

## Open Agenda

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### Memorandum for Executive Council

**SUBJECT** **PUBLIC ACCESS TO GOVERNMENT INFORMATION  
BILL, 2020**

Memorandum by the Chairman of the Social and Community  
Development Committee

**ADVICE SOUGHT**

1) **Council is asked to consider and advise whether the Public Access to Government Information Bill, 2020, should be printed, published and presented as Government Business at the next formal meeting of the Legislative Council. A copy of the Bill is at Annex A.**

**BACKGROUND &  
CONSIDERATIONS**

2) The Attorney General's Chambers was requested by Executive Council to put the current Public Access to SHG Information Code of Practice ("the Code") onto a statutory basis (see Annex B). In doing so the Attorney General was also instructed to make the following changes:

- (i) Changes that arise from the different nature of legislation to a policy/code of practice.
- (ii) Changes that allow for the practical application of a Public Access to Government Information Bill ("the Bill").
- (iii) Changes needed to make sure the Code as much as practicable addresses the exemptions in the UK Freedom of Information Act 2000.

3) The Bill arises from this request.

**The most significant changes between the Code and the Bill are detailed below:**

Who can apply for information

4) The Code does not address this. The Bill limits applications to those over 18 years of age who are resident or have St Helenian Status and are present on St Helena at the time of the application. Applications are limited to this group in order to prevent excessive requests from outside St Helena.

Test for exemptions to the disclosure of information

5) The Code details a list of exemptions to the duty to disclose

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information and states that the general principle in considering requests is that: “information will be released unless the harm to the interest protected by the exception outweighs any public interest in disclosure. Public interest here equates to the fundamental rights and freedoms set out in the St Helena Constitution”.

- 6) Public Interest is not the rights and freedoms set out in the Constitution but far wider. The Bill therefore does not mirror this test but instead follows the UK test of the public interest. This is detailed in section 4(2)(b) of the Bill which restricts disclosure of information where: “in all the circumstances of the case, the public interest in maintaining the exemption under section 8(2) outweighs the public interest in disclosing the information”.
- 7) In addition, the UK Act contains absolute exemptions for categories of information that are considered not to be disclosable under any circumstances. The Bill mirrors this important approach and splits the exemptions into two categories: absolute exemptions and exemptions subject to the public interest test.
- 8) Some areas that were also listed as exemptions in the Code are now moved to the category where the Government does not have to comply with a request for other reasons. These are detailed in section 8(3) and include requests of more than 8 hours work; vexatious requests and repeat requests.

### The exemptions to disclosure of information

- 9) Below details how the exemptions in the Code are now addressed in the Bill:
  - (i) *The information requested is not actually held by SHG*: This is no longer an exemption but is excluded from the application of the Bill by section 3.
  - (ii) *The information is already available in the public domain*: This is covered under an absolute exemption in section 8(1)(a).
  - (iii) *The handling of the request will substantially and negatively impact SHG service delivery*: This is not expressly included as it is covered under section 8(3) which provides that the Government is not obliged to comply with a request for information if the request will take more than 8 hours staff time.

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- (iv) *The request would take a disproportionate amount of staff time to answer (more than one day's time for one officer):* This is not an exemption of information as such but is covered under section 8(3) where the Government is not obliged to comply with the request for information.
- (v) *Information that would be disclosed would be likely to put the physical or mental health or safety of any individual, or group of individuals, at risk or at greater risk. For this exception to apply, the information that would be disclosed does not necessarily include naming an individual:* This is covered under section 8(2) (j) – not an absolute exemption.
- (vi) *The information could be likely to allow individuals to be identified, where there is a legitimate and reasonable expectation that their identity should remain confidential:* This is an absolute exemption under section 8(1) (f).
- (vii) *The information was provided to SHG in Confidence:* This is included as an absolute exemption under section 8(1) (g).
- (viii) *Disclosure could harm public safety or public order:* This is covered under section 8(2)(c) – not absolute exemption.
- (ix) *Disclosure could or could be likely to jeopardise the Island's security, either from internal or external threats:* Combined under section 8(2)(c) – not absolute exemption.
- (x) *The information has been obtained in confidence from the United Kingdom, another State or international organisation and where to disclose it would, or would be likely to, prejudice relations with that State or international organisation:* Included as section 8(2)(f) – not absolute exemption.
- (xi) *Disclosure would be contrary to the laws of St Helena:* Covered under section 8(1)(h) – absolute exemption.
- (xii) *The information could or could be likely to prejudice someone's legitimate commercial interests or where disclosure could lead to improper gain or advantage or would prejudice the competitive position of a public or private body:* Covered under section 8(2)(l) – not absolute exemption.
- (xiii) *The information is already scheduled for publication within the next six months. This is to ensure that SHG has the freedom to determine its own publication timetables:* Included under section 8(2)(a) - not absolute exemption.

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- (xiv) *The information is privileged under Standing Orders in Legislative Council:* Included in section 8(1)(d) – absolute exemption.
- (xv) *The information is official written advice to any ExCo member, confidentially given between parties, where disclosure would, or would be likely to, harm the frankness and candour of internal discussion, including opinion, advice, recommendation and deliberation not part of an Open ExCo agenda item:* Included in section 8(2)(d) – not absolute exemption.
- (xvi) *Disclosure would, or would be likely to, prejudice the effective formulation or development of Government policy or by premature disclosure of developing policy, undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views, thus frustrating policy making:* Included as section 8(2)(e) – not absolute exemption.
- (xvii) *Disclosure would, or would be likely to, undermine the effectiveness of an auditing or testing procedure used by a public body, or breach the duty of trust and confidentiality between the auditor and the body subject to audit:* Included in section 8(2)(i) – not absolute exemption.
- (xviii) *Disclosure would, or would be likely to, prejudice:*
- i. *the administration of justice*
  - ii. *the prevention or detection of crime*
  - iii. *the apprehension or prosecution of offenders*
  - iv. *the assessment by a public body of whether civil or criminal proceedings, or regulatory action pursuant to any enactment, would be justified*
  - v. *the assessment or collection of any tax or duty, or the operation of immigration controls*
- These are included in section 8(2) (h) – not absolute exemptions.
- (xix) *The request is vexatious.* This is not an exemption, but under section 8(3) the Government is not obliged to comply with the request.
- (xx) *The request repeats a previous request from the same or another applicant.* This is not an exemption but under section 8(3) the Government is not obliged to comply with the request. Under section 6(7)(b) the Information Officer will provide the previous response.

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(xxi) *In all cases, SHG reserves the right to withhold information as per these exceptions and for any other valid and stated public interest reason not so listed: This is included under section 8(2)(m) – not absolute exemption.*

10) The following are new absolute exemptions and have been based on the UK provisions:

(i) Information directly or indirectly supplied to the Government by or relates to specific special force bodies (as listed in section 23(3) of the Freedom of Information Act 2000);

(ii) Information held by the Government only by virtue of being contained in—

- i. a document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter;
- ii. a document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter;
- iii. a document created by a court, or a member of the administrative staff of a court for the purposes of proceedings in a particular cause or matter;
- iv. a document created by, or placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration;

(iii) Information if disclosure of the information under this Ordinance—

- i. would, or would be likely to, prejudice the maintenance of the convention of the collective responsibility of the Executive Council; or
- ii. would, or would be likely to, inhibit the free and frank provision of advice or free and frank exchange of views for the purposes of deliberation; or
- iii. would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs;

(iv) Information provided to the Government in confidence and where disclosure would constitute an actionable breach of confidence;

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- (v) Information if its disclosure—
    - i. is prohibited by or under any enactment; or
    - ii. would constitute or be punishable as a contempt of court;
  - (vi) Information which relates to communications with the Sovereign.
- 11) The following are new absolute exemptions based on UK provisions that in the UK can be overridden by the public interest test. These are in the absolute category in the Bill following a request from the Governor's Office for that categorisation due to the extraterritorial nature of the exemptions.
- (i) Information obtained in confidence from the Government of the United Kingdom and communications between the Office of the Governor and Government of the United Kingdom relating to business of the Office of the Governor;
  - (ii) Information relating to the conferring by the Crown of any honour or dignity.
- 12) The following are new exemptions that can be overridden by public interest. They are based on the UK provisions that can be overridden by public interest:
- (i) Information obtained in the course of, or derived from, a programme of research if—
    - i. the programme is continuing with a view to the publication, by the Government or any other person, of a report of the research; and
    - ii. disclosure of the information before the date of publication would, or would be likely to, prejudice the programme or the interests of any person participating in the programme or holding the information;
  - (ii) Information the disclosure of which under this Ordinance would, or would be likely to, prejudice the economic or financial interests of the Government;
  - (iii) Information in respect of which a claim to legal professional privilege or confidentiality of communications could be maintained in legal proceedings;

### Review Procedure

- 13) The Bill keeps a review procedure but to give uniformity to

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the procedure now makes the review the responsibility of the Chief Secretary or person delegated by them.

### Fees and Resources for requests

14) The Code allows for requests for disclosure to be refused where they will take more than a day of one officer's time to answer. The Bill has reworded this to be 8 hours of staff time in total. The Bill also allows for charges to be levied for photocopying and other resources. The current charge in the Code is 30p per sheet of A4 for photocopying. This charge and any other charges should be set by Regulations to follow the Bill.

15) SCDC expressed that they consider there should be as close to full cost recovery for SHG staff costs as possible. It is planned that the rate for staff costs will be set in Regulations.

### Guidance document

16) Although the code should be withdrawn when the Bill comes into force a guidance document will still need to be drafted for applicants so the procedure is clear. The guidance document can if required reference matters such as Councillors providing advice and assistance to people wishing to make requests. This is in the Code but has not been put into the Bill as it is not something that is suitable to make a legal obligation.

### FINANCIAL IMPLICATIONS

17) At present applications for information can already be made under the code. Putting the code on a statutory basis should therefore have only minimal new financial implications. The number of applications could of course increase in time but that would not be as a direct result of the code being put on a statutory basis.

18) The proposed near full cost recovery from the applicant, for staff time, should in fact reduce the current financial costs in responding to applications.

19) The only real additional financial implications could be the cost of increased legal challenges resulting from public access to government information now being on a statutory basis.

### ECONOMIC IMPLICATIONS

20) No direct new economic implications

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<b>CONSISTENCY WITH INVESTMENT POLICY PRINCIPLES</b>	21) N/A
<b>PUBLIC/SOCIAL IMPACT</b>	22) Would have a beneficial impact as the Bill encourages and allows access to Government information where relevant.
<b>ENVIRONMENTAL IMPACT</b>	23) No environmental impact.
<b>PREVIOUS CONSULTATION/ COMMITTEE INPUT</b>	24) The Bill was drafted following a request from Executive Council. The Bill was approved by SCDC on 23 <sup>rd</sup> June 2020.
<b>PUBLIC REACTION</b>	25) A positive public reaction is expected as the Bill puts access to Government information onto a statutory basis.
<b>PUBLICITY</b>	26) As the Bill moves a current code onto a statutory basis no public consultation is necessary. 27) Reporting to the public is expected to follow the normal procedure.
<b>SUPPORT TO STRATEGIC OBJECTIVES</b>	28) The Bill supports the 'Effective, efficient and accountable public sector' goal and Strategic Objective 9.1 Ensure effective governance through efficient and effective systems and processes.
<b>LINK TO SUSTAINABLE ECONOMIC DEVELOPMENT PLAN GOALS</b>	29) N/A
<b>OPEN/CLOSED AGENDA ITEM</b>	30) Recommended for the Open Agenda.

AAG

Corporate Support  
Corporate Services

15<sup>th</sup> July 2020

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