Freedom of Information
Your right to know

Government of JERSEY

298935442

April 2021

Original Request

Please kindly provide all minutes of meetings of Competent Authorities Ministers, and the Emergencies Council from 1 January 2020 to the present date.

Please also provide all Part B agendas and minutes of Council of Ministers (redacted if necessary) meetings between 1 January 2020 and the present date.

Original Response

While we do hold minutes, we consider that this information falls under Article 35 (Formulation and development of policies) of the Freedom of Information (Jersey) Law 2011. While this is the general approach adopted, the balance of public interest in respect of this specific request, and in relation to the specific information held, has nevertheless been considered; and as Article 35 is a qualified exemption, a Public Interest Test has been carried out.

As Article 35 is a qualified exemption a Public Interest Test must be carried out.

Public interest considerations favouring disclosure:

- disclosure of the information would support transparency and promote accountability to the general public, providing confirmation that the necessary discussions have taken place
- disclosure to the public fulfils an educative role about the early stages in procedural development and illustrates how the department engages with parties for this purpose

These are strong reasons to support public disclosures around the deliberations and decision-making of government, especially given the pervasive impact of the pandemic on the lives of Islanders.

Public interest considerations favouring withholding the information:

The nature of these meetings is confidential, in line with longstanding and fundamental conventions in Jersey, and elsewhere (prominently in the United Kingdom's constitution) around ministerial discussions. In particular, disclosing the workings and discussions of ministerial committees could reveal potential disagreements on details of policy and even policies themselves which, if made public, would undermine consensus driven decision-making as outlined in the "Code of Conduct and Practise for Ministers and Assistant Ministers" (2018) and hence undermine the working of Government.

Ministers must be at liberty to express their views frankly and candidly, without the fear of their views being automatically or even potentially reported in public, otherwise they might express their views less vigorously or more circumspectly, or even feel restrained from

voicing them at all, for fear that they will be represented in the media, now or in the near-future, in a way that is damaging to either themselves, the government, or the Island. This is especially the case during the "live" development of policy, when a "safe space" within which discussions takes place helps with the formulation of good decisions.

It is the case that Ministers in discussions should feel free to raise and examine all options, even those that may feel on subsequent consideration wholly inappropriate, without concern that even raising a matter could open the Minister to censure or criticism.

The risk, if publication takes place, is that discussion between Ministers (and officials) become stilted and constrained, known as the "chilling effect", by the knowledge that such discussions could be made public and decision-making would not have the benefit of the full range of freely expressed opinions to inform it.

Minutes of meetings could also become increasingly anodyne and uninformative, if they are to be public, to the detriment of good record-keeping and future decision-making where that relies on previous records of decisions taken to inform them on specific policy matters. It is particularly beneficial for the long-term public record if minutes are to reflect for posterity a "blow-by-blow" account of discussions and exchange of views. Indeed, discussions might take place increasingly or wholly outside formal recorded meeting, undermining good governance and record-keeping, if minutes of formal meetings are published (and a similar position applies to the publication of agendas, especially during a pandemic, when a "safe space" is crucial).

Accordingly, and having reviewed the individual minutes, the Scheduled Public Authority (SPA) is withholding the release of the information as it relates to the formulation and development of policy by the public authority.

Article 35 is a qualified exemption, which means that a public interest test is required to be undertaken by the SPA. On balance, and considering the above, it is our view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Once a policy is formulated and published, the public interest in withholding information relating to its formulation is diminished. However, the use of the exemption can continue to be supported if it preserves sufficient freedom during the policy formulation phase to explore options without that process being hampered by some expectation of future publication.

Noting all the above, and while the "chilling effect" arguments remain a strong basis for non-disclosure the "safe space" argument diminishes over time, especially as policy becomes finalised and public.

Items discussed at the Competent Authority and Emergencies Council meetings included discussions on legislation and public health guidance, business and community support measures, travel and borders, testing and vaccination programme, operational readiness, including schools and health services, and a range of other issues, including wider strategic public health discussions, as part of the government's response to the pandemic and in the context of available statistical information.

Items discussed at the Council of Ministers included preparation for Assembly sittings, and a wide range of policy matters, including the response to the pandemic, environmental and climate policy, including the Island Plan and carbon neutrality, children and education policy,

justice policy, health policy, transport policy, migration policy, external relations matters, including Brexit, financial and performance matters, including the Government Plan and the Annual Report, major projects, including the hospital and office accommodation, and a range of operational and risk management matters as part of progressing government business.

In relation to Competent Authority Meetings and Emergency Council meetings, consideration is currently being given to regular reviews to ascertain the ability to move items to the public `A' agenda, however no firm decisions have been made and it is not considered reasonable to withhold this response until the outcome of those discussions is known.

In respect of the Council of Minister's minutes, A minutes are published, and again, consideration will be given to transferrable items from 2020 to the A minutes by 30th June 2021.

This response delivers a reasonable balance, under the Law, between the need for transparency and accountability, and good decision-making by public authorities. Considering these various factors, the SPA has decided to maintain this exemption.

Article applied

35 Formulation and development of policies

Information is qualified exempt information if it relates to the formulation or development of any proposed policy by a public authority.

Internal Review Request

I wish to request an Internal Review of the response to request 298935442 made under the Freedom of Information Law.

On 11 February, I was advised by the Central FOI Unit that the SPA was "applying redactions where necessary", but no minutes - even in redacted form - ended up being released in response to my request.

I wish to request that the minutes - for which the process of redaction already appears to have been underway - are released in redacted form.

I would challenge the 'blanket' application of Article 35 relating to Formulation of Policy across all requested documents - this could surely have been applied on a case-by-case basis, assessing in each instance whether the completion of the policy formation process and public interest factors should weigh more heavily.

By deciding not to release any of the minutes, even in redacted form, the response does not deliver a "reasonable balance, under the Law, between the need for transparency and accountability, and good decision-making by public authorities"Considering these various factors, the SPA has decided to maintain this exemption", as claimed - it offers no transparency and accountability at all.

The SPA has in the past demonstrated that it is capable of striking this balance by releasing minutes of meetings in redacted form. This release of SEB minutes in 2019 is but one of several examples in which redacted minutes have been released, satisfying both the public interest test and the A35 considerations:

https://www.gov.je/government/freedomofinformation/pages/foi.aspx?ReportID=3085

Thank you in advance for processing this request. I look forward to your response.

Internal Review Response

This review has been completed by two senior staff members of the Government of Jersey, independent of the original decision-making process.

The arguments raised by the Requester were considered and a review was undertaken to ascertain whether Article 35 had been correctly applied.

They noted that during the initial response process consideration had been given to apply redactions under Article 35 to only certain areas of the Minutes, however it was felt at that time information that was not covered by this Article would have been minimal and it was not felt it would have assisted the requester in a meaningful manner. Also, the weighted argument of safe space and the chilling effect had been relied upon.

Having undertaken extensive work reviewing each set of Minutes for the Competent Authorities meetings, Emergencies Council meetings and the Council of Ministers meetings, the Review Panel considered that some information should have been provided to the requester, albeit limited in certain areas as, as either no exemption was originally applied to the Minutes or that information was already in the public domain at that point. However, the Review Panel concluded that Article 35 was still engaged.

Furthermore, it was established that Articles 25 (Personal information), 31 (Advice by the Bailiff, Deputy Bailiff or a Law Officer), 33(b) Commercial interests, 34 (The economy), 36 (Information intended for future publication), 39 (Employment), 41 (International relations) and 42(a) Law enforcement, had not originally been applied to the Minutes as Article 35 was utilised, and that these should have also been applied. Further detail in relation to the application of these Articles is provided within the Appendix.

Please see attached extractions from the Minutes for items where no exemption had been applied or it was felt by the Panel that the Article 35 exemption was not applicable.

Appendix

Additional exemptions applied

Article 25 – Personal Information

(1) Information is absolutely exempt information if it constitutes personal data of which the applicant is the data subject as defined in the Data Protection (Jersey) Law 2005.

(2) Information is absolutely exempt information if –

(a) it constitutes personal data of which the applicant is not the data subject as defined in the Data Protection (Jersey) Law 20187 ; and

(b) its supply to a member of the public would contravene any of the data protection principles, as defined in that Law.8 (3) In determining for the purposes of this Article whether the lawfulness principle in Article 8(1)(a) of the Data Protection (Jersey) Law 20189 would be contravened by the disclosure of information, paragraph 5(1) of Schedule 2 to that Law (legitimate interests) is to be read as if sub-paragraph (b) (which disapplies the provision where the controller is a public authority) were omitted.

Commentary

Article 25 is an absolute exemption, and therefore does not require a public interest test. However, whilst there appears to be limited public interest in the release of this data, it is noted that it has been applied to protect information that is personal to individuals and also where names are of less senior and non-Government employees where a reasonable expectation that this information would not be disclosed.

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

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

Commentary

The Review Panel members are withholding the release of information as it relates to the provision of Law Officer advice. Article 31 is a qualified exemption, which means that a public interest test is required. The public interest in disclosing information when this article is being applied must weigh particularly heavily in favour of disclosure in order to outweigh the inherent right to privilege. It is not considered the public interest in disclosing the information is outweighed by that in maintaining the exemption, as it is designed to protect the constitutional Law Officer privilege.

Article 33 - Commercial interests

Information is qualified exempt information if –

(a) it constitutes a trade secret; or

(b) its disclosure would, or would be likely to, prejudice the commercial interests of a person (including the scheduled public authority holding the information).

Commentary

The following considerations were taken into account by the Internal Review Panel members:

Public interest considerations favouring disclosure

- disclosure of the information would support transparency and promote accountability to the general public.

Public interest considerations favouring withholding the information

- the release of the sensitive commercial information could significantly disadvantage the States of Jersey's ability to retain commercial advantage in any such future process leading to the inability to secure best value for the tax payer; this will likely prejudice the States of Jersey finances as its bargaining power decreases

- costs are the result of negotiations and therefore commercially sensitive to release

- impact of a breach of confidentiality, leading to a negative commercial outcome for the facility.

Article 34 - The economy

Information is qualified exempt information if its disclosure would, or would be likely to, prejudice –

(a) the economic interests of Jersey; or

(b) the financial interests of the States of Jersey.

Commentary

Article 34 is a qualified exemption which requires there to be a likelihood of prejudice against the economic interests of Jersey or the financial interests of the States of Jersey. Whilst this could include reputational concerns, the larger concern is whether the economic interests of the States of Jersey could be prejudiced by the release of information – in this instance confidential information, that could undermine Jersey's reputation.

The following extract from the guidance of the UK Information Commissioner should also be noted:

The exemption concerns the effect on the economy rather than the government's ability to manage the economy. However, since it is an aim of governments to improve economic prosperity, weakening the government's control over the economy may also damage the economy itself.

Public interest would not be served by disclosing information which may have a detrimental impact on the economy.

Article 36 - Information intended for future publication

(1) Information is qualified exempt information if, at the time when the request for the information is made, the information is being held by a public authority with a view to its being published within 12 weeks of the date of the request.

(2) A scheduled public authority that refuses an application for information on this ground must make reasonable efforts to inform the applicant –

(a) of the date when the information will be published;

(b) of the manner in which it will be published; and

(c) by whom it will be published.

(3) In this Article, “published” means published –

(a) by a public authority; or

(b) by any other person.

Commentary

Information at the time of the request relating to the Economic Support Proposals was exempt under Article 36 as information was intended for publication within 12 weeks.

Article 39 - Employment Information

Is qualified exempt information if its disclosure would, or would be likely to, prejudice pay or conditions negotiations that are being held between a public authority and –

(a) an employee or prospective employee of the authority; or

(b) representatives of the employees of the authority.

Commentary

Article 39 is a prejudice-based exemption. That means that in order to engage this exemption there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects. In addition, this is a qualified exemption and consideration must be given to the public interest in maintaining the exemption.
The minutes contain information that could be deemed sensitive to the review of employment terms. It is believed that to release it could have prejudiced negotiations which were taking place. It is also concerned that any future negotiations may be affected due to the release of information before those negotiations are concluded. On balance, it is the view of the Internal Review Panel members that the public interest does not outweigh the potential prejudice of release.

Article 41 - International relations

(1) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice relations between Jersey and –

(a) the United Kingdom;
(b) a State other than Jersey;
(c) an international organization; or
(d) an international court.

(2) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice –

(a) any Jersey interests abroad; or

(b) the promotion or protection by Jersey of any such interest.

(3) Information is also qualified exempt information if it is confidential information obtained from –

(a) a State other than Jersey;

(b) an international organization; or

(c) an international court.

(4) In this Article, information obtained from a State, organization or court is confidential while –

(a) the terms on which it was obtained require it to be held in confidence; or

(b) the circumstances in which it was obtained make it reasonable for the State, organization or court to expect that it will be so held.

(5) In this Article – "international court" means an international court that is not an international organization and that was 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 was a party;

"international organization" means an international organization whose members include any two or more States, or any organ of such an organization;

"State" includes the government of a State and any organ of its government, and references to a State other than Jersey include references to a territory for whose external relations the United Kingdom is formally responsible

Commentary

The public interest in respect of Article 41 is weighted in favour of maintaining the exemption unless equally strong countervailing public interest arguments favour the disclosure of the information. It is recognised that there is a public interest in providing transparency about individuals with whom the Government have liaised. However, having considered the public interest, the Internal Review Panel members concluded that the public interest in disclosing this information is outweighed by the public interest considerations in withholding the information, in support of the Island's interests and to avoid any potential prejudice to the Island's relationship with other jurisdictions.

Article 42 - Law enforcement

Information is qualified exempt information if its disclosure would, or would be likely to, prejudice –

(a) the prevention, detection or investigation of crime, whether in Jersey or elsewhere.

Commentary

It is recognised that there is a public interest in providing information in a transparent manner, however this public interest is not considered to outweigh the interests of the government in preventing cyber-crime. It is considered that release of this information may increase risks, particularly in view of major cyber-attacks that have occurred in other jurisdictions in recent years.

The Government of Jersey continuously assesses risk to its network and technical infrastructure and manages a risk treatment plan to ensure every effort is made to maintain a secure and reliable service for its staff and users of its services.