as is reasonable in all the circumstances, inform the Trust of its determination in respect of the relevant question in paragraph (6) or paragraph (7).
- (6) In relation to the duty to confirm or deny, the question is “Does Article 12(2)(b) apply?” (i.e. is it in the public interest to maintain the exclusion from the duty to confirm or deny?).
- (7) In relation to the duty to disclose, the question is “Does Article 13(2)(b) apply?” (i.e. is it in the public interest to maintain the exemption?).
- (8) Acting in accordance with the determination of the public authority on the relevant question the Trust shall either grant the request or refuse it in accordance with Article 24.

NOTE

Where a public record has been transferred for archiving by the Jersey Heritage Trust the question will arise, who should deal with any request for information contained in the record?

This Article provides an answer in cases where the initial request is made to the Trust. In such cases, the Trust will deal itself with any absolute exemption, after consulting the responsible authority (paragraphs (2) and (3)).

Any requests which are not refused on that basis, but which appear to qualify for exemption subject to the public interest test in Article 13(2)(b), will be passed back to the relevant public authority, which has the right to decide how that test will apply (paragraphs (4)– (8)). The responsible authority's decision then has to be communicated, via the Trust, to the applicant.

Complex as this system may appear, it should not matter so far as the applicant is concerned: it merely defines the internal mechanism between public authorities, for deciding cases that concern transferred public records. The time limits prescribed in or under Article 15 continue to apply.

22 Duty to provide advice and assistance

- (1) A public authority shall supply to a person who makes, or proposes to make a request to it for information such advice and assistance as it is reasonable for it to provide.
- (2) A public authority that conforms to the code of practice under Article 51, in relation to a person mentioned in paragraph (1), is to be taken to have complied with that paragraph.

NOTE

A failure to comply with this requirement could, in theory, be the subject of an enforcement notice by the Commissioner.

The code of practice (see Article 51) will be an important way of fixing the precise steps that are to be regarded as “reasonable” for the purpose of this Article.

23 Refusal of request – absolute exemption

- (1) This Article applies where a public authority decides to refuse a request for information to any extent on the grounds that –
 - (a) a provision of Part 3 relating to the duty to confirm or deny is relevant to the request and is an absolute exemption; or
 - (b) the information is exempt information by virtue of an absolute exemption.
- (2) The public authority must, within the time for complying with Article 8(1), give the applicant a notice that –
 - (a) states that it is refusing to confirm or deny that it has the information or that it refuses to communicate the information requested, as the case may;
 - (b) specifies the exemption it considers applies;
 - (c) states why the exemption applies, unless doing so would involve disclosing exempt information;
 - (d) contains particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or states that the authority does not provide such a procedure, as the case may be; and
 - (e) contains particulars of the right conferred by Article 56 (application to the Commissioner for a decision).

NOTE

This Chapter of Part 2 of the Law (which needs to be read alongside Article 15– time limits for requests) lays down what information must be provided by a public authority that decides to refuse a request. For these purposes, a request is "refused" if it is refused in part.

The following is a summary of the various different possibilities.

Refusal based on an absolute exemption

If the authority refuses a request for information based on an absolute exemption then it must, within the time stipulated by Article 15 (normally 20 working days)–

- (i) tell the applicant that it is refusing the application;*
- (ii) identify the exemption on which it relies;*
- (iii) give reasons why the exemption applies (unless doing so would involve disclosing exempt information);*
- (iv) give details of its internal procedure (if any) for considering complaints; and*
- (v) give particulars of the right to make an application to the Commissioner under Article 56.*

Refusal based on non-absolute exemption

Here the position is more complicated, because of the extended time limits introduced by Article 15, which permits a two-stage process.

If the authority has completed its assessment of the public interest within the primary period of 20 working days, and decided to refuse the application, then it will at that stage –

- (i) *tell the applicant that it is refusing the application;*
- (ii) *identify the exemption on which it relies;*
- (iii) *give reasons why the exemption applies (unless doing so would involve disclosing exempt information);*
- (iv) *give reasons why the public interest in disclosure does not outweigh the public interest in concealment (unless doing so would involve disclosing exempt information);*
- (v) *give details of its internal procedure (if any) for considering complaints and*
- (vi) *give particulars of the right to make an application to the Commissioner under Article 56.*

If, however, the authority has not completed its consideration of the public interest at this preliminary stage – but proposes to take advantage of the extended period offered by Article 15(4), then it will provide information in two tranches.

At the first stage, within the primary period for response, it will –

- (i) *notify the applicant that an exemption applies;*
- (ii) *identify that exemption;*
- (iii) *explain why the exemption applies (unless doing so would involve disclosing exempt information);*
- (iv) *say that it is considering how to balance the interest in disclosure against the interest in concealment and give an estimated date by which that process will be completed;*
- (v) *give details of any internal procedure for considering complaints; and*
- (vi) *give particulars of the right to make an application to the Commissioner under Article 56.*

After it has completed its assessment of the public interest, it will then – insofar as it has decided that the public interest requires it to refuse the request – provide a second, definitive notice which –

- (vii) *formally refuses the request;*
- (viii) *explains its reasons for concluding that the public interest requires refusal of the request (unless doing so would involve disclosing exempt information); and*
- (ix) *repeats the information as to internal complaints procedure and complaints to the Commissioner.*

Refusal based on Article 17: excessive cost of compliance

The authority concerned must, within the time laid down in Article 15, inform the applicant–

- (i) *that it is refusing the request on the basis of Article 17;*
- (ii) *of its internal complaints procedure (if any); and*
- (iii) *of the right to complain to the Commissioner.*

Refusal based on Articles 19 and 20: vexatious or repeated requests

The position is essentially the same as for refusals based on Article 17.

24 Refusal of request – not an absolute exemption

- (1) This Article applies where a public authority decides to refuse a request for information to any extent

on the grounds that –

- (a) a provision of Part 3 relating to the duty to confirm or deny is relevant to the request but is not an absolute exemption; or
 - (b) the information is exempt information but not by virtue of an absolute exemption.
- (2) The public authority must, within the time for complying with Article 8(1), give the applicant a notice that –
- (a) states that it is refusing to confirm or deny that it has the information or that it refuses to communicate the information requested, as the case may be;
 - (b) specifies the exemption it considers applies;
 - (c) state why the exemption applies, unless doing so would involve disclosing exempt information;
 - (d) contains particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or states that the authority does not provide such a procedure, as the case may be; and
 - (e) contains particulars of the right conferred by Article 56 (application to the Commissioner for a decision).
- (3) However, if at the time when the notice under paragraph (2) is required to be given, the public authority has not reached a decision as to the application of Article 12(2)(b) or Article 13(2)(b), as the case may be, the notice given under paragraph (2) shall instead–
- (a) indicate that no decision as to the application of that provision has yet been reached; and
 - (b) contain a date by which the authority expects that such a decision will have been reached.
- (4) The public authority shall by the date mentioned in paragraph (3)(b) give a notice to the applicant containing the information mentioned in paragraph (2).
- (5) The public authority must, either in the notice given under paragraph (2) or (4), as the case may be, or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming, as the case may be, either –
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information; or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

NOTE

See note to Article 23.

25 Refusal of request – cost of compliance will exceed prescribed amount

- (1) This Article applies where a public authority believes that the cost of complying with a request would exceed any amount prescribed for the purpose of Article 17.
- (2) The public authority must, within the time for complying with Article 8(1), give the applicant a notice that –
 - (a) states that it is refusing to comply with the request because it believes that the cost of complying would exceed any amount prescribed for the purpose of Article 17;
 - (b) states the reasons for that belief;
 - (c) contains particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or states that the authority does not provide such a procedure, as the case may be; and
 - (d) contains particulars of the right conferred by Article 56 (application to the Commissioner for a decision).

NOTE

See note to Article 23.

26 Refusal of request – vexatious request

- (1) This Article applies where a public authority considers a request is a vexatious request to which Article 19 applies.
- (2) The public authority must, within the time for complying with Article 8(1), give the applicant a notice that –
 - (a) states that it is refusing to comply with the request because it considers the request to be a vexatious request to which Article 19 applies;
 - (b) states the reasons for so considering;
 - (c) contains particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or states that the authority does not provide such a procedure, as the case may be; and
 - (d) contains particulars of the right conferred by Article 56 (application to the Commissioner for a decision).

NOTE

See note to Article 23.

27 Refusal of request – repeated request

- (1) This Article applies where a public authority believes –
 - (a) that a request for information is identical or substantially similar to a previous a request for information to the public authority that it has complied with; and
 - (b) that a reasonable interval has not elapsed between compliance with the previous request and the making of the current request,and accordingly Article 20 applies to the application
- (2) The public authority must, within the time for complying with Article 8(1), give the applicant a notice that –
 - (a) states that it is refusing to comply with the request because it believes that Article 20 applies to the application;
 - (b) states the reasons for that belief;
 - (c) contains particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or states that the authority does not provide such a procedure, as the case may be; and
 - (d) contains particulars of the right conferred by Article 56 (application to the Commissioner for a decision).

NOTE

See note to Article 23.

Publication schemes

28 Publication schemes

- (1) Each public authority must –
 - (a) adopt and maintain a scheme that relates to the publication of information by the authority and is approved by the Commissioner;
 - (b) publish information in accordance with its publication scheme; and
 - (c) from time to time review its publication scheme.
- (2) A publication scheme must –
 - (a) specify classes of information that the public authority publishes or intends to publish;
 - (b) specify the manner in which information of each class is or is intended to be published; and
 - (c) specify whether the material is or is intended to be available to the public free of charge or on payment.
- (3) In adopting or reviewing a publication scheme, a public authority must have regard to the public interest –
 - (a) in allowing public access to information held by the authority; and
 - (b) in the publication of reasons for decisions made by the authority.
- (4) A public authority may publish its publication scheme in such manner as it thinks fit.
- (5) The Commissioner may, when approving a scheme, provide that his or her approval is to expire at the end of a specified period.
- (6) Where the Commissioner has approved the publication scheme of a public authority, the Commissioner may at any time give notice to the public authority revoking approval of the scheme as from the end of a period of at least 6 months beginning with the day on which the notice is given.
- (7) Where the Commissioner –
 - (a) refuses to approve a proposed publication scheme; or
 - (b) revokes his or her approval of a publication scheme,the Commissioner must give the public authority a statement of reasons for doing so.

NOTE

This Article and Article 29 together require the operation of "publication schemes", which are to be approved by the Commissioner. Only the most general principles are given by paragraph (3), to guide authorities and the Commissioner in framing and approving schemes. It is likely that, in practice, many authorities will wish to make use of model schemes approved by the Commissioner under Article 29. The obligation is not just to adopt and operate schemes, but to "maintain" and "review" them: it is, therefore, a continuing duty. The Commissioner is also entitled to maintain a continuing review over publication schemes and to limit approval to a specific period (paragraph (5)) or withdraw it upon 6 months' notice (paragraph (6)). The Law provides no statutory remedy by which to challenge the Commissioner's refusal to approve a scheme but judicial review would offer an avenue of challenge.

Publication schemes are of interest under the Law not merely because they are a way of giving access to information, but because they may provide grounds for denying access to information under Articles 30 and 31, which permit authorities to refuse access to information that has been or is going to be published.

It has to be noted that this Law can be brought into force in stages as and when funds and facilities become available to public authorities. Attention could therefore first be focused on making funds and facilities available to those public authorities where access to information is more important – the JFSC for instance, while implementing this Article (if at all) in respect of other public authorities at a later date.

29 Model publication schemes

- (1) The Commissioner may from time to time approve, in relation to public authorities falling within particular classes, model publication schemes prepared by the Commissioner or by any other person.
- (2) If a public authority falling within the class to which an approved model scheme relates adopts such a scheme without modification, no further approval of the Commissioner is required so long as the model scheme remains approved.
- (3) If a public authority adopts such a scheme with modifications, the approval of the Commissioner is only required in relation to the modifications.
- (4) The Commissioner may, when approving a model publication scheme, provide that the approval is to expire at the end of a specified period.
- (5) Where the Commissioner has approved a model publication scheme, the Commissioner may at any time publish, in such manner as the Commissioner thinks fit, a notice revoking approval of the scheme as from the end of a period of at least 6 months beginning with the day on which the notice is published.
- (6) If the Commissioner refuses to approve a proposed model publication scheme on the application of any person, the Commissioner must give the person a statement of the reasons for the refusal.
- (7) If the Commissioner refuses to approve a modification under paragraph (3), the Commissioner must give the public authority a statement of the reasons for the refusal.
- (8) If the Commissioner revokes approval of a model publication scheme, the Commissioner must include in the notice under paragraph (5) a statement of the reasons for doing so.

NOTE

This Article deals with model publication schemes. Authorities are not required to adopt schemes according to any particular model. They are free, if they wish, to devise their own "bespoke" scheme under Article 28, and submit it for approval to the Commissioner. However, practical considerations will urge most public authorities to make use of a model scheme, since that will avoid the need to obtain specific approval from the Commissioner. Where an appropriate model scheme exists, the Commissioner will probably expect authorities to justify any departure from it with some care. Within reason, uniformity is likely to increase public access and prevent perceived unfairness that might arise if, for instance, neighbouring parishes operated substantially different schemes. Nevertheless, it is important to note that, even where a model scheme is adopted, it remains the duty of the authority, under Article 28, to "maintain" and "review" the scheme. Each authority should exercise independent judgement as to whether a particular model scheme is truly appropriate (and remains truly appropriate) for its needs. The Commissioner also has power to withdraw approval on six months' notice (paragraph (5)). There is no statutory remedy for the refusal of the Commissioner to approve any scheme, or to approve any modifications, or to withdraw approval for a model scheme but, in these circumstances, judicial review would offer a means of challenging the decision (e.g. that the Commissioner was not acting reasonably in refusing to approve the scheme, or as the case may be).

PART 3

EXEMPT INFORMATION

30 Information accessible to applicant by other means

- (1) Information that is reasonably accessible to the applicant otherwise than under Article 8 is exempt information.

- (2) For the purposes of paragraph (1)–
 - (a) information may be reasonably accessible to the applicant even though it is not accessible except on payment; and
 - (b) information is to be taken to be reasonably accessible to the applicant if it is information that the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
- (3) For the purposes of paragraph (1), information that is held by a public authority and does not fall within paragraph (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless –
 - (a) the information is made available in accordance with the authority's publication scheme; and
 - (b) any payment required is specified in, or determined in accordance with, the scheme.
- (4) The exemption under this Article is an absolute exemption.

NOTE

This exemption is an absolute one (see Article 4 and paragraph (4)), so that there is no need for an authority to balance the public interest in maintaining the exemption against the public interest in disclosure.

It is not a "true" exception to the freedom of information, in the sense that it does not operate to deprive applicants of access to the information - it merely deprives them of access under this Law. It does not provide exemption from the duty to confirm or deny (Article 8(1)(a)), but only from the duty to communicate the information (Article 8(1)(b)).

The key to this Article is whether the information in question is "reasonably accessible to the applicant" otherwise than under this Law itself. The test is one of reasonable accessibility to the applicant (not to the public in general). This may sometimes work in the applicant's favour (if there are some special grounds why it would be unreasonable to expect the applicant to obtain the information elsewhere), and sometimes against the applicant (if he or she has access to the information by some reasonable means, even if those means would not have been available to members of the general public).

Information is to be taken to be reasonably accessible if there is a (legally enforceable) duty to provide it to members of the public on request, even if there is a charge (paragraph (2)(b)). Thus arrangements under other Laws are left untouched (cf. Article 49(1)(a)). Similarly, it is to be taken to be reasonably accessible if it is available under a publication scheme adopted under Article 28, see paragraph (3), from which this is a necessary implication. However, it is not treated as reasonably accessible merely because the authority is prepared to make it available on request, access must be available as a matter of right, not indulgence.

The mere fact that the information is only available for a fee is not regarded as making it reasonably inaccessible (paragraph (2)(a)). However it is important to note the limit of this proviso. Information "may" be reasonably accessible if it is accessible upon payment, but it may not be. If the payment is larger than an applicant could reasonably be expected to pay, then the information would not be reasonably accessible.

This Article imposes no express obligation on the public authority to tell the applicant where the information is to be found. But in fact there will be such a duty, because Article 22(2)(c) imposes an obligation to state "why the exemption applies". In practice this will mean that the authority concerned will need to explain where the information can be accessed, in order to justify its use of this Article.

31 Information intended for future publication

- (1) Information is exempt information if –
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not);

- (b) the information was already held with a view to such publication at the time when the request for information was made; and
 - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with Article 8(1)(a) would involve the disclosure of any information (whether or not already recorded) that falls within paragraph (1).

NOTE

Paragraph (1)

This is not an absolute exemption, but is subject to the need to weigh the competing public interest in disclosure and concealment (see Article 12(2)(b) and 13(2)(b)).

This Article is not intended merely as an adjunct to Article 30, permitting the administrative convenience of deferring requests for information that is imminently to enter the public domain in any event, for example under a publication scheme. Its purpose is wider than that. It is intended, also, to cover cases where the very purpose of assembling information is to publish it as with research projects and so forth. It is thought that to require such information to be disclosed "prematurely" would be liable to hamper such efforts, and to cause confusion. There are also circumstances where public authorities hold information that they intend to sell by publication (e.g. Ordnance Survey), or where the information is such that orderly dissemination to the public as a whole is the only fair way of proceeding (e.g. market sensitive economic data). Those cases too are covered by this Article.

It is because of such examples that the Article does not include any specific timetable for publication, or even require that a definite date should have been fixed for publication. There are two key safeguards. First, the touchstone, under paragraph (1)(c), of reasonableness. Refusal will be hard to justify unless there is some plan for the likely date of publication, at least within a range. To say "We intend to publish when our research is completed" may sometimes be reasonable, even if one does not expect the research to be completed for several years. But if there is no idea of the date on which publication might occur, it would become difficult to regard the refusal as satisfying the test of reasonableness. Secondly, it is essential that there should be a definite intention to publish: the information must, at the time of the request, be held "with a view" to publication. This does not mean that publication need be the only purpose: but the authority must have formed, in advance of the request, a bona fide intention to publish.

Paragraph (2)

By virtue of paragraph (2) the exemption may in certain circumstances justify refusing even to confirm or deny the existence of information. The circumstances are limited: the duty is excluded only if confirmation or denial of the existence of the information would, in effect, amount to providing it (or part of it). A statement to the effect that the authority will not say whether or not it has information but that, if it has it, it intends to publish it is, at first glance, somewhat paradoxical. But it is not impossible to imagine circumstances in which it could legitimately be made and assessed, for instance if the information falls into a class that would in the ordinary course of events (if it existed) be made available under a publication scheme. An example of a case which it is intended to cover under paragraph (2) is a request to the Treasury for any papers relating to the possible amendment of tax laws. Even a response that admitted or denied the existence of such papers would tend to reveal the Treasury's plans.

32 National security

- (1) Information is exempt information if exemption from Article 8(1)(b) is required for the purpose of safeguarding national security.
- (2) The duty to confirm or deny does not arise if, or to the extent that, exemption from Article 8(1)(a) is required to safeguard national security.

- (3) A certificate signed by the Chief Minister certifying that exemption from Article 8(1)(b), or from Article 8(1)(a) and (b), is, or at any time was, required to safeguard national security shall, subject to Article 74 (appeal against national security certificate), be conclusive evidence of that fact.
- (4) A certificate under paragraph (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.
- (5) A document purporting to be a certificate under paragraph (3) shall be received in evidence and shall be taken to be such a certificate unless the contrary is proved.
- (6) A document that purports to be certified by or on behalf of the Chief Minister as a true copy of a certificate issued by the Chief Minister under paragraph (3) shall in any legal proceedings be evidence of that certificate.

NOTE

This exemption is not an absolute one, so that even if it applies an authority must balance the public interest in maintaining the exemption against the public interest in disclosure, see Article 13(2)(b).

It applies in the same way to the duty to communicate information and to the duty to confirm or deny (paragraph (2)).

Its purpose is self-explanatory. It does not lay down a completely bright-line rule, since the question whether exemption is "required" for the purpose of safeguarding national security in effect calls for the exercise of judgment. It would not be legitimate to withhold disclosure merely because there may exist some remote and hypothetical risk to national security if it is disclosed. And once it is decided that exemption is so "required", there is a further need to balance considerations of national security against the public interest in disclosure.

In practice however, clarity is given by the use of Chief Ministerial certificates, which are capable of applying not only to specific information but to general categories of information under paragraph (4).

Chief Ministerial certificates are regulated by Article 74.

33 Defence

- (1) Information is exempt information if its disclosure under this Law would, or would be likely to, prejudice –
 - (a) the defence of the British Islands or any of them; or
 - (b) the capability, effectiveness or security of any relevant forces.
- (2) In paragraph (1)(b) "relevant forces" means –
 - (a) the armed forces of the Crown; and
 - (b) any forces co-operating with those forces, or any part of any of those forces.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with Article 8(1)(a) would, or would be likely to, prejudice any of the matters mentioned in paragraph (1).

NOTE

This is not an absolute exemption.

It follows that there are two questions to be asked of any information that might be covered by it. First, can it be said that its disclosure "would, or would be likely, to prejudice" defence interests; secondly, does the public interest in disclosure nevertheless outweigh the interest in concealment? The same tests apply when considering the duty to communicate information and the duty to confirm or deny (though their results may be different in either case).

“Prejudice”

Four points need to be kept in mind –

- (a) The test of "prejudice" is not intended to be meaningless. The prejudice must be real, not fanciful. It must be substantial (in the pedantic sense of the term), not merely de minimus. It is not intended to give effect to alarmist fears. It is intended to be more or less synonymous with "harm".*
- (b) Attention must also be paid to what exactly has to be "prejudiced" before an exemption applies.*
- (c) More important than the "prejudice" aspect of the matter is the requirement to conclude that disclosure "would, or would be likely to" prejudice. "Likely" does not necessarily mean "more likely than not" – but it clearly means more than "might" or "could possibly". There will, therefore, need to be considered a whole range of different possible consequences, more or less certain to follow disclosure. The focus of argument will often be over the probabilities that should be attached to these various consequences, and whether or not they are such that the consequences can be said to be "likely", rather than whether the consequences (if they follow) could be regarded as "prejudicial". The words chosen ("would, or would be likely to") are intended to suggest a need to establish relative strong probabilities in that regard.*
- (c) It must always be remembered that even the conclusion that prejudice is a likely or certain consequence of disclosure is not, in most cases, the end of the matter since most of the prejudice based exemptions in this Law are not absolute. There must follow the more delicate inquiry into the relative public interest in disclosure and concealment. At this point the severity of the prejudice and the degree of probability that will follow from disclosure again become important. Remote possibilities of insignificant harm will already have been filtered out. But even reasonably solid prospects of fairly serious harm might, in appropriate circumstances, not justify a refusal to disclose.*

34 International relations

- (1) Information is exempt information if its disclosure under this Law would, or would be likely to, prejudice –
 - (a) relations between Jersey and the United Kingdom and any other State;
 - (b) relations between Jersey and any international organisation or international court;
 - (c) the interests of Jersey abroad; or
 - (d) the promotion or protection by Jersey of its interests abroad.
- (2) Information is also exempt information if it is confidential information obtained from a State other than Jersey or from an international organisation or international court.
- (3) For the purposes of this Article, any information obtained from a State, organisation or court is confidential at any time –
 - (a) while the terms on which it was obtained require it to be held in confidence ;or
 - (b) while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- (4) The duty to confirm or deny does not arise if, or to the extent that, compliance with Article 8(1)(a)–
 - (a) would, or would be likely to, prejudice any of the matters mentioned in paragraph (1); or
 - (b) would involve the disclosure of any information (whether or not already recorded) that is confidential information obtained from a State other than Jersey or from an international organisation or international court.
- (5) In this Article –
 - “international court” means any international court that is not an international organisation and that is established –

- (a) by a resolution of an international organization of which the United Kingdom is a member; or
- (b) by an international agreement to which the United Kingdom is a party;

“international organization” means any international organization whose members include any 2 or more States, or any organ of such an organization;

“State” includes the government of any State and any organ of its government, and references to a State other than Jersey include references to any territory of the United Kingdom outside the United Kingdom.

NOTE

This Article contains two exemptions. Neither is absolute: both therefore require that the public interest in disclosure be balanced against the public interest in concealment.

35 The economy

- (1) Information is exempt information if its disclosure under this Law would, or would be likely to, prejudice –
 - (a) the economic interests of Jersey; or
 - (b) the financial interests of the States of Jersey.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with Article 8(1)(a) would, or would be likely to, prejudice any of the matters mentioned in paragraph (1).

NOTE

This exemption is not absolute: even if it applies, it requires that the public interest in disclosure be balanced against the public interest in concealment. The exemption applies in the same terms (though not necessarily with the same effect) to both the duty to communicate information and the duty to confirm or deny.

36 Investigations and proceedings conducted by public authorities

- (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of an investigation that the public authority has a duty to conduct with a view to it being ascertained –
 - (a) whether a person should be charged with an offence; or
 - (b) whether a person charged with an offence is guilty of it.
- (2) Information held by a public authority is also exempt information if it has at any time been held by the authority for the purposes of –
 - (a) an investigation that is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings that the authority has power to conduct; or
 - (b) any criminal proceedings that the authority has power to conduct.
- (3) Information held by a public authority is also exempt information if it was obtained or recorded by the authority for its functions relating to –
 - (a) investigations falling within paragraph (1) or (2)(b);
 - (b) criminal proceedings that the authority has power to conduct;
 - (c) investigations (other than investigations falling within paragraph (1) or (2)(b)) that are conducted by the authority for any of the purposes specified in Article 37(2) and by virtue of

powers conferred by or under an enactment; or

(d) civil proceedings that are brought by or on behalf of the authority and arise out of such investigations,

and it relates to the obtaining of information from confidential sources.

- (4) The duty to confirm or deny does not arise in relation to information that is (or if it were held by the public authority would be) exempt information by virtue of paragraph (1), paragraph (2) or paragraph (3).
- (5) In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in paragraph (1), (2) and (3) to the public authority include references—
- (a) to any officer of the authority; and
 - (b) in the case of any administration of the States, to any Minister with responsibility for that administration.

NOTE

The exemptions conferred by this Article are not absolute: even if this Article applies it requires that the public interest in disclosure be balanced against the public interest in concealment.

In practice there are two separate grounds for exemption, which may appear difficult to disentangle. Both relate to the investigation and prosecution of crime, but they are in somewhat different terms.

Paragraphs (1) and (2)

This exemption concerns information held by an authority for the purposes of investigating or prosecuting criminal offences. There are four points of note –

- (1) *The paragraphs embody the principle: once exempt, always exempt. If information has ever been held for the purposes set out, it becomes and remains exempt information.*
- (2) *The paragraphs apply whether or not disclosure of the information would prejudice investigation or prosecution. Article 37 contains a prejudice-based exemption for information whose disclosure might affect the "prevention or detection of crime". That test overlaps the test in this Article; but this Article's exemption is stronger.*
- (3) *The exemption applies only to authorities who hold information with a view to themselves investigating or prosecuting a crime: it is an exemption intended for investigating and prosecuting authorities as such. If a public authority collects information with a view to passing it to some other authority for investigation or prosecution, that information is not exempt under this provision (though it may be exempt under some other provision).*
- (4) *The exemption applies only to information that is held "with a view" to investigation or prosecution. As with the Article 28 ("with a view to . . . publication"), it does not require that the only or even the main or dominant purpose of holding the information should be investigation or prosecution: it is sufficient if that is one of the purposes for which the information is held.*

Paragraph (3)

This paragraph might be called the "informer exemption". In many ways it is wider than paragraphs (1) and (2): it includes information obtained for a wider range of purposes, in particular for a much wider variety of investigations. There is obviously a substantial overlap with Article 37: the key difference is the absence of any requirement to show prejudice to any of the matters listed in Article 37(1) before the exemption applies. In effect, the disclosure of information that might reveal details about informers or their use will usually be treated as

prejudicial.

In three respects, however, the exemption here is narrower than that in paragraphs (1) and (2) –

- (1) Although the maxim "once exempt, always exempt" applies here too, it is not sufficient that information is at some stage "held" for particular purposes: it must be "obtained or recorded" for those purposes.*
- (2) The test of purpose is arguably narrower: "for the purposes of its functions" is a stricter standard to meet than "with a view to", and there is room for applying a test of primary or dominant purpose where information is acquired for a variety of purposes.*
- (3) Most significantly, information only benefits from the exemption if it "relates to the obtaining of information from confidential sources".*

37 Law enforcement

- (1) Information that is not exempt information by virtue of Article 36 is exempt information if its disclosure under this Law would, or would be likely to, prejudice –
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;
 - (c) the administration of justice;
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature;
 - (e) the operation of the immigration controls;
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;
 - (g) the exercise by any public authority of its functions for any of the purposes specified in paragraph (2); or
 - (h) any civil proceedings that are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in paragraph (2), by or on behalf of the authority by virtue of powers conferred by or under an enactment.
- (2) The purposes referred to in paragraph (1)(g) and (h) are–
 - (a) to ascertain if a person has failed to comply with the law;
 - (b) to ascertain if a person is responsible for conduct that is improper;
 - (c) to ascertain if circumstances that would justify regulatory action in pursuance of an enactment exist or may arise;
 - (d) to ascertain a person's fitness or competence in relation to the management of bodies corporate or in relation to a profession or other activity that he or she is, or seeks to become, authorized to carry on;
 - (e) to ascertain the cause of an accident;
 - (f) to secure the health, safety and welfare of persons at work; and
 - (g) to protect persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with Article 8(1)(a) would, or would be likely to, prejudice any of the matters mentioned in paragraph (1).

NOTE

The exemptions conferred by this Article are not absolute: even if they apply, they require that the public interest in disclosure be balanced against the public interest in concealment.

The same tests apply (though not necessarily with the same results) to the duty to communicate information and the duty to confirm or deny.

Because its exemptions are broad, the application of the public interest test will be particularly important in handling exemptions under this Article.

38 Courts records, etc.

- (1) Information held by a public authority is exempt information if it is held only by virtue of being contained in –
 - (a) a document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter; or
 - (b) a document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter.
- (2) Information held by a public authority is also exempt information if it is held only by virtue of being contained in a document created by –
 - (a) a court; or
 - (b) a member of the administrative staff of a court,
for the purposes of proceedings in a particular cause or matter.
- (3) Information held by a public authority is exempt information if it is held only by virtue of being contained in –
 - (a) a document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration; or
 - (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
- (4) The duty to confirm or deny does not arise in relation to information that is (or if it were held by the public authority would be) exempt information by virtue of this Article.
- (5) In this Article –
 - “court” includes a tribunal or body *exercising the judicial power of the States of Jersey*; (*NOTE words in italics subject to confirmation*);
 - “proceedings in a particular cause or matter” includes an inquest or post-mortem examination;
 - “inquiry” means an inquiry or a hearing held under a provision contained in, or made under, an enactment;
 - “arbitration” means any arbitration to which Part 2 of the Arbitration (Jersey) Law 1998 applies.
- (6) An exemption under this Article is an absolute exemption.

NOTE

This exemption for court records and similar documents is an absolute one, so that there is no need for an authority to balance the public interest in maintaining the exemption against the public interest in disclosure, under Article 12(2)(b) or Article 13(2)(b). If a primary exemption in paragraph (1), paragraph (2) or paragraph (3) applies, the duty to confirm or deny is completely removed by paragraph (4).

The exemption covers information in, for example, pleadings and disclosed documents. If a public authority holds the information independently of particular court proceedings it is not exempt under this Article, though it may be exempt under, e.g., Article 47 (legal professional privilege).

The rationale of the exemption is that rules of court already provide a comprehensive code governing the

disclosure of court documents, and documents served in the course of proceedings, and that this Law should leave those provisions untouched. That (rather than any particular concern for secrecy) is the reason the exemption is absolute.

39 Audit functions

- (1) This Article applies to a public authority that has functions in relation to –
 - (a) the audit of the accounts of other public authorities; or
 - (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
- (2) Information held by a public authority to which this Article applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in paragraph (1).
- (3) The duty to confirm or deny does not arise in relation to a public authority to which this Article applies if, or to the extent that, compliance with Article 8(1)(a) would, or would be likely to prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in paragraph (1).

NOTE

The prejudice-based exemption conferred by this Article is not absolute: even if it applies it requires that the public interest in disclosure be balanced against the public interest in concealment (Article 12(2)(b) and 13(2, (b)).

It is intended to protect the internal records of bodies such as the Comptroller and Auditor General.

The test is the same for the duty to communicate information and the duty to confirm or deny, though not necessarily with the same result.

40 States Assembly privileges

- (1) Information is exempt information if exemption from Article 8(1)(b) is required to avoid an infringement of the privileges of the States Assembly.
- (2) The duty to confirm or deny does not apply if, or to the extent that, exemption from Article 8(1)(a) is required to avoid an infringement of the privileges of the States Assembly.
- (3) A certificate signed by the Greffier of the States certifying that exemption from Article 8(1)(b), or from Article 8(1)(a) and (b), is, or at any time was, required to avoid an infringement of the privileges of the States Assembly is conclusive evidence of that fact.
- (4) The exemption under this Article is an absolute exemption.

NOTE

This exemption is an absolute one, so that there is no need for an authority to balance the public interest in maintaining the exemption against the public interest in disclosure. An element of discretionary judgment is, however, required in deciding whether exemption is "required" for the purpose of protecting the privileges of the States Assembly.

The decision to give absolute protection to the privileges of the States Assembly is not unreasonable when one bears in mind that the States Assembly is not and should not be regarded as a branch of the executive. The scheme of the Law is that its main focus is on information held by the executive branch of government, and not by the courts or the legislature.

Democracy and justice may well be better served by allowing them to operate to some degree confidentially, especially since both have well-established traditions of general openness, and rules backing up those traditions. It is executive government that has widely been perceived as operating too much in the shadows.

The exemption conferred by this Article is absolute in more senses than one, because the States Greffier is given power to sign certificates that will be "conclusive evidence" that the exemption applies.

41 Formulation of States policy

- (1) Information held by a public body is exempt information if it relates to –
 - (a) the formulation or development of States policy;
 - (b) communications between Ministers;
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or
 - (d) the operation of a private office that provides personal administrative support to a Minister.
- (2) Once a decision as to States policy has been taken, any information used to provide an informed background to the taking of the decision is not to be regarded for the purposes of paragraph (1)(a), as relating to the formulation or development of States policy.
- (3) The duty to confirm or deny does not arise in relation to information that is (or if it were held by a public body would be) exempt information by virtue of paragraph (1).

NOTE

This exemption is not an absolute one, even if it applies, it requires that the public interest in disclosure be balanced against the public interest in concealment. The same test applies to the duty to communicate information and the duty to confirm or deny, though not necessarily with the same result.

42 Communications with Her Majesty etc. and honours

- (1) Information is exempt information if it relates to –
 - (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household; or
 - (b) the conferring by the Crown of any honour or dignity.
- (2) The duty to confirm or deny does not arise in relation to information that is (or if it were held by the public authority would be) exempt information by virtue of paragraph (1).

NOTE

This exemption is not an absolute one; even if it applies it requires that the public interest in disclosure be balanced against the public interest in concealment.

It provides a "class" exemption for communications concerning the royal family and meritorious awards.

The duty to confirm or deny the existence of such information is completely removed, even if disclosure would do no harm and would not have the effect of revealing anything of substance. The Article provides a strong exemption, but one that relates to a fairly narrow class of information.

43 Health and safety

- (1) Information is exempt information if its disclosure under this Law would, or would be likely to –

- (a) endanger the physical or mental health of an individual; or
 - (b) endanger the safety of an individual.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with Article 8(1)(a) would, or would be likely to, have either of the effects mentioned in paragraph (1).

NOTE

The Article provides an uncontroversial exemption in order to protect people's health and lives. The usual test ("would or would be likely to prejudice") is modified slightly: the relevant verb here is "endanger". This is rather easier to satisfy than a "prejudice" test; it connotes risk of harm, rather than harm itself.

The exemption is not an absolute one; even if it applies it requires that the public interest in disclosure be balanced against the public interest in concealment. Relevant factors will obviously include the risk and severity of any adverse effects on somebody's health, and the strength of the public interest in disclosure. The same test applies to the duty to communicate information and the duty to confirm and deny, though not necessarily with the same result.

44 Environmental information

- (1) Information is exempt information if the public authority holding it –
- (a) is obliged by Regulations made under Article 89 to make the information available to the public in accordance with the Regulations; or
 - (b) would be obliged by Regulations made under Article 89 to make the information available to the public but for any exemption contained in the Regulations.
- (2) The duty to confirm or deny does not arise in relation to information that is (or if it were held by the public authority would be) exempt information by virtue of paragraph (1).
- (3) Paragraph (1)(a) does not limit the generality of Article 30(1) (information accessible to applicants by other means).

NOTE

This exemption is technical; it is designed to avoid (or rather reduce) any overlap between Regulations made under Article 89 that are intended to implement the Aarhus Convention.

The object is to ensure that environmental information covered by such Regulations is made available, if at all, only under those Regulations. However, there remains a residual role for Article 8, since this is not an absolute exemption, but requires the public interest in disclosure to be balanced against the public interest in concealment. No such balancing act will be required when the information in question is available pursuant to Regulations under Article 89 (paragraph (1)(a)). But it will be required where the information in question is exempt under those Regulations, so that paragraph (1)(b) applies. In such cases, there will still be a duty to disclose if the public interest on balance favours disclosure.

45 Personal information

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if –
- (a) it constitutes personal data which do not fall within paragraph (1); and
 - (b) either the first or the second condition specified respectively in paragraphs (3) and (4) is satisfied.

- (3) The first condition is –
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in Article 1(1) of the Data Protection (Jersey) Law 2005, that the disclosure of the information to a member of the public otherwise than under this Law would contravene –
 - (i) any of the data protection principles, or
 - (ii) Article 10 of that Law (right to prevent processing likely to cause damage or distress) and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Law would contravene any of the data protection principles if the exemptions in Article 33A(1) of the Data Protection (Jersey) Law 2005 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part 4 of the Data Protection (Jersey) Law 2005 the information is exempt from Article 7(2)(a) of that Law (data subject's right of access to personal data).
- (5) The duty to confirm or deny –
 - (a) does not arise in relation to information that is (or if it were held by the public authority would be) exempt information by virtue of paragraph (1); and
 - (b) does not arise in relation to other information if or to the extent that either –
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with Article 8(1)(a) would (apart from this Law) contravene any of the data protection principles or Article 10 of the Data Protection (Jersey) Law 2005 or would do so if the exemptions in Article 33A(1) of that Law were disregarded, or
 - (ii) by virtue of any provision of Part 4 of the Data Protection (Jersey) Law 2005 the information is exempt from Article 7(1)(a) of that Law (data subject's right to be informed whether personal data being processed).
- (6) In this Article –

“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection (Jersey) Law 2005, as read subject to Part 2 of that Schedule and Article 27(1) of that Law;

“data subject” has the same meaning as in Article 1(1) of that Law;

“personal data” has the same meaning as in Article 1(1) of that Law.
- (7) The exemption under paragraph (1) is an absolute exemption.
- (8) The exemption under paragraph (2) is an absolute exemption so far as it relates to cases where the first condition referred to in that paragraph is satisfied by virtue of paragraph (3)(a)(i) or (b).

NOTE

This necessarily complex maze of exemptions is designed to mediate the overlap between rights of access under this Law, and rights of access under the Data Protection (Jersey) Law 2005.

46 Information provided in confidence

- (1) Information is exempt information if –
 - (a) it was obtained by the public authority from any other person (including another public authority); and
 - (b) the disclosure of the information to the public (otherwise than under this Law) by the public authority holding it would constitute a breach of confidence actionable by that or any other

person.

- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with Article 8(1)(a) would (apart from this Law) constitute an actionable breach of confidence.
- (3) The exemption under this Article is an absolute exemption.

NOTE

This Article confers exemption wherever disclosure of information would be a breach of confidence actionable at customary law. The duty to confirm or deny is only relaxed if confirmation or denial would itself be actionable.

The exemption is absolute. This is not because it is thought that some very special protection should attach to information that the customary law regards as confidential. Rather, it is that the question whether disclosure would be actionable as a breach of confidence already contains a species of public interest test, by way of defence to an action for breach of confidence. Since, therefore, this Article will not apply where disclosure is justified in the public interest, the addition of a test under Article 13 would merely add an unnecessary layer of complexity.

Although each administration of the States is treated as a "separate person" by the Law, under Article 94(2), they cannot generally maintain that disclosure of information would be a breach of confidence actionable by another States administration (see Article 93(3)).

47 Legal professional privilege

- (1) Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with Article 8(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

NOTE

Legal professional privilege applies to confidential communications between lawyers and their clients for the purpose of giving or receiving legal advice, and to any communication whose dominant purpose was the prosecution or defence of legal proceedings.

*The customary law attaches great importance to it, regarding it as worth maintaining even at the risk of convicting the innocent of serious crime (*R -v- Derby Magistrates Court, ex p. B* [1996] 1 A.C. 487), and discountenancing any attempt to remove it otherwise than pursuant to a clear statutory mandate. In granting it exemption under this Article, therefore, this Law reflects prevailing (and long-standing) judicial attitudes. The exemption, however, is not absolute, so far as the public authority's own privilege is concerned, and the public interest balancing test required by Articles 12(2)(b) and 13(2)(b) must be carried out.*

48 Commercial interests

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Law would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with Article 8(1)(a) would, or would be likely to, prejudice the interests mentioned in paragraph (2).

NOTE

Paragraph (1)

*This paragraph exempts "trade secrets" from disclosure. This exemption is not an absolute one; even if it applies it requires that the public interest in disclosure be balanced against the public interest in concealment. Nor does it provide any exemption from the duty to confirm or deny (although the exemption in paragraph (3) may apply). "Trade secret" is a term that has been discussed in case law, though it remains somewhat imprecise. The definition given by the Court of Appeal in *Lansing Linde Ltd. -v- Kerr* [1991] 1 W.L.R. 251, at 260 is "Information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret" which is "used in trade or business". It is also a pre-requisite that the owner "must limit the dissemination of it or at least not encourage or permit widespread dissemination"*

Paragraphs (2) and (3)

This is an exemption of some breadth. It is subject to the public interest test in Articles 12(2)(b) and 13(2)(b), and applies in the same terms (though possibly with different results in any particular case) to the duty to communicate information and the duty to confirm or deny.

A great deal of important information is liable to prejudice somebody's commercial interests. When the public learns that a particular drug may be unsafe, or a particular food contaminated, that an airline or a railway operator has low safety standards, the result is often commercial loss to somebody. On the other hand, there clearly is a need for some sort of protection for matters that are commercially confidential, but do not amount to a trade secret (or give rise to any actionable breach of a duty of confidence). For instance, the fact or progress of particular negotiations may legitimately be confidential, as might a substantial amount of information that may be provided (voluntarily or involuntarily) to public authorities. For instance, the Jersey Competition Regulatory Authority may be approached for informal guidance about whether a proposed transaction would be acceptable or not. Such information might be of enormous interest to competitors; but it would harm the process of regulation if fear of disclosure led commercial enterprises to withhold it from public authorities. And public authorities also have legitimate commercial interests to protect. It would be absurd, for example, if a person who wished to buy land from a public authority were entitled to ask, "What is the lowest price at which you would be prepared to sell?"

It is extremely hard to draft any form of words that will encompass those cases that seem intuitively legitimate candidates for exemption against those that do not. The result is, inevitably, an exemption that is far wider than it ideally should be. The difficult task of discriminating between those cases where exemption is proper and those where it is not is left to the application of the public interest tests under Articles 12(2)(b) and 13(2)(b).

49 Prohibition on disclosure

- (1) Information is exempt information if its disclosure (otherwise than under this Law) by the public authority holding it –
 - (a) is prohibited by or under any enactment;
 - (b) is incompatible with any Community obligation that applies to Jersey; or
 - (c) would constitute or be punishable as a contempt of court.
- (2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with Article 8(1)(a) would (apart from this Law) fall within any of paragraphs (a) to (c) of paragraph (1).
- (3) The exemption under this Article is an absolute exemption.

NOTE

These exemptions, which are absolute, protect information where disclosure is positively prohibited by other Jersey legislation, European Community law that is applicable to Jersey, and by rules of court or court order.

It is to be noted, however, that Article 90 will permit repeal or amendment of existing statutory provisions that have this effect where the States considers it is appropriate to do so.

50 Pre-Code information

- (1) Information is exempt information if it is contained in a public record created before 20th January 2000.
- (2) However, if a public record mentioned in paragraph (1) is subsequently amended, the information it contains is only exempt if the public record was last amended before 20th January 2000.

NOTE

This exemption means that information that is contained in a public record created before the Code was introduced that has not been amended since then cannot be communicated until the public interest test set out in Article 13(2)(b) has been applied to the information.

In practice it is difficult to see how information to which this Article applies that, had it been created after the introduction of the Code would not have been exempt under this Law, can be exempted by this Article since if its disclosure after that date is in the public interest so it must be the case for information created before that date.

PART 4

FUNCTIONS OF INFORMATION COMMISSIONER

51 Issue of code of practice in respect of Part 2 functions

- (1) The States may, by Regulations, issue, a code of practice providing guidance to public authorities as to the practice that it would be desirable for them to follow in connection with the discharge of the authorities' functions under Part 2.
- (2) The code of practice must, in particular, include provision relating to –
 - (a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information to them;
 - (b) the transfer of requests by one public authority to another public authority by which the information requested is or may be held;
 - (c) consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the disclosure of information;
 - (d) the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information; and
 - (e) the provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information.
- (3) The code may make different provision for different public authorities.
- (4) The States shall not make or amend Regulations under this Article until the Commissioner has been consulted and has commented on the proposals to be contained in the Regulations.
- (5) The Commissioner's comments must have been laid before the States before the Regulations to

which they relate are made by the States.

NOTE

This Article and Article 55 set out various functions of the States and the Commissioner in making "soft law", and publishing information about the way the Law is working and should work: codes of practice, guidance, and reports. These instruments, despite their absence of any direct legal effect, are likely to be important for ensuring that the Law operates as it should. Codes of practice may also have indirect legal effects, in that compliance with them is expressly made relevant when assessing, for example, whether an authority provides reasonable advice and assistance to applicants and would-be applicants and whether it is mandatory for an applicant to have complied with an internal grievance procedure before applying for relief from the Commissioner. If they work as they should they will assist in creating a "culture of openness". How effectively the Law works in practice therefore, especially in its early stages, may be surprisingly dependent on the documents that are promulgated under Part 4.

The general functions are allocated as follows: the States are responsible for making "codes of practice". The principal code deals with the code concerning keeping public records. The Commissioner must be consulted about these codes and but must then work within them.

The Commissioner has a number of subsidiary roles: to publish information about the Law; to carry out audits of public authorities - at their request and expense - to advise them on good practice; to make "practice recommendations" to wayward authorities with reference to the codes of practice; and to report to the States at least annually on the operation of the Law. These functions are buttressed by the much tougher provisions of Part 5 of the Law, which give real powers of legal enforcement to the Commissioner.

52 Code of practice for management of records

- (1) The States may, by Regulations, issue, a code of practice providing guidance to public authorities as to the practice that it would be desirable for them to follow in connection with the keeping, management and destruction of their records.
- (2) To facilitate the performance by the Archivist and other public authorities of their functions under this Law in relation to records that are public records for the purposes of the Public Records (Jersey) Law 2002, the code may also include guidance as to –
 - (a) the practice to be adopted in relation to the transfer of records under Article 20(1) of the Public Records (Jersey) Law 2002; and
 - (b) the practice of reviewing records before they are transferred under those provisions.
- (3) The code may make different provision for different public authorities.
- (4) The States shall not make or amend Regulations under this Article until the Commissioner has been consulted and has commented on the proposals to be contained in the Regulations.
- (5) The Commissioner's comments must have been laid before the States before the Regulations to which they relate are made by the States.
- (6) There shall not be included in a code made under this Article anything that is inconsistent with the Public Records (Jersey) Law 2002.

NOTE

Please see note to Article 51.

53 General functions of Commissioner

- (1) The Commissioner must encourage public authorities to follow good practice in their observance of

this Law.

- (2) In particular, the Commissioner must promote the observance by public authorities of codes of practice made under Articles 51 and 52.
- (3) The Commissioner must also arrange for the dissemination, which may be in any form and manner the Commissioner considers appropriate, of information the Commissioner considers it is expedient to give to the public –
 - (a) about the operation of this Law;
 - (b) about good practice; and
 - (c) about other matters within the scope of the Commissioner's functions under this Law.
- (4) The Commissioner may give advice on any of the matters mentioned in paragraph (3) to any person.
- (5) The Commissioner may, with the consent of a public authority, assess whether it is following good practice.

NOTE

Please see note to Article 51.

54 Recommendations as to good practice

- (1) If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under this Law does not conform with the practice proposed in the codes of practice made under Articles 51 and 52, the Commissioner may give to the authority a recommendation that specifies the steps that the Commissioner considers need to be taken to promote such conformity.
- (2) A recommendation under paragraph (1)–
 - (a) must be given in writing; and
 - (b) must specify the particular provisions of the code of practice that the Commissioner considers is not being complied with.

NOTE

Please see note to Article 51.

55 Reports to be laid before the States

- (1) The Commissioner must lay annually before the States a general report on the exercise of the Commissioner's functions under this Law.
- (2) The Commissioner may from time to time lay before the States such other reports with respect to those functions as the Commissioner thinks fit.

NOTE

Please see note to Article 51.

PART 5
ENFORCEMENT

56 Application for decision by Commissioner

- (1) A person may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part 2.
- (2) The Commissioner must make a decision as soon as practicable after receiving a complaint mentioned in paragraph (1).
- (3) However, the Commissioner is not required to do so if it appears to the Commissioner –
 - (a) that the person making the complaint has not exhausted any complaints procedure that is provided by the public authority in conformity with the code of practice under Article 51;
 - (b) that there has been undue delay in making the application;
 - (c) that the application is frivolous or vexatious; or
 - (d) that the application has been withdrawn or abandoned.
- (4) Where the Commissioner has received an application under this Article, the Commissioner must –
 - (a) if paragraph (3) applies - notify the person who made the complaint that no decision will be made and the grounds for not doing so; or
 - (b) in any other case - serve notice of the Commissioner's decision on the person who made the complaint and the public authority.
- (5) Where the Commissioner decides that a public authority –
 - (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by Article 8(1); or
 - (b) has failed to comply with any of the requirements of Article 16 (means of communication of information) or Articles 23-27 (information to be given on a refusal),the decision notice must specify –
 - (c) the Commissioner's reasons for his or her decision; and
 - (d) the steps that must be taken by the authority to comply with the requirement and the period within which they must be taken.
- (6) A decision notice must contain particulars of the right of appeal to the Tribunal conferred by Article 62.
- (7) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice.
- (8) If such an appeal is brought, no step that is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

NOTE

This Article provides the primary method by which this Law is to be enforced. In effect, the Commissioner forms a specialised first instance tribunal (albeit one that is not bound to act by means of a fully adversarial procedure: the mechanism is intended to be administrative and inquisitorial, at least at this level). There is an appeal from the Commissioner to the Information Tribunal and thence (on a point of law) to the Royal Court.

57 Information notices

- (1) This Article applies if the Commissioner has received an application under Article 56 in respect of a public body.
- (2) It also applies if the Commissioner reasonably requires any information –
 - (a) to determine if a public authority has complied or is complying with a of the requirements of Part 2; or
 - (b) to determine if the practice of a public authority in relation to the exercise of its functions under this Law conforms with that proposed in the codes of practice made under Articles 51 and 52.
- (3) The Commissioner may serve the authority with a notice that requires it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may also be specified in the notice, with such information relating to –
 - (a) the application;
 - (b) compliance with Part 2; or
 - (c) conformity with the code of practice,as the case may be, as is specified in the notice.
- (4) In a case falling within paragraph (1), the information notice must contain a statement that the Commissioner has received an application under Article 56.
- (5) In a case falling within paragraph (2)(b) the information notice must contain a statement–
 - (a) that the Commissioner regards the specified information as relevant for either of the purposes referred to in that paragraph; and
 - (b) of the Commissioner’s reasons for regarding the information as relevant for that purpose.
- (6) The information notice must also contain particulars of the right of appeal to the Tribunal conferred by Article 71.
- (7) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice.
- (8) If such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.
- (9) An authority shall not be required by virtue of this Article to furnish the Commissioner with any information in respect of –
 - (a) a communication between a professional legal adviser and his or her client in connection with the giving of legal advice to the client with respect to the client’s obligations, liabilities or rights under this Law; or
 - (b) a communication between a professional legal adviser and his or her client, or between such an adviser or his or her client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Law (including proceedings before the Tribunal) and for the purposes of such proceedings.
- (10) In paragraph (9) references to the client of a professional legal adviser include references to any person representing such a client.
- (11) The Commissioner may cancel an information notice by written notice to the authority on which it was served.
- (12) In this Article “information” includes unrecorded information.

NOTE

This Article provides a mechanism by which the Commissioner can obtain information from a public authority in order to enable an application under Article 56 to be determined. There is no equivalent power to compel the

production of information by a complainant.

The Commissioner's power to obtain information under this Article is quite different from the power to compel production of information which is required under Article 8; the exemptions in Part 3 of the Law do not apply. The Commissioner is free to seek information even if that information is, or might be, exempt. The only limitation on the Commissioner's power is that the protection of information subject to legal professional privilege is maintained.

58 Enforcement notices

- (1) This Article applies if the Commissioner is satisfied that a public authority has failed to comply with a requirement of Part 2.
- (2) The Commissioner may serve the authority with a notice requiring the authority to take, within such time as may be specified in the notice, such steps as are specified in the notice to comply with the requirement.
- (3) The enforcement notice must contain a statement of –
 - (a) the requirement of Part 2 that the Commissioner considers the public authority has failed to comply with; and
 - (b) the Commissioner's reason for reaching that conclusion.
- (4) The enforcement notice must also contain particulars of the right of appeal to the Tribunal conferred by Article 71.
- (5) An enforcement notice must not require any of the provisions of the notice to be complied with before the end of the period within which an appeal can be brought against the notice.
- (6) If such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.
- (7) The Commissioner may cancel an enforcement notice by written notice to the authority on which it was served.

NOTE

The Commissioner is not to be passively restricted to acting only on an application. This Article gives the Commissioner the power to take pro-active steps to enforce the Law using a notice that has legal consequences.

59 Failure to comply with notice

- (1) If a public authority has failed to comply with –
 - (a) so much of a decision notice as requires steps to be taken;
 - (b) an information notice; or
 - (c) an enforcement notice,

the Commissioner may certify in writing to the Royal Court that the public authority has failed to comply with that notice.
- (2) For the purposes of this Article, a public authority that, in purported compliance with an information notice –
 - (a) makes a statement that it knows to be false in a material respect; or
 - (b) recklessly makes a statement that is false in a material respect,is to be taken to have failed to comply with the notice.
- (3) *Where a failure to comply is certified under paragraph (1), the Court may inquire into the matter and*

may deal with the authority as if it had committed a contempt of court after hearing –

- (a) any witness who may be produced against or on behalf of the public authority; and
- (b) any statement that may be offered in defence.

NOTE – *The procedure set out in words in italics is still subject to confirmation.*

This Article sets out the primary method for enforcing the Commissioner’s decisions. They are, in effect, treated as orders of the Royal Court and enforced by proceedings for contempt of court.

Paragraph (3) makes it clear that the Court is not bound by the Commissioner's certificate of non-compliance, but must consider whether there has in fact been non-compliance.

The Law does not affect ordinary citizens, but public authorities. It does not impose criminal sanctions as such, but the quasi-criminal sanction of contempt proceedings.

60 No action against public authority

- (1) This Law does not confer any right of action in civil proceedings in respect of any failure to comply with any duty imposed by or under this Law.
- (2) Paragraph (1) does not affect the powers of the Commissioner under Article 59.

NOTE

This Article makes it clear that the power to enforce the Law through a combination of decision or enforcement notices by the Commissioner and proceedings for disobedience of such notices is intended to be reasonably comprehensive.

The Law does not confer private rights of action for a failure to provide information. Nor does it give rise to any damages claim, as such (though it is conceivable that, in very serious cases, there might be a tort claim for misfeasance in public office).

The Law does not exclude the power of the Royal Court to exercise its jurisdiction in judicial review proceedings. However any applicant for judicial review who attempts to use that procedure to avoid the detailed mechanisms laid down under this Law is likely to find permission refused because of the availability of alternative remedies.

Judicial review may, however, be a valuable supplement to the Law’s procedures where there is no remedy available under this Law.

Entry and inspection

61 Issue of warrants

- (1) This Article applies if the Bailiff or a Jurat is satisfied by information on oath supplied by the Commissioner that there are reasonable grounds for suspecting that a public authority has failed or is failing to comply with –
 - (a) any of the requirements of Part 3;
 - (b) so much of a decision notice as requires steps to be taken by the authority; or
 - (c) an information notice or an enforcement notice,and that evidence of that failure is to be found on the premises specified in the information.
- (2) It also applies if the Bailiff or a Jurat is satisfied by information on oath supplied by the Commissioner that there are reasonable grounds for suspecting that an offence under Article 91 has

been or is being committed, and that evidence of the commission of the offence is to be found on the premises specified in the information.

- (3) Where this Article applies the Bailiff or the Jurat, as the case may be, may, subject to Article 62 grant a warrant to the Commissioner.
- (4) A warrant authorizes the Commissioner or any of the Commissioner's staff at any time within 7 days of the date of the warrant –
 - (a) to enter and search the premises specified in the warrant;
 - (b) to inspect and seize any documents or other material found there that may be such evidence as is mentioned in paragraph (1) or paragraph (2); and
 - (c) to inspect, examine, operate and test equipment found there in which information held by the public authority may be recorded.

NOTE

This Chapter supplements the power of the Commissioner under Article 57. The power is necessary given the breadth of the definition of "public authority" in this Law.

62 Additional conditions for issue of warrant

- (1) The Bailiff or Jurat must not issue a warrant unless satisfied –
 - (a) that the Commissioner has given 7 days' notice in writing to the occupier of the premises in question demanding access to the premises;
 - (b) that either access was demanded at a reasonable hour and was unreasonably refused or, although entry to the premises was granted, the occupier unreasonably refused to comply with a request by the Commissioner or any of the Commissioner's staff to permit the Commissioner or the member of staff to do any of the things referred to in Article 61(4); and
 - (c) that the occupier, has, after the refusal, been notified by the Commissioner of the application for the warrant and has had an opportunity of being heard by the Bailiff or Jurat on the question of whether or not it should be issued.
- (2) Paragraph (1) shall not apply if the Bailiff or Jurat is satisfied that the case is one of urgency or that compliance with the paragraph would defeat the object of the entry.

NOTE

Please see note to Article 61.

63 Execution of warrants

- (1) A person executing a warrant may use such reasonable force as may be necessary.
- (2) The warrant shall be executed at a reasonable hour unless it appears to the person executing it that there are grounds for suspecting that the evidence in question would not be found if it were so executed.

NOTE

Please see note to Article 61.

64 Warrant to be shown

- (1) If the premises in respect of which a warrant is issued are occupied by a public authority –
 - (a) an officer or employee of the authority present when the warrant is executed must be shown the warrant and supplied with a copy of it; but
 - (b) if no such officer or employee is present, a copy of the warrant must be left in a prominent place on the premises.
- (2) If the premises in respect of which a warrant is issued are occupied by a person other than a public authority –
 - (a) the person must be shown the warrant and supplied with a copy of it when the warrant is executed; but
 - (b) if the person is not present when the warrant is executed, a copy of the warrant must be left in a prominent place on the premises.

NOTE

Please see note to Article 61.

65 Receipt to be given

- (1) A person who seizes anything in pursuance of a warrant must give a receipt for it if asked to do so.
- (2) Anything so seized may be retained for so long as is necessary in all the circumstances.
- (3) A person in occupation of the premises must be given a copy of anything that is seized if the person so requests and the person executing the warrant considers that it can be done without undue delay.

NOTE

Please see note to Article 61.

66 Matters exempt from inspection and seizure

The powers of inspection and seizure conferred by a warrant shall not be exercisable in respect of information that is exempt information by virtue of Article 32(1) (national security).

NOTE

Please see note to Article 61.

67 Exempt communications about legal advice

- (1) The powers of inspection and seizure conferred by a warrant shall not be exercisable in respect of –
 - (a) any communication between a professional legal adviser and the adviser’s client in connection with the giving of legal advice to the client with respect to the client’s obligations, liabilities or rights under this Law; or
 - (b) any communication between a professional legal adviser and the adviser’s client, or between such an adviser or such a client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Law (including proceedings before the Tribunal) and for the purposes of such proceedings.
- (2) Paragraph (1) applies also to –

- (a) any copy or other record of any such communication as is mentioned in that paragraph; and
 - (b) any document or article enclosed with or referred to in any such communication if made in connection with the giving of any advice or, as the case may be, in connection with or in contemplation of and for the purposes of such proceedings as are mentioned in that paragraph.
- (3) This Article does not apply –
- (a) to anything in the possession of a person other than the professional legal adviser or the client;
or
 - (b) to anything held with the intention of furthering a criminal purpose.
- (4) In this Article references to the client of a professional legal adviser include references to any person representing such a client.

NOTE

Please see note to Article 61.

68 Occupier to furnish what is not exempt

If the person in occupation of premises in respect of which a warrant is issued objects to the inspection or seizure under the warrant of material on the grounds that it consists partly of matters in respect of which those powers are not exercisable, the person shall, if the person executing the warrant so requests, furnish the latter with a copy of so much of the material as is not exempt from those powers.

NOTE

Please see note to Article 61.

69 Return of warrants

- (1) The Commissioner shall return a warrant to the Bailiff or a Jurat after it is executed or, if not executed, within the time authorized for its execution.
- (2) The person by whom the warrant is executed shall make an endorsement on it stating what powers have been exercised under the warrant.

NOTE

Please see note to Article 61.

70 Offences

A person who –

- (a) intentionally obstructs a person in the execution of a warrant; or
 - (b) fails without reasonable excuse to give a person executing such a warrant such assistance as the person may reasonably require for the execution of the warrant,
- is guilty of an offence and liable to a fine of [level ?] on the standard scale.

NOTE

Please see note to Article 61.

PART 6

APPEALS

71 Appeals against decision, information and enforcement notices

- (1) Where a decision notice has been served by the Commissioner in respect of a complaint against a public authority, the person who made the complaint or the public authority may appeal to the Tribunal against the notice.
- (2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.
- (3) In relation to a decision notice or enforcement notice which relates –
 - (a) to information to which Article 21 applies (public records transferred to the Trust); and
 - (b) to a matter that by virtue of paragraph (2) or paragraph (5) of that Article falls to be determined by the public authority mentioned in the paragraph instead of the Trust,paragraphs (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority mentioned in the paragraph or to the Trust.

NOTE

The first tier of appeals under the Law lies from the Commissioner to the Tribunal, under this Article. The scope of the appeal is defined in Article 72. Thereafter there is a further appeal, on a point of law alone, to the Royal Court (Article 73).

72 Determination of appeals

- (1) If on an appeal under Article 71 the Tribunal considers–
 - (a) that the notice against which the appeal is brought is not in accordance with the law; or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that the Commissioner ought to have exercised the discretion differently,the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner.
- (2) In any other case the Tribunal shall dismiss the appeal.
- (3) On an appeal under Article 71, the Tribunal may review a finding of fact on which the notice in question was based.

NOTE

This Article determines the scope of any appeal to the Tribunal. Although it is an appellate body, the Tribunal has wide powers. It is not restricted to quashing the Commissioner's decision, but can substitute its own. It can consider completely afresh any question of law (e.g. as to the interpretation of this Law) and any issue of discretion (e.g. as to the application of the public interest test).

73 Appeals from decision of Tribunal

Any party to an appeal to the Tribunal under Article 71 may appeal from the decision of the Tribunal on a point of law to the Royal Court.

NOTE

The appeal to the Royal Court is limited to an appeal on a point of law – there is no general right of appeal to that Court.

74 Appeals against national security certificate

- (1) This Article applies in respect of a certificate under Article 32(3).
- (2) The Commissioner or an applicant whose request for information is affected by the issue of the certificate may appeal to the Tribunal against the certificate.
- (3) If on the appeal the Tribunal finds that, applying the principles applied by the court on an application for judicial review, the Chief Minister did not have reasonable grounds for issuing the certificate, the Tribunal may allow the appeal and quash the certificate.
- (4) Where in proceedings under this Law it is claimed by a public authority that a certificate under Article 32(3) that identifies the information to which it applies by means of a general descriptor applies to particular information, any other party to the proceedings may appeal to the Tribunal on the ground that the certificate does not apply to the information in question and, subject to any determination under paragraph (5), the certificate shall be conclusively presumed so to apply.
- (5) On any appeal under paragraph (4), the Tribunal may determine that the certificate does not so apply.

NOTE

Article 32, which provides an exemption for information for which exemption is required to safeguard national security, contains a mechanism whereby the Chief Minister can issue certificates that are to act as "conclusive evidence" of the relevant facts. That is the end of the matter so far as the Commissioner is concerned, but this Article gives the Tribunal a special jurisdiction over such certificates, which can be invoked either by the Commissioner or by any applicant who is affected by a certificate.

Where the Chief Minister issues a certificate under Article 32, two separate issues might arise. If the issue is whether the certificate is correct (whether the information really does require exemption on national security grounds) then the Tribunal's powers are limited. The Tribunal cannot decide the issue itself, but can only review the certificate using the principles of judicial review (paragraph (3)). In practice this will place a burden on an appellant to show that the Chief Minister's conclusion was completely unreasonable. The Chief Minister gets the benefit of any doubt.

If, on the other hand, the issue is whether or not a particular item of information falls within the scope of a certificate that identifies a general category of information as subject to the Article 32 exemption, then the Tribunal is free to decide the question one way or the other (paragraph (4)).

There is no appeal from the Tribunal's decision under this Article, although judicial review would be possible.

75 Appeal proceedings

- (1) The provisions of Schedule 6 to the Data Protection (Jersey) Law 2005 have effect (so far as applicable) in relation to appeals under this Part.
- (2) Accordingly, Schedule 6 to the Data Protection (Jersey) Law 2005 is amended—
 - (a) by omitting from paragraph 2 "under Article 28(6) or 48" and substituting "under Article 28(6) or Article 48 of this Law or Article 71 or Article 74 of the Freedom of Information (Jersey)

Law 200-”;

- (b) by omitting from paragraph 5 “under Article 28(6) or 48’ and substituting “under Article 28(6) or Article 48 of this Law or Article 71 or Article 74 of the Freedom of Information (Jersey) Law 200-”;
- (c) by omitting from paragraph 5(3) “under Article 28(6)’ and substituting “under Article 28(6) of this Law or Article 74(4) of the Freedom of Information (Jersey) Law 200”.

NOTE

Schedule 6 to the Data Protection (Jersey) Law 2005 contains procedural rules bearing on any appeal to the Tribunal, including matters such as the Tribunal's composition and its power to make detailed rules of procedure. Thus a uniform regime will apply to the Tribunal's functions under both this and the 2005 Law.

PART 7

HISTORICAL RECORDS AND RECORDS HELD BY THE TRUST

76 Interpretation of Part 7

- (1) For the purposes of this Part, a record becomes a “historical record” at the end of the period of 30 years beginning with the year following that in which it was created.
- (2) Where records created at different dates are for administrative purposes kept together in one file or other assembly, all the records in that file or other assembly are to be treated for the purposes of this Part as having been created when the latest of those records was created.
- (3) In this Part “year” means a calendar year.

NOTE

Part 7 of the Law deals with historical records. In principle, public records have been made available after 30 years; but the period can be extended, and it often has been, for 75 or 100 years.

This Law, by putting matters on a statutory footing, will improve the position. The Public Records (Jersey) Law 2002 is amended (see Article 80). And the exemptions of Part 3 are modified for historical records, increasing ease of access to them.

Definition of historical record

The Law takes the same chronological approach to defining historical records as is taken by the Public Records (Jersey) Law 2002. A document is first regarded as "historical" 30 years after its creation or (in the case of a file, 30 years after the closure of the file.

77 Removal of exemptions: historical record generally

- (1) Information contained in a historical record cannot be exempt information by virtue of –
 - (a) Article 36(1) and (2) (investigations and proceedings conducted by public authorities);
 - (b) Article 38 (court records);
 - (c) Article 39 (audit functions);
 - (d) Article 41 (formulation of States policy);
 - (e) Article 42(1)(a) (communications with Her Majesty);

- (f) Article 47 (legal professional privilege);
 - (g) Article 48 (commercial interests); or
 - (h) Article 50 (preCode information).
- (2) Compliance with Article 8(1)(a) in relation to a historical record is not to be taken to be capable of having any of the effects referred to in –
 - (a) Article 38(3);
 - (b) Article 47(2); or
 - (c) Article 48(3).
 - (3) Information cannot be exempt information by virtue of Article 42(1)(b) (honours) after the end of the period of 60 years beginning with the year following that in which the record containing the information was created.
 - (4) Information cannot be exempt information by virtue of Article 37 (law enforcement) after the end of the period of 100 years beginning with the year following that in which the record containing the information was created.
 - (5) Compliance with Article 8(1)(a) in relation to any record is not to be taken, at any time after the end of the period of 100 years beginning with the year following that in which the record was created, to be capable of prejudicing any of the matters referred to in Article 37(1).

NOTE

This Article modifies the rules relating to historical records by progressively reducing the number of exemptions that apply to them. Exemptions are removed in three tranches: after thirty years, after sixty years, and after one hundred years.

It will be noticed that some exemptions never formally disappear. But that does not mean that they will not, realistically, be affected by the passage of time. Some may simply lose their force: it is highly unlikely that anybody is likely to be in a position to bring an action for breach of confidence a century after the information was originally recorded. Many things that might, if freshly revealed, have caused international tension will hardly do so many years later. But, conversely, some things that might have been quite innocuous if disclosed when they occurred may subsequently (as a result of some unforeseeable concatenation of circumstances) be capable of causing a great deal of damage. The public interest balance will also, of course, change over time.

78 Removal of exemption: historical records held by the Trust

Information contained in a historical record held by the Trust cannot be exempt information by virtue of Article 30 (information accessible by other means) or Article 31 (information intended for future publication).

NOTE

This Article prevents a public authority from refusing information on the ground either that it is reasonably available because it is held by the Trust, or that it is intended in due course to be published (when it is held by the Trust).

79 Decision as to refusal of discretionary disclosure of historical records

- (1) This Article applies to exempt information contained in a historical record that is not absolutely exempt information.
- (2) A public authority must consult the Minister responsible for historical public records before refusing

a request for the information.

NOTE

This Article requires a public authority to consult the minister responsible for historical public records when deciding whether the public interest test in Article 13 justifies refusing access to records to which a non-absolute exemption applies. It does not apply to cases where an absolute exemption is in issue. The result of this Article is that for historical public records a decision on the application of the public interest test will be taken by the responsible authority whose record it was in consultation with the minister who has overall responsibility for historical public records.

80 Amendment of Public Records (Jersey) Law 2002

- (1) The Public Records (Jersey) Law 2002 is amended in accordance with this Article.
- (2) In Article 1(1) the definition “open access period” is deleted.
- (3) In Article 9(c) for “in accordance with this Law” substitute “in accordance with the Freedom of Information (Jersey) Law 200-”.
- (4) In Article 11(o) “subject to Article 27(5);” is deleted.
- (5) In Article 22(3), everything after “a record that” is deleted and there is substituted “contains information that is exempt information for the purposes of the Freedom of Information (Jersey) Law 200-.”.
- (6) Parts 5 and 6 are repealed.
- (7) Articles 39 and 40 are repealed.

NOTE

This Article amends the Public Record (Jersey) Law 2002 to make it clear that when an application is made to the Trust for information that is in a public record that is in the possession of the Trust the application must be dealt with in accordance with Article 21 of this Law.

PART 8

AMENDMENT OF DATA PROTECTION (JERSEY) LAW 2005

Amendments relating to personal information held by public authorities

81 Extension of meaning of data

- (1) Article 1 of the Data Protection (Jersey) Law 2005 (basic interpretative provisions) is amended in accordance with paragraphs (2) and (3).
- (2) In paragraph (1)–
 - (a) in the definition of “data”, the word “or” at the end of paragraph (b) is omitted and after paragraph (c) there is inserted–
“or
(d) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (c);”;

and

(b) after the definition of “processing” there is inserted –

“ ‘public authority’ has the same meaning as in the Freedom of Information (Jersey) Law 200-;”.

(3) After paragraph (6) there is inserted–

“(7) In paragraph (d) of the definition of ‘data’ in paragraph (1), the reference to information ‘held’ by a public authority shall be construed in accordance with Article 3 of the Freedom of Information (Jersey) Law 200-.”.

(4) In Article 56 of that Law (prohibition of requirement as to production of certain records), after paragraph (6), there is inserted–

“(6A) A record is not a relevant record to the extent that it relates, or is to relate, only to personal data falling within paragraph (d) of the definition of ‘data’ in Article 1(1)”.

NOTE

This Chapter of Part 8 of this Law amends the Data Protection (Jersey) Law 2005 so as to extend rights for data subjects to have access to personal data held about them by public authorities, and to enforce the duty of accuracy. The scheme of this Law is that all rights of access by data subjects to personal data held about them should be dealt with under the Data Protection Law. Article 45 achieves this by exempting information of which the applicant is the data subject from the duty of disclosure under Article 8. There is an institutional link between the Data Protection Law and the Freedom of Information Law because the Commissioner and the Tribunal function under both.

A detailed understanding of Part 8 depends on a consideration of the Data Protection Law in greater detail than would be appropriate here. This note therefore briefly summarises the effect of the amendments made by Part 8.

Because the intention is to permit wider data access so far as public authorities are concerned, the definition of “data” is altered, so that it extends beyond the automated or organised data to which the Data Protection Law normally applies. All data held by a public authority, within the meaning of this Law, falls under the Data Protection Law so far as rights of access and duties of accuracy are concerned. This is achieved by amendments to Article 1 of the Data Protection Law which are set out in this Article. When registering as a data controller, public authorities must identify themselves as such (Article 16(1)(fa) of the Data Protection Law as inserted by Article 84 of this Law).

This brings into the Data Protection Law a variety of data which are more or less loosely structured. A distinction is then created within this class of data, depending on its organisation. Data that is relatively highly organised (“structured personal data”), such as a file dealing with various issues relating to a single individual, is treated in the same way as any other data under the Data Protection Law. However, data that is not structured in this way, morsels of information about an individual that might be scattered in a variety of places, has special treatment. There is no right of access to it unless it is specifically requested, so the public authority need not hunt for such information in response to an entirely general request for information. The authority is entitled to refuse access if the costs of producing that data alone would exceed the appropriate amount fixed under the Freedom of Information Act. This is the effect of Article 9A of the Data Protection Law, as inserted by Article 82 of this Law.

This is an elegant technique for dealing with the subject's right to data access, but it creates a problem. The intention is to extend the rights of access and accuracy to all publicly-held personal data – but not to extend every other provision of the Data Protection Law to it. The solution adopted is to disapply all other provisions of the Data Protection Law (such as the right to prevent processing that might cause distress, under Article 10 of the Law, and the application of many of the data protection principles) to data that only falls under the Law where the holder is a public authority. That is achieved by Article 33A of the Data Protection Law, as inserted by Article 83 of this Law.

After Article 9 of the Data Protection (Jersey) Law 2005 there is inserted–

“9A Unstructured personal data held by public authorities.

- (1) In this Article ‘unstructured personal data’ means any personal data falling within paragraph (d) of the definition of ‘data’ in Article 1(1), other than information that is recorded as part of, or with the intention that it should form part of, a set of information relating to individuals to the extent that the set is structured by reference to individuals or by reference to criteria relating to individuals.
- (2) A public authority is not obliged to comply with paragraph (1) of Article 7 in relation to any unstructured personal data unless the request under that Article contains a description of the data.
- (3) Even if the data are described by the data subject in his or her request, a public authority is not obliged to comply with Article 7(1) in relation to unstructured personal data if the authority estimates that the cost of complying with the request so far as relating to those data would exceed the appropriate limit.
- (4) Paragraph (3) does not exempt the public authority from its obligation to comply with Article 7(1) insofar as it requires the public authority to inform an individual if the unstructured personal data are being processed by or on behalf of the public authority unless the estimated cost of complying with that requirement alone in relation to those data would exceed the appropriate limit.
- (5) In paragraphs (3) and (4) ‘the appropriate limit’ means such amount as may be prescribed by the States by Regulations, and different amounts may be prescribed in relation to different cases.
- (6) Any estimate for the purposes of this Article must be made in accordance with Regulations under Article 17(3) of the Freedom of Information (Jersey) Law 2000.”.

NOTE

Please see note to Article 81.

This Article adds a provision to the Data Protection Law so as to draw a distinction between "structured" and "unstructured" personal data, for data that is held manually by public authorities and that only comes within the Data Protection Law as a result of the amendments made by this Law. "Structured" personal data is treated in the same way as other data, but unstructured personal data need only be made available if it is specifically requested and if the costs of identifying it are not excessive.

83 Exemptions applicable to certain manual data held by public authorities

After Article 33 of the Data Protection (Jersey) Law 2005 there is inserted–

“33A Manual data held by public authorities

Personal data falling within paragraph (d) of the definition of ‘data’ in Article 1(1) are exempt from –

- (a) the first, second, third, fifth, seventh and eighth data protection principles;
- (b) the sixth data protection principle except so far as it relates to the rights conferred on data subjects by Articles 7 and 14;
- (c) Articles 10 to 12;

- (d) Article 13, except so far as it relates to damage caused by a contravention of Article 7 of the fourth data protection principle and to any distress which is also suffered by reason of that contravention;
- (e) Part 3; and
- (f) Article 55”.

NOTE

Please see note to Article 81.

84 Particulars registrable under Part 3 of Data Protection (Jersey) Law 2005

In Article 16(1) of the Data Protection (Jersey) Law 2003 (the registrable particulars), before the word “and” at the end of paragraph (f) there is inserted–

“(fa) where the data controller is a public authority, a statement of that fact; and”.

NOTE

Please see note to Article 81.

85 Availability under Law disregarded for purpose of exemption

In Article 34 of the Data Protection (Jersey) Law 2005 (information available to the public by or under enactment), after the word “enactment” there is inserted “other than an enactment contained in the Freedom of Information (Jersey) Law 200”.

NOTE

Please see note to Article 81.

Other amendments

86 Exemptions applicable to privileges of the States Assembly

After Article 35 of the Data Protection (Jersey) Law 2005 there is inserted–

“35A States Assembly privilege

Personal data are exempt from –

- (a) the first data protection principles, except to the extent it requires compliance with the conditions in Schedules 2 and 3;
- (b) the second, third, fourth and fifth data protection principles;
- (c) Article 7; and
- (d) Articles 10 and 12(1) to (3),

if the exemption is required for the purpose of avoiding an infringement of the privileges of the States Assembly.”.

Note

This Chapter of Part 8 of this Law amends the Data Protection (Jersey) Law 2005 to incorporate into that Law a parallel exemption to Article 40 of this Law in respect of the personal data in the possession of the States Assembly.

87 Application to the States Assembly

After Article 63 of the Data Protection (Jersey) Law 2005 there is inserted—

“63A Application to States Assembly

- (1) Except as provided by Article 35A, this Law applies to the processing of personal data by or on behalf of the States Assembly.
- (2) Where the purposes for which and the manner in which any personal data are, or are to be, processed are determined by or on behalf of the States Assembly the data controller in respect of those data for the purposes of this Law shall be the Greffier of the States.
- (3) Nothing in paragraph (2) is to be taken to render the Greffier of the States liable to prosecution under this Law but Article 55 and paragraph 13 of Schedule 9 shall apply to a person acting on behalf of the States Assembly as they apply to any other person.”.

NOTE

Please see note to Article 86.

88 Amendments to Schedules of Data Protection (Jersey) Law 2005

- (1) In paragraph 5(c) of Schedule 2 to the Data Protection (Jersey) Law 2005 for “the States” there is substituted “the States Assembly”.
- (2) In paragraph 7(c) of Schedule 3 to the Data Protection (Jersey) Law 2005 for “the States” there is substituted “the States Assembly”.

NOTE

Please see note to Article 81.

PART 9

MISCELLANEOUS AND SUPPLEMENTAL

89 Power to make provision relating to environmental information

- (1) In this Article “the Aarhus Convention” means the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters signed at Aarhus on 25th June 1998.
- (2) For the purposes of this Article “the information provisions” of the Aarhus Convention are Article 4 of the Convention, together with Articles 3 and 9 of the Convention so far as relating to Article 4 of

the Convention.

- (3) The States may by Regulations make provision –
 - (a) to implement the information provisions of the Aarhus Convention or any amendment of those provisions made in accordance with Article 14 of the Convention; and
 - (b) to deal with matters arising out of or related to the implementation of those provisions or of any such amendment.
- (4) Regulations made under paragraph (3) may in particular–
 - (a) enable charges to be made for making information available in accordance with the Regulations;
 - (b) provide that any obligation imposed by the Regulations in relation to the disclosure of information is to have effect notwithstanding any enactment or rule of law;
 - (c) make provision for the issue of a code of practice;
 - (d) provide for Articles 53 and 54 to apply in relation to such a code with such modifications as may be specified;
 - (e) provide for any of the provisions of Parts 5 and 6 to apply, with such modifications as may be specified in the Regulations, in relation to compliance with any requirement of the Regulations; and
 - (f) contain such transitional or consequential provision (including provision modifying any enactment) as the States considers appropriate.

NOTE

This Article enables Regulations to be made to implement the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded under the auspices of the United National Economic Commission for Europe (UNECE) (the Aarhus Convention).

The Regulations made under this Article are intended to provide a complete code for access to information they cover, so that information dealt with (either by requiring disclosure or by exempting it) under such Regulations is generally exempt from the duties to provide access under Article 8. The powers granted by paragraph (4) of this Article, however, show that they are expected to follow a similar pattern to this Law itself, and to fit into the procedural framework laid down in this Law, so that the Commissioner and the Tribunal will be given similar powers to compel the production of information under the Regulations as they have under this Law itself.

90 Power to amend or repeal enactments prohibiting disclosure of information

- (1) This Article applies to an enactment that prohibits the disclosure of information held by a public authority that, by virtue of Article 49(1)(a), is capable of preventing the disclosure of information under Article 8.
- (2) The States may by Regulations repeal or amend the enactment to remove or relax the prohibition.
- (3) In paragraph (1)–
 - “enactment” means any enactment whether passed before or after this Law;
 - “information” includes unrecorded information.
- (4) Regulations made under this Article may –
 - (a) make such modifications of enactments as are consequential upon, or incidental to, the amendment or repeal of the enactment containing the prohibition;
 - (b) contain transitional provisions and savings;
 - (c) make different provision for different cases.

NOTE

Information whose disclosure is prohibited under any enactment is (absolutely) exempt from the duties to provide access under this Law (Article 49(1)(a)). This Article permits the States to remove or relax such prohibitions, bringing the information within this Law.

91 Offence of altering, etc. records with intent to prevent disclosure

- (1) Where –
 - (a) a request for information has been made to a public authority; and
 - (b) under Article 8 of this Law or Article 7 of the Data Protection (Jersey) Law 2005, the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that Article,any person to whom this paragraph applies is guilty of an offence if he or she alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.
- (2) Paragraph (1) applies to the public authority and to any person who is employed by, is an officer of or is subject to the direction of, the public authority.
- (3) A person guilty of an offence under this Article is liable to a fine of [level ?] on the standard scale.
- (4) Proceedings for an offence under this Article shall not be instituted except by or with the consent of the Attorney General.

NOTE

This Article creates an offence of altering, blocking, erasing, concealing or destroying records held by public authorities "with the intention of preventing disclosure" of all or part of that information. It can be committed only by a person who is employed by, or an officer of, or under the direction of a public authority. Therefore a burglar who breaks into the offices of the JRCA and destroys their records cannot commit an offence under this Article, whatever other offence he or she may commit. A government department cannot be prosecuted under this Article, but a person employed by a States administration can be (see Article 94(4)), as can a person acting or behalf of the States Assembly.

92 Saving of existing powers

Nothing in this Law is to be taken to limit the powers of a public authority to disclose information held by it.

NOTE

This Law lays down the circumstances in which public authorities are obliged to disclose information, but does not prevent them from being more generous if they wish to be. This is recognised elsewhere in the Law, most notably in Article 18, which permits public authorities to charge for information that they are not obliged to provide under the Law.

93 Defamation

Where any information communicated by a public authority to a person ("the applicant") under Article 8 was supplied to the public authority by a third person, the publication to the applicant of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made

with malice.

NOTE

This Article provides a defence of qualified privilege to any defamation claim where a public authority "publishes" under Article 8 information that was supplied by a third party. This is consistent with the customary/common law principle that information supplied pursuant to a public duty attracts qualified privilege (see. e.g., Adam -v- Ward [1917] A.C. 309). It is probably therefore unnecessary, albeit desirable, to spell the privilege out explicitly. The alternative (to exempt all defamatory matter from the duty of disclosure) would have undermined this Law considerably, especially since public authorities will often be in a poor position to know whether a particular defamatory statement made to them is true, much less to prove that it is true. Public authorities must be careful, however, not to pass on information that they know to be false. It is not, after all, the purpose of this Law to facilitate access to misinformation, and a person who publishes a statement that he or she knows to be false will normally be treated as acting maliciously. There might, however, be circumstances in which this was not the case. For example, a person might seek information about whether allegations have been made with a view to showing that the maker of those allegations had acted improperly. In those circumstances a public authority could not be said to be acting with malice if it disclosed the allegations, provided it made it clear that they were disclosed simply as allegations and that they were not being endorsed by the authority concerned. The purpose for which the authority acted in such a case (namely to inform the inquirer as to what allegations had been made) would be perfectly consistent with its duty under the Law, which must form the touchstone of malice.

The defence, of course, applies only to the communication by the public authority to the applicant. Applicants who disseminate defamatory information further do so at their own risk. Moreover, the defence only applies so far as public authorities are concerned if the communication is "under Article 8". If authorities choose to communicate information which they are not, under this Law, bound to communicate, they will not be entitled to the benefit of the defence.

94 Application to the Crown, the States Assembly and administrations of the States

- (1) This Law binds the Crown.
- (2) For the purposes of this Law each administration of the States is to be treated as a person separate from any other administration of the States.
- (3) Paragraph (1) does not enable an administration of the States to claim for the purposes of Article 4 (1)(b) that the disclosure of any information by it would constitute a breach of confidence actionable by any other administration of the States.
- (4) The Crown, the States Assembly, a committee or other body established by the States or by or in accordance with the standing orders of the States Assembly or an administration of the States is not liable to prosecution under this Law.
- (5) However, Articles 70 and 91 apply to a person acting on behalf of or employed by the Crown, the States Assembly, a committee or other body established by the States or by or in accordance with the standing orders of the States Assembly or an administration of the States, as they apply to any other person.

NOTE

For the purposes of this Law, each administration of the States is treated as having separate legal personality, whether or not they do in fact have such personality. However, to prevent the absurdity of one department hiding behind alleged obligations of confidentiality owed to another, the exemption in Article 46 (information subject to an actionable duty of confidence) is excluded as between most States administrations.

95 Citation and commencement

- (1) This Law may be cited as the Freedom of Information (Jersey) Law 200-.
- (2) This Law shall come into force on such day as the States may by Act appoint and different days may be appointed for different provisions or different purposes.

NOTE

This Article provides for the citation and commencement of the Law.

It is important to note that not all of the provisions of the Law need be brought into force at the same time. Various requirements of the Law may be brought into force as funding for them becomes available. Equally the provisions of the Law need be applied to a public authority only when it acquires the funding or facilities it requires to implement the Law.

SCHEDULE

(Article 7)

PROVISIONS AND AMENDMENTS CONSEQUENT ON ARTICLE 6

1 Data Protection (Jersey) Law 2005 – general

- (1) The corporation known as the Data Protection Commissioner, that, by virtue of Article 6(1) of the Data Protection (Jersey) Law 2005, became and was to be regarded as one with the office originally established by Article 2(1)(a) of the Data Protection (Jersey) Law 1987 as the office of Data Protection Registrar, continues for the purposes of the Data Protection (Jersey) Law 2005 and this Law as a corporation but, by virtue of Article 6(1) of this Law, under the name Information Commissioner.
- (2) The Data Protection Tribunal established by Article 2(1)(b) of the Data Protection (Jersey) Law 1987, that, by virtue of Article 6(4) of the Data Protection (Jersey) Law, was continued under the same name for the purposes of the Data Protection (Jersey) Law 2005, continues for the purposes of the Data Protection (Jersey) Law 2005 and this Law but –
 - (a) by virtue of Article 6(2) of this Law, under the name Information Tribunal; and
 - (b) by virtue of Article 6(3) of the Data Protection (Jersey) Law 2005, as amended by paragraph 1 of this Schedule, with the inclusion of the 2 additional members specified in that Article.
- (3) A reference in any enactment, instrument or document to the Data Protection Commissioner shall be construed in relation to any time after the commencement of Article 6(1) of this Law, as a reference to the Information Commissioner.
- (4) A reference in any enactment, instrument or document to the Data Protection Tribunal shall be construed in relation to any time after the commencement of Article 6(2) of this Law, as a reference to the Information Tribunal.

2 Data Protection (Jersey) Law 2005 – amendments

- (1) In this paragraph “the Law” means the Data Protection (Jersey) Law 2005.
- (2) In Article 1(1) of the Law –
 - (a) in the definition “Commissioner” for “Data Protection Commissioner” there is substituted “Information Commissioner”; and
 - (b) for the definition “Tribunal” there is substituted –

“ ‘Tribunal’ means the Information Tribunal referred to in Article 6”.
- (3) For Article 6 of the Law there is substituted –

“6 Commissioner and Tribunal

- (1) There is a Commissioner, known as the Information Commissioner, for the purposes of this Law and of the Freedom of Information (Jersey) Law 2005.
- (2) There is a Tribunal, known as the Information Tribunal, for the purposes of this Law and of the Freedom of Information (Jersey) Law 2005.
- (3) The Tribunal shall consist of a president, and 6 other members, appointed by the States.
- (4) The 6 other members shall be appointed on the basis that they represent the interests of data subjects, data controllers, public bodies and those likely to seek information from public bodies.

- (5) Of those 6 other members, one or more shall be appointed as vice-presidents by the States.
 - (6) Schedule 5 shall have effect’.
- (4) For the heading of Schedule 5 for the Law there is substituted–

“SCHEDULE 5

(Article 6(6))

INFORMATION COMMISSIONER AND INFORMATION TRIBUNAL”

- (5) For paragraph 1(1) of Schedule 5 of the Law there is substituted–

“(1) The Commissioner shall be a corporation sole by the name of the ‘Information Commissioner’.”.

3 Amendments to other legislation

In the following provisions for “Data Protection Commissioner” there is substituted “Information Commissioner” –

- (a) paragraph 5 of the Schedule to the Data Protection (Credit Reference Agency) (Jersey) Regulations 200-;
- (b) Article 8(5) of the Lloyds TSB (Jersey) Law 1997;
- (c) Article 5(5) of the Royal Bank of Canada (Jersey) Law 2000.

NOTE

These amendments are necessary as a consequence of the Data Protection Commissioner and the Data Protection Tribunal becoming the Information Commissioner and the Information Tribunal.