
STATES OF JERSEY



STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE CHIEF MINISTER REGARDING A REQUEST FOR ACCESS TO INFORMATION MADE UNDER THE CODE OF PRACTICE ON PUBLIC ACCESS TO OFFICIAL INFORMATION

**Presented to the States on 14th October 2009
by the Privileges and Procedures Committee**

STATES GREFFE

REPORT**Foreword**

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982 as amended, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against the Chief Minister regarding a request for access to information made under the Code of Practice on Public Access to Official Information.

Connétable J. Gallichan of St. Mary,
Chairman, Privileges and Procedures Committee.

STATES OF JERSEY COMPLAINTS BOARD

16th September 2009

Findings of the Complaints Board constituted under the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint by Mr. Graham Power against the Chief Minister regarding the refusal to provide information under the Code of Practice on Public Access to Official Information

Hearing constituted under the Administrative Decisions (Review) (Jersey) Law 1982

1. Present -

Board Members

Advocate R.J. Renouf, Chairman
Mr. N.P.E. Le Gresley
Ms. C. Vibert

Complainant

Mr. G. Power
Connétable A.S. Crowcroft of St. Helier

Chief Minister

Senator T.A. Le Sueur, Chief Minister
Mr. M.J. Pinel, Head of Employee Relations, Human Resources Department
Miss. S. Roberts, Legal Adviser, Law Officers' Department

States Greffe

Mr. M.N. de la Haye, Greffier of the States

The hearing was held in public at 3.30 p.m. on 16th September 2009 in the Blampied Room, States Building.

2. Summary of the dispute.

2.1 The Board was convened to hear a complaint by Mr. Graham Power in relation to a refusal by the Chief Minister to provide to him certain information he was seeking under the provisions of the Code of Practice on Public Access to Official Information.

3. Chairman's introduction

3.1 The Chairman, Advocate Richard Renouf, welcomed the parties and the members of the public who were present at the hearing. He pointed out that the Complaints Board was named as the appeal body under Part IV of the

Code of Practice on Public Access to Official Information. The Chairman explained the scope of the powers of the Complaints Board as set out in the Administrative Decisions (Review) (Jersey) Law 1982 and, in particular, clarified that the Board was restricted to requesting a Minister to reconsider a decision as opposed to a court which could, in certain circumstances, overturn a ministerial decision.

- 3.2 The Chairman reminded the parties that the hearing was related to the single issue of the information that Mr. Power was seeking and made it clear that it would not be allowed to stray into other matters relating to Mr. Power's suspension as Chief Officer of the States of Jersey Police.
- 3.3 The Chairman stated that the Board was grateful for the very comprehensive written submissions that both parties had provided in advance of the hearing and suggested that the oral submissions should be restricted to amplifying and drawing attention to particular matters of importance in the written submission.

4. Summary of the Complainant's case.

- 4.1 Mr. Power explained that he was accompanied by the Connétable of St. Helier but would present his case himself. He explained that his application was made under the appeal mechanism set out in Part IV of the Code of Practice on Public Access to Official Information that the Chairman had already referred to which stated that any person who was aggrieved by a decision of a Department or Minister to provide information could appeal to the Complaints Board.
- 4.2 Mr. Power's complaint related to 3 documents which were created as part of a process which was purported to have been conducted under the Disciplinary Code for the Chief Officer of the States of Jersey Police. The 3 documents relevant to the complaint were as follows –
- i) A letter from the then Minister of Home Affairs, Deputy Andrew Lewis, to the Chief Executive, Mr W.D. Ogley, under paragraph 2.1.1 of the Disciplinary Code notifying the Chief Executive that the Minister had decided to invoke the Disciplinary Code and asking for a preliminary investigation. This was provided to Mr. Power by post two days after his suspension from the post of Chief Officer of the States of Jersey Police.
 - ii) A letter from the then Minister for Home Affairs to Mr. Power notifying him that the disciplinary process had been commenced, to which was attached a copy of 2 versions of the Disciplinary Code, one referring to committee government and one updated to change the relevant references to refer to ministerial government. This was provided to Mr. Power during the suspension meeting; and
 - iii) A letter from the Minister to Mr. Power notifying him that he had been suspended from duty. This was provided to Mr. Power during the suspension meeting.

- 4.3 Mr. Power explained that the information he was seeking was quite simple. On 17th November 2008 he had written to the Chief Executive seeking details of the date and time that the 3 letters were created. He believed that this information would be available on the States IT system and could easily be provided by the Head of the Information Services Department.
- 4.4 Mr. Power stated that under the Code of Practice on Public Access to Official Information there was a presumption of openness and any applicant was therefore entitled to receive information he or she requested unless the public authority could show a legitimate reason why it should be withheld in accordance with the exemptions in the Code. Mr. Power explained that an applicant for information under the Code was under no obligation to provide any reasons why he wanted particular information but, in order to assist the Board and in the interests of transparency, he set out certain background information.
- 4.5 Mr. Power explained that in the 3 letters the then Minister for Home Affairs had claimed that his concerns arose because of a letter he had received from the Chief Executive, with which was enclosed a letter from the Deputy Chief Officer Mr David Warcup. The Minister stated that he received these letters 'on 11th November 2008.' The correspondence referred to the findings of a review of the historic abuse investigation by the Metropolitan Police. A copy of the letter from the Deputy Chief Officer to the Chief Executive had been disclosed to him and was dated 10th November 2008.
- 4.6 Mr. Power explained that additionally, in what was claimed by the then Minister and the Chief Executive to be an account of the suspension meeting on 12th November 2008, the first paragraph recorded that he had been told that concerns had arisen following a briefing 'on the previous evening' and following the receipt of the letter from the Deputy Chief Officer dated 10th November 2008. This assertion by the then Minister and Mr. Ogley was subsequently confirmed in witness statements that both had given to Wiltshire Police who were conducting the 'Preliminary Investigation' required by the Disciplinary Code. Extracts from these statements were made available to the Board and confirmed that the decision to suspend Mr. Power was said to have been taken by the then Minister as a consequence of a letter from the Chief Executive on 11th November 2008, which enclosed the letter from the Deputy Chief Officer dated 10th November 2008 as well as information given at a briefing on the evening of 11th November 2008.
- 4.7 Mr. Power considered that it was legitimate to question the validity of the accounts of when relevant decisions were taken and the order in which they were taken. The reasons included-
- i) The fact that the 3 letters relating to discipline and suspension appeared detailed and legalistic in their tone. Mr. Power believed that they would have been hard to produce in the few working hours between the presentation on the evening of the 11th November 2008 and the time of the suspension meeting at 11.10 a.m. on the following day;

- ii) A revised version of the Disciplinary Code changing references from 'Committee' to 'Minister' appeared to have created during the same time period;
- iii) Both Mr Ogley and the then Minister claimed in their statements that the decisions to commence the disciplinary process and to suspend Mr. Power from duty arose from information received on the 11th November but both referred only to the creation of the letter notifying him that disciplinary proceedings had commenced. They both said that this was done after information was received on 11th. They were silent in respect of the other two letters.
- iv) The letter from the then Minister to the Chief Executive should, if the process had been followed correctly, have been the first in the series of three documents, and a copy provided to Mr. Power although his copy had only been provided by post two days after the suspension and then only after it had been requested in a letter from him which was hand-delivered on 13th November 2008;
- v) The suspension letter, which was handed to Mr. Power during the meeting on the morning of 12th November 2008, made reference to 'our meeting earlier today' even though it was agreed by all parties that no earlier meeting took place;
- vi) In spite of repeated requests made over a period of 9 months, Ministers had persistently refused to provide details of the times and dates on which these 3 documents were created. Mr. Power claimed that it was almost beyond belief that they would persist with their refusal to this extent if they had nothing to hide;
- vii) The former Minister for Home Affairs and the former Chief Minister had made general public statements to the effect that the proper process had been followed at all times, but they had offered no explanations for the apparent inconsistencies in the documents.

4.8 Mr. Power stated that the information he was seeking about the time and date of the creation of the 3 documents was important to him for a number of reasons. Ministers and senior civil servants had claimed that evidence had been viewed first and the decision taken to suspend him taken afterwards in the light of that evidence. That process was very different to an alternative sequence of events where a decision to suspend might have been taken first and the evidence to justify that decision assembled subsequently to justify the decision. If it transpired that the version of events put forward by the Minister and Chief Executive was not correct this would have implications for the credibility of key witnesses in any future disciplinary process. Mr. Power expressed the view that if a person was willing to lie about one matter that person might equally be prepared to lie in another context.

4.9 Mr. Power reiterated that his request was a simple one. For over 9 months he had been seeking details of the time and date on which the 3 documents dated 12th November 2008 had been created. This request had first been made by

him on 17th November 2008 and repeated in a variety of ways since that time without success.

- 4.10 Mr. Power stated that he had noted from the Chief Minister's written submission that it might be claimed that the information he was seeking was not 'information' for the purpose of the Code of Practice on Public Access to Official Information and that the information did not exist. In response to these assertions he set out his view that the Code of Practice defined 'information' as '*any information or official record held by an authority*' and in his submission this clearly covered data held electronically on the States IT system. If this was not the case it would take out of the scope of the Code of Practice the majority of government information and it was inconceivable that was the intention of the States in introducing the Code. Mr. Power referred the Board to an extract from Collins English Dictionary which defined '**Information**' as '**1.** Knowledge acquired in any manner; facts **2.** Computers **a** the meaning given to data by the way it is interpreted. **b** same as **data** (sense 2.)' He pointed out that '**Data.**' was defined as '**1.** A series of observations, measurements, or facts; information. **2.** Computers, the numbers, digits, characters, and symbols operated on by a computer.' Mr. Power asserted that if the view offered by the Chief Minister were to be accepted this would have significant implications for the scope of the Code in an era when the majority of information held by authorities is in electronic form.
- 4.11 Although the Chief Minister had claimed that the information did not exist in the format that Mr. Power had requested it, Mr. Power clarified that the reference to a signed statement from the Head of the IS Department was simply a suggested means to provide the information and the 'information' itself requested referred simply to the times and dates which he believed would be held on the States network.
- 4.12 Mr. Power addressed the second reason set out in the Minister's written submission for withholding the information, namely that to do so might '*infringe legal professional privilege or lead to the disclosure of legal advice to an authority*' and was therefore exempt from disclosure under the Code. Mr. Power made it clear that he was not asking for access to any legal advice that the Minister may have obtained and he was only interested in knowing when the 3 letters were first created. Mr. Power did not believe it could be appropriate to suggest that, if legal advice was taken at any stage in a process, all subsequent decisions could be caught by the legal privilege exemption in the Code of Practice.
- 4.13 Mr. Power concluded his presentation to the Board by referring to public interest considerations. He considered that the fact that the Minister might have received legal advice before taking the decision to suspend him undermined the credibility of the official account of events. If the official account was correct this legal advice would have had to have been given in the period between the presentation on the evening of 11th November and the meeting on the morning of 12th and this added to the implausibility of the official sequence of events put forward. Mr. Power stated that if Ministers, assisted by civil servants, had put together a false account of events and produced paperwork and made statements to support that false account, there was, in his submission, an issue of public interest. He reiterated that the Code

of Practice as based on a presumption of openness with the stated purpose of 'increasing public access to information' and he invited the Board to support his view that the information he was seeking should be provided to him.

5. Summary of the Chief Minister's case.

- 5.1 Miss Sylvia Roberts, Legal Adviser, Law Officers' Department, informed the Board that she was presenting the Chief Minister's submission and addressed the Board on his behalf.
- 5.2 Miss Roberts explained to the Board that the Chief Minister's position was –
- (i) that the Code of Practice on Public Access to Official Information did not require a Minister to create information in order to deal with a request as, in the Chief Minister's view, the Code required the disclosure of information already in existence (unless the information requested fell within one of the exemptions);
 - (ii) the information which Mr. Power was seeking was exempt from disclosure under paragraph 3.2.1(a)(v) on the grounds that disclosure of the information would or might be liable to '*infringe legal professional privilege or lead to the disclosure of legal advice to an authority*'.
- 5.3 Miss Roberts addressed firstly the definition of 'information' for the purposes of the Code of Practice in the context of Mr. Power's application. She reminded the Board that paragraph 1.2.1(b) of the Code stated that '*information means any information or official record held by an authority*'. She pointed out that there was no further definition of 'information' under the Code.
- 5.4 Miss Roberts asserted that the information which Mr. Power was seeking did not exist as there was currently no statement or document in existence which set out the dates and times on which the 3 letters were created. She submitted that the purpose of the Code of Practice was to require the disclosure of information which already existed, such as records of decisions, policies or procedures and that the Code did not require the person asked for disclosure to research answers to questions. The Code of Practice did not, in Miss Roberts' submission, require a Minister to make enquiries on behalf of an individual and thereby construct information which did not already exist in order to provide a response.
- 5.5 The present case could, in her submission, be contrasted with a request to know the names of the attendees at a meeting where the relevant information could be cut and pasted from the minutes of the meeting. Miss Roberts further pointed out that paragraph 1.2.4 of the Code stated that it applied 'to information **created** after the date on which the Code is brought into operation and, in the case of personal information, to information **created** before that date' . Paragraph 1.2.1 referred to information 'held' by an authority, suggesting that information must already exist, whereas the information that Mr. Power was seeking did not already exist and would have to be created in order to deal with his request.

- 5.6 Miss Roberts addressed secondly the issue of exemptions under the Code. She submitted that, even if the Board considered that the Code of Practice did apply to Mr. Power's request, the Chief Minister's view was that it was exempt from disclosure under the exemptions listed in the Code. The Chief Minister had declined to supply the information requested as he considered that it was exempt under paragraph 3.2.1(a)(v) of the Code which stated –

'3.2 Exemptions

3.2.1 Information shall be exempt from disclosure, if –

- (a) such disclosure would, or might be liable to –

(...)

- (v) infringe legal professional privilege or lead to the disclosure of legal advice to an authority, or infringe medical confidentiality;'

- 5.7 Miss Roberts pointed out that paragraph 3.2.1 stated that information **shall** be exempt from disclosure if such disclosure would '*or might be liable to*' infringe legal professional privilege. The Chief Minister's assertion was that disclosure of the information requested would, or might be liable, to infringe legal professional privilege or lead to the disclosure of legal advice. 'Legal professional privilege' was not defined in the Code or in statute and it had evolved over time through case law. It was intended to provide confidentiality between professional legal advisers and clients to ensure openness between them. It was submitted that privilege attached not only to the advice itself but also to the fact that advice had been sought and when that advice was sought. Miss Roberts pointed out that the Code of Practice for Scrutiny Panels and the PAC approved by the States in 2008 contained provisions on the confidentiality of legal advice received by Ministers. The privilege had always been regarded as an important one as it was essential that there should be no inhibition in place to stop anyone seeking legal advice. Once privilege was waived, whether intentionally or inadvertently, it could not be relied on at a later stage.
- 5.8 In response to questions from the Board concerning why the mere fact of disclosing the date and time of the creation of the documents would breach legal professional privilege Miss Roberts stated that in the particular circumstances of this case the disclosure of the information would lead Mr. Power to know whether or not legal advice had been given.
- 5.9 Miss Roberts drew the Board's attention to the provisions of the United Kingdom Freedom of Information Act 2000 which stated at Section 42 that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings was exempt information. The exemption under the 2000 Act was a qualified one subject to the public interest test although Miss Roberts pointed out that no such test applied under the Jersey Code of Practice on Public Access to Official Information. Miss Roberts referred to advice published by the UK Information Commissioner on the

application of the legal professional privilege exemption which made it clear that there would need to be a strong public interest in disclosure to offset the inevitable strong public interest in favour of exemption, particularly if the advice was recent or current. In Miss Roberts' submission the Chief Minister would not, as a result, have been required to disclose the information even if a Freedom of Information Law similar to the UK Act had applied in Jersey.

- 5.10 In summary Miss Roberts invited the Board to agree that the information that Mr. Power was seeking was not 'information' for the purposes of the Code of Practice as it did not already exist. Nevertheless, even if the Board considered that the information was covered by the Code, she submitted that it was exempt from disclosure under exemption 3.2.1(a)(v).

6. Board findings

- 6.1 The Board notes that both parties accept that the Code of Practice on Public Access to Official Information creates a presumption of openness in relation to official information and the Board concurs with that view. As a result it is clearly incumbent on the Chief Minister to justify why he is refusing to disclose the information that Mr. Power is seeking and it is not for Mr. Power to justify why he has requested it. Although Mr. Power gave the Board some reasons for seeking the information these have not been material to the Board's consideration of the matter
- 6.2 The Board, having considered the submissions made by Miss Roberts on behalf of the Chief Minister, rejects the argument that the information that Mr. Power is seeking cannot be considered as 'information' for the purposes of the Code. The Board notes that the Code of Practice defines 'information' as *'any information or official record held by an authority'* and the Board believes it is unreasonable to suggest that data held on the States IT network is not 'information' for the purposes of the Code. The Board believes that the Chief Minister has confused reference to the 'means' by which the information which could be provided to Mr. Power with the information itself. The Board believes that the information requested should be held as data on the States IT network or could be found in paper records. The Board considers that Mr. Power was possibly over-prescriptive in referring to the need for a signed statement from the Head of the IS Department but it is clear that there are a variety of other means by which the information, which consists simply of 3 times and dates, could be provided.
- 6.3 It must be the case that there are many requests for official information made to States departments that require the collation of information and the production of a document or schedule as a means to transmit that information to the applicant. The Code appears to allude to this possibility as paragraph 2.1.1(f) allows an authority to make a charge where a request *'would require extensive searches of records'*. At the hearing the Chairman gave as an example the recent well-publicised request by the Jersey Evening Post for information made under the Code of Practice about the expenses of chief officers. The Board considers it is almost certain that, in that case, there was no single pre-existing document that contained the information requested and an officer or officers in the States Treasury or another department had to examine electronic financial records to extract the information requested and

then collate a schedule for the journalist concerned. The Board considers that a request under the Code cannot be refused merely because some research is required to collate the information requested and then record it in a form suitable for release to an applicant.

- 6.4 Having concluded that the information sought falls under the Code and that it was unreasonable for the Chief Minister to consider that it did not, the Board went on to consider whether the decision that the information was covered by the legal professional privilege exemption could have been made *'by a reasonable body of persons after proper consideration of all the facts'* (Article 9(2)(d) of the Administrative Decisions (Review) (Jersey) Law 1982).
- 6.5 In considering this issue the Board has been careful to remember that it is not a court of law and cannot adjudicate on purely legal issues. In addition, notwithstanding the fact that the Chairman and one member of the Board are qualified Jersey lawyers, the Board's role is not to consider the matter from a perspective of legal interpretation.
- 6.6 The Board accepts the view expressed by Miss Roberts that the principle of legal professional privilege is an extremely important one that should be respected and protected to ensure confidentiality between a client and his or her legal adviser. The Board notes that the States have recognised in the Code of Practice for Scrutiny Panels and the PAC referred to by Miss Roberts that even the mere fact that a Minister has taken legal advice should not normally be disclosed.
- 6.7 Although the Board recognises that legal professional privilege is an important concept it has struggled to understand how the Chief Minister can claim that the mere disclosure of the 3 dates and times requested by Mr. Power would breach that privilege. Mr. Power has made it very clear that he is merely seeking information on the sequence of events and that he is not seeking access to any legal advice the Minister might have received and is not even seeking to discover whether or not the Minister sought legal advice.
- 6.8 Having considered the facts presented and the submissions made to it, the Board was not convinced how the mere giving of the 3 times and dates requested would automatically allow Mr. Power to know whether or not legal advice was sought and given and thereby breach legal professional privilege. Mr. Power is not seeking to discover who created the letters, who had input into any successive drafts there may have been or on whose computer they were created. The information he is seeking consists simply of 3 times and 3 dates. The then Minister for Home Affairs might have sought advice from a range of sources before taking his decision to suspend Mr. Power and no material was presented to the Board to show how, 'in the particular circumstances of this case', as submitted by Miss Roberts, disclosure of the 3 times and dates would automatically lead him to know that legal advice had been sought.
- 6.9 The Board was concerned by the verbal submission made on behalf of the Chief Minister that disclosure of the information sought would almost certainly lead to further requests for information from Mr. Power. The Board's view is that every request for information made under the Code must be

considered on its individual merits and the fact that future requests might legitimately be covered by exemptions in the Code cannot be used as a reason for refusing an initial request unless an exemption applies. It cannot be known whether or not Mr. Power would wish to make further requests for information if he received the 3 dates and times he is seeking and this matter is simply not relevant for the purposes of the present application as any future requests would need to be considered on their own merits. If the Chief Minister took account of this when taking his decision on this particular request for information the Board considers he was unreasonable to do so.

- 6.10 In considering whether or not the Chief Minister was reasonable in stating that disclosure of the information would breach legal professional privilege the Board also noted the contents of 2 letters provided to it as part of the Chief Minister's submission. In a letter to Mr. Power from the then Director of Human Resources dated 5th February 2009 the Director wrote *'It seems to me that the information you seek (as set out in points 1-11 of your letter of 11th December 2008 addressed to the Minister for Home Affairs) in fact amounts, for the most part, to questions you will wish to put to witnesses at any disciplinary hearing which might follow the current investigation, rather than to a request for information as envisaged by the Code'*. In a letter to the Greffier of the States from the Chief Minister about this application dated 29th June 2009 this point was reiterated even more clearly in the following terms *'The information Mr. Power seeks could, however, be elicited by questions he can put to a witness at any disciplinary hearing which might take place'*. The Board notes that at no point in either of these letters was it claimed that the information would be covered by legal professional privilege although it noted that Miss Roberts submitted that the fact that Mr. Power had been told that he could seek the information at a disciplinary hearing did not necessarily mean that it would be disclosed at any such hearing.
- 6.11 Having considered the terms of the Code of Practice on Public Access to Official Information as approved by the States the Board does not consider it was appropriate for Mr. Power to be notified that he could elicit the information at a subsequent hearing rather than applying under the Code. The Code allows a person to apply for information and there is a **presumption of openness** unless one of the exemptions applies. Furthermore, as Mr. Power pointed out to the Board, any future disciplinary hearing may not cover the process of the initial suspension and the opportunity to elicit the information at that hearing may not even exist.
- 6.12 The Board is firstly satisfied that the information requested exists and is 'information' for the purposes of the Code and secondly that none of the exemptions can legitimately apply to it and the Chief Minister cannot as a result rebut the presumption of openness. The Board therefore concludes, in accordance with Article 9(2)(d) of the Administrative Decisions (Review) (Jersey) Law 1982 that the decision of the Chief Minister *'could not have been made by a reasonable body of persons after proper consideration of all the facts'*. In accordance with the Law the Board therefore requests the Chief Minister to reconsider his decision and report back to the Board within one month. In reconsidering his decision the Board urges the Chief Minister to consider carefully how disclosing 3 times and dates, and nothing else, could

possibly disclose whether any legal advice was sought or given and thereby breach legal professional privilege.

Signed and dated by:
Advocate R.J. Renouf, Chairman

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Mr. N.P.E. Le Gresley

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Ms. C. Vibert